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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of the Cable Television )  
Consumer Protection and Competition Act )  
of 1992 )  
 )  
Broadcast Signal Carriage Issues )

MM Docket No. 92-259

**MOTION FOR LEAVE TO FILE LATE COMMENTS**

STARSIGHT TELECAST, INC. ("StarSight"), by its attorneys, hereby files this Motion, pursuant to Section 1.415(d) of the Commission's Rules, 47 C.F.R. § 1.415(d), for leave to file late comments in the above-reference proceeding. StarSight seeks leave to file comments in support of the Petition for Partial Reconsideration and Clarification of the National Association of Broadcasters.<sup>1/</sup>

Under Section 1.415(d) of the Commission's rules, additional comments beyond the proper filing deadline are prohibited "unless specifically requested or authorized by the Commission." 47 C.F.R. § 1.415(d). In this case, Commission authorization for StarSight to file late comments is appropriate because of the manner in which StarSight's interactive television program guide can address the heightened concern over the excessive amount of violence depicted on television. In fact, the Chairman of the House Telecommunications and Finance Subcommittee introduced

<sup>1/</sup> Pursuant to the Public Notice released May 13, 1993, such comments would have been considered timely had they been filed on or before June 7, 1993. Replies to such oppositions would have been considered timely had they been filed on or before June 22, 1993.

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recently legislation aimed exclusively at limiting the amount of television violence depicted on television.<sup>2/</sup> The public interest benefits that StarSight's program guide can offer in this regard should be a part of the public record.

StarSight's patented interactive television program guide and VCR control service is an easy-to-use, cost effective and accurate method of identifying, selecting and recording television programming. The interactive guide will be transmitted in the vertical blanking interval ("VBI") of every PBS station's local signal beginning February, 1994.

Television violence is clearly a matter of heightened public concern. StarSight's program guide provides parents an easily accessible means of limiting their children's exposure to television violence. Moreover, StarSight's television guide can function currently in a manner similar to that proposed by the yet-to-be developed V-chip.<sup>3/</sup> The StarSight product can identify those programs which contain parental advisories notifying parents of programs depicting violence on a seven-day, rolling basis. Today the StarSight product provides rating information supplied by the Motion Picture Association of America ("MPAA"); therefore, if Congress imposes a rating system on television programs similar to the MPAA's rating system, the StarSight product is able to provide viewers a thematic or window of information identifying programs which contain such ratings.

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<sup>2/</sup> H.R. 2888, 103rd Cong., 1st Sess., (August 5, 1993).

<sup>3/</sup> The V-chip is at the heart of H.R. 2888. See also, Edmund L. Andrews, "A Chip That Allows Parents to Censor TV Sex and Violence", The New York Times, July 18, 1993, at F14.

This will be a convenient tool for parents to screen those violent programs they believe are unsuitable for their children.

StarSight's interactive television program guide also indicates which television programs are close-captioned for the hearing impaired. StarSight's product provides a window or thematic which displays only those close-captioned programs for the next seven days. This advanced feature empowers physically challenged viewers to receive the full benefits of interactive program services and the convenient and easy-to-use services which it offers.

Moreover, StarSight will be providing educational program schedules and StarSight service free into school classrooms through its participation in "Cable in the Classroom." Educators will be able to sort and select programming on any channel by theme category such as science and history, and subthemes, such as zoology and American history. By enabling teachers a hands-on way to select instructional television programs, the StarSight product will be an effective tool for instructional learning.

The Commission should develop a complete record in considering how its must carry decision may affect new technologies, such as StarSight's interactive television programming guide, which will allow the public a better means of identifying violent television programming.

To ensure that the Commission has a complete record of the important public interest benefits that StarSight's interactive program guide can offer, the Commission should accept these comments in support of the Petition for Partial Reconsideration

and Clarification filed by the National Association of Broadcasters.

FOR THE FOREGOING REASONS, StarSight Telecast, Inc. requests that the Commission grant this motion for leave to file comments in this proceeding.

September 13, 1993

Respectfully submitted,

StarSight Telecast, Inc.

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TO: The Commission

**COMMENTS OF STARSIGHT TELECAST, INC. IN SUPPORT  
OF THE PETITION FOR PARTIAL RECONSIDERATION AND  
CLARIFICATION OF THE NATIONAL ASSOCIATION OF BROADCASTERS**

STARSIGHT TELECAST, INC. (the "Company"), by its undersigned attorneys, hereby comments on the Petition for Partial Reconsideration and Clarification of the National Association of Broadcasters ("Petition") filed May 3, 1993 in the above-referenced proceeding.

