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July 29, 1994

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FEDERAL COMMUNICATIONS COMMISSION  
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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:

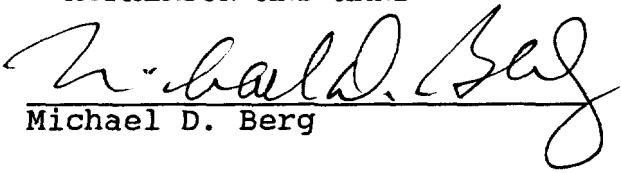
StarSight Telecast, Inc. ("StarSight"), pursuant to Section 1.1206(a)(2) of the Commission's Rules, hereby notifies the Commission that representatives of StarSight and PBS National Datacast met with Maureen O'Connell, Esq., Legal Advisor to Commissioner Quello; Lisa B. Smith, Esq., Legal Advisor to Commissioner Barrett; Commissioner Chong and Jill Lockett, Special Advisor to Commissioner Chong; and, in the Cable Services Bureau, Meredith J. Jones, Esq., Mary Ellen Burns, Esq., Elizabeth Beaty, Esq. and Meryl Icove, Esq. The substance of the matters discussed is reflected in the attached written presentation. An original and one copy of this letter has been submitted to the Secretary.

Please direct any inquiries concerning this matter to the undersigned at (202) 371-6099.

Respectfully submitted,

VERNER, LIIPFERT, BERNHARD  
MCPHERSON AND HAND

By:

  
Michael D. Berg

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List ABCDE

Mr. William F. Caton  
May 5, 1994  
Page 2

Attachment

cc: Maureen O'Connell, Esq.  
Lisa B. Smith, Esq.  
Commissioner Rachelle Chong  
Jill Lockett, Esq.  
Meredith J. Jones, Esq.  
Mary Ellen Burns, Esq.  
Elizabeth Beaty, Esq.  
Meryl Icove, Esq.

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**JUL 29 1994**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

**THE FCC SHOULD ASSURE,  
VIA ACTION ON RECONSIDERATION OR OTHERWISE,  
THAT STARSIGHT/PBS VBI TRANSMISSIONS  
ARE NOT BLOCKED BY CABLE OPERATOR GATEKEEPERS**

**EX PARTE SUBMISSION  
MM DOCKET NO. 92-259**

**STARSIGHT TELECAST, INC.**

Erwin G. Krasnow  
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TABLE OF CONTENTS

I. BACKGROUND. . . . . 1

    A. StarSight: The Company, The Service and How It Is Distributed. . . . . 1

        1. The company: StarSight Telecast, Inc. . . . . 1

        2. The StarSight service. . . . . 1

        3. How the service is distributed. . . . . 2

II. THE PROBLEM. . . . . 2

III. CURRENT LAW REQUIRES CABLE RETRANSMISSION OF STARSIGHT VBI MATERIAL IN MUST CARRY AND RETRANSMISSION CONSENT SIGNALS. . . . . 3

    A. The 1992 Cable Act and FCC Implementing Rules. . . . . 3

    B. Under These Provisions Cable Retransmission of StarSight Is Mandatory. . . . . 4

        1. StarSight retransmission is technically feasible. . . . . 4

        2. StarSight is program-related. . . . . 4

        3. StarSight is "necessary for the receipt of programming by handicapped persons or for educational or language purposes." . . . . . 5

        4. Commission rules prohibit cable operators from receiving payment for retransmitting must carry signals, including the StarSight VBI portions of those signals. . . . . 6

    C. Current Law Must Be Enforced. . . . . 6

IV. IF CURRENT COMMISSION RULES OR POLICIES ARE MODIFIED, SUCH AS ON RECONSIDERATION, THE PUBLIC INTEREST REQUIRES THAT THE COMMISSION ASSURE THAT STARSIGHT RETRANSMISSION IS REQUIRED. . . . . 7

