

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Video Description: Implementation of the) MB Docket No. 11-43
Twenty-First Century Communications and)
Video Accessibility Act of 2010)

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. Introduction and Summary

The National Association of Broadcasters (NAB)¹ submits reply comments on the Notice of Proposed Rulemaking in the above-captioned proceeding regarding the video description of television programming.² Broadcasters support the goal of the Twenty-First Century Communications and Video Accessibility Act of 2010 to enhance the ability of individuals who are blind or visually impaired to enjoy video programming.³ We are leaders among communications providers in providing accessible news, entertainment and emergency information to Americans who are blind or visually impaired. Broadcasters have faithfully implemented the CVAA and Commission policies to provide video described televised programming and inform viewers where to find such programming.⁴ In fact,

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

² *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, MB Docket No. 11-43, 31 FCC Rcd 2463 (2016)(Notice).

³ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (CVAA or Act); H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 19 (2010); S. Rep. No. 111-386, 111th Cong., 2d Sess., at 1, (2010); 47 C.F.R. § 79.3.

⁴ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report to Congress, 29 FCC Rcd 8011, 8022 (2014) (2014 Status Report).

television stations frequently exceed the required threshold for the amount of programming that must be video described.⁵

In the Notice, the Commission proposes major expansions of the video description requirements, including an increase in both the number of hours of video described programming that broadcast networks and their station affiliates must provide per calendar quarter,⁶ and the number of broadcast networks subject to the rules.⁷ The Commission also proposes a so-called “no backsliding” policy that would ensure that a network and its affiliates remain subject to the rules even when a network falls off the list of top ranked networks specified in the Act.⁸

These rule changes would exceed the Commission’s statutory authority and impose undue burdens on providers. First, adoption of the proposals would be arbitrary and capricious because the Commission fails to meet its statutory mandate to justify additional rules based on a meaningful cost-benefit analysis of the video description rules. Second, even if the Commission had fulfilled this mandate, the CVAA does not authorize the Commission to increase the number of networks covered by the rules or adopt the no backsliding proposal. Finally, NAB urges the Commission to gradually phase-in any rules ultimately adopted, and provide flexibility to providers required to meet the higher quota of video described programming hours.

⁵ *Id.*, at 8019.

⁶ 47 C.F.R. § 79.3(b)(1).

⁷ *Id.*, at § 79.3(b)(1) and (b)(2). The Commission proposes parallel rules changes for multichannel video programming distributors (MVPDs) and non-broadcast networks.

⁸ Notice, 31 FCC Rcd at 2474-75.

II. Adoption of the Proposals Would Be Arbitrary and Capricious Because the Commission's Cost-Benefit Analysis of the Video Description Rules is Insufficient

A. History of the Video Description Rules and the Current Statute

The Commission first required certain broadcasters (and non-broadcast networks) to video describe programming in 2000.⁹ Those rules specified that television station affiliates of “one of the top four commercial television broadcast networks (ABC, CBS, Fox and NBC)” and located in the top 25 designated market areas (DMAs) must provide 50 hours of video description per calendar quarter, among other obligations.¹⁰ In 2002, the D.C. Circuit Court of Appeals vacated the rules because the Commission lacked statutory authority to promulgate them.¹¹ In 2010, Congress enacted the CVAA, which directed the Commission to reinstate the original video description rules.¹² A year later, the Commission followed suit, including the specific mandate that certain affiliates of only ABC, CBS, Fox and NBC must provide video described programming.¹³ In 2014, pursuant to the CVAA, the Commission submitted the 2014 Status Report to Congress with its findings regarding the status, benefits and costs of video described television programming, based on input from consumers and industry.¹⁴

The Commission now proposes three significant extensions of broadcasters' obligations. First, it plans to increase the required amount of video described programming by 75 percent, from 50 hours per calendar quarter to 87.5 hours.¹⁵ Second, it proposes to

⁹ *Implementation of Video Description of Video Programming*, Report and Order, MM Docket No. 99-339, 15 FCC Rcd 15230 (2000) (2000 Order).