**I. BACKGROUND AND PRELIMINARY STATEMENT**

On March 29, 1993, the Commission released a Report and Order<sup>1/</sup> in this proceeding to implement the mandatory television broadcast signal carriage ("must-carry") and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").<sup>2/</sup> The National Association of Broadcasters ("NAB") petitioned the Commission to reconsider its decision in the Report and Order regarding the proper test to determine whether material

1/ Report and Order in MM Docket 92-259, 8 FCC Rcd 2965 (1993). See also, Clarification Order, 58 FR 32449 (June 10, 1993).

2/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§4-6, 106 Stat. 1460 (1992).

transmitted on the vertical blanking interval ("VBI") is program-related.<sup>3/</sup> In particular, the NAB urged the Commission to reconsider reliance on the use of the copyright test as described in WGN Continental Broadcasting Co. V. United Video, ("WGN") 685 F.2d 218 (7th Cir. 1982), to determine whether material in the VBI of a broadcaster's signal is program-related and thus subject to the Report and Order's must-carry requirements.

The Company supports the Commission's reliance on the factors enumerated in WGN to determine program-relatedness. Nonetheless, the Company urges the Commission to defer to the broadcaster to make this vital content-based decision. The Company believes that the broadcaster is in the best position to make this determination as opposed to cable operators or the Commission. As demonstrated herein, this approach is the only administratively feasible means of resolving the difficult copyright issues posed by this aspect of the must carry proceeding, and will promote the development of new and innovative uses of the VBI, such as the StarSight interactive television program guide.

**A. StarSight Telecast Inc. and the StarSight Product**

StarSight Telecast, Inc. is a leading developer of interactive on-screen television program guides. The Company's innovative on-screen television programming guide is transmitted in the VBI of the television signal. Therefore, StarSight is vitally interested in the Commission's must carry decision as it

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<sup>3/</sup> Petition For Partial Reconsideration and Clarification of the National Association of Broadcasters filed May 3, 1993.

relates to the VBI. StarSight is owned substantially by leading cable operators, broadcasters, publishers and entertainment providers including Viacom International, Cox Communications, Spelling Entertainment, Tribune Company, Times Mirror Cable Television, Providence Journal, and KBLCOM.

The Company's patented Starsight product ("StarSight") is an interactive television program guide and VCR control service which provides an easy-to-use, cost effective and accurate method of identifying, selecting and recording television programming. StarSight's television program information provides consumers with detailed television schedule information including program title, story plot and rating to help subscribers sort through the vast array of television programming provided by cable television systems. StarSight's program information greatly enhances a viewer's ability to understand programming options and to quickly and efficiently select desired programming. StarSight will enable a viewer to preview program themes and attributes, such as the recently adopted parental advisories for violent programs, close-captioned program listings, sexually explicit or adult programming, or virtually any other program attributes. The product also allows a consumer to block-out unwanted channels completely or on a temporary or per-program basis.

The Company will launch an operational test of StarSight to subscribers of Viacom's cable television system in Castro Valley, California, during the fourth quarter of 1993. The Company has also entered into an agreement with a subsidiary of Public Broadcasting Service Corporation ("PBS") which provides that most local PBS affiliated television stations will transmit StarSight

over the VBI. Thus, by the end of January, 1994, StarSight will be available to approximately 98% of all homes across the nation either through over-the-air broadcasts or through cable systems which carry a local PBS station.

Consumers will need a StarSight decoder box or a StarSight compatible VCR or converter to use the StarSight program guide and the accompanying StarSight VCR record and play-back features. StarSight compatible hardware and software designs are being incorporated into various models of new consumer televisions, VCRs, and cable decoders manufactured by such manufacturers as Zenith Electronics, Scientific Atlanta, General Instruments, Goldstar, Mitsubishi and Samsung.

**B. StarSight Offers Many Public Interest Benefits**

The Commission should ensure that program enhancements such as StarSight are accorded must carry protection. By enhancing viewer choice, StarSight offers consumers a wide array of public interest benefits. Parents may use StarSight to block out unwanted channels or programs which may be inappropriate for their children to view. This feature will be particularly significant if Congress imposes a rating system on television programs similar to the Motion Picture Association of America's rating system; StarSight is capable of displaying a thematic of programs containing such ratings. Parents could then program their television sets to block out programs with violent ratings.