    A. StarSight Retransmission Is Pro-Competitive; Certain Cable Operators Assert Gatekeeper Control of the VBI. . . . . 7

**TABLE OF CONTENTS (cont.)**

1.	Principal purposes of the 1992 Cable Act were to develop new technologies and to thwart anticompetitive behavior by cable operators. . . . .	7
2.	In the 1992 Cable Act, Congress prohibited specific abuses known prior to the time of enactment. . . . .	8
3.	Stripping of StarSight is precisely the same kind of abuse, but has arisen after enactment. . . . .	9
4.	Competition and continued access to technology are cornerstones of national communications policy . . . . .	10
5.	Competition continues to be the primary motivation behind significant Congressional initiatives. . . . .	10
B.	Technological Innovation, Such as StarSight's Service, Must Be Encouraged, Not Discouraged. . . . .	11
C.	Steps the Commission Should Take. . . . .	11
1.	On reconsideration, assure that all issues are resolved in a way that clarifies and requires retransmission of StarSight and other similar services. . . . .	11
2.	Consider clarifying the rules to thwart anticompetitive and other misconduct in the interim. . . . .	12
3.	Be prepared to respond on an expedited basis to petitions for special or other relief from providers of new services which face being smothered by gatekeeper tactics. . . . .	12

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I. BACKGROUND.

A. StarSight: The Company, The Service and How It Is Distributed.

1. The company: StarSight Telecast, Inc.

StarSight Telecast, Inc., based in Fremont, California, is an 80-person publicly-traded new technology company founded in 1986 to develop an interactive, on-screen guide to multi-channel video programming. Over the past six years this company has invested \$35 million and has been granted several patents to bring this product from research and development to consumers' living rooms. Along the way StarSight has attracted investors who include Viacom International, Inc., The Tribune Company, Cox Communications, Inc., Spelling Entertainment, Inc., The Providence Journal Company, Times Mirror Cable Television and KBLCOM Incorporated. StarSight is now engaged in the initial rollout of its new service nationwide.

2. The StarSight service.

In essence StarSight is an electronic roadmap to the information superhighway. Currently usable for broadcast and cable television, it will also be adapted to emerging technologies such as Direct Broadcast Satellites (DBS) and video dialtone. The service and what it does for viewers are illustrated graphically in Exhibit A hereto.

Using an easy-to-use remote control device, StarSight allows the viewer to call up on a portion of the television screen detailed information about the program in progress, or about any and all programs available to the viewer over the next seven days. Concerning programs in progress, StarSight provides the following constantly updated information at any time during the duration of the program: the title; amount of time left; a

summary of the plot or subject matter; type of program by category (e.g., educational, movie, sports, children's programming); stars or characters; rating (e.g. PG-13) if applicable; and whether the program contains profanity, mature themes, violence or other bases for the possible exercise of viewer or parental discretion.

StarSight allows the viewer to locate programs by theme category. For example, deaf and hearing impaired viewers can use it to determine all programs on their over-the-air or cabled television sets which will be closed captioned during the next week. In addition to closed captioning, StarSight themes include children's programs, education, including Cable in the Classroom, movies, sports, news/talk/magazine, comedy and several others. A foreign language theme is now in development; it will allow foreign language speakers to identify all programs in their language during the next seven days.

Viewers can use this information to plan their viewing, and to automatically record programs they want to watch at their time-shifted convenience. At the touch of a button on the StarSight remote control device, viewers can pre-arrange the VCR recording of any program - or series of programs - listed in the StarSight schedule. Hence all programming is made more accessible to more viewers, thereby increasing the diversity of program choices available to the public.

### 3. How the service is distributed.

Under arrangement with the Public Broadcasting Service (PBS), StarSight will be transmitted to viewers via one line of the VBI of each PBS-affiliated station nationwide. (Each television broadcast signal has ten usable lines in its VBI. StarSight is also now in discussions with commercial broadcasters concerning their possible VBI transmission of StarSight.)

The service is offered to viewers on a low-cost subscription basis (currently \$4.00 per month, or 92¢ per week.) It is also made available free of charge to schools and other educational institutions. StarSight will permit teachers to review all programming options within various categories to prepare lesson plans.

To receive StarSight a viewer must have either a StarSight ready television receiver or a special converter box available from consumer electronic stores or cable operators. Zenith, the only remaining U. S. manufacturer of television sets, is currently producing the first 100,000 StarSight-ready sets.

## II. THE PROBLEM.

Viewers who receive their television signals over the air should have no problem in using StarSight if they choose to do so. Viewers hooked up to cable, however, face differing treatment depending on the identity of their particular cable operator. Certain multiple system operators (MSO's) -- most notably Time Warner -- are taking the position that they own the VBIs of the signals retransmitted by their systems. They have announced to StarSight their intent to strip the service from the retransmitted signals, whether or not those signals are carried pursuant to must carry or retransmission consent, unless StarSight meets MSO demands for gatekeeper payments. StarSight is currently investigating possible instances of stripping of the service by two Time Warner systems.

