

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: January 4, 2001

Released: January 18, 2001

By the Commission: Commissioners Furchtgott-Roth and Powell dissenting and issuing separate statements.

I. INTRODUCTION AND BACKGROUND

1. On August 7, 2000, the Commission adopted rules requiring broadcasters and other video programming distributors to provide video description and to make emergency information more accessible to visually impaired viewers. In this *Order*, we grant in part and deny in part eight petitions seeking reconsideration¹ of the *Report and Order*.² We also provide clarification on certain issues related to the video description rules.³ As we have noted throughout this proceeding, television is the primary source of news and information and provides hours of entertainment each week to American homes. Video description is the description of key visual elements in a television program, inserted into the natural pauses in the program's audio. The video description rules are designed to make television programming more accessible to the many Americans who are visually impaired without imposing an undue burden on the programming production and distribution industries.

2. The Commission has reviewed and studied video description for five years, issuing three notices on the matter,⁴ two reports to Congress,⁵ and the *Report and Order*. The newly adopted rules

¹ Petitioners include DIRECTV, Inc. (DIRECTV), EchoStar Satellite Corporation (EchoStar), Home Box Office (HBO), the Motion Picture Association of America, Inc. (MPAA), the National Association of Broadcasters (NAB), the National Cable Television Association (NCTA), the National Federation of the Blind (NFB), and Turner Broadcasting System, Inc. (TBS). The A&E Television Networks (A&E), the League of United Latin American Citizens (LULAC), and the National Council of La Raza (NCLR) filed comments in support of certain issues raised in the petitions. The American Council of the Blind (ACB), the American Foundation for the Blind (AFB), NCTA, the National Television Video Access Coalition (NTVAC), and the Media Access Group at the WGBH Educational Foundation (WGBH) filed responses partially opposing and partially supporting the petitions. Four petitioners filed replies: DIRECTV, EchoStar, HBO, and MPAA.

² In the Matter of Video Description of Video Programming, MM Docket No. 99-339, *Report and Order*, 15 FCC Rcd 15230 (2000) (*Video Description Report and Order*).

³ No parties sought reconsideration of the rules regarding emergency information.

⁴ The Commission issued the first notice in 1995, Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176, *Notice of Inquiry*, 11 FCC Rcd 4912 (1995), and the second in 1997, (continued....)

require affiliates of ABC, CBS, Fox, and NBC in the top 25 Designated Market Areas (DMAs) to provide 50 hours per calendar quarter of prime time or children's programming with video description. Multichannel video programming distributors (MVPDs) with 50,000 or more subscribers must provide 50 hours of video described programming each quarter on each of the top five national nonbroadcast networks they carry. All broadcast stations and MVPDs that have the technical capability to do so, regardless of market size or number of subscribers, must "pass through" any video description received from a programming provider. The *Report and Order* also adopted "undue burden" exemption procedures as well as enforcement procedures under which complaints alleging violations would be filed with the Commission. The video description rules become effective April 1, 2002. In addition, under new rules that become effective upon approval from the Office of Management and Budget broadcast stations and MVPDs that provide local emergency information must make the critical details of that information accessible to persons with visual disabilities through aural presentation or accompany a "crawl" or "scroll" with an aural tone to alert persons with disabilities to an emergency situation.

3. In this *Order*, we generally affirm the decisions made in the *Report and Order*. We continue to believe that requiring video description will make television more accessible to the many Americans who are visually impaired and that we have the authority to adopt video description requirements. Although petitioners argue that the rules should be modified, if not eliminated,⁶ we note that approximately 600 individuals submitted personal responses to the petitions,⁷ describing their frustration over trying to "see the story without sight" and generally opposing any changes to the rules.⁸ After careful (Continued from previous page) _____

Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, *Notice of Inquiry*, 12 FCC Rcd 7829 (1997). The third notice, the *Notice of Proposed Rulemaking* released in 1999, initiated the instant proceeding. In the Matter of Video Description of Video Programming, *Report and Order*, MM Docket No. 99-339, *Notice of Proposed Rulemaking*, 14 FCC Rcd 19845 (1999) (*Notice*).

⁵ The Commission released the first report in 1996, Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, MM Docket No. 95-176, *Report*, 11 FCC Rcd 19214 (1996), and the second in 1998, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, *Fourth Annual Report*, 13 FCC Rcd 1034 (1997).

⁶ For example, the NFB filed a petition asking the Commission to repeal the newly adopted rules and start again.

⁷ See e.g., Letter from Rhea Collett to Magalie Salas, Secretary, FCC (Nov. 7, 2000); Letter from Phyllis Cottle to Magalie Salas, Secretary, FCC (Nov. 3, 2000); Letter from Ray Crowder to Magalie Salas, Secretary, FCC (Nov. 9, 2000); Letter from Carol Ann Ewing to Magalie Salas, Secretary, FCC (Nov. 1, 2000); Electronic Message from Seymour Hoffman to the FCC (Nov. 1, 2000); Letter from Mary M. Jern to Magalie Salas, Secretary, FCC (Nov. 8, 2000); Letter from Mrs. Norma F. Krajczar to Magalie Salas, Secretary, FCC (Nov. 12, 2000); Electronic Message from Retired USAF Colonel Richard L. Klass to the FCC (Oct. 31, 2000); Electronic Message from Cynthia E. Lynn RN to the FCC (Nov. 1, 2000); Letter from Jeffrey J. Moyer to the FCC (Nov. 8, 2000); Letter from James M. Oyer, Job Counselor, The Franklin County Bd. Of Mental Retardation and Development Disabilities to the FCC (Nov. 7, 2000); Electronic Message from Daniel Stabe to the FCC (Nov. 10, 2000); Electronic Message from Val Taylor to the FCC (Nov. 1, 2000); Letter from Kenneth M. Watterson to Magalie Salas, Secretary, FCC (Nov. 8, 2000).

⁸ For example, Jonathan Avila states that "[t]he July vote on this issue was a giant step towards equality for all Americans. ... I support video description on television programming because as a legally blind American I am able to receive crucial and essential information that I could not access in the past." Letter from Jonathan Avila, Manager of Training and Technical Staff for Bartimaeus Group to Magalie Salas, Secretary, FCC (Nov. 14, (continued....))

consideration of the record, we continue to believe that the public interest benefits of requiring video description outweigh the costs of complying with the rules.

4. We do make certain changes to and clarifications of our rules. We amend our rules to define the top five nonbroadcast networks as those that are ranked in the top five as defined by national audience share and that also reach 50 percent or more of MVPD households. We amend the rules to allow broadcast stations and MVPDs to count previously aired programming one time toward quarterly requirements. We clarify that once a broadcast station or MVPD that is required under our rules to provide video description has aired a particular program with video description, all subsequent airings of that program by that broadcast station or MVPD on the *same* network or channel must contain the video description. We further clarify that broadcast stations and MVPDs may use the SAP channel to provide services other than video description when subsequently airing a video described program, as long as those services, such as foreign language translations, are program-related. Similarly, we establish an exception to our pass-through requirements, allowing broadcast stations and MVPDs to use the SAP channel to provide program-related services other than video description when airing a program that contains video description. We amend our rules to allow programming providers, in addition to programming distributors, to file waivers for exemptions. We will allow consumers to bring informal complaints to the Commission at any time. We amend the rules, however, to require consumers to certify in any formal complaint to the Commission, and distributors to certify in their answers, that they have attempted to resolve the dispute prior to filing the complaint with the Commission. Finally, we adopt a definition of “prime time” and clarify the definition of “technical error” for purposes of determining compliance with the rules. We believe that these modifications promote our goal of not imposing an undue burden on programming producers or distributors, while enhancing the availability of video description to the visually impaired segment of our society.

II. DISCUSSION

A. Entities to Provide Programming with Video Description

1. Distributors and Programmers

5. In the *Report and Order*, we adopted a rule that requires broadcast stations in the top 25 DMAs affiliated with the top four commercial broadcast networks, ABC, CBS, Fox, and NBC, as well as (Continued from previous page) _____
2000). With respect to the petitions, Mr. Avila asks the Commission to “[p]lease stand strong in your decision to not let blind and visually impaired Americans become second rate citizens.” *Id.*; see Letter from Hannah K. McGinnis to Magalie Salas, Secretary, FCC (Nov. 3, 2000) (stating that “[a]s you declared, television should provide essential information and entertainment to blind and visually impaired citizens. ... Their needs are no less important than those of deaf and hard of hearing citizens who already receive closed captioning”). Sharon Bryant, who is an occupational therapist for “older adults” struggling with macular degeneration has “listened to many older Americans describe their frustration in not being able to view their televisions.” Letter from Sharon Bryant MS, CTRS, OTR at the Low Vision Rehabilitation Clinic to Magalie Salas, Secretary, FCC (Nov. 8, 2000). Urging the Commission to “go forward with the ruling and the eventual implementation of this very important service,” Ms. Bryant reminds us that “[o]ur population is aging and in the near future there will be escalating numbers of Americans who could benefit from video description.” *Id.* Duane H. Davis explains “[e]very day, over and over again, visually impaired people are confronted with the abject realization that they cannot participate in society as others do. ... It is good for the visually impaired individuals, and good for society, for visually impaired individuals to be motivated and included whenever possible.” Letter from Duane H. Davis, Assistant Professor of Philosophy, The University of North Carolina at Asheville to Magalie Salas, Secretary, FCC (Nov. 6, 2000).