Thus, StarSight offers a common ground between those advocating government action to reduce the level of violence on television and those who oppose content regulation of television

programming. StarSight allows viewers to make the ultimate choice of whether they want their television set to screen out violent programming. Further, the Company updates StarSight's program schedule on a seven-day rolling basis which means parents will always have a seven-day window to review whether upcoming programs contain parental advisories and to make appropriate decisions for their children.

StarSight offers an array of other important benefits to television viewers. StarSight's program guide indicates which television programs are close-captioned. At the touch of a button, StarSight will display all available close-captioned programming for a seven-day period. This advanced feature empowers physically challenged viewers to receive the full benefits of interactive program guide services and the convenient and easy-to-use services which it offers.

In addition, the StarSight program guide includes a "Cable in the Classroom" thematic which makes the full range of commercial-free Cable in the Classroom programming more readily accessible to educators. Cable in the Classroom is an outreach project which brings educational programming created by various cable programmers such as the Discovery Channel and C-SPAN into the classroom. The Company will provide its subscription service free to schools that participate in the Cable in the Classroom program. By using StarSight, educators will be able to sort and select programming on any channel by theme category such as science and history, and subthemes, such as zoology and American History. StarSight is an effective tool for instructional

learning because it enables teachers a convenient way to select and use instructional television programs.

The easy-to-use StarSight interactive VCR recording and play-back features offer benefits to educators and consumers alike. For example, when a teacher would like to record a program, StarSight allows the teacher to select the title of the program and, by pressing a single button, to record a program by show title, up to seven days in advance. Moreover, the recorded program is stored by title so play-back is as easy as selecting the program title and pressing play; the VCR will automatically fast forward or rewind the tape and begin playing the program. This allows the VCR to be used as an instructional tool and also facilitates the easy operation of the VCR.

**C. Development of the Program-Related Test**

To ensure that the public can experience the many benefits of StarSight, the Commission must accord must carry protection to the VBI portion of a broadcaster's signal. This ensures that StarSight, as encoded in the signal of PBS affiliates, will be available to the viewing public and school classrooms. Section 614(b)(3)(A) of the 1992 Cable Act requires a cable operator to carry, in its entirety, "the primary video, accompanying audio, and line 21 close caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers." Section 615(g)(1) provides the same requirements for qualified local public television stations. Thus, cable systems must carry

the "primary video" transmission of each local broadcast station, as well as other "program-related" material appearing in the broadcast signal's VBI whenever such carriage is "technically feasible."

Congress provided little direction as to the appropriate test for determining whether material that a broadcaster transmits in its VBI is "program-related" such that the VBI would be subject to the must-carry requirements. The Senate Report accompanying the 1992 Cable Act does not define program-related material.<sup>4/</sup> The House Report provides somewhat more guidance as to what should be considered program-related material<sup>5/</sup>. In this proceeding, the Commission solicited comment on the manner in which "program-related" material should be defined. In the Report and Order, the Commission concluded that "the best guidance for what constitutes program-related material is to be found in the factors enumerated in" WGN.<sup>6/</sup>

In WGN, the court accorded great deference to the broadcaster's determination of whether VBI transmissions should

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4/ The Senate Report provides that cable operators shall have "discretion on whether to retransmit other material which may be transmitted in the vertical blanking interval or on subcarriers which are unrelated to the main program service" provided by local commercial television stations. S. Rep. No. 102-92, 102nd Cong., 1st Sess. 85 (1991) S. 12. The same guideline applies to noncommercial educational stations. Id. at 89.

5/ "Program-related material is meant to include integral matter such as subtitles for hearing-impaired viewers and simultaneous translations into another language. It is not meant to include tangentially related matter such as a reading list shown during a documentary or the scores of games other than the one being telecast or other information about the sport or particular players." H.R. Rep. No. 102-628, 102nd Cong., 2d Sess. 93 (1992).