## III. CURRENT LAW REQUIRES CABLE RETRANSMISSION OF STARSIGHT VBI MATERIAL IN MUST CARRY AND RETRANSMISSION CONSENT SIGNALS.

### A. The 1992 Cable Act and FCC Implementing Rules.

The 1992 Cable Act ("Act")<sup>1/</sup> prescribes two closely related standards for the mandatory retransmission of VBI content in television signals, one for commercial signals and one for noncommercial signals. Under Section 4 of the Act a cable operator which must carry a commercial television signal must include its VBI material if technically feasible, and if the material is "program related." 47 U.S.C. § 534(b)(3). VBI material in noncommercial "must carry" signals must also be retransmitted if technically feasible and program-related, and if the material "may be necessary for receipt of programming by handicapped persons or for educational or language purposes." 47 U.S.C. § 535(g)(1). The Act does not define "program-related" or "may be necessary for" within this context. (The Act did not specify standards for retransmission of VBI content with regard to retransmission consent signals.)

In MM Docket 92-259, the FCC adopted rules implementing these statutory provisions.<sup>2/</sup> These rules track the statutory provisions described above. The FCC adopted as a guideline for "program-relatedness" the factors enumerated in WGN Continental

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1/ 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)).

2/ Report and Order, 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 ¶¶ 75-82 (released March 29, 1993), 72 RR 2d 204, 230-32.

Broadcasting v. United Video, 685 F.2d 218 (7th Cir. 1982). See Report and Order, ¶ 81. WGN holds that VBI material is protected by the copyright of the main channel program if the VBI material is (1) intended to be seen by the same viewers as watch the main program (2) during the same interval of time in which the main program is broadcast and (3) if the VBI material is "integrally related" to the main program. WGN Continental Broadcasting, 693 F.2d 622, 626 (7th Cir. 1982). In applying these articulated criteria in WGN, the court found that VBI material presenting local news at the same time as the main channel's national news, and that offered a program guide for future programming, met the three factors, including "sufficiently integral" to the main channel program. The Commission has adopted these three factors as a non-dispositive guideline to program-relatedness.

In its Report and Order, the Commission restated the additional statutory requirement for noncommercial stations, but did not define the meaning of "as may be necessary for the receipt of programming" by handicapped persons or for educational or language purposes. See Report and Order at ¶ 80.

While the 1992 Cable Act did not provide guidelines for VBI retransmission of signals pursuant to retransmission consent, in its Report and Order the Commission interpreted its mandatory VBI retransmission requirements with regard to commercial stations to extend to stations retransmitted pursuant to retransmission consent. The Commission expanded its application of mandatory VBI carriage requirements "to all local commercial television stations carried by a cable system, and not just to must carry stations." See Id., at ¶ 171. The same standards, therefore, apply to the required transmission of VBI material in both must carry and retransmission consent signals.

B. Under These Provisions Cable Retransmission of StarSight Is Mandatory.

1. StarSight retransmission is technically feasible.

In its Report and Order, the Commission stated that retransmission of VBI content is "'technically feasible' if it does not require the cable operator to incur additional expenses and to change or add equipment in order to carry such material." Id at ¶ 82.

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. In fact, cable operator intervention is required only to block, or strip, VBI material from retransmitted signals. To do this cable operators must order and install equipment, and determine which VBI line is being used.

2. StarSight is program-related.

StarSight falls squarely within the scope of WGN and meets all three prongs of its test. StarSight is intended to be used by the same viewers as watch the main program and during the same interval of time. StarSight does not take up the entire screen, and is actually used during the main program while it is in progress. The viewer need not "exit" the main channel program to access the VBI material, and can view the two simultaneously.

StarSight is also more "integrally related" (the third prong of the WGN test) than the VBI material in that case. In WGN the material in addition to a program guide was local news which was separate from, and which bore no necessary relationship to, the national news being offered on the main channel. StarSight, in contrast, provides information about the main channel program in progress. This information includes plot summaries, program durations, time remaining, and channel and station designations.

3. StarSight is "necessary for the receipt of programming by handicapped persons or for educational or language purposes."

StarSight meets the additional requirement imposed for the mandatory carriage of noncommercial stations' VBI content by making programming more accessible to underserved audiences. According to the National Captioning Institute and Gallaudet College, who have assisted StarSight in developing its closed captioned theme category, accurate information on captioned programs is often hard to find. Within the same television program series, some programs may be captioned and others not. Other programs slated to be captioned in fact may not be.