“larger” MVPDs, MVPDs that serve 50,000 or more subscribers, to provide programming with video description.⁹ We further explained that implicit in our rules is the decision to hold programming distributors, rather than programming producers, responsible for compliance with our rules.¹⁰

6. DIRECTV, Inc. (DIRECTV) contends that the Commission’s rules hold “the wrong party” responsible for providing video described programming. DIRECTV argues that the Commission should hold programmers responsible for compliance with the video description rules because distributors have no ability to do so.¹¹ If a programmer violates the rules, DIRECTV asserts that MVPDs will be subject to costly litigation seeking indemnification for any liability incurred.¹² As we acknowledged and explained in the *Notice*, while we expect that programming networks, and not broadcast stations or MVPDs, will describe the programming, we should hold distributors responsible for compliance for ease of enforcement and monitoring of compliance with our rules.¹³ DIRECTV presents no new arguments or evidence that would lead us to change our conclusion. Consistent with our findings in adopting closed captioning rules, while we are placing the ultimate responsibility on program distributors, we expect that distributors will incorporate video description requirements into their contracts with program producers and owners, and that parties will negotiate for an efficient allocation of video description responsibilities.¹⁴ We therefore deny DIRECTV’s request to hold programming producers, rather than programming distributors, responsible for compliance with our rules.

2. DBS Operators

7. The video description rules require MVPDs that serve 50,000 or more subscribers to provide video description during prime time or on children’s programming.¹⁵ We recognized in the *Report and Order* that this standard would include within the scope of the rules two DBS systems that together reach 12 million subscribers: DIRECTV and EchoStar Satellite Corporation (EchoStar).¹⁶ We determined that while DIRECTV indicated that modifying its network to support three audio channels would cost “tens of millions of dollars,” those costs appeared to be more than offset by revenues. Specifically, we found that DIRECTV had more than 8.5 million customers as of May 2000, and based on the DBS average programming price of \$30 per month, we expect that DIRECTV subscriber revenues would be over \$3

⁹ *Video Description Report and Order*, 15 FCC Rcd at 15238, ¶ 20, 15241, ¶ 25.

¹⁰ *Video Description Report and Order*, 15 FCC Rcd at 15238, ¶ 20, n.52.

¹¹ DIRECTV Petition at 8.

¹² DIRECTV Petition at 12-13.

¹³ *Notice*, 14 FCC Rcd at 19855, ¶ 25.

¹⁴ See *In the Matter of Closed Captioning and Video Description of Video Programming, Report and Order*, 13 FCC Rcd 3272, 3286, ¶ 28 (1997) (stating the same with respect to closed captioning responsibilities).

¹⁵ *Video Description Report and Order*, 15 FCC Rcd at 15241, ¶ 25, and at App. B (setting forth the rules to be codified at 47 C.F.R. § 79.3(b)).

¹⁶ *Video Description Report and Order*, 15 FCC Rcd at 15242, ¶ 28.

billion per year.¹⁷ Similarly, based on EchoStar's more than 4 million subscribers as of May 2000, we expect that EchoStar's subscriber revenues would appear to be nearly \$1.5 billion per year.¹⁸

8. DIRECTV and EchoStar argue in their petitions that the Commission failed to adequately address the costs that the video description rules impose on DBS operators.¹⁹ DIRECTV asserts that the Commission based its decision "on a fictitious revenue figure" and that "gross revenues are an inappropriate measure" of its ability to bear the expenses associated with the new rules.²⁰ Both petitioners claim that neither company is currently profitable.²¹ DIRECTV explains that, in addition to the costs needed to upgrade its system, the rules create staffing costs and missed opportunity costs, and impose costs for video describing programs "estimated at \$4,000 per hour."²² EchoStar asserts that "[a] requirement supporting SAP feeds for all the hundreds of broadcast stations retransmitted by EchoStar would constitute a significant additional expenditure of bandwidth ... approximately 6.25% of a channel of incremental bandwidth ... comparable to, or even greater than, the 4% set-aside for public interest programming."²³ Neither petitioner, however, explains how this information would lead us to change our finding that MVPDs serving 50,000 or more subscribers should provide programming with video description. We recognize that our video description rules impose costs on DIRECTV and EchoStar, as they do on other MVPDs, as well as broadcast stations. DIRECTV and EchoStar have not provided information to convince us, however, that direct broadcast satellite (DBS) providers should be categorically exempt from our rules. Moreover, neither petitioner explains how the rules impose an undue financial burden or an undue burden on available bandwidth sufficient for the Commission to determine that either should be exempt from the video description rules. While we find no reason at this time to change our standard for MVPDs, DIRECTV and EchoStar have the option of seeking individual exemptions by providing sufficiently detailed information under the rules demonstrating that compliance would result in an undue burden.²⁴

¹⁷ *Video Description Report and Order*, 15 FCC Rcd at 15242, ¶ 28.

¹⁸ *Video Description Report and Order*, 15 FCC Rcd at 15242, ¶ 28.

¹⁹ DIRECTV Petition at 8-12; EchoStar Petition at 8-11; DIRECTV Reply at 6-7.

²⁰ DIRECTV Petition at 8, 10.

²¹ DIRECTV Petition at 10; EchoStar Petition at 10-11.

²² DIRECTV Petition at 11. DIRECTV specifically argues that beyond the cost of upgrading its system, "the new rules will require DIRECTV to bear additional costs, including: (i) the addition of video description programming to the top five nonbroadcast networks, estimated at \$4,000 per hour; (ii) staff and marketing materials necessary to educate consumers and to field questions and complaints from consumers who utilize the SAP channel for Spanish language programming; (iii) the implementation of internal compliance measures, such as monitoring equipment and additional staff; and (iv) the opportunity costs incurred from reserving the SAP channel for video description rather than to provide new interactive services in high demand." *Id.*

²³ EchoStar Petition at 9.

²⁴ *Video Description Report and Order*, 15 FCC Rcd at 15247-48, ¶ 42.

3. Premium Networks

9. MVPDs that fall within the scope of our video description rules²⁵ must provide 50 hours of described programming quarterly on each of any of the top five nonbroadcast networks they carry, as defined by prime time national audience share.²⁶ In the *Notice*, we proposed to require larger MVPDs to provide programming with video description on nonbroadcast networks that reach 50 percent or more of MVPD households.²⁷ Noting, however, that, as the National Cable Television Association (NCTA) pointed out, more than 40 cable networks serve 50 percent or more of MVPD households and that it might be burdensome for cable systems to retransmit video described programming on so many nonbroadcast networks, we decided to limit the number of nonbroadcast networks to the top five.²⁸ In the *Report and Order*, we also stated that we believed our decision to require 50 hours per quarter would avoid any conflicts between competing uses of the SAP channel.²⁹ In particular, we noted that we did not expect certain premium networks, including the Home Box Office (HBO), to be among the top five nonbroadcast networks subject to our rules.³⁰ The rule, as currently written, however, would require HBO to provide video description.

10. HBO asserts that the Commission never intended to include networks like HBO within the scope of our video description rules.³¹ In its petition, HBO contends that by modifying the standard from MVPDs that reach 50 percent of the MVPD households to the top five nonbroadcast networks, the Commission did not intend to expand the scope of the rule to include networks that would not have been subject to the rules originally proposed in the *Notice*.³² HBO suggests several options to remedy this issue: change the definition of nonbroadcast networks covered by the rule to be either the top five national *non-premium* nonbroadcast networks, based on Nielsen Media Research, Inc. (Nielsen) national prime time audience share, or those national nonbroadcast networks that reach 50 percent or more of MVPD households and are ranked in the top five, based on Nielsen national prime time audience share;³³ or exempting from the rules those networks that currently transmit a high percentage (such as 65 percent or more) of their prime time schedules with Spanish language audio using the SAP channel.³⁴

²⁵ That is, those with 50,000 or more subscribers.

²⁶ *Video Description Report and Order*, 15 FCC Rcd at 15241, ¶ 25.

²⁷ *Video Description Report and Order*, 15 FCC Rcd at 15240, ¶ 24 (citing *Notice*, 14 FCC Rcd at 19854-55, ¶ 25).

²⁸ *Video Description Report and Order*, 15 FCC Rcd at 15240-42, ¶¶ 24-26.

²⁹ *Video Description Report and Order*, 15 FCC Rcd at 15245, ¶ 34

³⁰ *Video Description Report and Order*, 15 FCC Rcd at 15245, ¶ 34, n.103.

³¹ HBO Petition at 2.

³² HBO Petition at 3.

³³ HBO Petition at 6-7.

³⁴ HBO Petition at 7.