6/ Report and Order at ¶ 81.

be considered program-related material. The question before the WGN court was whether the two components of WGN's broadcast signal (i.e., the Nine O'Clock News carried in the primary video signal and related stories and program schedule material transmitted in the VBI of WGN's Nine O'Clock News) deserved copyright protection. The court examined whether the material in the VBI was related to the primary video signal; specifically, whether the broadcaster intended the VBI programming to be viewed by viewers watching the nine o'clock news, during the same interval of time in which that news was broadcast, and as an integral part of the news program. WGN at 629. If so, WGN would be entitled to a copyright in the combined primary video and VBI transmission of the Nine O'Clock News program. The Court held that because WGN broadcast VBI programming that was intended to be viewed in conjunction with its Nine O'Clock News program, the entire signal warranted copyright protection. The VBI programming could not be stripped away from the primary signal without violating WGN copyright in the entire signal. WGN at 628.

## II. ARGUMENT

### A. The Broadcaster's Intent Controls Under the WGN Test

The court in WGN holds that if material transmitted in the VBI is related to the program transmitted in the primary signal, the two components of the signal comprise a single, copyrightable work. The Report and Order defers to this analysis to determine whether material in the VBI must be carried by cable operators retransmitting a broadcaster's signal. That is, if the two components of the signal (both the material in the primary video

signal and in the VBI) could be copyrighted together, the material in the VBI must be carried by the cable operator.

Under copyright law expressed in WGN, if a broadcaster intends for the material transmitted in the VBI to be seen together with the program carried in the main signal, then the material is program-related. In other words, the broadcaster's intention controls as to whether material transmitted in the VBI is program-related. This notion squares with the overriding principle of copyright law that only an author's intended original expression of ideas gives rise to copyrighted interests. Feist Publications, Inc. v. Rural Telephone Service Company, Inc., 111 S. Ct. 1282, 1290 (1991).

The copyright protection the court in WGN provided to the two components of WGN's broadcast signal is analogous to the copyright protection of factual compilations. The Supreme Court in Feist Publications held that a factual compilation is eligible for copyright protection if it features an original selection or arrangement of facts. Id. The court does not concern itself with the level of creativity required to create the compilation; the threshold for copyright purposes is satisfied as long as the work possesses some creative element, no matter how crude, humble or obvious it might be. Id. at 1287. Thus, it is the author's intended arrangement or selection of facts -- the expression -- which is accorded copyright protection. The court in WGN recognizes the same underlying copyright principle; it is the author's expression of ideas that controls when deciding if the compilation of two copyrighted works (in the case of a television

broadcast signal, the primary Nine O'Clock news broadcast and the material in the VBI) deserves copyright protection.

Consequently, if what is copyrightable material depends on the author's intent and the principles of copyright law are the controlling basis for determining the definition of program related, then it follows that what the author intended to be his or her expression should control in determining whether the work warrants a copyright. In the context of this proceeding, the broadcaster's intent as to its expression determines whether material transmitted in the VBI is program-related. Therefore, cable operators must carry program-related material transmitted in the VBI if the broadcaster intends any portion of the VBI transmission to be viewed with the primary video program.

If a broadcaster, such as a PBS affiliate, intends that any material that it broadcasts in its signal's VBI is intended to be seen by the same viewers watching the primary PBS signal, during the same interval of time as the PBS signal is broadcast, and as an integral part of the PBS signal, then it is program-related and must be carried.

Furthermore the PBS affiliate, not the Commission or the cable operator, as the licensee of the signal, is best able to decide what is intended to be seen together with the primary signal. To involve the Commission in determinations of this kind would conflict with established principles of copyright law and involve the Commission in difficult content-based determinations.

**B. Legislative History Supports PBS' Pioneering Efforts**

The legislative history of the 1992 Cable Act supports StarSight's unique joint venture with PBS and suggests that the Commission accord must carry status to StarSight. The House Report notes that "PBS stations have pioneered the use of broadcast spectrum to deliver closed-captioning, descriptive video and other important program-related services that serve the special needs of vision- or hearing-impaired viewers." H.R. Rep. No. 102-628, 102nd Cong., 2d Sess. 101 (1992) (emphasis added). The House Report further states that "PBS also delivers lesson plans and other data on the VBI to accompany the educational programming delivered to the nation's schools." Id. StarSight is yet another example of ways in which PBS seeks to enhance the public interest benefits of its program offerings. As such, the Commission should defer to the judgment of individual PBS licensees who opt to transmit StarSight with their primary signals as an integral part of the primary video signal.

