

**STATEMENT OF COMMISSIONER AJIT PAI,
APPROVING IN PART AND DISSENTING IN PART**

Re: *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43.

“Just because a man lacks use of his eyes doesn’t mean he lacks vision.” Legendary musician Stevie Wonder once made that keen observation. In 2014, I had the privilege of meeting him and hearing his ideas for expanding the availability of “video-described programming”—basically, a show in which one can listen to a narrator give an oral description of what is being shown on the screen. He told me how hearing such a description helped him envision what was happening and integrate that information with the dialogue that he heard.

Stevie isn’t alone. Video description currently allows millions of blind and visually impaired Americans to more fully enjoy much of the quality programming that is being produced during this Golden Age of Television.

Consider, for example, one of the most critical scenes from the AMC series *Breaking Bad*. (Spoiler alert, but you’ve had plenty of time to binge-watch the whole series, as I did.¹) Hank is in Walt’s bathroom. He finds the inscribed copy of Walt Whitman’s *Leaves of Grass* and silently, for some time, tries to come to grips with the implication. If you couldn’t see the screen and no one was describing to you what was occurring, you would miss entirely Hank’s realization that Walt is Heisenberg, a plot point that is central to upcoming episodes.

Congress recognized the value of video description in the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”). In that law, it instructed the FCC to reinstate video description rules adopted by the Commission in 2000 but subsequently struck down by the U.S. Court of Appeals for the D.C. Circuit.² One year later, in 2011, the FCC did just that.

Today, the Commission proposes to expand upon those regulations and require that more programming on more broadcast and non-broadcast networks be video-described. Because I support increasing the availability of video description, I am voting to approve in part.

At the same time, I’m concerned that taken together, the proposals in this *Notice of Proposed Rulemaking* exceed the Commission’s statutory authority. I therefore regrettably must also dissent in part. I’ll briefly describe why.

In the CVAA, Congress carefully limited the Commission’s ability to expand upon our reinstated video description rules. In particular, Congress said that any additional regulations “may not increase, in total, the hour requirement for additional described programming by more than 75 percent of the requirement” in the reinstated regulations.³ Unfortunately, the proposals set forth in this *Notice of Proposed Rulemaking* don’t respect this congressionally-imposed limit.

Specifically, the reinstated regulations require four specific broadcast networks (ABC, CBS, Fox, and NBC) and the top five non-broadcast networks in the United States to each broadcast 50 hours of video-described programming per quarter. That constitutes a total requirement of 450 hours per quarter (9 networks x 50 hours). Pursuant to the CVAA, the Commission therefore has the authority to increase that total hours requirement by 75%, which works out to an additional 337.5 hours per quarter of video-described programming.

¹ See also “FCC to Fine Americans Who Don’t Keep Up with TV Shows,” *The Onion* (Jan. 6, 2011), available at <http://www.theonion.com/article/fcc-to-fine-americans-who-dont-keep-up-with-tv-sho-18725> (quoting former Chairman Genachowski as saying that “Staying abreast of popular culture is the responsibility of every citizen.”).

² See 47 U.S.C. § 613(f)(1).

³ See 47 U.S.C. § 613(f)(4)(B).

However, all of the proposals in this NPRM, in combination, would increase the amount of mandated video-described programming by at least 862.5 hours per quarter. That would constitute a 192% increase in the total hours requirement. First, those nine networks currently covered by the rules would have their quarterly requirement raised from 50 hours to 87.5 hours, an increase of 75%. And second, that same 87.5 hours quarterly requirement would be imposed upon one new broadcast network and five new non-broadcast networks.

But the statute doesn't allow the Commission to have its cake and eat it too. We can increase the per network hours requirement on existing networks by 75%. Or perhaps we can impose video description requirements on additional programming networks so that the increase in total hours is 75%. But Congress denied us the legal authority to do both.

And the 192% figure is a conservative estimate of the increase in the total hours requirement for video-described programming that would result from these proposals. The NPRM also proposes something called a "no-backsliding" requirement. Under this rule, a top five broadcast network or a top ten non-broadcast network would still be required to abide by our video description requirement even if its viewership fell and it was no longer a top five or top ten network. Over time, the Commission's regulations could end up applying to many more than 15 networks and the total hours requirement could increase by much more than 192% over time. This is the "Hotel California" approach to regulation: a network can check out of the upper ranks of viewership any time it likes, but it can never leave our regulatory reach.

Incredibly, the FCC even reinvents math. The NPRM explains that "the 'top five' will include ABC, CBS, Fox, and NBC, regardless of their relative rankings. In the event that one or more of those named networks suffers a sustained drop below fifth place in relative broadcast network rankings, the 'top five' broadcast networks for the purposes of these rules could consist of more than five networks."⁴ Just reflect upon that for a moment. 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 $2 + 2 = 5$.

In the hopes of reaching a compromise, I suggested that we neutrally seek comment on a no-backsliding requirement as well as an extension of the video description requirements to additional networks. This would have given sufficient notice of these ideas for the public to have input and would have kept the proposed increase in the total hours requirement within the law. It would have led to a unanimous vote without sacrificing the majority's ability to adopt any idea teed up in the NPRM. But as is so often the case these days, my modest suggestion was rejected. It crossed some red line, the reason for which I cannot fathom.

I'm therefore not optimistic about how the Commission will handle this proceeding going forward. But to quote Stevie Wonder, I "hope my premonition misses" and that we'll work together to reach a consensus—one that makes video-described programming more available and can withstand judicial review.

⁴ NPRM at note 83.