11. All parties that filed pleadings in response to its petition support HBO's request.³⁵ The League of United Latin American Citizens (LULAC)³⁶ and the National Council of La Raza (NCLR)³⁷ urge the Commission to adopt one of HBO's options because they believe networks, like HBO, that provide substantial amounts of Spanish language programming should not be forced to eliminate or disrupt that programming.³⁸ The American Foundation for the Blind (AFB), the National Television Video Access Coalition (NTVAC), and the Media Access Group at the WGBH Educational Foundation (WGBH) do not object to a rule modification based on an audience reach criterion, but urge the Commission to reject HBO's argument that the Commission could create an exemption based on use of the SAP channel for Spanish programming. They assert that Spanish language translations and video descriptions can be offered on alternate feeds to provide multiple broadcasts or cablecasts of the same programs.³⁹

12. We did not intend, in adopting our video description rules, to include networks within the scope of those rules that would not have fallen within the scope of our proposal in the *Notice*. Accordingly, we amend Section 79.3(b)(3) to clarify that the 50-hour requirement applies to the top five national nonbroadcast networks, based on Nielsen national prime time audience share, that reach 50 percent or more of MVPD households.⁴⁰ This result is consistent with our goal of enhancing the widespread availability of video description. The programming of each of the several nonbroadcast, non-premium networks with the highest ratings is available to more than 75 million subscribers.⁴¹ By contrast, while HBO is among the nonbroadcast networks with the highest ratings during prime time, only 27 million subscribers subscribe to its service.⁴² We thus believe that limiting the top nonbroadcast networks to those that are ranked in the top five as defined by national audience share and that reach 50 percent or more of MVPD households best fulfills our goal of ensuring the widest availability of video description. We also believe that this result reconciles our proposal in the *Notice* and our intent to limit the number of nonbroadcast networks required to provide video described programming for the reasons set forth in the *Report and Order*.

³⁵ LULAC Comments at 2-5; NCLR Comments at 1-2; AFB Response at 2-4; NTVAC Opposition at 4; WGBH Opposition at 3-4.

³⁶ LULAC describes itself as "the largest and oldest Hispanic organization in the United States ... and works through community-based programs operating at more than 700 LULAC councils nationwide." LULAC Comments at 1.

³⁷ NCLR describes itself as "the nation's largest Hispanic civil rights organization serv[ing] over three million Hispanics through a formal network of 'affiliates' – 250 Hispanic community-based organizations that together operate in 39 states, Puerto Rico, and the District of Columbia." NCLR Comments at 1.

³⁸ LULAC Comments at 2-3; NCLR Comments at 2. Both LULAC and NCLR state that more than 93% of the HBO prime time program is accessible to Spanish-speaking viewers through the use of the SAP channel. LULAC Comments at 2; NCLR Comments at 2.

³⁹ AFB Response at 2, 4; NTVAC Opposition at 4; WGBH Opposition at 3-4.

⁴⁰ Thus, MVPDs that serve 50,000 or more subscribers must provide 50 hours of video description per quarter on each channel on which they carry one of the top five national nonbroadcast networks, based on Nielsen national prime time audience share, that reach 50 percent or more of MVPD households.

⁴¹ See, e.g., WGBH Comments on the *Notice* at 13.

⁴² See, e.g., WGBH Comments on the *Notice* at 14.

4. “Pass-Through” of Video Description

13. In the *Report and Order*, we adopted pass-through requirements for programming that contains video description. Broadcast stations, including NCE stations, that have the technical capability to do so, must pass through any second audio program containing video description that they receive from their affiliated networks.⁴³ Similarly, MVPDs that have the technical capability to do so must pass through any second audio program containing video description that they receive from a broadcast station or nonbroadcast network.⁴⁴

14. The National Association of Broadcasters (NAB) asks the Commission not to apply the pass-through requirement where a top 25 market broadcast station has already met its 50-hour quarterly requirement, if the station wants to provide Spanish language or any other SAP service for that particular program. Similarly, NAB asks the Commission not to apply the rule to a small market station not subject to any quarterly minimum, if the station wants to provide any other SAP service for that particular program.⁴⁵ NTVAC opposes NAB’s request, arguing that there is no reason to deprive the visually impaired community of described programming where the station already has the equipment in place and is receiving the programming in described format.⁴⁶ WGBH agrees with NAB that stations should be able to serve their non-English speaking viewers,⁴⁷ but both NTVAC and WGBH express concern that allowing local stations to use their SAP channel to provide any other services would allow a local broadcaster to use its SAP channel for information or services that are not related to any programming, including radio feeds or farm reports.⁴⁸

15. We agree that we should provide some additional flexibility under the rule. Because the SAP channel cannot be used to provide two services simultaneously, broadcast stations and MVPDs should be able to provide another service on a SAP channel when airing a program that contains video description, as long as that service is related to the program. Accordingly, we amend Sections 79.3(b)(2) and (4) to require broadcast stations and MVPDs that have the technical capability to do so to pass through video description, unless a program-related use of the SAP channel would cause a conflict with the video description.⁴⁹ We believe this approach affords broadcast stations and MVPDs reasonable flexibility to meet the needs of visually impaired viewers and other viewers that might benefit from program-related use of the SAP channel.

⁴³ *Video Description Report and Order*, 15 FCC Rcd at 15243, ¶ 30, and at App. B (setting forth “pass-through” rules for broadcast stations to be codified at 47 C.F.R. §§ 79.3(b)(2)).

⁴⁴ *Video Description Report and Order*, 15 FCC Rcd at 15243, ¶ 30, and at App. B (setting forth “pass-through” rules for MVPDs to be codified at 47 C.F.R. §§ 79.3(b)(4)).

⁴⁵ NAB Petition at 3.

⁴⁶ NTVAC Opposition at 11.

⁴⁷ WGBH Opposition at 8.

⁴⁸ NTVAC Opposition at 11; WGBH Opposition at 8.

⁴⁹ This holds true even if an entity subject to our video description rules has met the 50-hour requirement.

5. Analog and Digital Television

16. In the *Report and Order*, we stated that the newly adopted video description rules do not apply to digital broadcasts, but that we expect ultimately to require digital television broadcasts to contain video description.⁵⁰ NAB argues that the Commission should not mandate video description in an analog environment because the costs for providing video description represent “orphan” investments in analog systems that are scheduled to be abandoned.⁵¹ NTVAC and WGBH, on the other hand, argue that video description rules should apply to both analog and digital broadcasts.⁵² We reject NAB’s argument that because we did not “impose expenditures” on the cable industry for new analog equipment in the navigation devices proceeding, the Commission should similarly not require broadcasters to provide video description with analog broadcasts.⁵³ The purpose of the navigation devices proceeding was to make equipment, including cable television set-top boxes or direct broadcast satellite receivers previously available only from MVPDs, available for commercial retail purchase.⁵⁴ The statutory authority underlying the proceeding is premised on the belief that consumers would benefit from competition in the manufacturing and sale of this equipment.⁵⁵ The Commission determined, however, that there would not be a market demand for analog-only services, that analog devices would “soon be obsolete,” and that requiring the development of analog equipment would interfere with the development of competition in the digital marketplace.⁵⁶

17. These reasons are inapplicable here. One of the ways in which video description may be transmitted with digital broadcasts is by using an additional audio channel like the SAP channel. NAB simply presents no evidence supporting its contention that technical upgrades made to analog systems cannot be used after the transition to digital television (DTV). We thus have no reason to believe that requiring video description with analog broadcasts will result in significant orphaned investments.⁵⁷ Moreover, as we have previously stated and as AFB, NTVAC, and WGBH argue, the need for video description exists now and given that broadcasters will likely continue transmitting in analog format until at least December 2006, we do not wish to wait for the transition to be complete before adopting video description requirements.⁵⁸

⁵⁰ *Video Description Report and Order*, 15 FCC Rcd at 15234, ¶ 7.

⁵¹ NAB Petition at 6-8.

⁵² NTVAC Opposition at 7; WGBH Opposition at 8-9.

⁵³ NAB Petition at 7-8.

⁵⁴ In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CS Docket No. 97-80, *Order on Reconsideration*, 14 FCC Rcd 7596, 7597, ¶ 1 (1999) (*Navigation Devices Reconsideration Order*).

⁵⁵ *Navigation Devices Reconsideration Order*, 14 FCC Rcd at 7600, ¶ 13 (referencing Section 629 of the Communications Act, as amended, 47 U.S.C. § 549).

⁵⁶ *Navigation Devices Reconsideration Order*, 14 FCC Rcd at 7600, ¶ 13.

⁵⁷ NAB Petition at 7.

⁵⁸ *Notice*, 14 FCC Rcd at 19853, ¶ 22; AFB Petition at 3; NTVAC Petition at 7; WGBH Petition at 8.

18. Finally, NTVAC and WGBH argue that “the Commission should make clear now that its mandate will extend to transmission and reception of video description in digital television.”⁵⁹ Both parties argue the Commission should implement rules that require manufacturers of digital consumer reception equipment to support the ancillary audio channel that video description can use in DTV, and provide a schedule for implementing video description on digital programming.⁶⁰ WGBH warns that “unless the Commission signals now that description will need to be supported in DTV, expensive retrofitting or substantial delays will occur down the road.”⁶¹ As we have stated throughout this proceeding, we expect ultimately to require DTV broadcasts to contain video description, but we believe that the decision on how and when to develop those requirements should come after there has been further experience with both digital broadcasting and video description. We fully intend to address the issues raised by NTVAC and WGBH in a future periodic DTV review proceeding. Given our intent to require video description of digital programming at a later time, however, we urge equipment manufacturers to design their products with video description in mind.