¹⁰ 47 C.F.R. § 79.3(b)(1). Subparagraph (b)(2) raised the number of applicable DMAs from the top 25 to the top 60, as of July 1, 2015.

¹¹ *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (MPAA).

¹² 47 U.S.C. § 613(f)(1).

¹³ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 26 FCC Rcd 11847, 11853 (2011) (2011 Order).

¹⁴ See *supra* note 4; 47 U.S.C. § 613(f)(3).

¹⁵ Notice, 31 FCC Rcd at 2471-72.

increase the number of broadcast networks (and their station affiliates) subject to the rules from the “top four” networks (ABC, CBS, Fox and NBC) listed in the CVAA-approved original rules to the “top five” broadcast networks.¹⁶ Third, the Commission proposes a new “no backsliding” rule, which ensures that once a broadcast network is ranked in the top four (or the proposed top five), the network would remain subject to the rules even if it dropped off the list of top ranked networks.¹⁷

The Commission grounds its authority to adopt these proposals in Section 202(f)(4) of the CVAA:

(4) CONTINUING COMMISSION AUTHORITY

(A) In general

The Commission may not issue additional regulations unless the Commission determines, at least 2 years after completing the reports required in paragraph (3), that the need for and benefits of providing video description for video programming, insofar as such programming is transmitted for display on television, are greater than the technical and economic costs of providing such additional programming.

(B) Limitation

If the Commission makes the determination under subparagraph (A) and issues additional regulations, the Commission may not increase, in total, the hour requirement for additional described programming by more than 75 percent of the requirement in the regulations reinstated under paragraph (1).¹⁸

The Commission’s “continuing authority” to issue the proposed “additional regulations” thus hinges on a finding under subparagraph (A) that “the need for and benefits of” video described programming are “greater than the technical and economic costs” of expanding the video description obligations.

¹⁶ *Id.*, at 2472-2474.

¹⁷ *Id.*, at 2474-2475.

¹⁸ 47 U.S.C. §613(f)(4).

B. The Commission's Cost-Benefit Analysis of the Video Description Rules is Fundamentally Flawed

The Commission bases its required cost-benefit analysis on findings in the 2014 Status Report.¹⁹ On the cost side, the Commission states that the expense to produce an hour of video described programming is relatively low, and notes that providers have not filed any petitions for exemption from the rules due to economic burdens.²⁰ The Commission thus finds that adopting the new rules will not impose undue financial burdens on industry.²¹

With respect to the alleged benefits, the Commission points to statements by individual commenters in the 2014 Status Report that video description provides “significant benefits to individuals who are blind or visually impaired,” by offering them “greater independence and the ability to follow and understand television programs.”²² It also notes consumer requests for more such programming.²³ The Notice ultimately concludes that the benefits of video description outweigh the costs of the new rules.

NAB submits that the Commission's cost-benefit analysis does not justify adoption of the proposals because the record of any such benefits is remarkably deficient. The Notice's *entire record* of the benefits of video description consists of only 30 brief comments from individual consumers.²⁴ The Commission has not conducted a nationwide survey of consumer behavior or satisfaction, or otherwise gathered *any* meaningful information about

¹⁹ Notice, 31 FCC Rcd at 2469.

²⁰ *Id.*, at 2468-2469.

²¹ *Id.*, at 2469.

²² *Id.*, at 2467 (citing 2014 Status Report, 29 FCC Rcd at 8012-13).

²³ *Id.*

²⁴ 2014 Status Report, 29 FCC Rcd at 8017-8021. Nine individuals and two advocacy groups also submitted comments on the Notice in support of increased video description. However, both the American Foundation for the Blind (AFB) and the American Council for the Blind (ACB) offer only bald assertions that demand for video description is growing based on earlier comments in the docket or assumptions that the blind and visually-impaired population is growing. AFB Comments, MD Docket No. 11-43, at 3 (June 27, 2016); ACB Comments, MD Docket No. 11-43, at 1 (June 23, 2016).

