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VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND ^{MAY 19 1994}
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Michael D. Berg
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May 19, 1994

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

RE: Ex Parte Presentation: MM Docket No. 92-259

Dear Mr. Caton:

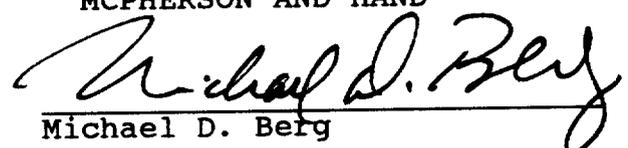
StarSight Telecast, Inc. ("StarSight"), pursuant to Section 1.1206(a)(1) of the Commission's Rules, hereby notifies the Commission that its attorneys have submitted a written ex parte presentation to Blair Levin, Chief of Staff to the Chairman and to Merrill Spiegel, Special Assistant to the Chairman. An original and two copies of this letter and the attached written presentation have been submitted to the Secretary.

Please direct any inquiries concerning this matter to the undersigned.

Respectfully submitted,

VERNER, LIIPFERT, BERNHARD
MCPHERSON AND HAND

By:


Michael D. Berg

Attachment
Service copy: Blair Levin, Esquire
Merrill Spiegel, Esquire

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May 18, 1994

VIA HAND DELIVERY

Blair Levin, Esquire
Chief of Staff
Office of the Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

Re: StarSight Telecast, Inc.

Dear Blair:

Enclosed in connection with our conversation today are: 1) the ex parte summary distributed and filed in conjunction with our meetings at the Commission May 4 and 5, 1994 and 2) information about StarSight and the interactive on-screen program guide service it plans to launch nationally on June 1 via the vertical blanking intervals (VBI) of PBS stations nationwide.

The StarSight/PBS position is that Sections 76.62(e) and (f) of the Commission's rules, and the WGN v. United Video guideline for "program-relatedness" adopted by the Commission, require cable retransmission of StarSight. In terms of relief, StarSight and PBS seek limited, interim action to forestall an imminent violation of current rules. Such relief could take the form of clarification or interpretation of existing rules, either generically or with respect to StarSight in particular, to forestall the stripping of the service at its inception from must carry signals. Relief would be in the nature of a holding action, or pendente lite preservation of the status quo, pending Commission resolution of reconsideration issues in the signal carriage docket (MM Docket 92-259).

Based upon review of those few pending petitions for reconsideration which address VBI carriage, none of the petitions must be resolved as a prerequisite to interim relief for StarSight, nor would such relief prejudice the Commission's

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ability to resolve pending issues prospectively. Relief could so state explicitly.

Alternatively, VBI subissues could be resolved on an expedited basis ahead of other signal carriage issues. As a practical matter, this is unlikely to provide relief within the needed time frame, and would allow establishment of the negative precedent of gatekeeper removal of a new VBI service. In addition, StarSight's use of the VBI promotes several Cable Act and Commission goals (such as competition, technological development, and the accessibility of programming and new technologies both universally and to underserved audiences).

Relief is not obviated, nor made less urgent, by the anticipated ruling of the Supreme Court on the validity of must carry. If must carry rules are invalidated, the Commission will still maintain standards for the voluntary retransmission of broadcast signals, as it has done historically. In addition, the Commission has generally applied the same set of carriage requirements to retransmission consent and must carry signals.

The following additional background is provided to facilitate the Chairman's familiarity with the problem on an expedited basis. In the Cable Act of 1992 ("Act")^{1/} Congress recognized the potential of the VBI to make television more accessible to the handicapped, for second language and educational purposes, and as a platform for technological innovation.^{2/} As stated, our client's service will be delivered in the VBIs of PBS, and eventually of commercial, television stations. The VBI, as you know, is an underutilized portion of the television signal. Its main use now is to transmit closed captioning for the hearing impaired and certain other services. Each television broadcast signal and cable program service has ten usable VBI lines. StarSight will utilize one of these lines in one retransmitted signal on each cable system.

In a technical sense, VBI material travels with the main channel program and can be retransmitted by cable television systems along with the rest of the signal without expense or intervention. Cable intervention is required to remove, or

^{1/} The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 102 Stat. 1460.

^{2/} Pub. L. No. 102-385 §§ 4(b)(3)(A) and 5(g)(1) (codified at 47 U.S.C. §§ 534(b)(3)(A) and 535(g)(1)). See also House Committee on Energy and Commerce, H.R. Rep. No. 628, 102d Cong. 2d Sess. 92, 101 (1992).

