

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

In the Matter of	)	
	)	
Carriage of Digital Television Broadcast Signals	)	
	)	
Amendments to Part 76 of the Commission's Rules	)	CS Docket No. 98-120
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	
	)	
Local Broadcast Signal Carriage Issues	)	CS Docket No. 00-96
	)	
Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals	)	CS Docket No. 00-2
	)	

To: The Commission

**PETITION OF GEMSTAR-TV GUIDE INTERNATIONAL, INC.  
FOR CLARIFICATION OR, IN THE ALTERNATIVE, RECONSIDERATION**

Gemstar-TV Guide International, Inc. (Gemstar) hereby petitions the Commission for clarification or, in the alternative, reconsideration of the *First Report and Order* in the above-referenced proceeding.<sup>1</sup> Gemstar urges the Commission to make clear what should be evident from the totality of its order – that it has not finally determined whether electronic program guides (EPGs) are integral to broadcasters' television programming and thus must be carried by cable systems as part of the digital broadcast signals in which they are transmitted. More generally, the Commission should clarify that it did not prematurely define the test for

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<sup>1</sup> *Carriage of Digital Broadcast Television Signals, Amendments to Part 76 of the Commission's Rules, First Report and Order and Further Notice of Proposed Rulemaking, CS Docket Nos. 98-120, 00-96, 00-2, FCC 01-22 (rel. Jan. 23, 2001) (Digital Carriage R&O/FNPRM).*

determining whether EPG data or any other information transmitted in a digital broadcast signal are “program-related” and entitled to mandatory cable carriage.

This petition is necessitated by a passing discussion of electronic program guides in the *First Report and Order*. In the course of analyzing the legal requirements for digital cable carriage, the Commission expressly reserved for separate resolution the broader question of what content, in the digital context, meets the legal standard for mandatory carriage as part of a broadcast signal.<sup>2</sup> But the *Report and Order* devoted two short paragraphs to the question of the applicability of the digital cable carriage rules to EPGs. These paragraphs contain statements that, on one reading, are inconsistent with the Commission’s intention to answer the broader question in light of all the record information it has solicited. Comparing the carriage of updating EPG program (and related) information in the analog and digital environments, the *Report and Order* states:

In the digital television context, there is no VBI for EPG information to be carried on, rather, the EPG data would be part of the PSIP. *In this circumstance*, we find that program guide data that are not specifically linked to the video content of the digital signal being shown cannot be considered program-related, and, therefore, are not subject to a carriage requirement.<sup>3</sup>

Some have read these statements as pre-determining that EPGs generally are excluded from carriage as part of the digital signal.<sup>4</sup> Gemstar believes that the Commission did not and cannot have intended such a result, and accordingly seeks appropriate clarification or reconsideration.<sup>5</sup>

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<sup>2</sup> See *Digital Carriage R&O/FNPRM* ¶¶ 57, 122.

<sup>3</sup> *Id.* ¶ 64 (emphasis added).

<sup>4</sup> See, e.g., Ex Parte Notice of AOL Time Warner, Inc., CSR-5528-Z, Attachment at 3 (Mar. 15, 2001) (*AOLTW March 15 Ex Parte*); Ex Parte Presentation of Time Warner Cable, CSR-5528-Z, at 2 (Mar. 16, 2001) (*TWC March 16 Ex Parte*).

The Commission surely cannot have intended, by this obscure, brief and factually inaccurate statement, to hold that EPGs in general are categorically incapable of being “program-related” within the meaning of Sections 614(b)(3) and 615(g)(1) of the Communications Act.<sup>6</sup> The Gemstar EPG, for example, *does* provide data about the very programming being shown at the time the data are being transmitted to or accessed by the viewer, and the information can be distributed in *either* the PSIP or the main digital channel. We have argued in the analog context that the fact that the EPG contains *additional* program and related information (about programming on other stations, for example) does not change the essential character – indeed, enhances the essential character – of EPGs as “program-related” services that broadcasters desire their viewers to receive.<sup>7</sup> The question has not been resolved in the analog context,<sup>8</sup> and for the following reasons could not properly have been resolved in the *Report and Order* in this proceeding.