video description. There is no data on the number of viewers who use video description, or the percentage of viewers with visual impairments who use it, or consumer demand for more such programming. Nor is there any comparison of the benefits of video description to other services that could be provided with the resources devoted to video description, such as improved closed captioning or local news and informational programming. Without more, or at least some, relevant information, the Commission cannot seriously conclude that the benefits of the proposed rules would outweigh the costs, especially given the well-documented expenses of providing video description.²⁵

To be clear, NAB does not claim here that there cannot be benefits to video description or that an adequate cost-benefit analysis might meet Congress's threshold to justify additional rules. Rather, we merely highlight that the Commission may not discern anything about the benefits of video description based on 30 brief individual comments from a U.S. population of 319,000,000.²⁶ It certainly cannot pass muster under the CVAA's clear direction that the Commission must determine "that the need for and benefits of" providing video described programming "are greater than the technical and economic costs of providing such additional programming."²⁷ Indeed, the Commission itself characterizes its record about the use of video description as "anecdotal."²⁸

In addition to flouting the CVAA mandate, the lack of cost-benefit analyses violates Presidential directives. In July 2011, President Obama issued Executive Order 13579 to

²⁵ *Id.*, at 8032.

²⁶ By way of comparison, the Commission received approximately 3.7 million comments and complaints in the net neutrality docket. Jacob Kastrenakes, *FCC Received a Total of 3.7 Million Comments on Net Neutrality*, The Verge (Sep. 16, 2014).

²⁷ 47 U.S.C. § 613(f)(4)(A); see also Statement of Commissioner Michael O'Rielly: "The cost-benefit analysis could be improved significantly, especially on the benefit side . . . the sparseness of the cost-benefit analysis makes it difficult to assess the value of the no-backsliding rule proposed." Notice, 31 FCC Rcd at 2499.

²⁸ 2014 Status Report, 29 FCC Rcd at 8027.

help ensure that regulations protect public health, welfare and safety while promoting economic growth, innovation, competitiveness and job creation.²⁹ EO 13579 required the Commission and other such agencies to propose or adopt regulations only upon a reasoned determination that its benefits justify its costs.³⁰ The Office of Information and Regulatory Affairs (OIRA) further clarified that the benefits of a proposed regulation should be quantified to the extent possible (e.g., number of affected persons),³¹ and an agency should rely on the best economic information, where available, or consider developing the necessary data and research itself.³² If quantitative analysis is inappropriate because a rule will benefit individuals in terms of dignity or some other qualitative factor, an agency should at least try to estimate the value of such benefits. OIRA recommends that agencies conduct studies of consumer preferences and behavior to measure the level of satisfaction that individuals derive from using a particular resource.³³

As discussed above, however, the Commission has not tried to study the benefits of the proposed changes to the video description rules, in either quantitative or qualitative terms. It has not attempted to calculate the number of persons who would benefit from the proposals, or place a value on video description by surveying consumer preferences or use of video description. Relying on only a handful of brief comments from individuals who would

²⁹ The President issued Executive Order 13563 in January 2011, setting forth principles for cost-benefit analyses that “covered” agencies (e.g., Cabinet departments and independent agencies) must apply when adopting rules. Executive Order, *Improving Regulations and Regulatory Review*, 76 FR 3821 (Jan. 21, 2011). The President later issued Executive Order 13579, directing independent regulatory agencies like the Commission to comply with the principles in EO 13563. Executive Order 13579, *Regulation and Independent Regulatory Agencies*, 76 FR 41857 (July 14, 2011).

³⁰ EO 13563, § 1(b).

³¹ OIRA, Office of Management and Budget (OMB), Circular A-4, *Regulatory Impact Analysis: A Primer*, at 9, available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

³² *Id.*

³³ *Id.*

like more video described programming to justify new rules is not only insufficient, but also out of step with common OIRA practice.³⁴

Finally, the Commission's proposed expansion of the video description rules is a "classic case of arbitrary and capricious agency action."³⁵ Fundamental principles of administrative law dictate that regulations must "rest on reasoned decisionmaking in which 'the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"³⁶ Moreover, where an agency relies on an evaluation of the costs and benefits of a proposed action, no significant element of such an analysis may lack record support.³⁷ For example, in *California I*, the court found that there was inadequate record support for the Commission's finding that changes in the telephone market had reduced the risks of the Bell Operating Companies discriminating against their competitors.³⁸ The court did not even address the Commission's weighing of the relative costs and benefits of its action, instead dismissing the Commission's approach because it lacked any basis in the record,³⁹ rendering the

