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Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

PETITION FOR PARTIAL RECONSIDERATION
AND CLARIFICATION SUBMITTED BY THE
NATIONAL ASSOCIATION OF BROADCASTERS

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Executive Summary

The National Association of Broadcasters (“NAB”) submits this petition for partial reconsideration and clarification of the Commission’s *Report and Order*, which requires major market network affiliates to provide video description services. Given the burden that these video description requirements will impose on local broadcast stations, NAB believes that reconsideration is warranted.

In this petition, NAB asks for reconsideration or clarification of certain specific aspects of the video description rules. Specifically, NAB requests the Commission to reconsider its decision that broadcast stations may not count toward their quarterly requirement for described programming any programming that they have previously aired with video description. Just as the Commission counts repeat showings of captioned programming toward broadcast stations’ quarterly requirements for the provision of video programming with closed captions, the Commission should count repeat showings of video described programming toward stations’ quarterly requirements. The Commission should similarly alter its enforcement procedures for the video description rules to be consistent with the established procedures for enforcing the closed captioning rules, as those procedures appear more effective and efficient for consumers, video programming distributors and the Commission.

The Commission should also limit its requirement for all technically capable stations to “pass through” any second audio program containing video description that they receive from their affiliated networks, so as to provide local stations with increased flexibility to provide other important services (especially Spanish language) to viewers. NAB additionally requests clarification of the standards for determining compliance

under the rules to insure that local stations are not faulted for any lack of described programming due to technical difficulties beyond an individual station's control.

Beyond these specific requests for reconsideration or clarification of particular aspects of the rules, NAB questions the Commission's decision to mandate video description in an analog environment. In light of the current transition to digital television, NAB submits that requiring broadcasters to spend substantial monies in upgrading their soon-to-be obsolete analog systems to provide described analog programming constitutes an undue burden.

Finally, NAB urges the Commission to reconsider whether it possesses statutory authority to mandate video description in either an analog or digital environment. A number of parties to this proceeding, as well as two Commissioners, believe that, given the language, legislative history and structure of Section 713 of the Communications Act, the Commission's authority is limited to conducting an inquiry and issuing a report on video description. In light of the disagreement among even the Commissioners on this basic jurisdictional question, NAB believes it warrants reconsideration.

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TO: The Commission

**PETITION FOR PARTIAL RECONSIDERATION
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NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ submits this petition for partial reconsideration and clarification of the Commission’s *Report and Order* in this proceeding.² In the *R&O*, the Commission required major market network affiliates to provide video descriptions for television viewers with visual disabilities. Specifically, the Commission required that, commencing with calendar quarter April to June 2002: (1) broadcasters affiliated with ABC, CBS, Fox and NBC in the top 25 television markets will be required to provide a minimum of 50 hours per calendar quarter of described prime time and/or children’s programming, and (2) any broadcast station, regardless of market size, will be required to “pass through” any video description it receives from a programming provider if the broadcast station has the technical capability to do so. The *R&O* additionally included further requirements pertaining to the provision of emergency information to the visually impaired by broadcast stations.

¹ NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

² *Report and Order* in MM Docket No. 99-339, FCC 00-258 (rel. August 7, 2000) (“*R&O*”).

In this petition, NAB asks for reconsideration or clarification of certain aspects of the Commission's video description rules, including repeat programming and the "pass through" requirements, as well as the enforcement and compliance procedures. Given the continuing transition to digital broadcasting, NAB also requests the Commission to reconsider its decision to adopt the technically challenging and expensive video description requirements in an analog environment. More fundamentally, NAB also asks the Commission to reconsider whether it possesses the statutory authority to implement mandatory video description in either an analog or digital environment. Given the burden that these video description rules will impose on local broadcast stations at a time when they are constructing digital facilities, NAB believes that reconsideration is warranted.

I. The Commission's Rules Pertaining to Repeat Programming and the "Pass Through" of Described Programming Need Revision or Clarification.

