

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

In the Matter of)
)
Carriage of Digital Television Broadcast) CS Docket No. 98-120
Signals)
)
Amendments to Part 76)
of the Commission's Rules)

To: The Commission

**REPLY OF GEMSTAR-TV GUIDE INTERNATIONAL, INC.
TO OPPOSITION TO PETITIONS FOR RECONSIDERATION**

Gemstar-TV Guide International, Inc. ("Gemstar") petitioned the Commission to clarify or reconsider its *Digital Must-Carry Order*¹ because the *Order* contained statements regarding cable carriage of electronic program guides ("EPGs") that were factually inaccurate and seemed potentially inconsistent with the Commission's express intent to resolve the broader question of what content, in the digital context, meets the legal standard for mandatory carriage as part of a broadcast signal.²

¹ First Report and Order and Further Notice of Proposed Rulemaking, *In re Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues, Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, CS Docket Nos. 98-120, 00-96 and 00-2, FCC 01-22 (rel. Jan. 23, 2001) ("*Digital Must-Carry Order*" and "*Digital Must-Carry FNPRM*").

² Petition of Gemstar-TV Guide International, Inc. for Clarification or Reconsideration, CS Docket Nos. 98-120, 00-96, 00-2 (filed April 25, 2001) (discussing inconsistency of ¶¶ 63-64 of *Digital Must-Carry Order* with totality of *Order* and *FNPRM*).

Time Warner Cable (“TWC”) opposes Gemstar’s Petition, arguing that despite the Commission’s stated intention in the *Digital Must-Carry FNPRM* to engage in an open-ended consideration of what constitutes “program-related” material in the digital context, the Commission made a prior determination in the *Digital Must-Carry Order* that digital EPGs are not “program-related.”³ TWC finds a clarity that is belied by both the totality of the *Order* and the confusing language of the relevant paragraphs. TWC’s explanation of the Commission’s action is an invitation to arbitrary and capricious decision-making that should be disregarded. As we have suggested, the Commission should clarify or reconsider its action and harmonize its treatment of EPGs with its treatment of all other digital content offered as part of broadcasters’ digital signals.

The fact remains that the Commission never has expressed a view about whether EPGs are program-related or entitled to mandatory cable carriage. The Commission, indeed, has never defined the reach of the program-related concept. It is only now exploring that question in the *Digital Must-Carry FNPRM*.⁴ In the *Digital Must-Carry Order*, the Commission said that EPG information carried in the PSIP of a digital signal “that [is] not specifically linked to the video content of the digital signal being shown cannot be considered program-related, and, therefore, [is] not subject to a carriage requirement.”⁵ The test with respect to mandatory carriage, however, is not whether material is “specifically linked” to the program with which it is being carried, but whether the content is “program-related.” And EPG information may be offered in *either* the PSIP or the main digital channel. In either case, it would still be part of a

³ See Time Warner Cable’s Opposition to Petitions for Reconsideration, CS Docket No. 98-120, at 16-19 (filed May 25, 2001) (“TWC Opposition”).

⁴ See *Digital Must-Carry FNPRM* at ¶ 122.

broadcaster's proffered digital program stream and would still provide information directly related to the content of the digital broadcast signal through which it is being distributed. In other words, the sentence on which TWC seizes is predicated on a factually inaccurate assumption and does not, in any event, address the question of whether EPGs are or can be related to broadcast programming within the meaning of the current standard – that is, the three-prong program-related test of *WGN Continental Broadcasting Co. v. United Video Inc.*⁶

While TWC professes to see no significance in these facts, they are directly relevant to the judgment that will be at the heart of the *Digital Must-Carry FNPRM*. Consequently, the Commission has broadly invited comment “on the proper scope of [the concept of] program-related [content] in the digital context”⁷ so as to give meaning to its finding in the *Order* that “cable operators are required to carry program-related material as part of the broadcaster’s primary video.”⁸ Thus, the Commission has made clear that it is seeking basic information as a foundation for a decision as to how the program-related standard should be applied in the digital context – not merely a “fine tuning” (as TWC would have it) of a critical standard that it has never before been fully delimited and rarely applied. Now is the time, we suggest, for the Commission follow through on its initial judgment that the program-related standard must evolve dynamically to reflect regulatory and competitive needs.⁹ The *Order*'s

⁵ *Digital Must-Carry Order* at ¶ 64.

⁶ 693 F.2d 622 (7th Cir. 1982).

⁷ *Digital Must-Carry FNPRM* at ¶ 122.

⁸ *Digital Must-Carry Order* at ¶ 57.

⁹ See Report and Order, *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast & Signal Carriage Issues*, MM Docket No. 92-259, 8 FCC Rcd 2965, 2986 (1993); Memorandum Opinion and Order, MM Docket No. 92-259, 9 FCC Rcd 6723, 6734 (1994).

issuance was decidedly *not* the time to identify particular kinds of content as within or without a standard as to which the Commission simultaneously acknowledged that it had not yet given meaning.

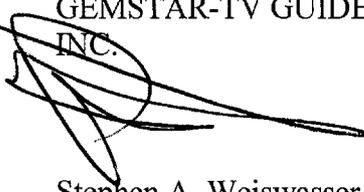
In sum, the language in the *Order*, as we have shown, lacks the reasoned analysis that should accompany the application of a statutory term, is inaccurate as a factual matter, and is, whatever else may be said about it, murky.¹⁰ Gemstar is not, as TWC suggests, unwilling to take “no” for an answer – although that would be the wrong answer. However, even a “no” – and that is not what the Commission provided here – would have to be based on reasoned analysis. Especially in light of the Commission’s intention to engage in a broad-ranging investigation of the program-related standard, the words it used did not and could not have constituted such an analysis. Accordingly, the Commission should clarify that it did not intend in the *Digital Must-Carry Order* prematurely to determine that EPG information cannot be program-related material in the digital context or prematurely to define that test. If the Commission did intend to apply some sort of separate digital “program-related” test to EPGs and exclude them from a more

¹⁰ The language, for example, is best read as saying that EPG information carried in the PSIP that is not specifically linked to the video content of a digital signal cannot be found to be “program-related.” “Specifically linked,” of course, is not the standard for mandatory carriage, and we do not understand the Commission to be formulating a new standard in the *Order*. It is not unfair to conclude that the paragraph may be suggesting that material that is not “program-related” is not “program-related.”

general consideration program-related material, then it should reconsider its decision, given the complete lack of analysis it provided to support that judgment.

Respectfully submitted,

GEMSTAR-TV GUIDE INTERNATIONAL,
INC.

A handwritten signature in black ink, appearing to be 'Stephen A. Weiswasser', written over the company name.

Stephen A. Weiswasser
Mary Newcomer Williams
Russell D. Jessee
COVINGTON & BURLING
1201 Pennsylvania Avenue NW
Washington, DC 20004-2401
Tel.: 202-662-6000
Fax: 202-662-6291

Its Attorneys

June 7, 2001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply of Gemstar-TV Guide International, Inc. to Opposition to Petitions for Reconsideration was hand-delivered this 7th day of June 2001, to:

Henk Brands
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
Counsel for Time Warner Cable
1615 M Street, NW
Suite 400
Washington, DC 20036



Russell D. Jessee