³⁴ The lack of cost-benefit analyses in the Notice is consistent with Commission inaction across other sectors. The Administrative Conference of the U.S. (ACUS) issued a report in 2013 demonstrating that the Commission routinely issues far more regulations than any other federal agency, but never weighs the often very high costs of such rules against low or even speculative benefits. Curtis W. Copeland, ACUS, *Economic Analysis and Independent Regulatory Agencies*, at 102-105 (Apr. 30, 2013), available at <https://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf>. See also Letter from the Honorable Marsha Blackburn, U.S. House of Representatives, to FCC Chairman Tom Wheeler (Apr. 24, 2015) (urging the Commission to conduct a cost-benefit analysis of its proposed net neutrality rules).

³⁵ *United States Telecom Assoc., et al. v. FCC*, 227 F.3d 450, 461 (2000) (holding that the Commission failed to engage in reasoned decision-making in implementing the Communications Assistance for Law Enforcement Act (CALEA)).

³⁶ *Id.*, quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

³⁷ *California v. FCC*, 905 F.2d 1217, 1231 (9th Cir. 1990) (*California I*) (rejecting Commission decisions in *Computer III* as arbitrary and capricious due to a lack of supporting evidence).

³⁸ *Id.*, at 1233.

³⁹ *Id.*, at 1238-39. Similarly, in *United States Telecom Assoc.*, the court was unable to discern how the Commission determined that the steps it adopted to implement CALEA were cost-effective because the Commission made no attempt to examine the relevant costs of doing so. *United States Telecom Assoc.*, 227 F.3d at 461.

Commission's analysis moot. *California I* is directly parallel to the Commission's action in the Notice, which should be similarly dismissed.

The Commission is certainly capable of conducting a credible cost-benefit analysis. For instance, the Tenth Circuit Court of Appeals affirmed the Commission's 1983 allocation of certain new VHF television assignments in Utah, Pennsylvania, West Virginia and Kentucky, calling the Commission's analysis of the relevant costs and benefits "exhaustive," and a "hard look."⁴⁰ Indeed, the Commission itself has recognized the value of an analysis, such as in the carriage dispute between Comcast and the Tennis Channel, where it found that Comcast's cost-benefit analysis of carrying the Tennis Channel was "irredeemably flawed" because Comcast "failed to consider the benefits" of carrying the channel on a more widely distributed tier.⁴¹

In the Notice at hand, however, the Commission glosses over the scant record of video description benefits, rendering its cost-benefit examination of the proposals meaningless. Further, the Commission's discussion of even these few comments is lacking, consisting largely of repetitive anecdotes of why various individuals like video described programming and want more.⁴² Indeed, the entire tenor of the Notice reveals the Commission's clear predisposition towards expanding the video description rules regardless of countervailing market or policy concerns. Accordingly, given the lack of support in the record, and failure to conduct the cost-benefit analysis required to justify additional rules, adoption of the proposals would be arbitrary and capricious.

⁴⁰ *Springfield Television of Utah, Inc., v. FCC*, 710 F.2d 620, 624 (10th Cir. 1983), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1156 (D.C. Cir. 1969).

⁴¹ *Tennis Channel, Inc. v. Comcast Cable Communs.*, MB Docket No. 10-204, 27 FCC Rcd 8508, 8536 (2012), Review granted by *Comcast Cable Communs. v. FCC*, 717 F.3d 982 (D.C. Cir. 2013).

⁴² Notice, 31 FCC Rcd at 2468.

III. The Commission Lacks Statutory Authority to Expand the Video Description Rules as Proposed in the Notice

Even assuming *arguendo* that the Commission’s cost-benefit analysis of the video description rules is sufficient to justify a widened regulatory scope, the CVAA does not provide the Commission with authority to increase the number of broadcast networks subject to the rules or implement a “no backsliding” rule. Congress carefully limited the extent to which the Commission may change the video description rules, and the Commission may not presume authority not delegated in the Act.