NAB asks that the Commission reconsider its decision that broadcast stations may not count toward their 50-hour quarterly requirement programming that they have previously aired with video description. *See R&O* at ¶ 33. This refusal to count repeat programming with video description toward the quarterly minimum places the network affiliated stations subject to the Commission's rules in a quandary, given the limited types of programming that may be counted toward the quarterly requirement. Specifically, the Commission has determined that affiliated stations must provide described prime time or children's programming, which, as a practical matter, will be *network* programming. Because the four major networks all have a summer rerun "season," during which they do not produce new prime time programming for their affiliated stations to air, it appears unfair and illogical for the Commission to refuse to count repeat showings of described prime time network programming toward the quarterly requirements of these network affiliates. Visually impaired viewers will, after all, still benefit from the

descriptions of repeated network programming, just as hearing impaired viewers benefit from the repeat showings of video programming with closed captioning. The Commission does count the repeat showing of captioned programming toward broadcast stations' quarterly requirements for the provision of video programming with closed captions. There is no reason for this disparate treatment, and the Commission should similarly count repeat showings of video described programming toward stations' quarterly requirements.

The Commission also required all broadcast stations, even those outside the top 25 television markets, to "pass through" any second audio program containing video description that they receive from their affiliated networks, if they have the necessary technical capability. *See R&O* at ¶ 30. NAB believes that this "pass through" requirement should not apply in certain limited situations. Specifically, a top 25 market station that has already met its 50-hour quarterly requirement (or a small market station not subject to any quarterly minimum) should not be required to pass through a second audio program containing video description received from its network, if that station wants to provide Spanish language (or any other SAP service) for that particular program. If an affiliated broadcaster has already fulfilled its quarterly requirement (or is not subject to any such requirement), then that broadcaster should have the flexibility to either pass through a second audio program containing video description received from its network, or to use the SAP channel to provide another service. NAB believes that this flexibility will allow local broadcasters to serve both the visually impaired community and other viewers, particularly Spanish language speakers. As the Commission recognized the value of such flexibility

elsewhere in its video description rules,³ NAB urges the Commission to clarify the general “pass through” requirement in this manner.

II. The Commission Should Reconsider or Clarify Certain Aspects of the Enforcement and Compliance Procedures Contained in the Rules.

With regard to the enforcement procedures adopted in connection with the video description rules, NAB asks the Commission to reconsider its deviance from the procedures established to enforce the closed captioning rules. In its closed captioning order, the Commission determined that any complaints about the captioning provided by video programming distributors be first directed to those distributors (such as broadcast stations), rather than the Commission. According to the Commission, directing complaints to distributors in the first instance would be an “effective and efficient way to streamline the process,” because “a large number of complaints” would be “resolved at the distributor level.” The Commission further stated that this approach would “lead to quicker action to resolve a complaint than if the complaint were filed directly with the Commission, eliminating any unnecessary administrative burdens for consumers and video programming distributors.” *Closed Captioning Order* at ¶ 240.⁴

In the video description rules, however, the Commission departed from these established procedures, so that any complaints about the provision of described programming will be submitted to the Commission initially. Clearly this altered procedure will prevent the resolution of *any* complaints at the program distributor level and will involve the Commission in *every*

³ As discussed above, the Commission determined to allow programming providers to repeat programming without video description, if they wish to make another use of the SAP channel, such as Spanish language audio. *R&O* at ¶ 33.

complaint about the provision of video description. NAB asserts that such a procedure will be neither effective nor efficient for consumers, video programming distributors or the Commission. In addition, NAB sees no basis for the Commission to have adopted a different complaint procedure for the enforcement of its video description requirements than for the enforcement of its closed captioning regulations, as the record does not indicate that the existing closed captioning procedures have been ineffective or inadequate. For these reasons, NAB requests that the Commission alter its enforcement procedures for the video description rules to be consistent with the established procedures for enforcing the closed captioning rules.

NAB also requests that the Commission clarify the standards for determining compliance under the video description rules. To evaluate whether a video programming distributor (such as a television station) has complied with the description requirements, the Commission will, under the current rules, “consider showings that any lack of video description was *de minimis* and reasonable under the circumstances.” 47 C.F.R. § 79.3(c)(4). NAB requests that the Commission clarify that technical errors beyond an individual station’s control be deemed to fall within the “reasonable under the circumstances” provision of Section 79.3(c)(4).

