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August 31, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

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

Dear Mr. Chairman:

On behalf of StarSight Telecast, Inc. ("StarSight"), this letter refutes erroneous and misleading information contained in an August 3, 1994 letter submitted in this proceeding for Time Warner Cable ("TW letter"), and adds to the record.

- 1) StarSight's service is integrally related to the main program in progress.

The 1992 Cable Act requires cable operators to retransmit the entire signal, including "program-related material carried in the VBI or on subcarriers," of commercial and noncommercial must carry television stations. The Commission's adopted guideline for "program-relatedness," the factors enumerated in WGN Continental Broadcasting v. United Video, 685 F. 2d 218 (7th Cir. 1982) ("WGN"), provide that VBI material must be an "integral part" of the main program in order to be part of the must carry retransmission.

Contrary to the TW letter, StarSight meets and exceeds this test without any expansion of the meaning of "program related." The TW letter ignores the facts of WGN itself, a pitfall the Commission must avoid. Assuming the FCC retains WGN as a test for VBI "program relatedness," the Commission must recognize that the WGN court did not adopt or apply its criteria in a factual vacuum.^{1/}

^{1/} Whether or not WGN is retained or modified as a guideline, policy considerations require that the Commission not tolerate

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StarSight is considerably more integral to the main program in progress than the VBI material considered in WGN:

a) StarSight is overlaid on a portion of the main program screen, a factor the WGN court considered sufficient by itself to make the VBI material "integral" to the main program. WGN, 693 F.2d 622, 626. The VBI material in WGN was not overlaid in the main program, but obliterated it completely, forcing the viewer to choose between VBI and main program material. This created an obstacle to a finding of "integral to the main program" which does not apply to StarSight. The court overcame this obstacle in WGN, finding that the VBI material was intended to be seen by the same viewers at the same time as the main program. There is, therefore, little doubt that the WGN court would have found StarSight to be "integral".

b) StarSight contains far more information about the main program than the WGN VBI material. In WGN, the court was satisfied that the separate local news in the VBI was "integral to," although it merely "paralleled," the national news in progress in the main program. StarSight, in contrast, relates directly to the substance of the main program, providing viewers (1) a plot summary, (2) subject matter and title, (3) time remaining, (4) rating and viewer discretion information, (5) the ability to record and block, and soon (6) guidance to parents and caregivers to maximize the educational value to children of PBS children's educational programs in progress.

c) Like StarSight, the WGN VBI also contained a program guide:

The teletext channel is to contain an announcement of future programming on WGN. The viewer of the nine o'clock news, a compendium not all parts of which may interest every viewer, is thus invited to switch to the teletext channel when his attention to the news flags, to see what is forthcoming on WGN.

Id. at 627. Similarly, in addition to main program material, StarSight offers a more comprehensive and sophisticated, but conceptually analogous, program guide service. StarSight, for example, uses themes and subthemes to categorize programs,

1/(...continued)
the stripping of the StarSight service from the VBIs of must carry signals.

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empowering viewers to find programs which are related to the main program in progress, as well as others.

In essence, StarSight is a 1994 application of the VBI technology that was determined to be integrally related to the main program when WGN was decided in 1982. The 1992 Cable Act promotes the availability of developing technology. The TW letter would have the Commission freeze VBI technology -- at least if offered by broadcasters -- at 1982 levels.

d) Nothing in WGN, the Cable Act of 1992, its legislative history or Commission rules requires that, in order to be part of a broadcast signal for must carry purposes, VBI material must be exclusively related to the main program in progress. In fact, as shown above, WGN itself involved a hybrid service -- teletext of local news stories separate from main channel national news, and a program guide of future programs. StarSight also combines material that is integrally related to the main program in progress -- indeed, a considerable amount of such material -- with features that are less directly connected to that program. For the Commission to allow the anticompetitive stripping of all but purely main program-related services from must carry signals would not only contradict WGN, but would frustrate Congressional intent that technological innovation be encouraged and available for consumers, not cable operators, to judge.^{2/}

- 2) Congressional intent in the 1992 Cable Act is far broader than the excerpts of legislative history selectively invoked by the TW letter.