A. The Commission May Not Rewrite the CVAA

As mentioned above, the Commission’s first attempt to mandate video description was rejected by the D.C. Circuit Court of Appeals for lack of statutory authority. The *MPAA* court found that the Commission wrongly took an instruction in the 1996 Telecommunications Act to produce a report about video description as license to adopt new regulations.⁴³ The court also rejected the Commission’s claim that new rules were allowed because Congress did not “expressly foreclose the possibility,”⁴⁴ adding that a specific delegation of authority was especially important here because video description rules “raise First Amendment issues.”⁴⁵

It was against this backdrop that Congress adopted the video description requirements in the CVAA.⁴⁶ In subparagraph 613(f)(1) of the Act, Congress directs the Commission to reinstate the same video description rules initially adopted in 2000.⁴⁷ In

⁴³ *MPAA*, 309 F.3d at 802.

⁴⁴ *Id.*, at 805-806 citing *Ry. Labor Executives’ Ass’n. v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (“Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony . . .”).

⁴⁵ *Id.*, at 805.

⁴⁶ National Cable & Telecommunications Association Comments, MB Docket No. 11-43, at 3 (June 27, 2016).

⁴⁷ 47 U.S.C. § 613(f)(1).

subparagraph 613(f)(2), Congress provides the Commission with all of its affirmative authority to modify the reinstated rules,⁴⁸ including updates to reflect the digital television transition and periodic updates of the top 25 DMAs and top ranked cable networks, among others.⁴⁹

The absence of the Commission's proposals in the Notice from this list of modifications in subparagraph 613(f)(2) is significant because the Commission apparently seeks to presume authority to change the video description rules where none exists, repeating its error in the 2000 Order. However, if Congress had intended to authorize the Commission to extend the rules to additional networks or adopt a no backsliding rule, it would have included these items on this list.⁵⁰ Congress was certainly aware of both ideas since the Commission specifically rejected requests by commenters to apply the rules to networks beyond the top four in the 2000 Order.⁵¹ Clearly, Congress purposely decided against granting the Commission affirmative authority to change the number of networks covered by the rules.⁵²

Moving forward in the Act, subparagraph 613(f)(3) directs the Commission to conduct an inquiry into video description after the rules were in effect for a couple of years, which the Commission fulfilled in the 2014 Status Report. Finally, in subparagraph 613(f)(4), the CVAA specifies the limitations on the Commission's "continuing authority" to issue additional video description rules relied upon by the Commission to propose the rules

⁴⁸ *Id.*, at § 613(f)(2).

⁴⁹ *Id.*, at § 613(f)(2)(B).

⁵⁰ The statutory construction canon of *expressio unius* holds that "to express or include one thing implies the exclusion of the other, or of the alternative." *United States v. Porter*, 745 F.3d 1035, 1046 (10th Cir. 2014) citing *Black's Law Dictionary* 661 (9th ed. 2009).

⁵¹ 2000 Order, 15 FCC Rcd at 15238 (rejecting calls by consumer advocacy groups to require PAX, UPN, and WB to provide video programming because doing so would impose undue economic burdens on their affiliate stations).

⁵² *MPAA*, 309 F.3d at 798.

changes in the Notice.⁵³ This provision confines the Commission’s authority to adopt “additional regulations” to only two respects: (1) it may not increase the required number of video described programming hours provided by the four networks listed in the rules unless the Commission determines that the benefits of doing so outweigh the costs;⁵⁴ and (2) the Commission may apply the rules in additional DMAs, but only after a period of time and certain conditions are met.⁵⁵

Contrary to the bare assumptions in the Notice, none of these provisions imbues the Commission with authority to change the rules as proposed, because such changes are not expressly contemplated in the CVAA.⁵⁶ In particular, the CVAA must be viewed in light of *MPAA*, where the court rejected the Commission’s presumption of authority to adopt the original rules in the absence of a specific prohibition against doing so, calling this position “entirely untenable.”⁵⁷ This is the only reasonable approach. For example, the Commission assumes authority to expand the video description rules under subparagraphs 613(4)(f)(A) and (B), but even those clauses are written in the negative, barring additional rules “unless” the benefits outweigh the costs, and further limiting any such changes to an increase in only the number of required hours of video described programming the four listed networks must provide. In other words, the Commission’s *only* authority to adopt more rules is contained under a negative limitation, rather than affirmative grant.