B. Programming to Contain Video Description

1. Amount of Programming

a. Counting Repeats of Video Described Programming

19. In the *Report and Order*, we clarified that, once the rules go into effect, broadcast stations and MVPDs may not count toward their 50-hour quarterly requirement programming that they have previously aired with video description.⁶² We further explained in the *Report and Order* that broadcast stations and MVPDs may, however, count any programming they air in excess of their quarterly requirements, if and when they repeat the programming later.⁶³ In addition, a broadcast station or MVPD may count any video described programming that they air before the effective date of the rule, if they repeat it after the effective date of the rule.⁶⁴

20. All parties that filed petitions or responses to petitions on this issue support flexibility in counting programming previously aired with video description toward the 50-hour quarterly requirement. NAB, NCTA, and Turner Broadcasting Systems, Inc. (TBS) argue that broadcast stations and MVPDs do not have enough programming each quarter to meet the 50-hour requirement and not counting repeats of video described programming will force broadcast stations and MVPDs to change regularly scheduled programming or describe programming, such as sports programming, to meet the requirement.⁶⁵ NCTA

⁵⁹ NTVAC Petition at 7; WGBH Petition at 9.

⁶⁰ NTVAC Petition at 7; WGBH Petition at 9.

⁶¹ WGBH Petition at 9.

⁶² *Video Description Report and Order*, 15 FCC Rcd at 15244, ¶ 33, and at App. B (setting forth rules on repeats of programs containing video description to be codified at 47 C.F.R. §§ 79.3(c)(2)).

⁶³ *Video Description Report and Order*, 15 FCC Rcd at 15244, ¶ 33.

⁶⁴ *Video Description Report and Order*, 15 FCC Rcd at 15244, ¶ 33.

⁶⁵ NAB Petition at 2-3; NCTA Petition at 9-10; TBS Petition at 3-4.

and TBS also contend that the restriction will force cable program networks to pay to video describe licensed programming, programming that they do not own.⁶⁶ Finally, NAB and NCTA argue that there is no reason for counting repeat showings of captioned programming toward quarterly closed captioning requirements, but not repeats of video described programming toward video description requirements.⁶⁷

21. WGBH agrees with the petitioners that broadcast stations and MVPDs should be allowed to count previously described programming toward their quarterly requirement, whether the programming is distributed on the same channel for which it was originally described or on another channel.⁶⁸ WGBH states that the blind and visually impaired audience is not interested in the description of programming such as sports.⁶⁹ Similarly, AFB and NTVAC believe some flexibility is warranted.⁷⁰ NTVAC suggests that a maximum number of repeats in any one quarter could be established or broadcasters and MVPDs could be credited with the first repeat of a described program.⁷¹ Both AFB and NTVAC, however, disagree with NAB and NCTA that repeats for closed captioning can be compared with video description because the majority of television programs are now captioned, but our rules only require a few hours of video described programming per quarter.⁷² Finally, AFB, NTVAC, and WGBH believe that program distributors and producers can provide for description as part of licensing arrangements and, therefore, oppose any recommendation to exempt programming that is licensed, but not owned, from our rules.⁷³

22. We agree that some flexibility is warranted and will allow broadcast stations and MVPDs to count a repeat of a described program once toward their 50-hour requirement.⁷⁴ Based on the information provided in the petitions, we recognize that some entities may not have enough new programming each quarter that is appropriate for video description. For example, NAB explains that the four major networks do not produce new prime time programming during the summer rerun season⁷⁵ and NCTA asserts that program networks already have little flexibility because the rules are limited to children's and prime time programming.⁷⁶ While we are unwilling to allow broadcast stations and MVPDs to count all previously aired programming that contains video description toward quarterly requirements,

⁶⁶ NCTA Petition at 11; TBS Petition at 2.

⁶⁷ NAB Petition at 3; NCTA Petition at 12.

⁶⁸ WGBH Opposition at 4.

⁶⁹ WGBH Opposition at 5.

⁷⁰ AFB Opposition at 4-5; NTVAC Opposition at 9-10.

⁷¹ NTVAC Opposition at 9.

⁷² AFB Opposition at 4-5; NTVAC Opposition at 9.

⁷³ AFB Opposition at 4; NTVAC Opposition at 12; WGBH Opposition at 5.

⁷⁴ Broadcast stations and MVPDs can count a repeat of a previously aired program in the same quarter or in a later quarter, but only once altogether.

⁷⁵ NAB Petition at 2-3.

⁷⁶ NCTA Petition at 9.

we believe that allowing a limited number of repeats will provide broadcast stations and MVPDs reasonable flexibility to make programming more accessible to the blind or visually impaired without intruding unnecessarily into program production and distribution.

23. Finally, we reject NCTA's and TBS's implicit argument that cable program networks should not have to pay to video describe licensed programming. We agree with AFB, NTVAC, and WGBH that programming distributors and producers can provide for video description as part of a licensing agreement. Moreover, MVPDs may file waiver requests if the cost of providing video description for licensed programming creates an undue burden.⁷⁷

b. Subsequent Airings

24. In addition to outlining rules on how to count repeats of video described programming, we adopted rules in the *Report and Order* pertaining to when a station must provide the video description contained in a previously aired program. Specifically, we stated that "once a broadcast station or MVPD has aired a particular program with video description, all of that broadcast station's or MVPD's subsequent airings of that program should contain video description, unless another use is being made of the SAP channel."⁷⁸ We further explained that this requirement should not impose any burden because the cost of both describing programming and upgrading equipment and infrastructure to distribute it should be a one-time fixed cost.⁷⁹

25. NCTA, with the support of WGBH, asks the Commission to modify this "subsequent airing" requirement as it applies to MVPDs. According to NCTA, the assumption that the cost of both describing programming, and upgrading equipment and infrastructure should be a one-time fixed cost "does not hold true if this obligation applies to cable operators."⁸⁰ NCTA argues that if, for example, "a broadcast station carried by a cable operator airs a video-described program, and a cable program network later airs that same program, that cable network would have to create the entire infrastructure necessary to provide that one program with video description – even if that network would not be otherwise subject to the video description rules."⁸¹ WGBH agrees that the rule should be clarified and asserts that the

⁷⁷ As noted above, some parties argue that they do not have enough programming each quarter to enable them to meet the 50-hour requirement without counting repeats, unless they change their regularly scheduled programming to describe programming, such as sports programming, to meet the requirement. *See supra* text accompanying note 65. In the *Report and Order*, we declined to exempt categories of programming, including sports programming, from our video description requirement. We believed it was unnecessary to create these types of exemptions because of the limited nature of our initial requirement. *Video Description Report and Order*, 15 FCC Rcd at 15248, ¶ 43 and n.123. That is, we believed that the top networks subject to our rules would be able to select 50 hours per quarter without having to describe programming such as sports programming. If any entities subject to our rules find that they do not have enough prime time or children's programming to enable them to meet their requirement without describing sports programming or repeats, they may seek an undue burden exemption on that basis.

⁷⁸ *Video Description Report and Order*, 15 FCC Rcd at 15244, ¶ 33, and at App. B (setting forth rules on the subsequent airing of programs containing video description to be codified at 47 C.F.R. §§ 79.3(c)(3)).

⁷⁹ *Video Description Report and Order*, 15 FCC Rcd at 15244, ¶ 33.

⁸⁰ NCTA Petition at 15.

⁸¹ NCTA Petition at 15.

Commission's rule on subsequent airing of video described programming refers to the particular programming network, not the MVPD.⁸²

26. We clarify that once an MVPD that must provide video description under our rules has aired a particular program with video description on a particular network, every subsequent time that MVPD transmits that program *on the same network*, it must include the video description, unless another program-related use is being made of the SAP channel. Applying this requirement only to the network that initially aired the video-described program is consistent with our finding in the *Report and Order* that the cost of describing programming and upgrading facilities should be a one-time cost. In addition, consistent with our earlier decision regarding the obligation to pass through video described programming, we amend Section 79.3(c)(3) to clarify that a broadcast station or MVPD may elect not to provide video description in subsequent airings of a program if the network is using the SAP channel to provide another program-related service.

27. We do not agree with WGBH, however, that this "subsequent airing" rule should apply to networks that are not subject to our quarterly requirement, but have the technical capability to provide video description.⁸³ We believe that imposing a "subsequent airing" requirement on networks not otherwise required to provide any video description might discourage those networks from voluntarily providing video description in the first place.

2. Clarification of the Definition of "Prime-Time" Programming

28. Broadcast stations and MVPDs must provide described programming either during prime time or in children's programming.⁸⁴ We explained in the *Report and Order* that prime time programming is the most watched programming, and so programming provided during this time will reach more people than programming provided at any other time.⁸⁵

29. While none of the petitioners challenged the requirement that video programming be described during prime time, TBS asked that we clarify the definition of prime time.⁸⁶ TBS notes that "the predominant definition of 'prime time' in the industry is 8:00-11:00 p.m. local time in the Eastern and Pacific time zones Monday-Saturday, and 7:00-11:00 p.m. on Sunday. Under this definition, prime time in the Central time zone coincides with the Eastern time zone (an hour earlier local time) and prime time in the Mountain zone is divided between prime time in the Pacific time zone and prime time in the Central time zone."⁸⁷ NTVAC and WGBH agree that clarification is needed and support the definition that TBS

⁸² WGBH Opposition at 7.