Congressional intent to promote the availability of emerging technology, and to thwart gatekeeper stripping of new services by cable operators with anticompetitive incentives, is crystal clear in the Cable Act itself. As a result, legislative history must be applied with particular care now in the context of the Act as

^{2/} In a significant parallel to Commission implementation of the 1992 Cable Act in this docket, the WGN court noted that the 1976 Copyright Act "was impelled by recent technological advances, such as xerography and cable television, which the courts interpreting the prior act . . . had not dealt with to Congress's satisfaction. This background suggests that Congress probably wanted the courts to interpret the definitional provisions of the new act flexibly, so that it would cover new technologies as they appeared, rather than to interpret those provisions narrowly as to force Congress periodically to update the act." WGN, 693 F.2d at 627. The same is true of Commission application of the Cable Act to new technological advances such as StarSight.

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a whole so as not to thwart new services or encourage new gatekeeper behavior.

VBI-related portions of the legislative history are ambiguous when applied to a new service such as StarSight.^{3/} The TW letter, noting House Report language that "encourages" carriage of all VBI services, implies that such carriage therefore is not mandatory. This is misleading and incorrect. Services whose retransmission is "encouraged" in the legislative history may also be required to be carried. For example, in the same paragraph of report language cited in the TW letter, the Committee "encourages" retransmission of commercial and public broadcast station enhancements "of [the] signal provided for the purposes of 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 ... [and] similar future services which may evolve, such as Program Information and Identification...". H.Rep.No. 628, 102 Cong., 2d Sess. 93 (1992). Closed captioning retransmission is mandatory as well as "encouraged." Thus, the Committee viewed services providing StarSight-like functions to be on a par with closed captioning-type services, retransmission of which the Committee otherwise clearly considers mandatory.

Other statements in both the House and Senate reports 1) recognize public television's pioneering role in developing uses of the VBI to deliver "important services that have served the needs of the visually and hearing impaired," as well as foreign language services, and 2) explicitly state Congressional intent that viewers with such special needs "should not lose the valuable services simply because they rely on cable to gain access to the public television programming." See, e.g., *Id.* at 101. As discussed in Section 3 of this letter below, the StarSight/PBS service is another prime example of PBS' leading role in this area.

The primary guidance to the Commission should be the statutory language of the 1992 Cable Act itself and its explicit

^{3/} In this instance, the normally secondary legislative history is less probative because the StarSight/PBS service, with its combination of material directly related to the main program and to other programming, was not specifically known to or considered by Congress, which enacted the legislation to prevent gatekeeper elimination of emerging viewer options. As Judge Patricia Wald has observed, "it sometimes seems that citing legislative history is ... akin to 'looking over a crowd and picking out your friends.'" 68 Iowa L. Rev. 195, 214 (1983).

policy goals to encourage the development of new, innovative, competitive technologies and to limit anticompetitive practices of cable operators. There is no ambiguity in the statute about Congressional goals. Specifically, Congress found:

1. "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)(6).
2. "There is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations.... The distribution of unique noncommercial, educational programming services advances that interest." 47 U.S.C. § 521 (a)(7). [emphasis added]
3. "It is the policy of the Congress in this Act 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).

Furthermore, the 1992 Cable Act specifically addressed anticompetitive cable practices that thwart the development of technologies such as StarSight and create bottlenecks to market access. See, e.g., regulation of carriage agreements (47 U.S.C. § 536); program access provisions (47 U.S.C. § 548); and provisions to ensure that cable operators do not become a bottleneck to competitive consumer electronics equipment (47 U.S.C. § 544a).

The policy goals underlying these provisions, and the Act's expressly stated policies, should be the Commission's overriding considerations.

- 3) StarSight is VBI programming that "may be necessary for receipt of programming by handicapped persons or for educational or language purposes."

