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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
 )  
Implementation of Section 304 of )  
the Telecommunications Act of 1996 )  
 )  
Commercial Availability of Navigation Devices )

CS Docket No. 97-80

To: Cable Services Bureau

**COMMENTS OF  
GEMSTAR-TV GUIDE INTERNATIONAL, INC.  
AND GEMSTAR DEVELOPMENT CORP.**

Gemstar-TV Guide International, Inc. and its wholly-owned subsidiary Gemstar Development Corp. (collectively, "Gemstar") submit these comments in response to the Commission's Further Notice of Proposed Rule Making<sup>1</sup> in the above-captioned proceeding. We file these comments to emphasize that the threat of cable interference with broadcast-delivered interactive electronic program guide ("EPG") data constitutes a continuing obstacle to the achievement of Congress's and the Commission's goal of a truly competitive market for navigation devices. Gemstar is the leading provider of interactive EPGs. In proceedings that are

<sup>1</sup> *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Further Notice of Proposed Rule Making and Declaratory Ruling, CS Docket No. 97-80 (rel. Sept. 18, 2000).

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still pending before the Commission, Gemstar has provided considerable evidence of the capacity and willingness of at least one major MSO, Time Warner Cable, to frustrate consumers in their choice of EPGs.<sup>2</sup> The Commission should exercise its statutory authority to prohibit this practice and thereby ensure that consumers have unfettered access to independent EPGs.

Congress specifically directed the Commission to assure the commercial availability of navigation devices. The record before the Commission demonstrates unmistakably that the job of assuring commercial availability is not yet complete.<sup>3</sup> To fulfill its

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<sup>2</sup> Gemstar detailed such conduct in a Petition for Special Relief against Time Warner Cable, in which it sought enforcement of the statutory and FCC cable carriage requirements to prohibit Time Warner from stripping Gemstar EPG information from the signals of local broadcast stations. *See* Petition for Special Relief of Gemstar International Group, Ltd. and Gemstar Development Corp. for Enforcement of the Communications Act of 1934, as Amended, and the Commission's Must Carry Rules, CSR 5528-Z (filed Mar. 16, 2000, Public Notice Mar. 24, 2000) ("Petition"). *See also* Petition of Gemstar to Impose Conditions on AOL/Time Warner, *Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control*, CS Docket No. 00-30 (Apr. 26, 2000) ("Gemstar AOL/Time Warner Petition"). Gemstar's Petition and Reply in the special relief proceeding also emphasize that Time Warner's conduct has directly contravened the congressional policy set forth in Section 629 of the Communications Act, which, as noted above, charges the Commission with assuring a competitive market for navigation devices. *See* Petition at 13-23, 29-31; Reply of Gemstar International Group, Ltd. and Gemstar Development Corp., CSR 5528-Z (Apr. 24, 2000) at 22-25 ("Gemstar Special Relief Reply"). Thus, the Commission has authority to prohibit this anticompetitive conduct under either the cable carriage requirements or under its Section 629 mandate, or both.

<sup>3</sup> *See* Petition at 13-23, 29-31; Gemstar Special Relief Reply at 22-25; Gemstar AOL/Time Warner Petition. *See also* Comments of Thomson Consumer Electronics, CSR 5528-Z (Apr. 13, 2000) at 2-7, 11 (by stripping EPG data from broadcast signals, Time Warner's cable systems have deprived consumers of an important interface with their TVs and their chosen means of accessing programming, have confused consumers who mistakenly believe that their equipment has malfunctioned, and have eliminated choice in the selection of an EPG); Comments of the Consumer Electronics Association, CSR 5528-Z (Apr. 13, 2000) at 3 (stripping of EPG data on Time Warner cable systems eliminated competitive alternatives and created a barrier to entry and undermined the availability of competing navigation devices in contravention of Section 629 of the Communications Act); Comments of Circuit City Stores, CSR 5528-Z (Apr. 13, 2000) at 3 (consumers express disappointment and confusion when EPG functionality is featured in a (continued...))

congressional mandate, we urge the Commission explicitly to prohibit cable operators from disabling EPG information that is transmitted through the analog or digital signals of broadcast stations that are being carried on their systems.

Section 629 of the Communications Act requires the Commission to “adopt regulations to assure the commercial availability, to consumers . . . of . . . equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.”<sup>4</sup> When it initially implemented this requirement, the Commission determined that its obligation to “assure the commercial availability” of navigation devices extends to EPG equipment, which is used to access “services offered over multichannel video programming systems.”<sup>5</sup> Accordingly, the Commission declared its commitment to “encouraging the development of the market for the provision of electronic program guide services.”<sup>6</sup> The Commission reserved the question of whether specific requirements might be necessary to “assure the commercial availability” of such equipment, but undertook to “monitor developments with respect to the availability of electronic program guides to determine whether any action is appropriate in the future.”<sup>7</sup>

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product, but is not supported or is disabled locally, and have returned TVs and VCRs featuring Gemstar’s EPG in response to a cable system’s decision to disable the EPG).

<sup>4</sup> 47 U.S.C. § 549(a).