Additionally, in the Americans with Disabilities Act, Congress found that discrimination against individuals with disabilities persists in critical areas such as communications. See 42 U.S.C. § 12101(a)(3).

StarSight is an instantaneous solution to these problems for viewers in general, and is particularly useful to those seeking captioned programming. By offering up-to-the-minute, constantly updated information about captions and subtitles, StarSight makes programs more accessible to this large and historically undeserved portion of the audience.

StarSight also makes it easier for all viewers to find educational programs, and is particularly useful for educational purposes. StarSight is available free of charge to schools and other educational institutions. StarSight's recording/time shifting capability, in combination with its ability to thematically select programming options, helps educators to incorporate television material into their curriculum. For

example, if a teacher plans to teach about endangered species during the upcoming week, he or she can scan StarSight's "Science" category, selecting a subcategory on wildlife, and suggest programs to students to watch on their own time. He or she could program the VCR at the touch of a button to record desired programs to create a library for the students or to show the programs in the classroom. This greatly facilitates lesson planning and maximizes multimedia approaches as teaching tools.

In addition, StarSight serves as a valuable tool to parents. First, StarSight makes informational and educational children's programming more accessible by allowing selection within a thematic category. In addition, it facilitates parental discretion in the home. StarSight rates programs in terms of profane language or violent and sexual content and enables parents to block specific programs, channels or time slots. This tool is invaluable to parents and could also help the government to avoid a complex regulatory scheme, with its attendant First Amendment concerns.

Finally, with the addition of the future foreign language theme category, StarSight will provide viewers who speak foreign languages a necessary and simple means to determine what foreign language video programming is available.

4. Commission rules prohibit cable operators from receiving payment for retransmitting must carry signals, including the StarSight VBI portions of those signals.

The 1992 Cable Act prohibits cable operators from accepting or requesting "monetary payment or other valuable consideration in exchange ... for carriage" either of local commercial stations or of noncommercial stations in fulfilling their must carry obligations under the Act. See 47 U.S.C. § 534(b)(10) and 47 U.S.C. § 535(i).

As discussed, StarSight meets the VBI carriage requirements under the FCC's currently articulated standards. As such, retransmission of StarSight's service is protected under the provisions against compensation for carriage. It is part of the signal to be retransmitted without alteration or degradation under the technical standards of the Commission's rules. See 47 U.S.C. § 534(b)(3) and 47 U.S.C. § 535 (g)(1).

#### C. Current Law Must Be Enforced.

The Congress charged the FCC to promulgate regulations necessary to implement and enforce the must carry provisions, including the content requirements, of the 1992 Cable Act. See 47 U.S.C. § 534(f), (d) and 47 U.S.C. § 535(j). The Supreme Court

recently deferred a decision on a facially constitutional challenge to the must carry provisions of the Act pending remand of the case to the District Court and a likely return appeal to the Supreme Court. Turner Broadcasting System, Inc. v. F.C.C., No. 93-44 (decided June 27, 1994).<sup>3/</sup>

In practical effect, the Supreme Court permitted the FCC's must carry regulations, including its VBI content requirements, to stand during the lengthy litigation proceedings. During this time the Commission, of course, is obligated to ensure that its must carry regulations are not violated.

IV. IF CURRENT COMMISSION RULES OR POLICIES ARE MODIFIED, SUCH AS ON RECONSIDERATION, THE PUBLIC INTEREST REQUIRES THAT THE COMMISSION ASSURE THAT STARSIGHT RETRANSMISSION IS REQUIRED.

As a result of pending petitions for reconsideration<sup>4/</sup> or otherwise, current law could be modified. In any such modification, it is critical that the Commission assure that services such as StarSight may not be anticompetitively stripped from broadcast signals, and are passed through to cable subscribers. Under virtually any regulatory scheme, assuring the availability of StarSight as a consumer option serves the public interest in several concrete and demonstrable ways.

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<sup>3/</sup> A majority of the Court rejected cable industry arguments that cable television should be analyzed using the same strict First Amendment standard of constitutional review applied to the print press. The majority found that cable operators have "bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home." Turner at 32. The majority also found "by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch." Id. As a result, the majority, rejecting a strict scrutiny standard of constitutional review, held that "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." Id. at 33.

<sup>4/</sup> StarSight filed comments with respect to certain of those petitions, and is a party to the signal carriage docket proceeding.