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strip, VBI material from retransmitted signals. In a legal sense, however, whether and to what extent cable systems should be required to retransmit VBI material has been a contested issue historically.

The Act addresses these issues by prescribing two related standards, one for commercial and the other for noncommercial television signals, for the mandatory cable retransmission of VBI material. Under Section 4 of the Act a cable operator which must carry a commercial television signal must retransmit its VBI material if it is technically feasible to do so, and if the material is "program-related." 47 U.S.C. Section 534(b)(3). VBI material in noncommercial "must carry" signals must also be retransmitted if technically feasible and program-related, and if it "may be necessary for receipt of programming by handicapped persons or for educational or language purposes." 47 U.S.C. Section 535(g)(1). The Act does not define "program-related" or "may be necessary for" the specified purposes.

In MM Docket 92-259, the FCC adopted rules implementing these statutory provisions^{3/}. These rules track the statutory provisions described above. Technical feasibility is generally presumed, and is not expected to be an issue for StarSight. For program-relatedness the FCC adopted as a guideline the decision in WGN Continental Broadcasting v. United Video ("WGN"), 685 F.2d 218 (7th Cir. 1982). WGN held that VBI material is protected by the copyright of the main channel program if the VBI material is 1) intended to be viewed by the same viewers 2) during the same time period and 3) if the VBI material is integrally related to the main program. Applying these criteria, the court in WGN found that VBI material that presented local news at the same time as the main channel's national news, and that offered a program guide for future programming, was sufficiently integral.

StarSight's service is at least as integral as the VBI content in WGN. StarSight actually provides more material about the main channel program in progress. This information includes plot summaries, program durations, time remaining, and channel and station designations. In addition, StarSight provides rating information which gives parents the opportunity to, through the StarSight system, block violent or other undesired program content in progress or in advance. StarSight also provides

3/ Report and Order, In the Matter of Implementation of the Cable Television Consumer Projection and Competition Act of 1992: Broadcast Signal Carriage Issues, MM Docket No. 92-259 ¶¶ 75-82 (released March 29, 1993), 72 RR 2d 204, 230-32.

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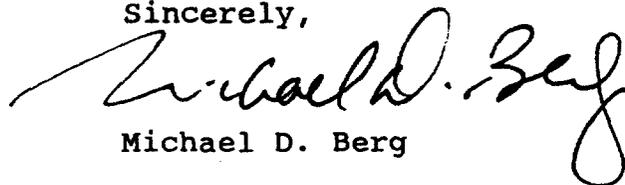
information that increases the accessibility and receipt of programming for handicapped persons and for educational purposes.

Petitions for reconsideration of various aspects of these rules have been filed and remain pending before the FCC. Interim relief for StarSight can be afforded while those petitions are pending without prejudicing their ultimate outcome. The National Association of Broadcasters (NAB), for example, argues that WGN should not be used because it is overly restrictive, and that only material that is clearly and totally unrelated to the main program may be deleted. (StarSight filed in response to this petition last Fall, arguing that under the WGN test the broadcaster in the first instance should determine "program-relatedness.") Nielsen, the audience measurement service, wants reconsideration of the FCC determination that Nielsen source identification codes, transmitted in the VBI to identify programs as part of the rating system, are not program-related. Cable interests, including the National Cable Television Association and Time Warner, support the use of the WGN test.

None of these petitions, nor any others of which we are aware, changes the facts that there are rules and a standard now in force, and that StarSight retransmission appears to be required under them. We seek a simple interim clarification, or other ruling, to this effect.

We are available to provide elaboration, or other information, upon request, and appreciate your expedited interest in this matter.

Sincerely,



Michael D. Berg

Enclosure



You're Invited . . .

*To the StarSight™ Launch Party
to celebrate cable's first
interactive television program guide
with one-button VCR recording.*

When: Tuesday, May 24 at 2:30 PM

Where: StarSight Booth # 2851 at NCTA in New Orleans

Why: To Celebrate a Cable Industry Milestone

What:
-Formal Cable Launch of StarSight
-Live Satellite Link with First Viacom Cable StarSight
Subscriber in Castro Valley, California
-Live Entertainment and Other Festivities

Who: Michael Faber, StarSight Telecast
John Goddard, Viacom Cable
Hal Krisbergh, General Instruments Corp.
The First "StarSight Family"

Technology: StarSight Telecast's Interactive Program Guide
Viacom Cable's Interactive Castro Valley System
Jerrold's new CFT 2900 1 GHz Converter