As discussed above, the Commission has determined that network affiliates must provide described prime time or children’s programming, which, as a practical matter, will be network programming. Assuming an individual affiliate is ready and able to pass through to viewers described programming received from its network, but, due to technical difficulties beyond that station’s control, the described programming is not properly received, then that “lack of video

⁴ The Commission expressly affirmed this decision in its reconsideration of the closed captioning rules. See *Order on Reconsideration* in MM Docket No. 95-176, 13 FCC Rcd 19973 at ¶ 116 (1998).

description” by the station should be deemed “reasonable under the circumstances” under Section 79.3(c)(4).⁵ NAB urges the Commission to clarify its rules in this manner.

III. The Commission Should Reconsider its Decision to Mandate Video Description in an Analog Environment.

As detailed in NAB’s comments, broadcasters would be required to undertake extensive and expensive engineering modifications and upgrades to implement the Commission’s proposals. The studio and plant of local television stations would need substantial modifications to receive and route described video programming. In addition, the networks’ origination centers and satellite distribution systems would require significant upgrades to provide described programming to local affiliates on a regular basis.⁶

Even beyond any consideration of the exact size of the expenditures to be incurred by broadcasters to provide video description, NAB emphasizes that these costs represent “orphan” investments in broadcasters’ analog distribution systems that are scheduled to be abandoned. The extensive technical upgrades that must be made to existing analog systems to distribute

⁵ This situation may arise, for example, if there is an unexpected disruption in the satellite transmission of described programming from a network to their affiliates.

⁶ See Comments of NAB in MM Docket No. 99-339, filed Feb. 23, 2000, at 15-17 (detailing costs in millions to networks for modifying origination facilities and satellite distribution systems); NAB *Ex Parte* Submission dated July 7, 2000 at 1 (a survey of network affiliated stations in top 50 markets showed that nearly 87% of stations would have to modify or reconstruct their studios to handle described programming from a network, and adding this capability would, on average, cost stations \$161,459.00 and require 278.4 manhours). The Commission, however, unreasonably discounted these cost figures and relied exclusively on the significantly lower cost estimates provided by another commenter. See *R&O* at ¶ 13 and n.34. NAB questions the Commission’s sole reliance on any single commenter’s cost figures, particularly since the lower cost estimates do not appear to have taken into consideration all of the steps described in NAB’s submission as needed to enable video description. For example, many stations responding to NAB’s survey indicated that their studio-to-transmitter links do not currently include the capability to support video description, despite the assertions of another commenter regarding such links. See *R&O* at note 63.

described programming cannot continue to be utilized after the transition to digital television (“DTV”).⁷ In light of the current transition to digital television, mandating broadcasters to spend substantial monies on their soon-to-be obsolete analog systems constitutes an undue burden.⁸ For these reasons, NAB requests the Commission to reconsider its decision to mandate video description in an analog environment.

Indeed, the Commission has in other contexts declined to mandate consumer-oriented services in an analog environment due to the advent of digital technology. For example, in reconsidering its decision requiring cable operators to separate the navigation from the security function of cable set-top (or converter) boxes, the Commission deferred indefinitely the obligation to provide separate devices for consumer access to analog programming.⁹ The Commission took this action because it recognized that requiring manufacturers to produce, and forcing MVPDs to purchase and provide to consumers, new *analog* security devices “would result in unnecessary expenditures . . . for a module that will soon be obsolete.” *Navigation Devices Order*, 14 FCC Rcd at 7602. Thus, the Commission declined to require the cable industry to incur additional expenditures for analog navigation equipment, even though Congress

⁷ NAB again observes that the record showed disagreement among commenters as to whether or not upgrades made in the analog environment would have any utility following the transition to digital broadcasting. The Commission noted the differing positions on this issue, but gave no explanation as to why NAB’s arguments should be discounted, and provided no basis for accepting assertions that its “video description rules therefore will work in tandem with the transition to DTV.” *R&O* at ¶ 23. As Commissioner Powell observed in his separate statement (at note 24), the Commission has “no real confirmation of this view.”