<sup>5</sup> Report and Order, *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, 13 FCC Rcd 14775, 14820 (1998).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 14821.

Gemstar's pleadings currently pending before the Commission demonstrate in detail both why it is now time to act and why cable MSOs have both the incentive and capacity to control the growing market for EPGs at the expense of their cable customers. Time Warner has sought to achieve this anticompetitive goal by stripping free EPG updating information from the vertical blanking interval ("VBI") of local television stations carried on Time Warner systems. This practice of disabling the EPG equipment by preventing consumers from receiving critical updating information escalated and accelerated over the course of two years, expanding to Time Warner cable systems across the country and ultimately forcing Gemstar to file the Petition for Special Relief against Time Warner discussed above.<sup>8</sup>

Gemstar's experience with Time Warner demonstrates that, absent Commission intervention, cable operators have the power and incentive to use their control over the broadcast signal to disable EPGs that compete with their own navigational products, reserving for themselves a virtual monopoly on EPG equipment and services within their franchise areas. As explained in the Petition, if cable operators are permitted to destroy the functionality of independent EPGs, retailers of electronics equipment will become unwilling to offer receivers with EPG modules, because they cannot assure consumers that the EPG will function properly or

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<sup>8</sup> Though Time Warner discontinued stripping Gemstar's EPG data after the announcement of the proposed AOL/Time Warner merger, it has continued to assert a unilateral right to disable independent EPGs by stripping data from broadcast signals and it has offered no assurance that it will not resume its anticompetitive practices without awaiting the outcome of the special relief proceeding. Thus, equipment manufacturers, retailers and consumers have no assurance that non-cable EPG equipment will function free from interference from cable operators such as Time Warner. As we have shown in the special relief proceeding, the threat of cable interference represents a powerful barrier to the development of a robust, independent EPG market. For a fuller discussion of how Gemstar operates in the equipment market, *see* Petition at 1-4, 8-17. We ask that the factual portion of the Petition be incorporated by reference into this filing.

reliably.<sup>9</sup> Manufacturers would then have little incentive to produce equipment featuring independent EPGs, when the functionality of those EPGs may be destroyed at any time to serve the anticompetitive goals of a cable operator intent on favoring its own navigation devices and, with those devices, its own content and services.<sup>10</sup>

This concern about the power of cable operators to harm consumers' ability to select EPGs is compounded in the digital context. Cable operators are poised to block unaffiliated EPGs that rely on data embedded in DTV signals. In the digital world, EPGs potentially represent an even more important element of consumers' viewing experiences. Interactive EPGs will facilitate the successful introduction and ultimate acceptance of DTV by simplifying and rationalizing the expanded and changing digital channel landscape, making it easier for consumers to navigate and select from the array of channels available to them. But as the value of interactive EPGs increases in the digital environment, so do the incentives for cable operators to eliminate competition to cable-affiliated EPGs.<sup>11</sup> Thus, it is no surprise that cable operators made explicit in retransmission consent negotiations that they "reserve the right" to strip out EPG data from broadcasters' DTV signals.<sup>12</sup>

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<sup>9</sup> See Petition at 13-18; Gemstar Special Relief Reply at 22-25.

<sup>10</sup> See Petition at 18-23; Gemstar Special Relief Reply at 22-25.

<sup>11</sup> See, e.g., Comments of the Association for Maximum Service Television, CSR 5528-Z (Apr. 13, 2000) at 3 ("If the Commission permits cable interference with EPGs in the analog world, cable's power to control EPGs in the digital world, where EPGs will be critical gateways to multimedia content, will be that much more unconstrained.")

<sup>12</sup> See Letter from Stephen A. Weiswasser, Executive Vice President and General Counsel, Gemstar International Group, Ltd., to Chairman William Kennard, *Ex Parte Presentation*, CS Docket No. 98-120 and CSR 5528-Z (Apr. 25, 2000).

The Commission must ensure that cable operators cannot thwart the goals of Section 629 by preventing the delivery to subscribers of data essential to the functioning of EPG equipment obtained from unaffiliated vendors. Specifically, the Commission should meet its obligations under Section 629 by prohibiting cable operators from interfering with EPG information provided in the analog or digital signals of broadcasters carried on their systems. In the analog context, this means requiring cable operators to deliver any EPG information embedded in the broadcast VBI without interference. As explained in detail by Gemstar and others in the special relief proceeding, the FCC's authority to impose this requirement rests not only in Section 629 – though this authority in itself is sufficient – but also in the existing statutory and FCC cable carriage requirements. In the digital context, the Commission should require cable operators to carry all data embedded in the DTV signal that enable or facilitate the functionality of independent EPGs.

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For the foregoing reasons, the Commission should explicitly require that cable operators carry without interruption or interference any EPG information transmitted in the digital or analog broadcast signal. By adopting these requirements – which impose no meaningful burden or expense on cable operators – the Commission will take a critical and indeed essential step towards achieving the objectives established by Congress in Section 629.

Respectfully submitted,

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AND GEMSTAR DEVELOPMENT CORP.



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