First, the Commission clearly did not intend to abandon the program-related standard for determining what components of the digital signal – whether located in the PSIP or the main channel and whether EPG-related or some other kind of content – must be transmitted

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<sup>5</sup> Properly understood against the backdrop of the points made herein, paragraph 64 appears to say only that a PSIP-delivered EPG that does *not* contain any data descriptive of the program(s) with which it is being transmitted is not subject to mandatory cable carriage.

<sup>6</sup> See 47 U.S.C. §§ 534(b)(3), 535(g)(1).

<sup>7</sup> See, e.g., Ex Parte Presentation of Gemstar-TV Guide International, Inc., CSR 5528-Z (Mar. 16, 2001) (*Gemstar March 16 Ex Parte*).

<sup>8</sup> Gemstar withdrew its Petition for Special Relief raising this question in the analog context because the cable practice of stripping the content from the broadcast signal had ceased. See Withdrawal of Petition for Special Relief and Notice of Dismissal as of Right, CSR-5528-Z (April 10, 2001). In that circumstance, we suggest that this issue is best addressed in the rulemaking context.

to the viewer without cable interference. The Commission is bound by statute to assure cable carriage, “to the extent technically feasible, [of] program-related material carried” by local television stations.<sup>9</sup> For the purpose of determining whether information transmitted in a broadcast signal is sufficiently linked to broadcast programming to be entitled to cable carriage along with the broadcast signal, there is no substantive difference between data carried in the analog VBI, the digital PSIP or the main digital signal. Whether information embedded in a broadcast signal is “program-related” cannot factually, logically or as a matter of policy depend on the portion of the signal in which it is carried or the mode of transmission used.

Wherever and however the information is transmitted, the question as it concerns EPGs is the same: whether the transmission of a comprehensive EPG containing program information about the carrying station and all other stations available to the viewer is “program-related” within the meaning of the statute. We believe that it is, and we will provide support for that proposition in response to the *Digital Carriage FNPRM*, which specifically seeks comment on what content should be treated as “program-related” for purposes of applying the statutory carriage requirement.<sup>10</sup>

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<sup>9</sup> 47 U.S.C. §§ 534(b)(3), 535(g)(1). Section 615(g)(1), applicable to public television stations, provides for carriage of program-related material “that may be necessary for receipt of programming by handicapped persons or for educational or language purposes.”

Although the statute speaks in terms of VBI-based analog carriage, the Commission has acknowledged the applicability of the program-related standard to the digital context. *See Digital Carriage R&O* ¶ 57 (describing possible DTV enhancements and concluding that “[t]he statute contemplates and our rules require that cable operators provide mandatory carriage for this program-related content”).

<sup>10</sup> In fact, as we will show, EPGs and EPG data are even more important, and thus more integrally related to the broadcaster’s programming service, in the digital context than the analog.

*Second*, as suggested above, there is no basis in the statute or in logic or policy for subjecting EPGs to a different standard of “program-relatedness” than is applicable to other material transmitted in the digital signal. Although the statute guarantees that certain types of information (*e.g.*, closed captioning) must be carried and that certain types of information (fee-based ancillary and supplementary services) are not entitled to carriage, nowhere does the statute single out EPG data for special treatment. Therefore, whether carriage of EPG data (or any particular EPG) is mandated under the statute depends on application of the program-related standard, as defined by the Commission for *all* data transmitted over the relevant media. And, given the Commission’s commendable effort to use the *Digital Carriage FNPRM* to explore what content might be “program-related” in the digital context – an issue about which the Commission now admittedly lacks information essential to rendering a judgment – it could not simply and *a priori* eliminate an entire category of content from consideration in that further proceeding. This is especially so in light of evidence that, if anything, electronic program guides may deserve special protection from cable interference in the digital context because of their critical capacity to integrate video, audio and data for broadcasters desiring to provide enhanced and interactive television services.<sup>11</sup>