Moreover, the House Report recommends the following policy guidelines to cable operators:

The Committee encourages cable operators, when retransmitting a commercial or public broadcast station's signal or a cable programming service, to preserve and deliver to consumers intact all enhancements of that signal provided for the purposes for wider access for under-served audiences, including closed captioning which utilizes the VBI, and video descriptions and alternative languages which employ the Separate Audio Program (SAP) channel. The Committee also encourages cable operators to pass on to consumers without alteration similar future services which may evolve, such as Program Information and Identification which also may be placed in the VBI. (emphasis added)

Id. at 93.<sup>7/</sup>

StarSight clearly falls within the scope of these program enhancements which Congress intended the public to receive without interference from cable television operators. StarSight provides (1) concerned parents with a tool to protect their children from excessive TV violence; (2) physically challenged viewers on-screen listings of close-captioned programs; (3) educators with easy-to-use VCR recording and play-back features to facilitate classroom learning; and (4) consumers with television program listings that are continually updated on a seven-day rolling basis. As such, PBS's decision to offer StarSight in conjunction with its other program offerings is clearly in the public interest. The Commission should ensure that this important program enhancement is available to the viewing public as intended by PBS.

**C. The Commission Should Allow Program Enhancements Transmitted in the VBI To Develop in a Fair Regulatory Environment**

Absent the clarification sought herein, a cable television operator could unilaterally strip StarSight from the VBI based simply on its decision that StarSight is not program-related material. The Commission must recognize that no cable television operator can be totally objective in making this determination. Cable operators may refuse to carry the StarSight transmission in favor of a competing on-screen programming guide, or simply to

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<sup>7/</sup> The House Report states that "minority and physically challenged viewers should not lose these valuable services simply because they rely on cable to gain access to public television programming." Id. at 101.

encourage use of the cable operator's own printed programming guide. Such action by a cable operator would contravene the 1992 Cable Act's intention to foster a regulatory environment discouraging anti-competitive behavior by cable television operators.<sup>8/</sup>

Section 11(c)(2)(B) of the 1992 Cable Act requires the Commission to establish reasonable limits on the number of cable channels that can be occupied by a video programmer in which a cable operator has an ownership interest ("channel occupancy limits").<sup>9/</sup> In adopting this provision, Congress determined that the cable industry is increasingly vertically integrated. As a result, cable operators have the ability and the incentive to favor their affiliated programmers.<sup>10/</sup> Such vertical integration, Congress determined, could make it difficult for non-cable affiliated or competing programmers to secure carriage on vertically integrated cable systems.<sup>11/</sup>

Thus, by permitting cable operators to either strip the material a broadcaster transmits in the VBI or substitute its own material in the VBI, the Commission would be condoning the very conduct that the 1992 Cable Act seeks to prohibit.

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<sup>8/</sup> Vertical integration in this context refers to common ownership of both cable systems and program networks, channels, services or production companies.

<sup>9/</sup> 47 U.S.C. § 533 (f)(1)(B).

<sup>10/</sup> Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-264, (released July 23, 1993) at ¶ 167.

<sup>11/</sup> 1992 Cable Act, § 2(a)(5).

Moreover, by adopting such a policy, the Commission would sanction a decrease in the diversity of voices available to cable subscribers. Increasing the diversity of sources of cable programming is one of the main reasons Congress required the channel occupancy limits. Thus, allowing a cable operator to strip the VBI of what it deems non-program-related material would defeat the intent of the 1992 Cable Act.

### III. CONCLUSION

FOR THE FOREGOING REASONS, StarSight Telecast, Inc. urges the Commission to grant NAB's Petition for Reconsideration and Clarification to the extent that it seeks to clarify the Report and Order's "program-related" requirement. Such a clarification of the Report and Order would (a) resolve considerable uncertainty concerning this aspect of the must carry proceeding, (b) extricate the Commission from difficult content-based decisions, and (c) allow StarSight and similar VBI-delivered technologies to develop in a fair regulatory environment.

Respectfully submitted,  
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September 13, 1993

CERTIFICATE OF SERVICE

I hereby certify that on this 13<sup>th</sup> day of September, 1993, copy of the foregoing Motion for Leave to File Late Comments and Comments of Starsight Telecast, Inc. in Support of the Petition for Partial Reconsideration and Clarification of the National Association of Broadcasters was mailed U.S. first-class mail, postage prepaid to the following:

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