A. StarSight Retransmission Is Pro-Competitive; Certain Cable Operators Assert Gatekeeper Control of the VBI.

1. Principal purposes of the 1992 Cable Act were to develop new technologies and to thwart anticompetitive behavior by cable operators.

In the 1992 Cable Act, Congress sought to encourage the development of new, innovative, competitive technologies and services. The Congress specifically found that "there is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." 47 U.S.C. § 521 (a)(7).

StarSight's service is a prime example of the type of technology media Congress sought to encourage. Further, Congress found that the distribution of unique noncommercial, educational programming services advances the governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations which Congress has authorized. See 106 Stat. 1460 § 2(a)(7). StarSight's service clearly falls within the category of programming services advancing the interests of noncommercial television.

Further, in the Act, Congress consistently attempted to address perceived anticompetitive practices on the part of the vertically integrated cable industry in its effort to foster the development of new media services. In its policy findings, Congress said:

...The regulatory system created by the Cable Communications Policy Act of 1984 was premised upon the continued existence of mandatory carriage obligations for cable systems, ensuring that local stations would be protected from anticompetitive conduct by cable systems.

See e.g. 47 U.S.C. § 521(a)(17). The Congress further found that the legislation was necessary to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers. 47 U.S.C. § 521(b)(5).

2. In the 1992 Cable Act, Congress prohibited specific abuses known prior to the time of enactment.

The policy goals underlying much of the Act were enacted to address anticompetitive practices of cable operators. For example, Section 12 regulation of carriage agreements and Section 19 program access provisions restrict the ability of cable operators to discriminate in favor of affiliated programming

channels or services. Consumer electronics equipment compatibility provisions (in Section 17) were enacted to prohibit cable operators from restricting consumer access to competitive consumer electronics equipment.

Section 12 was enacted to address anticompetitive practices in the carriage and distribution of video programming services. The provision was crafted to ensure that a cable operator does not discriminate against an unaffiliated programming vendor in which it does not hold a financial interest. Congress was acting to prohibit a coercive environment in the distribution and carriage of programming services. See H.R. Rep. No. 628, 102d Cong. 2d Sess. 110 (1192).

Similarly, Section 19, "Development of Competition and Diversity in Video Programming Distribution", was enacted to "promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market" and to "spur the development of communications technologies." The section prohibits cable operator practices "the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or customers." 47 U.S.C. § 548(a). Congress enacted this provision in response to long-standing complaints on the part of alternative multichannel video programming distributors who were unable to gain access or were forced to pay discriminatory prices for cable programming. Similar abuses now threaten to stifle the development of VBI services.

Finally, in Section 17 of the Act, Congress sought to ensure that cable operators do not become a bottleneck to consumer access to competitive consumer electronics equipment. See also First Report and Order, In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment, ET Docket No. 93-7, released May 4, 1994.

3. Stripping of StarSight is precisely the same kind of abuse, but has arisen after enactment.

Precisely the same threats are presented by the stripping of StarSight from the VBI of PBS stations. Despite the efforts of the Congress and the Commission, the cable operator again would be put in the position of controlling their customers' ability to receive cable-compatible consumer electronics equipment offering advanced services such as StarSight.

StarSight is most susceptible to being stripped from the VBI of public television channels in those markets where a cable operator is developing its own program guide service. Permitting such an action would stifle the development of new media services

and presents the exact problem Congress sought to address in 1992. The success of a new service such as StarSight would depend solely upon whether the largest cable MSO's have an equity interest in the company developing the service in question or in developing a competing service. In 1992, Congress sought to put an end to situations in which cable MSO's can determine the fate of new services and programmers. The marketplace, not its gatekeepers, should decide.

The average cable system has hundreds of VBI lines potentially available to it for its own VBI services. By requiring cable operators to retransmit StarSight's service within the VBI, the Commission in no way would inhibit cable operators or cable programmers from developing competitive services to StarSight, also using VBI technology. Cable operators could choose to utilize fallow VBI within their own systems or, as did StarSight, a cable operator or programmer could negotiate for the use of VBI with a national television network. However, it is important to note that although certain cable MSO's have announced plans to strip StarSight's service, the service currently is not being replaced by any other VBI programming now or for the foreseeable future. In effect, these MSO's seek to deny new services to their subscribers for gatekeeper reasons, even when they have no competing service to offer.