⁵³ 47 U.S.C. § 613(f)(4).

⁵⁴ *Id.*, at § 613(f)(4)(A) and (B).

⁵⁵ *Id.*, at § 613(f)(4)(C).

⁵⁶ Motion Picture Association of America (MPAA) Comments, MB Docket No. 11-43, at 4 (June 27, 2016).

⁵⁷ *MPAA*, 309 F.3d at 805.

The Commission's proposal to extend its authority beyond what Congress granted is particularly evident in the context of the no backsliding rule.⁵⁸ As Commission Pai explained, such a rule would allow the list of "top four" broadcast networks specified in the reinstated rules to include five or six or more broadcast networks:

"This is the 'Hotel California' approach to regulation: a network can check out of the upper ranks of viewership any times it likes, but it can never leave our regulatory reach. . . . Incredibly, the FCC even reinvents math. . . . In FCC-speak, the top five broadcast networks can mean more than five networks. This brings to mind the insistence of the Party in George Orwell's *1984* that $2 + 2 = 5$."⁵⁹

Surely, Congress did not contemplate such an illogical result in crafting the CVAA, nor intend to allow the Commission to effectively rewrite the video description rules outside the boundaries delegated in the Act.⁶⁰

The Commission's presumption of authority to expand the rules in ways not delegated in the Act also violates the well-established principle that an agency does not possess *plenary* authority to act in an area because Congress has granted it *some* authority to act in the area.⁶¹ The Commission has no independent discretion to increase the number of networks subject to the rules, or to hold captive under the rules any networks not listed in the rule reinstated by the CVAA. It can only undertake actions specifically delegated in the Act. Nor will the Commission receive any deference from a court in this regard, since an agency's interpretation of a statute only comes into play when there is a legislative gap for

⁵⁸ NAB also seeks clarification of how the no backsliding rule would work. For example, we urge the Commission to confirm that a television station that changes or loses its affiliation with a top four (or five) network would no longer be required under the no backsliding rule to continue carrying the mandated number of hours of video described programming.

⁵⁹ Notice, 31 FCC Rcd at 2498, Statement of Commissioner Ajit Pai.

⁶⁰ *Ins v. Phinpathya*, 464 U.S. 183, 198 (1984) ("It is a hornbook proposition that '[all] laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.'").

⁶¹ *Ry. Labor Executives' Ass'n.*, 29 F.3d at 670.

the agency to fill.⁶² However, both the text and intent of the CVAA are clear: the Commission may only increase the number of required hours of video described programming, or extend the rules to additional DMAs, but nothing else. There is no room for Commission discretion to interpret the CVAA differently.

Such a cautious approach is also consistent with the heightened consideration accorded to obligations like the video description rules that invoke First Amendment concerns. As noted by MPAA,⁶³ both the *MPAA* court and the Commission have recognized the impact that video description has on program content. The court distinguished between closed captioning, which is a rote transcription of dialog into an accessible format, and video description, which entails the interpretation of visual scenes.⁶⁴ The Commission itself has explained that video description requires the development of a second script, which raises creativity . . . issues.”⁶⁵ The video description rules are thus a form of compelled speech, and given the narrow view of government authority to regulate speech,⁶⁶ it is a certainty that Congress purposely crafted the CVAA to prevent another case of Commission overreach.

Finally, as MPAA explains, imposing a permanent obligation on an indefinite pool of networks would be systematically unfair.⁶⁷ The main reason for requiring only the top four broadcast networks to provide video described programming was to ensure that only those entities with sufficient resources would have to shoulder the burden.⁶⁸ Extending the rules to lower ranked networks would completely upend this approach.