⁸³ See WGBH Opposition at 7 (contending that the rule should be clarified so that stations that are not required to provide video description under our rules should not be required to include video description in subsequently aired programming, unless they have the technical capability necessary to do so).

⁸⁴ *Video Description Report and Order*, 15 FCC Rcd at 15246, ¶ 36, and at App. B (setting forth rules on providing video described programming to be codified at 47 C.F.R. §§ 79.3(b)(1) and (3)).

⁸⁵ *Video Description Report and Order*, 15 FCC Rcd at 15246, ¶ 36.

⁸⁶ TBS Petition at 5-7.

⁸⁷ TBS Petition at 6.

provides.⁸⁸ TBS also asks the Commission to clarify that for TBS Superstation, a single-transponder nonbroadcast network, “prime time” nationwide will be considered prime time in the Eastern time zone.⁸⁹ Both NTVAC and WGBH stated that they had no objection to this request.

30. We adopt the industry definition of “prime time” for purposes of video description. Accordingly, we amend Section 79.3(a)(6) to define “prime time” as the period from 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7 and 10:00 p.m. Monday through Saturday, and 6 and 10:00 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday, or 7 to 10:00 p.m. Monday through Saturday, and 6 to 10:00 p.m. on Sunday. While Part 76 of our rules provides a five-hour time period to define prime time,⁹⁰ we note that our repealed prime-time access rules limited presentations of programs from national networks to a three-hour period during prime time.⁹¹ We also note that Nielsen uses a three-hour time period from Monday through Saturday, and the four-hour time period on Sunday to collect audience prime time viewing data.⁹² We find that using Nielsen’s time periods is consistent with our decision to define the top five nonbroadcast networks based on the audience share during prime time as determined by Nielsen. Moreover, we note that the parties are in agreement on this definition. We also agree that prime time for TBS Superstation, a single-transponder system, should be defined as prime time in the Eastern time zone. Again, as TBS points out, this definition coincides with Nielsen’s standard practice⁹³ and none of the parties object to this definition.

3. Text Information

31. In the *Report and Order*, we recognized that making text information accessible to the blind and visually impaired is important, but that we believed a secondary audio program may not be the appropriate vehicle to provide text-based information.⁹⁴ We therefore encouraged programming producers with text information to provide that information aurally, by announcing, for example, the names of

⁸⁸ NTVAC Opposition at 12; WGBH Opposition at 5.

⁸⁹ TBS Petition at 7.

⁹⁰ 47 C.F.R. § 76.5(n). Section 76.5 defines prime time, for purposes of cable systems, as “[t]he 5-hour period from 6 to 11 p.m., local time, except that in the central time zone the relevant period shall be between the hours of 5 and 10 p.m., and in the mountain time zone each station shall elect whether the period shall be 6 to 11 p.m. or 5 to 10:00 p.m.” *Id.*

⁹¹ The repealed rule required commercial television stations owned by or affiliated with a national television network “to devote, during the four hours of prime time (7-11 p.m. e.t. and p.t., 6-10 p.m. c.t. and m.t.), no more than three hours to the presentation of programs from a national network, programs formerly on a national network (off-network programs) other than feature films, or, on Saturdays, feature films.” 47 C.F.R. § 73.658 (1994) (repealed).

⁹² See Nielsen Media Research, *2000 Report on Television, The First Fifty Years* at 14 (2000) (defining prime time as 8 to 11:00 p.m., Monday through Saturday, and 7 to 11:00 p.m. Sunday).

⁹³ TBS Petition at 7.

⁹⁴ *Video Description Report and Order*, 15 FCC Rcd at 15246, ¶ 38.

speakers.⁹⁵ We also adopted rules for providing emergency information to visually impaired viewers. All broadcast stations and MVPDs that provide emergency information intended to further life, health, safety, and property through regularly scheduled newscasts and newscasts that are sufficiently urgent to interrupt regular programming, must make the critical details of that information accessible to persons with visual disabilities through aural presentation.⁹⁶ A broadcast station or MVPD that provides emergency information using a “crawl” or “scroll” must accompany the message with an aural tone to alert persons with visual disabilities to turn on a radio, the SAP channel, or a designated digital channel.⁹⁷

32. The National Federation of the Blind (NFB) contends that the Commission’s final video description rules are fundamentally flawed because they give priority to describing programming over making printed information on the screen accessible.⁹⁸ NFB argues that the Commission should rescind the final rules and begin an entirely new proceeding because “[b]y the time anyone gets around to thinking about accessible information . . . the available resources will already be committed elsewhere.”⁹⁹ The American Council of the Blind (ACB), AFB, NTVAC, and WGBH support NFB’s concerns about providing described text information, but oppose its request, in effect, to “start all over again.”¹⁰⁰ Instead, AFB, NTVAC, and WGBH encourage the Commission to initiate a separate proceeding to address the issue of video descriptions for text information.¹⁰¹ ACB and NTVAC also explain that while the technology and production outlets for delivering video description for television programs has been in place for years, the technology for described information is still being developed.¹⁰² NCTA likewise encourages programming producers with text information to provide that information aurally, but argues that NFB does not explain “how any broader requirement to verbalize textual information could be accomplished without unduly disrupting the viewing experiences of many customers.”¹⁰³

33. We emphasize that we fully recognize the importance of described text information. As ACB and NTVAC explain, the industry has begun to examine the use of “synthetic voice”¹⁰⁴ and we

⁹⁵ *Video Description Report and Order*, 15 FCC Rcd at 15246, ¶ 38.

⁹⁶ *Video Description Report and Order*, 15 FCC Rcd at 15250-51, ¶¶ 49-50, and at App. B (setting forth rules on providing video described programming to be codified at 47 C.F.R. §§ 79.2(b)(1)).

⁹⁷ *Video Description Report and Order*, 15 FCC Rcd at 15250-51, ¶¶ 49-50, and at App. B (setting forth rules on providing video described programming to be codified at 47 C.F.R. §§ 79.2(b)(1)).

⁹⁸ NFB Petition at 2.

⁹⁹ NFB Petition at 9-10.

¹⁰⁰ ACB Opposition at 1-2; AFB Response at 5; NTVAC Opposition at 6; WGBH Opposition at 9.

¹⁰¹ AFB Response at 5; NTVAC Opposition at 6; WGBH Opposition at 9.

¹⁰² ACB Opposition at 2; NTVAC Opposition at 6.

¹⁰³ NCTA Comments at 1-2.

¹⁰⁴ See ACB Opposition at 2 (stating that Time Warner provides a tone for emergency information, a synthetic voice saying go to a particular channel for information, and finally a synthetic voice on that channel describing the emergency information); NTVAC Opposition at 6 (stating that synthetic voice holds considerable promise for the video industry and consumers alike).

encourage further development of this or any other technology that would address the issue of described information. We agree with NTVAC, however, that video description of programming should not be delayed until the issues of describing text information are addressed.¹⁰⁵ NFB has not presented any new arguments that would lead us to change our finding that video described programming and video described text information are not mutually exclusive services. We therefore deny NFB's request to rescind the video description rules while recognizing the importance of addressing the issue of described information in a separate proceeding.

C. Use of SAP Channels

34. In the *Report and Order*, we stated that we believed our decision to require 50 hours per quarter, or roughly 4 hours per week, of programming with video description would avoid any conflicts between competing uses of the SAP channel.¹⁰⁶ DIRECTV argues that mandatory requirements to use the SAP channel for video description will confuse customers and that consumer education will not alleviate the problem.¹⁰⁷ DIRECTV contends that it will be required to dedicate staff and resources to address these consumer issues on a permanent basis because "one-time consumer education measures will not alleviate the problem."¹⁰⁸ In response, NTVAC states that "both Spanish speaking and blind people can figure out program schedules and learn to adjust their viewing habits accordingly."¹⁰⁹

35. We recognized in the *Report and Order* that no technical solution to allow two uses of the SAP channel simultaneously is currently available, but that most networks that use the SAP channel to provide Spanish language audio do so on a limited basis. We concluded that in the majority of cases our rules would not create conflicts between Spanish language audio and video description for use of the SAP channel and that any confusion could be corrected through viewer education.¹¹⁰ DIRECTV presents no new arguments or evidence in its petition for reconsideration that would lead us to change that conclusion. Any change in programming, whether voluntary or mandatory, requires some measure of consumer education and associated costs to provide that education. DIRECTV fails to present any information that the cost of providing that education would outweigh the benefits of the rules. We also believe that the minimal amount of programming required under our rules does not overly burden use of the SAP channel. Rather, the roughly 4-hour per week requirement reasonably accommodates competing uses of the SAP channel, such as providing programming that is accessible to Spanish-speaking viewers.

D. Waivers and Exemptions

36. In the *Report and Order*, we adopted the "undue burden" exemption procedures and

¹⁰⁵ NTVAC Opposition at 6.

¹⁰⁶ *Video Description Report and Order*, 15 FCC Rcd at 15245, ¶ 34.

¹⁰⁷ DIRECTV Petition at 8-9 DIRECTV Reply at 7.

¹⁰⁸ DIRECTV Petition at 9.

¹⁰⁹ NTVAC Opposition at 11.