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<sup>11</sup> *See, e.g.*, Comments of the National Association of Broadcasters, *In re Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Docket No. 01-7, at 24-29 (Mar. 19, 2001) (“In the digital environment, the EPG will be the mechanism used by cable operators to establish the linkages between the video, audio and data elements of interactive services. . . . [C]able operators (in an analog or digital environment) may use EPGs to disfavor the programming of competitors through unfavorable screen placement and through dilution of their brand identity. This EPG-related market power will only increase in the digital environment where programmers are offering a variety of interactive services, as cable operators will now have the ability to disassociate interactive services from both their related television programming and from the identity of the provider offering them.”).

*Finally*, the Commission clearly did not intend in the *Digital Carriage R&O* to settle upon an alternative formulation of the program-related test (built around some notion of a “specific link” between data transmitted and video “being shown”) either for EPGs or for all content in the digital environment.<sup>12</sup> In the *Digital Carriage FNPRM*, the Commission embraced the program-related standard as the test for determining the scope of protected carriage for enhanced digital services, and it called for comment as to the meaning of that term and the content that must be carried in the digital context. Specifically, the Commission (1) noted that digital television technology will enable broadcasters to offer a variety of information and enhancements in conjunction with broadcast video programming; (2) sought technical information on how such information and enhancements would be provided to consumers; and (3) asked whether such information and interactive enhancements in the digital broadcast signal should qualify as “program-related” and entitled to mandatory cable carriage.<sup>13</sup>

In light of the Commission’s acknowledgement that it does not yet have a complete understanding of what types of program enhancements broadcasters will provide in the digital environment, how such enhancements will be delivered to consumers, and what policy considerations are relevant to determining whether such enhancements should be considered program-related and entitled to cable carriage, the *Report and Order* cannot reasonably be read

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<sup>12</sup> It is possible that the Commission intended the “specific link” standard to be a restatement of the *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622 (7<sup>th</sup> Cir. 1982), test (or some element thereof) typically applied in the analog context. Although we believe that the Commission should neither have established a new test *nor* affirmed an old analog test for program-relatedness at this stage in the proceeding, we reiterate that even if the Commission decides to apply the *WGN* test in the digital environment, the Gemstar electronic program guide information should be found to be “program-related” and entitled to cable carriage. *See, e.g., Gemstar March 16 Ex Parte.*

<sup>13</sup> *Digital Carriage FNPRM* ¶ 122.

to resolve *any* program-relatedness question, much less to have reached a judgment about the eligibility for carriage of one particular type of content. In short, the *Digital Carriage R&O/FNPRM* cannot be read to make a decision that depends on an understanding of what digital broadcast services will provide at the same time that it asks questions the answers to which will shape and undergird that understanding.<sup>14</sup>

This is particularly true where, as here, the technical features of digital television make it possible for information that is clearly related to a broadcaster's video programming to be delivered to consumers in a variety of ways not contemplated in the analog environment. One example should suffice to demonstrate the point. The digital "bits" of data that make up a content package need not be delivered to the recipient as a unified whole. Instead, the bits can be broken down, delivered to the recipient in the most efficient manner possible, and reconstructed in the recipient's device (for example, in the consumer's digital television receiver or set-top box), which in most instances will be equipped with significant memory and processing capability. In this environment, a broadcaster could take advantage of the increased memory and data processing capability of digital television equipment to download information into the viewer's receiver at one time (for example, during non-prime-time when the broadcaster is transmitting less bandwidth-intensive standard definition programming) to be accessed at a later time by triggers embedded in, for example, bandwidth-intensive high definition programming