4. Competition and continued access to technology are cornerstones of national communications policy

Chairman Reed Hundt often has emphasized the importance of access to information technologies. For example, in a March 1994 speech to the World Telecommunication Development Conference, the Chairman stressed the importance of "access of business to customers...". Speech at 2. Chairman Hundt recognized this element within the context of breakthroughs of invention and entrepreneurship. It would be the height of irony to stifle StarSight's success by permitting cable operators to deny StarSight access to its prime customers.

Similarly, Vice President Gore repeatedly has emphasized the importance of avoiding information "gatekeepers" or "toll booths" on the "information superhighway." For example, in a December 1993 speech to the National Press Club ("Speech"), the Vice President stated that "we should prevent unfair cross-subsidies and act to avoid information bottlenecks that would limit consumer choice, or limit the ability of new information providers to reach their customers." Speech at 7. In the same speech, the Vice President warned:

without provisions for open access, the companies that own the networks could use their control of the networks to ensure that

their customers only have access to their programming. We have already seen cases where cable company owners have used their monopoly control of their networks to exclude programming that competes with their own.

Speech at 8. StarSight's plea for relief falls squarely within the concerns articulated by this Administration and this Commission.

5. Competition continues to be the primary motivation behind significant Congressional initiatives.

The policy objectives of legislation currently pending in the Congress (S. 1822 and H.R. 3636) are consistent with StarSight's request for relief. The House has passed by overwhelming margin H.R. 3636, the "National Communications Competition and Information Infrastructure Act of 1994" to "encourage deployment of advanced communications services through competition..." Similarly, S. 1822, pending in Committee, the "Communications Act of 1994," shares the same overarching goal. Permitting individual cable operators, or new "telecommunications networks" to strip new innovative services fosters the very bottleneck control concerns that Congress again is seeking to prevent.

- B. Technological Innovation, Such as StarSight's Service, Must Be Encouraged, Not Discouraged.

Entrepreneurs willing to take the risks of investing in new applications of technology must know that their products will reach the marketplace to be judged by consumers based upon their merits or shortcomings. No one is entitled to guaranteed success. But everyone must be assured equal access to the court of consumer judgment. Otherwise investment in new technology development will slow or wither. StarSight is a leader in VBI development. Its blockage from the marketplace would set a terrible precedent for the other would-be VBI entrepreneurs and investors.

Further, mandatory retransmission of StarSight serves the broader national interest by spurring jobs, helping to advance our nation's interest in global competitiveness. StarSight began with four people six years ago and now has 80 employees. If this company is denied the chance to compete, these jobs, and the many others that will be created if StarSight succeeds, will be lost. Furthermore, Zenith, our nation's last U.S. manufacturer of consumer electronics currently is manufacturing the first 100,000 StarSight-compatible television receivers. Zenith has spent millions of dollars developing VBI technology.

C. Steps the Commission Should Take.

1. On reconsideration, assure that all issues are resolved in a way that clarifies and requires retransmission of StarSight and other similar services.

In disposing of petitions for reconsideration, the Commission should expressly provide that retransmission of program guide services such as StarSight that offer information directly about the main program, as well as other and future offerings, cannot be stripped from retransmitted signals.

The few petitions for reconsideration that address VBI carriage issues generally can be divided into two groups. One group urges the Commission to adopt the WGN test for "program relatedness." See Opposition to Petitions for Reconsideration, filed by National Cable Television Association ("NCTA") 6-7 (urging that the "Commission not modify its rules") and Opposition of Time Warner Entertainment Company, L.P., To Petitions for Reconsideration or Clarification, 1-3 (supporting the Commission's WGN test). The other group advocates that the Commission, on reconsideration, adopt an alternative test that is less restrictive than WGN. See Petition for Partial Reconsideration and Clarification of the National Association of Broadcasters 1-5 (opposing WGN in favor of a more relaxed standard) and Petition for Reconsideration filed by A.C. Nielsen Company (opposing WGN so as to adopt a standard that includes Nielsen program identification cues essential to audience measurement.) None of these petitions, nor Commission action upon them, obviates the need to clarify expressly that StarSight and similar services are VBI material which must be retransmitted as part of the broadcast signal.

If the Commission upon reconsideration were to adopt one of the less restrictive standards proposed, then there is even less question that StarSight's service is "program related" and qualifies for mandatory carriage under the Commission's VBI carriage requirements.

2. Consider clarifying the rules to thwart anticompetitive and other misconduct in the interim.
3. Be prepared to respond on an expedited basis to petitions for special or other relief from providers of new services which face being smothered by gatekeeper tactics.