¹¹⁰ *Video Description Report and Order*, 15 FCC Rcd at 15245, ¶ 34.

standards that we use in the closed captioning context.¹¹¹ We will exempt any affected broadcast station or MVPD that can demonstrate through sufficient evidence that compliance would result in an “undue burden,” which means significant difficulty or expense.¹¹² We declined, however, to exempt any particular category of programming or class of programming providers, given the limited nature of the initial video description rules. We stated that we would consider these issues when we consider expanding the scope of entities that must provide video described programming, and the amount of video description those entities must provide.¹¹³

37. Several parties urge the Commission to amend the video description rules to permit program networks and producers, in addition to distributors, to file requests for waivers for undue burden as they are permitted to do under the closed captioning rules.¹¹⁴ Noting that cable program networks and program owners are not included within the definition of “video programming distributor” under Part 79 of our rules,¹¹⁵ NCTA asserts that these entities, rather than the cable operator, would be the appropriate entities to file for undue burden waivers in most cases.¹¹⁶ TBS argues that while the rules place substantial burdens on networks, those networks have no opportunity to petition for an exemption from the requirements of the rules, leaving them no recourse.¹¹⁷ WGBH agrees with NTCA, noting that program networks and producers must be involved and supportive partners with MVPDs to achieve successful provision of described programming. WGBH asserts that both networks and producers should have rights similar to distributors to request undue burden exemptions.¹¹⁸

38. We agree that video programming providers should be allowed to file waivers for exemptions under the undue burden standard, as they are allowed under our closed captioning rules. Accordingly, we amend Section 79.3(d) to permit video programming providers, as defined under Part 79

¹¹¹ *Video Description Report and Order*, 15 FCC Rcd at 15247-48, ¶ 42, and at App. B (setting forth the procedures and standards for assessing “undue burden” exemptions to be codified at 47 C.F.R. § 79.3(d)). The procedures and standards used to assess undue burden exemptions in the closed captioning context are set forth at 47 C.F.R. § 79.1(f).

¹¹² *Video Description Report and Order*, 15 FCC Rcd at 15247-48, ¶ 42. In the *Report and Order*, we stated that we would consider the following factors: the nature and cost of providing video description of the programming; the impact on the operation of the broadcast station or MVPD; the financial resources of the broadcast station or MVPD; the type of operations of the broadcast station or MVPD; any other factors the petitioner deems relevant; and any available alternatives to video description. *Id.*

¹¹³ *Video Description Report and Order*, 15 FCC Rcd at 15248, ¶ 43.

¹¹⁴ NCTA Petition at 16-17; TBS Petition at 7; WGBH Opposition at 6.

¹¹⁵ NCTA Petition at 17. For purposes of our closed captioning rules, Section 79.1(a)(3) defines “video programming provider” as “[a]ny video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to broadcast or nonbroadcast television network and the owners of such programming.” 47 C.F.R. Part 79.1(a)(3).

¹¹⁶ NTCA Petition at 17.

¹¹⁷ TBS Petition at 7.

¹¹⁸ WGBH Opposition at 6.

of our rules, to petition the Commission for a full or partial exemption from our video description requirements. As we similarly stated in the closed captioning proceeding, the undue burden exemption is intended to be “sufficiently flexible to accommodate a wide variety of circumstances” for which compliance with our video description requirements would pose a significant financial or technical burden.¹¹⁹ As we have previously recognized, video description is most likely to be added to programming at the production stage prior to distribution, where it is most economically and technically efficient.¹²⁰ Moreover, to the extent a broadcast station’s or MVPD’s inability to comply with our rules stems from problems at, for example, the programming producer end, we believe we should allow the programming producer to plead its hardship directly to the Commission. Otherwise, the programming producer would have to submit information to its local distribution outlets around the country, which would then file numerous separate waiver requests with the Commission. To avoid this inefficiency, therefore, we will allow programming providers to seek exemptions under the undue burden standard. We emphasize, however, that while we will allow other programming providers to seek exemptions from our rules, we hold programming distributors responsible for compliance.

E. Enforcement

1. Initial Complaints

39. In the *Report and Order*, we adopted procedures to enforce our initial video description rules.¹²¹ Under these procedures, complaints are not required to be submitted to a programming distributor before being filed with the Commission. A complainant may allege a violation of the video description rules by sending a complaint to the Consumer Information Bureau (CIB) at the Commission by any reasonable means, such as a letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette, Braille, or some other method that would best accommodate a complainant’s disability.¹²² CIB will forward formal complaints to the Commission’s Enforcement Bureau.¹²³

40. NAB and NTCA note that we have established enforcement procedures for our video description rules that differ from the enforcement procedures for our closed captioning rules.¹²⁴ They contend that complaints should be submitted to a programming distributor before being filed with the Commission.¹²⁵ According to NCTA, “requiring the complainant to go to the video programming

¹¹⁹ See In the Matter of Closed Captioning and Video Description of Video Programming, *Report and Order*, 13 FCC Rcd 3272, 3363, ¶ 198 (1997) (providing the same rationale under our closed captioning rules).

¹²⁰ See *supra* at ¶ 6 (stating that we expect that programming networks, and not broadcast stations or MVPDs, will describe the programming) (citing *Notice*, 14 FCC Rcd at 19855, ¶ 25).

¹²¹ *Video Description Report and Order*, 15 FCC Rcd at 15248-49, ¶¶ 45-47.

¹²² *Video Description Report and Order*, 15 FCC Rcd at 15248-49, ¶ 45.

¹²³ *Video Description Report and Order*, 15 FCC Rcd at 15248-49, ¶ 45. In the *Report and Order*, the Commission delegated authority to act on and resolve any complaints in a manner consistent with the *Report and Order*. *Id.*

¹²⁴ NAB Petition at 4-5; NCTA Petition at 12-14.

¹²⁵ NAB Petition at 5; NCTA Petition at 12-13.

distributor first will allow the parties to more quickly and satisfactorily resolve the dispute.”¹²⁶ NAB argues that there is no basis on which to adopt a different complaint procedure for the enforcement of video description rules than for closed captioning because “the record does not indicate that the existing closed captioning rules have been ineffective or inadequate.”¹²⁷ AFB and NTVAC oppose the petitioners’ request, arguing that obtaining information to contact programming distributors is too difficult for blind and visually impaired viewers.¹²⁸ NTVAC contends that “[i]t would be simpler and far more efficient for visually impaired viewers to have a single point of contact.”¹²⁹

41. We believe that viewers should try to resolve disputes with video programming distributors prior to filing a formal complaint with the Commission, as suggested by NAB and NCTA. We therefore amend our rules to require complainants to certify in formal complaints to the Commission, and distributors to certify in their answers, that they have attempted in good faith to settle disputes prior to filing formal complaints and answers with the Commission. We note that this result is consistent with our recently revised rules for filing formal complaints against common carriers.¹³⁰ Prior to or instead of filing a formal complaint, however, viewers may contact CIB either to attempt to resolve disputes by filing an informal complaint, or to obtain information about how to contact the programming distributor. We believe that these procedures will provide parties the opportunity to resolve disputes quickly and efficiently.

2. Clarification of “Technical Errors”

42. Our video description rules provide that, in evaluating whether a video programming distributor has complied with the requirement to provide video programming with video description, we will consider a showing that any lack of video description was *de minimis* and reasonable under the circumstances.¹³¹ NAB asks the Commission to clarify that technical errors beyond an individual station’s control will fall under the “reasonable circumstances” provision.¹³² NAB explains, for example, that “if a station is ready and able to pass through to viewers described programming received from its network, but, due to technical difficulties beyond the station’s control, the described programming is not properly

¹²⁶ NCTA Petition at 13-14.

¹²⁷ NAB Petition at 5.

¹²⁸ AFB Response at 3; NTVAC Opposition at 9.

¹²⁹ NTVAC Opposition at 9.

¹³⁰ Amendment of Rules to be Followed When Formal Complaints are filed Against Common Carriers, CC Docket No. 96-238, *First Report and Order*, 12 FCC Rcd 22497 (1997). We also followed these rules when we adopted rules to implement section 255 of the Act, which requires manufacturers of telecommunications equipment, and providers of telecommunications services, to make such equipment and provide such services in a manner that is accessible to persons with disabilities. See Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, WT Docket No. 96-198, *Report and Order and Further Notice of Inquiry*, FCC 99-181 (rel. Sept. 29, 1999).

¹³¹ *Video Description Report and Order*, 15 FCC Rcd at 15244, ¶ 33, and at App. B (setting forth the standards for assessing compliance with the video description rules to be codified at 47 C.F.R. § 79.3(c)(4)).

¹³² NAB Petition at 5-6.

received, then that ‘lack of video description’ should be deemed ‘reasonable under the circumstances.’”¹³³ Stating that the Commission rarely faults a broadcaster or cablecaster for a temporary rule violation, NTVAC argues that a technical error should not be construed to include the lack of equipment to provide video descriptions, but that a technical error is “a temporary difficulty” that is “a short-term failure of equipment.”¹³⁴

43. We clarify that to be classified as a technical error, the problem must be beyond a station’s control. In addition, the problem must be *de minimis* and reasonable under the circumstances. We will examine carefully, however, any showings ascribed to technical error to ensure that those instances are only a temporary difficulty, such as that caused by short-term failure of equipment, and not by a station unreasonably failing to pass-through the described programming supplied by its network.