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<sup>14</sup> For example, the *Digital Carriage FNPRM* notes that "digital television offers the ability to enhance video programming in a number of ways," and then seeks "comment on whether such information or interactive enhancements like playing along with a game or chatting during a TV program should qualify as 'program-related.' What are broadcasters plans in this regard? What are the technical requirements for broadcasting, receiving and viewing this programming material? Would they be viewed on a screen simultaneously or is it necessary to change channels or select a different view on the same screen?" *See id.*

transmitted in prime time. Although the downloaded data may not be related substantively to the programming airing at the time the information is being transmitted to the consumer's equipment, it surely would be related to later programming the consumer would be watching while accessing the downloaded data. Many kinds of content (including EPG data) could be delivered in this way; there would be *no* justifiable basis for distinguishing categorically among such data in creating and applying the digital "program-related" standard.

In citing this example, we are not, of course, asking the Commission to decide now how the "program-relatedness" of the described material should be resolved in the further proceedings initiated by the *FNPRM*. Rather, we believe that the example demonstrates (1) the complexity that digital technology adds to the "program-related" standard; (2) the inappropriateness of any effort to resolve "program-relatedness" issues as they relate to the PSIP or EPGs before the record is complete; and (3) the importance of reaching a comprehensive and practical "program-related" test for the digital context (one that must, inevitably, be more flexible and less mechanistic than the analog test).

For now, because so many questions about what the digital broadcast service will include and how digital services will be delivered to consumers remain unanswered, we believe it clear that the Commission could not legally have intended – and should clarify that it did not intend – to pre-judge in the *Report and Order* whether particular categories of information would be considered program-related or what test would be applied to determine whether particular information or categories of information will be considered program-related and entitled to cable carriage in the digital context.

As we have noted, however, some have argued that, with respect to EPGs (alone among the content broadcasters may offer), the Commission did just that – excluded electronic

program guide information from digital cable carriage.<sup>15</sup> For the reasons we have discussed, such a conclusion should not be tweaked from one murky and factually suspect paragraph in the *Report and Order*. It would have been arbitrary and capricious on this record for the Commission to have reached any such conclusion.<sup>16</sup> Accordingly, given the existence of a more sensible and limited interpretation of its words,<sup>17</sup> the Commission need not reach beyond what law and logic permit it to do.

If, however, it was the Commission's intent to exclude all EPG data from digital cable carriage, for the reasons set forth above we request reconsideration and rescission of that decision pending resolution of the program-relatedness questions raised in the *Digital Carriage FNPRM*.

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For the foregoing reasons, Gemstar respectfully petitions the Commission to clarify that the statement at paragraph 64 of the *Report and Order* was not intended to exclude PSIP-delivered or other EPG supporting data from digital cable carriage or to establish a general "program-related" test for the carriage of secondary material in the digital broadcast signal. If the Commission did intend one of these results, Gemstar urges the Commission to reconsider its decision, rescind the statement in the *Report and Order* and address the program-related issues

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<sup>15</sup> See, e.g., *AOLTV March 15 Ex Parte*, Attachment at 3 (quoting last sentence of *Digital Carriage R&O* ¶ 64 and stating that "[t]he Commission's recent DTV carriage order confirms that EPG data is not program-related"); *TWC March 16 Ex Parte*, at 2 (citing *Digital Carriage R&O* ¶ 64 and asserting that "the *Digital Must-Carry Order* dispositively rejected Gemstar's claim [that its EPG data transmitted in the analog VBI are program-related and entitled to cable carriage].").

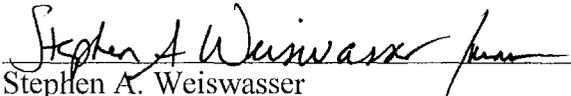
<sup>16</sup> See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

<sup>17</sup> See *supra* note 5.

raised in the *Further Notice of Proposed Rulemaking* with the twin goals of promoting competition and innovation in the advanced television services market and assuring that cable subscribers receive all digital programming enhancements and services available free to viewers who receive digital broadcast signals over the air.

Respectfully submitted,

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