The precise meaning of this language (of Section 615 of the statute and Section 76.62(f) of Commission rules) is not clear. Nowhere is it revealed, for example, what "may be necessary" means. Nor is it certain whether "necessary for" modifies only "receipt of programming by handicapped persons," or the other two phrases as well. These significant ambiguities, however, do not stop the TW letter from concluding summarily that StarSight does not meet the test, whatever it is.

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In fact, StarSight:

-- is vital to the receipt of programming by the deaf and hard of hearing. StarSight enables hearing-impaired viewers to find accurate information on closed-captioned programming, which has been historically difficult to find. The National Captioning Institute and Gallaudet College consider this new technology critical to improved access to closed-captioned programs.

-- makes educational programming, including children's educational programming, more accessible to viewers. StarSight is available free of charge to schools and other educational institutions. PBS considers StarSight a valuable educational tool to help educators to incorporate video material into their curriculum. StarSight is a valuable tool for parents, enabling them to access educational children's programming and selectively block programming that is rated in terms of profane, violent, and sexual content.

-- will be an integral part of the new PBS children's educational series entitled "Ready to Learn." PBS/StarSight have developed an interactive program to help parents/caretakers educate children while viewing PBS children's programs.

-- will make second language programming more accessible to viewers based upon the language themes and subthemes now in development.

4) StarSight is offered by the broadcaster.

The TW letter claims that StarSight is not transmitted "by the broadcaster." It is. Public television stations, broadcast licensees, have made an editorial decision to use a line of their VBI to offer the PBS/StarSight service, which they see as compatible with their main programming and public service mission. PBS-affiliated stations have made this decision to directly enhance their programming initiatives: StarSight will be offered in coordination with PBS's Ready to Learn program; it will provide information concerning in-progress and upcoming programming; it will offer an interactive educational tool to use in conjunction with PBS's educational children's programming; and it provides PBS stations a needed source of legitimate revenue.

PBS is committed to serving the needs of under-served audiences and has been a pioneer in developing innovative uses of VBI technology. StarSight is an important venture for PBS Datacast, Inc. and in turn, supports the viability of public television stations. Congress has encouraged PBS to offset programming costs by engaging in such commercial ventures.

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Now a publicly traded company employing 120 people, StarSight has expended over \$40 million to develop this technology. Neither PBS nor its affiliates have the financial resources to do this on their own. Partnership with others such as StarSight has enabled PBS to be at the cutting edge of VBI services. Development of these services would be difficult or impossible if noncommercial stations were required to create and fund all of their own VBI material to satisfy mandatory carriage criteria.

There is no authority for such a criterion. Nowhere is it specified that a broadcaster loses must carry status for VBI material unless the individual station originates the material itself. Nor would such a policy make any public interest sense, whether applied to commercial or noncommercial stations.

5) Gatekeeper power is not a "marketplace arrangement".

The TW letter asserts that StarSight and others should make "marketplace arrangements for the distribution of [their] product." Precisely the same euphemisms failed as arguments against the codification of must carry. Must carry became statutory because Congress found that it was necessary to prevent cable operator abuse of market power, which creates market dysfunction not conducive to "marketplace arrangements." Such arrangements require an equality of bargaining power on both sides.

The United States Supreme Court, in the same recent Turner Broadcasting decision mischaracterized in the TW letter, held that:

When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply 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. (footnote omitted).

Turner Broadcasting System, Inc. v. FCC, No. 93-44, 32 (June 27, 1994).

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In these circumstances, what the TW letter seeks to preserve is a last vestige of otherwise outlawed behavior in the relatively new and unsettled frontier of the VBI. Extortion of gatekeeper tolls is not a "marketplace arrangement." Instead, it is precisely the type of anticompetitive, anti-consumer, anti-First Amendment practice which spurred the Cable Act of 1992.

In implementing that Act in this proceeding, the Commission must not lose sight of this bedrock principle, and must not stand by while the aims of the Act are frustrated by old anticompetitive methods applied to new technologies.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Michael D. Berg".

Erwin G. Krasnow
Michael D. Berg
Elizabeth J. Sadove

cc (via hand delivery): Commissioners James H. Quello, Andrew C. Barrett, Rachelle B. Chong, and Susan Ness.