⁸ As Commissioner Powell explained in his separate statement (at 8), the Commission, in examining the burden involved in providing described programming, generally failed to consider broadcasters’ operating costs, and in particular neglected to consider the “enormous costs associated with the transition to digital.”

⁹ See *Order on Reconsideration* in CS Docket No. 97-80, 14 FCC Rcd 7596 (1999), *aff’d*, *General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000) (“*Navigation Devices Order*”).

had found that consumers would “benefit” from increased “competition in the manufacturing and sale of [such] equipment.” *Id.*¹⁰

If the imminent transition to digital technology was sufficient reason to avoid imposing “unnecessary expenditures” on the cable industry for new analog equipment in the *Navigation Devices Order*, then the Commission should in this proceeding similarly avoid requiring broadcasters to incur unnecessary expenditures to provide video description in an analog environment. In light of its treatment of MVPDs in its *Navigation Devices Order*, NAB suggests that the Commission has acted arbitrarily in refusing to consider the on-going digital transition, and the enormous costs associated with it, in determining to mandate that broadcasters provide video description in an analog environment.¹¹

IV. The Commission Should Reconsider Because It Lacks Statutory Authority to Implement Mandatory Video Description.

Finally, NAB asks the Commission to reconsider whether it possesses the statutory authority to mandate video description in either an analog or digital environment. As NAB argued in detail in its initial and reply comments, an examination of the language, structure and legislative history of Section 713 of the Communications Act, which specifically addresses both the closed captioning and video description of television programming, shows that the

¹⁰ NAB notes that, even though the Commission was required (by Section 304 of the 1996 Telecommunications Act) to adopt rules enhancing consumer access to cable navigation devices, the Commission nonetheless refused to impose these navigation and security separation regulations on the industry for analog equipment. In the case of video description, however, the Commission was certainly not statutorily *required* to adopt any regulations.

¹¹ See, e.g., *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) (FCC must at least explain its different treatment afforded to similarly situated broadcast renewal applicants); *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999) (court found FCC’s disparate treatment of incumbent and new wireless licensees to be arbitrary and capricious).

Commission has only the authority to conduct an inquiry and issue a report on the use of video description.¹² Moreover, NAB contended in its comments that the Commission cannot rely upon its general grants of authority in the Communications Act that do not even refer to video description to expand the terms of Section 713(f), which explicitly limit the Commission to conducting an inquiry and issuing a report on video description. And as set forth in our original comments, the constitutional implications of prescribing video description also militate against an overly broad reading of the Commission's authority with respect to video description.

In light of the numerous commenters who argued that the Commission lacked the authority to implement video description,¹³ and the disagreement among the Commissioners on this very issue,¹⁴ NAB requests the Commission to reconsider its statutory authority to promulgate mandatory video description regulations. The majority of the Commissioners argued that the Commission possessed ancillary jurisdiction under Sections 1, 4(i) and 303(r) of the Communications Act to adopt video description requirements. *See R&O* at ¶¶ 54-55. But the majority ignores the fact that the Commission's exercise of this ancillary jurisdiction has been regarded as appropriate in situations where Congress and the Communications Act were *silent* as

¹² Section 713(f), entitled "Video Descriptions Inquiry," directs the Commission to "commence an inquiry to examine the use of video descriptions" and "report to Congress on its findings." In stark contrast, Section 713(a)-(e) expressly mandates the adoption of closed captioning requirements, specifically directs the Commission to establish a schedule for implementation, and authorizes certain exemptions from the captioning requirements. 47 U.S.C. § 613. Given this contrast in the language of Section 713, it must be "presumed that Congress act[ed] intentionally and purposefully" in excluding language authorizing a Commission rulemaking with regard to video description, while including such language with respect to closed captioning. *Gozlon-Peretz v. U.S.*, 498 U.S. 395, 404 (1991); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987); *Russello v. U.S.*, 464 U.S. 16, 23 (1983).

¹³ *See, e.g.*, Comments of National Cable Television Association; Motion Picture Association of America, Inc.; A&E Television Networks; DIRECTV, Inc.