F. Jurisdiction

44. In the *Report and Order*, we held that the Commission has the authority to adopt video description rules. We explained that sections 1, 2(a), 4(i), and 303(r) of the Act,¹³⁵ taken together, direct and empower the Commission to make available to all Americans a radio and wire communication service, and to make regulations to carry out this mandate, that are consistent with the public interest and not inconsistent with other provisions of the Act or other law.¹³⁶ In reaching this decision, we considered but rejected the arguments of commenters that video description rules would be inconsistent with other law, namely sections 624(f) and 713(f) of the Act,¹³⁷ as well as the First Amendment, and might also interfere with the rights of copyright holders.¹³⁸

45. Petitioners raise the same arguments raised before in this proceeding. For example, petitioners suggest that analysis of the issue of our authority to adopt video description rules begins and ends with section 713(f) of the Act,¹³⁹ which instructed the Commission to “commence an inquiry . . . and report to Congress” on video description, but not to make rules. Against the backdrop of section 713, petitioners contend that the Commission cannot rely on other provisions of the Act to make rules.¹⁴⁰ Petitioners also suggest that our rules are content-based, violating the First Amendment¹⁴¹ and, as applied

¹³³ NAB Petition at 5-6.

¹³⁴ NTVAC Opposition at 5.

¹³⁵ These sections are codified at, respectively, 47 U.S.C. §§ 151, 152(a), 154(i), 303(r).

¹³⁶ *Video Description Report and Order*, 15 FCC Rcd at 15251-52, ¶¶ 54-55.

¹³⁷ These sections are codified at, respectively, 47 U.S.C. §§ 544(f), 613(f).

¹³⁸ *Video Description Report and Order*, 15 FCC Rcd at 15252-56, ¶¶ 56-66.

¹³⁹ DIRECTV Petition at 4-5; EchoStar Petition at 2-3; NAB Petition at 8-9; NCTA Petition at 2-3; *see also* A&E Comments at 4-6.

¹⁴⁰ DIRECTV Petition at 5; DIRECTV Reply at 7; EchoStar Petition at 7; MPAA Petition at 5-6; NAB Petition at 9-10; *see also* A&E Comments at 6-7.

¹⁴¹ DIRECTV Petition at 7; DIRECTV Reply at 8; MPAA Petition at 7-8; *see also* A&E Comments at 8-12.

to cable operators, section 624(f) of the Act,¹⁴² which does not permit the government to “impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI of the Act.]” Petitioners further suggest that our rules interfere with the rights of copyright holders.¹⁴³

46. We addressed most of the statutory arguments petitioners raised at the *Report and Order* stage, and they have offered no reason for us to reconsider our conclusion. As discussed in detail in the *Report and Order*, sections 1, 2(a), 4(i), and 303(r) make clear that the Commission’s fundamental purpose is to make available so far as possible to all Americans a radio and wire communication service, and it has the power to make rules to carry out this mandate that are consistent with the public interest, and not inconsistent with other law. Our video description rules further the public interest because they are designed to enhance the accessibility of video programming to persons with visual disabilities, but at the same time not impose an undue burden on the video programming production and distribution industries. Our video description rules are not inconsistent with sections 624(f) and 713(f) of the Act, the First Amendment, or copyright law. Our rules are not inconsistent with section 713(f), because that section neither authorizes nor prohibits a rulemaking on video description. Our rules are not inconsistent with section 624(f), because they do not require cable operators to carry any particular programming. Our rules are not inconsistent with the First Amendment, because they are content-neutral regulations, and satisfy the applicable test of serving an important government interest without burdening substantially more speech than necessary. Our rules are not inconsistent with copyright law because they do not violate any copyright holder’s rights.¹⁴⁴ In sum, as we explained in greater detail in the *Report and Order*, we believe that our video description rules further the very purpose for which the Commission was created – “to make available, so far as possible, to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service”¹⁴⁵ – and are within our power to adopt because they are “not inconsistent with [the] Act”¹⁴⁶ and serve the “public convenience, interest, and necessity” and are “not inconsistent with law.”¹⁴⁷

¹⁴² NCTA Petition at 4-6.

¹⁴³ MPAA Reply at 2.

¹⁴⁴ We also reject EchoStar’s new argument that our rules are inconsistent with section 255 of the Act. EchoStar Petition at 7-8; EchoStar Reply at 1-2. Section 255 requires manufacturers of telecommunications equipment, and providers of telecommunications services, to make such equipment and services accessible to persons with disabilities, but only “if readily achievable.” 47 U.S.C. § 255. EchoStar suggests that our video description rules do not have a similar contingency. EchoStar Petition at 7-8; EchoStar Reply at 1-2. EchoStar also argues that the discrepancy between the “readily achievable” standard and our video description rules further suggests that we do not have authority to adopt such rules – Congress did not qualify the provision of video description because there was no access obligation to qualify in the first place. EchoStar overlooks, however, the fact that our video description rules contain procedures for waiver if compliance would create an undue burden. See 47 C.F.R. § 79.3(d).

¹⁴⁵ 47 U.S.C. § 151.

¹⁴⁶ 47 U.S.C. § 154(i).

¹⁴⁷ 47 U.S.C. § 303(r).

III. CONCLUSION

47. In this *Order on Reconsideration*, we reaffirm and modify rules to more precisely balance the interests between providing a benefit to a great number of visually impaired Americans without imposing an undue burden on the programming production and distribution industries. As we stated in the *Report and Order*, however, as industry and the public gain greater experience with video description, we hope that an increasing number of broadcast stations and MVPDs will provide video description, and those that do so will provide an increasing number of hours of video described programming.

IV. PROCEDURAL MATTERS

48. Authority for issuance of this *Memorandum Opinion and Order on Reconsideration* is contained in Sections 4(i), 303(r), 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 403, and 405.

49. *Supplemental Final Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act (RFA),¹⁴⁸ the Commission has prepared a Supplemental Final Certification of the possible impact on small entities of the rules adopted in this *Memorandum Opinion and Order on Reconsideration*.¹⁴⁹ The Supplemental Final Certification is set forth in Appendix C.

V. ORDERING CLAUSES

50. Accordingly, IT IS ORDERED that the petitions for reconsideration or clarification ARE GRANTED to the extent provided herein and otherwise ARE DENIED pursuant to Sections 1, 2(a), 4(i), 303(r), 307, 309, 310, 403, 405, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303(r), 307, 309, 310, 403, 405, 613, and Section 1.429(i) of the Commission's rules, 47 C.F.R. § 1.429(i).

51. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) & (j), 303(r), 307, 308 and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) & (j), 303(r), 307, 308, 309, Part 79 of the Commission's rules, 47 C.F.R. Part 79, IS AMENDED as set forth in Appendix B.

52. IT IS FURTHER ORDERED that the rule amendments set forth in Appendix B that revise section 79.3 of the Commission's rules, 47 C.F.R. § 79.3, SHALL BECOME EFFECTIVE on April 1, 2002.

53. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order on Reconsideration* in MM Docket No. 99-339, including the Supplemental Final Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

54. IT IS FURTHER ORDERED that this proceeding is terminated.

¹⁴⁸ 5 U.S.C. § 601 *et seq.*

¹⁴⁹ 5 U.S.C. § 605(b).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A**PETITIONS FOR RECONSIDERATION**

1. DIRECTV, Inc. (DIRECTV)
2. EchoStar Satellite Corporation (EchoStar)
3. Home Box Office (HBO)
4. Motion Picture Association of America, Inc. (MPAA)
5. National Association of Broadcasters (NAB)
6. National Cable Television Association (NCTA)
7. National Federation of the Blind (NFB)
8. Turner Broadcasting System, Inc. (TBS)

COMMENTS IN SUPPORT OF THE PETITIONS

1. A&E Television Networks (A&E)
2. League of United Latin American Citizens (LULAC)
3. National Council of La Raza (NCLR)

OPPOSITIONS, PARTIAL OPPOSITIONS AND PARTIAL SUPPORT OF THE PETITIONS

1. American Council of the Blind (ACB)
2. American Foundation for the Blind (AFB)
3. NCTA
4. National Television Video Access Coalition (NTVAC)
5. Media Access Group at the WGBH Educational Foundation (WGBH)

REPLIES

1. DIRECTV
2. EchoStar
3. HBO
4. MPAA

**APPENDIX B
Rule Changes**

Part 79 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 79-CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING

1. The authority citation for Part 79 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 613

2. Section 79.3 is amended by
- (a) adding paragraph (a)(6);
 - (b) revising paragraphs (b)(2), (b)(3), (b)(4)(i), (b)(4)(ii);
 - (c) revising paragraphs (c)(2) and (c)(3);
 - (d) redesignating paragraph (c)(4) as paragraph (c)(5);
 - (e) adding new paragraph (c)(4);
 - (f) revising paragraph (d)(1);
 - (g) revising paragraphs (e)(1)(iv) and (e)(1)(v);
 - (h) adding paragraph (e)(1)(vi); and
 - (i) revising paragraph (e)(2).

The revisions read as follows:

§ 79.3 Video description of video programming.

* * * * *

(a) * * *

(6) Prime Time. The period from 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7 and 10:00 p.m. Monday through Saturday, and 6 and 10:00 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday, or 7 to 10:00 p.m. Monday through Saturday, and 6 to 10:00 p.m. on Sunday.