⁶² *Id.*, at 671 citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984).

⁶³ MPAA Comments at 5-6.

⁶⁴ *MPAA*, 309 F.3d at 803.

⁶⁵ *Closed Captioning and Video Description*, Report, 11 FCC Rcd 19214, 19221 (1996).

⁶⁶ The Supreme Court has consistently recognized that broadcasters are entitled to exercise broad journalistic freedom. *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984).

⁶⁷ MPAA Comments at 5-6.

⁶⁸ 2000 Order, 15 FCC Rcd at 15242.

B. The CVAA's Legislative History Underscores Congressional Intent to Limit the Commission's Authority to Modify the Video Description Rules

The CVAA's legislative path further illustrates the Commission's lack of authority to raise the number of covered broadcast networks or implement a no backsliding rule. Specifically, the original House and Senate versions of the Act each contained provisions that provided the Commission with conceivable authority to adopt additional video description rules. However, both provisions were deleted before final enactment of the CVAA, in favor of much narrower limits on the Commission's authority. For instance, the original Senate bill contained a clause under the "Continued Commission Authority" subsection that directed the Commission to "promulgate any other regulation that the Commission may find necessary to implement, enforce, or otherwise carry out the provisions of this section, including regulations to increase the amount of video description required to achieve full access to video programming for individuals who are blind or visually impaired."⁶⁹ However, this relatively broad provision was replaced in the final bill with a clause directing the Commission only to increase the number of covered DMAs.⁷⁰ No mention is made of additional broadcast networks.

Similarly, the original House version contained a provision instructing the Commission to produce a report nine years after enactment of the CVAA assessing "the need for additional described programming," and allowing the Commission one year later to "increase the availability of such programming" based upon the findings in such a report.⁷¹

⁶⁹ Equal Access to 21st Century Communications Act, S. 3304, 111th Congress, 2nd Sess., Sec. 204(f)(2)(C), (May 4, 2010), available at <https://www.congress.gov/111/bills/s3304/BILLS-111s3304is.pdf>.

⁷⁰ 47 U.S.C. § 613(f)(4)(C).

⁷¹ Twenty-First Century Communications and Video Accessibility Act of 2010, H.R. 3101, 111th Cong. 2d Sess., Sec. 202(f)(4)(B), (July 26, 2010), available at <https://www.congress.gov/111/crpt/hrpt563/CRPT-111hrpt563.pdf>.

In fact, the accompanying House Report even mentioned increasing the number of networks subject to the rules as one option for increasing the amount of described programming.⁷² However, like the Senate proceeding, this provision was deleted from the final bill, again replaced by a specific instruction to increase the number of covered DMAs, with no mention of additional networks.⁷³

Both legislative tracks reveal Congress' intent to limit the Commission's authority to modify the rules.⁷⁴ As Commissioner O'Rielly stated, increasing the number of networks subject to the rules:

“ . . . failed to garner sufficient support, and was removed from the final version of the bill that was ultimately enacted into law. So it's implausible to think – and actually contrary to the canons of statutory authority – that we have the authority to apply the rules to more networks now, six years after enactment, when language that would have allowed us to do the same thing ten years after enactment didn't even survive the legislative process.”⁷⁵

The CVAA provides the Commission no leeway to adopt the proposed expansions of the video description rules.

IV. Any New Video Description Obligations Must be Phased-in Gradually and Provide Compliance Flexibility

The Commission seeks comment on when new video description rules should take effect.⁷⁶ If the Commission moves ahead with the proposals in the Notice despite a lack of authority as discussed above, NAB agrees with MPAA that the most reasonable approach is to link compliance to the date when the rules become effective. Using an earlier date would change providers' expectations mid-stream. As MPAA suggests, a two-year window from the

⁷² *Id.*, at 29.

⁷³ 47 U.S.C. § 613(f)(4)(C).

⁷⁴ “If 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.” *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984)

⁷⁵ See *supra* note 24.