¹⁴ Commissioners Furchtgott-Roth and Powell both concluded that the Commission lacked jurisdiction to impose rules mandating video description.

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to the specific subject at issue.¹⁵ This ancillary jurisdiction cannot, however, properly be relied upon in cases where Congress has specifically addressed the precise question at issue, and certainly cannot justify Commission action contrary to the express terms of a statutory provision such as Section 713(f). Indeed, with regard to video description, the Commission's adoption of rules constitutes a course of action that Congress had expressly considered and clearly rejected.¹⁶

The majority of Commissioners also contended that the Commission possesses the authority to adopt mandatory video description requirements because Congress did not specifically prohibit the Commission from doing so. *See R&O* at ¶ 58. This approach turns established administrative law upside down. Under a proper view of the authority agencies possess in a system of administrative law based on delegated powers, the Commission can act only if *authorized* to do so. The mere absence of an explicit prohibition against taking a particular action is not the equivalent of an express authorization to act.¹⁷ It is, moreover, wholly

¹⁵ *See, e.g., United States v. Southwestern Cable*, 392 U.S. 157 (1968); *Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988).

¹⁶ As explained in detail in NAB's comments, and as noted in Commissioner Powell's dissent (at 3-4), Section 713 *mandated* the Commission to prescribe closed captioning regulations, but, in Conference Committee, Congress expressly *eliminated* language from that section which would merely have *permitted* the Commission to adopt video description regulations. *See* H.R. Rep. No. 458, 104th Cong., 2d Sess. 183 (1996). This "contrast in statutory language is 'particularly telling' when it represents a decision by a conference committee to resolve a dispute in two versions of a bill, and the committee's choice is then approved by both Houses of Congress." *Goncalves v. Reno*, 144 F.3d 110, 132 (1st Cir. 1998), *cert. denied*, 119 S.Ct. 1140 (1999) (citation omitted). As the Supreme Court has similarly stated, the deletion of a provision by a Conference Committee "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 199-200 (1974).

¹⁷ *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) ("The rulemaking power granted to an administrative agency . . . is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'") (citations omitted); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited

impracticable and unrealistic for Congress to consider every action that the Commission might take beyond those authorized, and include language expressly prohibiting this range of actions in every legislative enactment. In sum, the mere fact that Section 713(f) does not explicitly prohibit the Commission from adopting rules mandating video description is not sufficient to establish the Commission's jurisdiction, particularly given the clear language, structure and legislative history of Section 713.

V. Conclusion

As described in detail above, the Commission should reconsider or clarify certain aspects of its video description rules. Just as the Commission counts repeat showings of captioned programming toward broadcast stations' quarterly requirements for the provision of video programming with closed captions, the Commission should count repeat showings of video described programming toward stations' quarterly requirements. The Commission should similarly alter its enforcement procedures for the video description rules to be consistent with the established procedures for enforcing the closed captioning rules, as those procedures appear more effective and efficient. The Commission should also limit its requirement for all technically capable stations to "pass through" any second audio program containing video description that they receive from their affiliated networks, so as to provide local stations with greater flexibility to provide other services (such as Spanish language) to viewers.

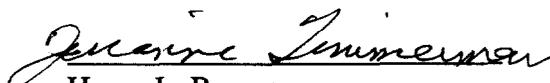
Beyond these requests for reconsideration or clarification on detailed aspects of the video description rules, the Commission should reconsider its decision to mandate video description in

to the authority delegated by Congress"); *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000) (in case addressing authority of FDA to regulate tobacco, appellate court concluded that the district court erred in "fram[ing] the issue as whether Congress has evidenced its clear intent to *withhold* from FDA jurisdiction to regulate

an analog environment, in light of the current transition to digital television and the disutility of further investment by broadcasters in their analog transmission systems. Even more fundamentally, the Commission should reconsider whether it possesses statutory authority to implement video description in either an analog or digital environment. Given the disagreement among the Commissioners on this basic jurisdictional question, NAB believes it warrants reconsideration.

Respectfully submitted,

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tobacco products”; rather, the “issue is correctly framed as whether Congress intended to *delegate* such jurisdiction to the FDA”) (emphasis in original).