(b) * * *

(2) Television broadcast stations that are affiliated or otherwise associated with any television network, must pass through video description when the network provides video description and the broadcast station has the technical capability necessary to pass through the video description, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description;

(3) Multichannel video programming distributors (MVPDs) that serve 50,000 or more subscribers, as of September 30, 2000, must provide 50 hours of video description per calendar quarter during prime time or on children's programming, on each channel on which they carry one of the top five national nonbroadcast networks, as defined by an average of the national audience share during prime time of nonbroadcast networks, as determined by Nielsen Media Research, Inc., for the time period October 1999-September 2000, that reach 50 percent or more of MVPD households; and

(4) * * *

(i) must pass through video description on each broadcast station they carry, when the broadcast station provides video description, and the channel on which the MVPD distributes the programming of the broadcast station has the technical capability necessary to pass through the video description, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description; and

(ii) must pass through video description on each nonbroadcast network they carry, when the network provides video description, and the channel on which the MVPD distributes the programming of the network has the technical capability necessary to pass through the video description, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.

(c) * * *

(2) Programming with video description that has been previously counted by a broadcaster or MVPD toward its minimum requirement for any quarter may be counted one additional time toward that broadcaster's or MVPD's minimum requirement for the same or any one subsequent quarter.

(3) Once a commercial television broadcast station as defined under paragraph (b)(1) of this section has aired a particular program with video description, it is required to include video description with all subsequent airings of that program on that same broadcast station, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.

(4) Once an MVPD as defined under paragraph (b)(3) of this section:

(i) has aired a particular program with video description on a broadcast station they carry, it is required to include video description with all subsequent airings of that program on that same broadcast station, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description; or

(ii) has aired a particular program with video description on a nonbroadcast station they carry, it is required to include video description with all subsequent airings of that program on that same nonbroadcast station, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.

* * * * *

(d) * * *

(1) A video programming provider may petition the Commission for a full or partial exemption from the video description requirements of this section, which the Commission may grant upon a finding that the requirements will result in an undue burden.

* * * * *

(e) * * *

(1) * * *

(iv) the specific relief or satisfaction sought by the complainant;

(v) the complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, or some other method that would best accommodate the complainant's disability); and

(vi) a certification that the complainant attempted in good faith to resolve the dispute with the broadcast station or MVPD against whom the complaint is alleged.

(2) The Commission will promptly forward complaints satisfying the above requirements to the video programming distributor involved. The video programming distributor must respond to the complaint within a specified time, generally within 30 days. The Commission may authorize Commission staff either to shorten or lengthen the time required for responding to complaints in particular cases. The answer to a complaint must include a certification that the video programming distributor attempted in good faith to resolve the dispute with the complainant.

APPENDIX C

Supplemental Final Regulatory Flexibility Analysis Certification

Memorandum Opinion and Order on Reconsideration

The Regulatory Flexibility Act (RFA)¹⁵⁰ requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”¹⁵¹ The *Notice of Proposed Rulemaking (Notice)* in this proceeding proposed rules to provide video description on video programming to ensure the accessibility of video programming to persons with visual impairments.¹⁵² The *Report and Order* adopted rules requiring broadcasters and other video programming distributors to provide video description and to make emergency information more accessible to visually impaired viewers.¹⁵³

In an abundance of caution, the Commission published an Initial Regulatory Flexibility Analysis (IRFA) in the *Notice*,¹⁵⁴ even though the Commission was reasonably confident that the proposed rules would not have the requisite “significant economic impact” on a “substantial number of small entities.” The IRFA sought written public comment on the proposed rules. No written comments were received on the IRFA, nor were any general comments received that raised concerns about the impact of the proposed rules on small entities. Because the Commission believed the rules adopted in the *Report and Order* would have a negligible effect on small businesses, the Commission published a Final Certification that the rules adopted in that order would not have a significant economic impact on a substantial number of small entities.¹⁵⁵

The *Memorandum Opinion and Order on Reconsideration* amends certain rules adopted in the *Report and Order*. The Commission amends its rules to define the top five nonbroadcast networks as those that are ranked in the top five as defined by national audience share and that also reach 50 percent or more of MVPD households. The amended rules allow broadcast stations and MVPDs to count previously aired programming one time toward quarterly requirements. Once a broadcast station or MVPD subject to the video description rules has aired a particular program with video description, only subsequent airings of that program by that broadcast station or MVPD on the *same* network or channel must contain the video description. Under both this “subsequent airing” rule and the “pass-through” rule, broadcast stations and

¹⁵⁰ The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 11- Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

¹⁵¹ *See* 5 U.S.C. § 605(b).

¹⁵² In the Matter of Video Description of Video Programming, *Report and Order*, MM Docket No. 99-339, *Notice of Proposed Rulemaking*, 14 FCC Rcd 19845 (1999) (*Notice*).

¹⁵³ In the Matter of Video Description of Video Programming, *Report and Order*, MM Docket No. 99-339, 15 FCC Rcd 15230 (2000) (*Report and Order*).

¹⁵⁴ *Notice*, 14 FCC Rcd at 19862-69.

¹⁵⁵ *Report and Order*, 15 FCC Rcd at 15265.

MVPDs may now use the SAP channel to provide services other than video description, as long as those services, such as foreign language translations, are program-related. The rule amendments allow programming providers, in addition to programming distributors, to file waivers for exemptions. The rule amendments adopt a definition of “prime time” and clarify the definition of “technical error” for purposes of determining compliance with the rules. These amendments only affect large entities as discussed in the Final Certification included in the *Report and Order*.¹⁵⁶ No small entities will experience an economic impact as a result of these amendments.

Finally, under the rule amendments, consumers may bring informal complaints to the Commission at any time, but must include in a formal complaint to the Commission a certification that they have tried to resolve a dispute with the distributor prior to filing the complaint. In addition, distributors are required to make similar certifications in their answers. These amendments to the rules are created to attempt to resolve issues prior to filing a formal complaint. The Commission believes that requiring these certifications is necessary to assure a smooth process to address outstanding issues in a timely and efficient manner. The burden imposed by the inclusion of these certifications is nominal for both consumers and distributors because it will require no more than a single statement to be added to the initial formal complaint and its answer. These amendments will not have a significant economic impact on a substantial number of small entities.

The Commission therefore certifies, pursuant to the RFA, that the rule amendments adopted in the present *Memorandum Opinion and Order on Reconsideration* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Memorandum Opinion and Order on Reconsideration*, including a copy of this Supplemental Final Certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act.¹⁵⁷ In addition, the Commission will send a copy of the *Memorandum Opinion and Order on Reconsideration*, including a copy of this Supplemental Final Certification, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, a copy of the *Memorandum Opinion and Order on Reconsideration* and this Supplemental Final Certification will be published in the Federal Register.¹⁵⁸

¹⁵⁶ *Report and Order*, 15 FCC Rcd at 15265.

¹⁵⁷ *See* 5 U.S.C. § 801(a)(1)(A).

¹⁵⁸ *See* 5 U.S.C. § 605(b).

DISSENTING STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH**In the Matter of Implementation of Video Description of Video Programming,
MM Docket No. 99-339, Memorandum Opinion and Order on Reconsideration**

I dissented from the original Report and Order's adoption of video description rules because I was unable to read the Communications Act as authorizing such regulations. *See* Statement of Commissioner Harold W. Furchtgott-Roth, Concurring in Part and Dissenting in Part, *In the Matter of Implementation of Video Description of Video Programming*, MM Docket No. 99-339, *Report and Order*, 15 FCC Rcd 15230 (2000). Accordingly, I agree with those commenters who seek reversal of that Order on grounds of lack of jurisdiction, *see supra* at ¶ 45, and I dissent from today's action to the contrary.

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DISSENTING STATEMENT OF COMMISSIONER MICHAEL K. POWELL

In The Matter of Implementation of Video Description of Video Programming, MM Docket No. 99-339,
Memorandum Opinion and Order on Reconsideration

Inasmuch as I share my colleagues' desire to improve access to communications services for the disability community, I cannot support the above-captioned *Order* concerning video description of video programming.

As I noted in my separate statement to the original *Order*, I thoroughly wish that I could support the expansive implementation of video description rules that the Majority is pursuing.¹ However, I continue to believe that Congress spoke to the video description issue in Section 713(f) of the Communications Act of 1934, and purposely limited our authority to studying the issue and reporting to Congress. Since Section F of this *Order* re-affirms the Majority's view that it can promulgate video description rules under its various ancillary jurisdiction provided, in large measure, by Sections 4(i) and 303(r) of the Communications Act, I dissent to this *Order*.

I personally cannot read the law conveniently, even for so worthy a constituency.

¹ To be clear, while I disagree with the Majority about its use of ancillary jurisdiction as a basis for this rulemaking generally, I continue to support that portion of the original *Order* that provides for emergency text information in audio form because I believe that the promotion of safety of life and property is within the scope of the specific authority provided by the Communications Act and the Commission's various rules. See *In The Matter of Implementation of Video Description of Video Programming, MM Docket No. 99-339, FCC 00-259, Report and Order* (July 21, 2000) (Separate Statement of Michael K. Powell, Commissioner, Federal Communications Commission) [available on the World Wide Web at <<http://www.fcc.gov/commissioners/powell>>].