⁷⁶ Notice, 31 FCC Rcd at 2476.

effective date of the rules would be most appropriate and consistent with Commission precedent.⁷⁷

An earlier deadline would also reduce broadcasters' ability to comply. First, television networks and station affiliates newly subject to the rules may have to adjust their program production systems and schedules to accommodate the time-consuming processing of producing video-described programming.⁷⁸ Second, the costs to start up a system for video description can be significant,⁷⁹ especially for smaller stations that are affiliated with lower-ranked networks. Such stations will need a reasonable amount of time to plan for this new expense, and given that budget cycles can run for a full year or longer, the Commission would be wise to allow stations as much advance notice of this new obligation as possible.⁸⁰

Third, it is still typical for the secondary audio stream (SAP) to be used for both video description and foreign language programming, typically Spanish. Both industry and the Commission's Disability Advisory Committee continue to consider ways to streamline this process so that viewers no longer have to switch back and forth. In the meantime, however, options are limited, meaning that the Commission must balance the needs of blind and non-English speaking viewers.⁸¹ Some networks have pre-existing affiliate or contractual obligations that require them to provide a certain amount of Spanish language on the SAP channel. These broadcasters will have less flexibility to provide additional video described programming, and will need additional time to ramp up to meet any new obligations that entail use of the SAP channel.

⁷⁷ MPAA Comments at 14.

⁷⁸ Comments of the National Association of Broadcasters, MB Docket No. 11-43, at 5-9 (Apr. 28, 2011).

⁷⁹ 2014 Status Report, 29 FCC Rcd at 8032.

⁸⁰ NCTA Comments at 18-19.

⁸¹ MPAA Comments at 13.

The record also demonstrates that increasing the required number of video described hours from 50 hours per quarter to 87.5 will significantly tax broadcasters and other video providers. Given the CVAA's mandate that additional rules not be economically or technically challenging,⁸² it is incumbent upon the Commission to consider policies designed to minimize burdens on broadcasters, and do so at the outset rather than on an *ad hoc* basis.

The biggest hurdle to compliance is the policy of counting a repeated broadcast no more than twice – once for the original airing and once for a repeat – towards the quarterly hours threshold, regardless of how many times a program actually airs.⁸³ This rule severely restricts a broadcaster's flexibility to fulfill the hourly quota with existing prime time and children's programming. The Commission must recognize that the repeat rule is out of step with a 50 percent increase in the amount of video described programming, and inject some leeway into the process to reflect this reality. One option would be to increase the maximum number of times a program could be counted to three or four or more, depending on the circumstances of a broadcaster or video provider. As NCTA notes, this would be especially helpful during calendar quarters when they air relatively fewer hours of new programming.⁸⁴

Another obstacle arises from the rule that only prime time and children's programming count towards the video description quota.⁸⁵ As MPAA notes, First Amendment concerns mean that the video description rules may not impact a broadcaster's programming decisions.⁸⁶ However, raising the quarterly minimum by 50 percent may do exactly that by causing broadcasters to air more programming eligible towards the video

⁸² 47 U.S.C. §613(f)(4).

⁸³ 47 C.F.R. § 79.3(c)(2); see MPAA Comments at 11; NCTA Comments at 14.

⁸⁴ NCTA Comments at 16.

⁸⁵ *Id.*, at § 79.3(b)(2).

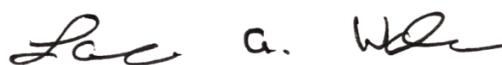
⁸⁶ MPAA Comments at 11-12.

description quota than they may otherwise provide. This will be particularly challenging for broadcasters that air a substantial amount of live and near-live programming that is not suitable for video description, and providers that air relatively fewer hours of children's programming. Thus, the Commission should also consider allowing additional types of programming to count towards the rule.

V. Conclusion

For the foregoing reasons, NAB submits that the Commission's determination that additional video description rules are justified is based on an insufficient record and ineffectual cost-benefit analysis. In addition, even if such a determination and analysis were well-founded, the Commission lacks authority under both the plain language and legislative history of the CVAA to adopt the proposed expansions of the video description rules. We also request that the Commission provide additional flexibility to broadcasters required to meet the proposed increase in quarterly hours of video described programming.

Respectfully submitted,



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