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

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

REPLY COMMENTS OF GEMSTAR-TV GUIDE INTERNATIONAL, INC.

Summary and Introduction

In these reply comments, Gemstar-TV Guide International, Inc. ("Gemstar") addresses the application of a proper standard for program-related material in the digital context that will ensure viewer access to enhanced broadcast content and features without imposing significant burdens on cable systems. In the *Digital Must-Carry Order*, the Commission decided that a broadcaster's "primary video" subject to mandatory cable carriage would be "a single

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programming stream and other program-related content."[1] Some have criticized this limitation as unduly narrow, contrary to the plain meaning of statutory language, and contrary to Congressional intent.[2] However the Commission defines this aspect of the overall must carry obligation, Gemstar believes that it has correctly identified a mechanism by which a "panoply" of digital enhancements can be made available to cable subscribers: "The statute contemplates and our rules require that cable operators provide mandatory carriage for program-related content."[3]

Cable operators and cable programmers have proposed a view of program-related material that is considerably more restrictive than Congress intended in establishing the must-carry obligation. If anything, the digital transition requires a less restrictive, not more restrictive, view of program-related material than has obtained in the analog context. That is so because the kinds of offerings digital technology makes possible are enhancements of the basic broadcast service and are the reasons why consumers will transition to the new platform.

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[1] *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*, First Report and Order and Further Notice of Proposed Rule Making, CS Docket Nos. 98-120, 00-96 and 00-2, FCC 01-22, ¶ 57 (rel. Jan. 23, 2001) ("*Digital Must-Carry Order*" and "*Digital Must-Carry FNPRM*").

[2] *See, e.g.,* Joint Petition for Reconsideration of the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting at 4-13, CS Docket Nos. 98-120, 00-96, and 00-2 (April 25, 2001); Petition for Reconsideration of The Walt Disney Company at 3-7; Petition for Reconsideration of Telemundo Communications Group, Inc. at 4-6; NAB/MSTV/ALTV Petition for Reconsideration and Clarification at 10-16; Petition for Reconsideration of Paxson Communications Corporation at 10-12; Petition for Reconsideration and Clarification of the Broadcast Group at 5-6. (Unless otherwise noted, all pleadings cited herein refer to those filed in Docket Nos. 98-120, 00-96, and 00-2.)

[3] *Digital Must-Carry Order* at ¶ 57.

I. CABLE OPERATORS AND CABLE PROGRAMMERS PROPOSE AN EXTREMELY NARROW AND UNSUPPORTABLE DEFINITION OF PROGRAM-RELATED MATERIAL.

The cable interests (represented primarily by the National Cable & Telecommunications Association ("NCTA") and AT&T Corp.), propose that the Commission adopt an extremely narrow definition of program-related material in the digital context.[4] In fact, their application of the *WGN* test[5] for program-relatedness in the digital context accommodates only that small range of material already determined to be program-related in the analog context – closed captioning information, V-chip ratings data, and Nielsen Source Identification Codes – plus the channel mapping and tuning protocols of PSIP.[6] They essentially seek to establish a moratorium on the development and delivery of new program-related material, denying viewers many of the enhancements that could make digital broadcasting a major improvement over analog and undermining major program possibilities that could expedite the digital transition. In the *Digital Must-Carry Order*, the Commission determined that the three *WGN* factors it uses as a test for program-relatedness in the analog context should continue to serve as a guide to identifying program-related material in the digital context.[7] That is no justification, however, for confining program-related material in the way that the cable interests suggest.

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[4] *See* NCTA Comments at 26-27; AT&T Comments at 27-28; ICCP Comments at 15-17; Starz Comments at 16-18.

[5] *See WGN Continental Broadcasting Co. v. United Video Inc.*, 693 F.2d 622, 626 (7th Cir. 1982); *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast & Signal Carriage Issues*, Report and Order, MM Docket 92-259, 8 FCC Rcd 2965, 2986 (1993) ("*Analog Cable Carriage R&O*").

[6] *See, e.g.*, NCTA Comments at 28; ICCP Comments at 16-17.

[7] *See Digital Must-Carry Order* at ¶ 61.

AT&T contends that "cable operators . . . have discretion over whether to carry material that is '*subscription and advertiser-supported.*'"[8] But the statute's grant of discretionary authority to deny carriage is not as expansive as AT&T contends, and the sentence from which AT&T lifts this phrase merely states that carriage of nonprogram-related material, such as certain subscription and advertiser-supported *information services*, is at cable operators' discretion. The sentence does not generally exclude advertiser-supported material from the definition of program-related, nor does it define the term.[9] The Commission continues to carry the burden of determining what categories of content are integral to the media program stream and thus subject to mandatory carriage as program-related material.

Time Warner Cable ("TWC") yet again implausibly suggests that because there is no vertical blanking interval ("VBI") in digital, no program-related material is entitled to carriage in the digital context.[10] This argument ignores Congress's express statutory command to the Commission to adapt carriage regulations to digital technology. *See* 47 U.S.C. § 534(b)(4)(B). Section 614 requires carriage of program-related material carried in the VBI because at the time of its enactment, analog was the only form of broadcast transmission. Foreseeing that there would be relevant differences between analog and digital technology, Congress empowered – indeed, required – the Commission to adapt the analog carriage rules to the digital environment to "ensure" cable carriage of local broadcast signals transmitted digitally.

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[8] AT&T Comments at 29-30 (emphasis in original).

[9] Such a broad exclusion from program-related material would make no sense. If all subscription and all free (*i.e.*, advertiser-supported) material were excluded from the definition of program-related, nothing would qualify and term would be rendered meaningless.

[10] *See* TWC Comments at 28-29.

The Commission's revision of the reference to VBI in its cable carriage rules "to take account of digital technology" properly recognizes and carries out this Congressional mandate.[11]

II. THE COMMISSION'S APPLICATION OF THE *WGN* TEST IN THE DIGITAL CONTEXT SHOULD REFLECT THE UNIQUE CHARACTERISTICS AND POTENTIAL OF DIGITAL BROADCASTING.

As Gemstar and other commenting parties have shown, Congress intended that must-carry regulation would ensure that cable systems carry not only broadcast programming but also various broadcaster-transmitted enhancements.[12] And the Commission has recognized that program-relatedness is a dynamic concept that should be accommodating to technological change.[13] Gemstar in its initial comments suggested a view of the *WGN* test – building on the Commission's own notion that the test should evolve to accommodate developing technologies – that would provide ample room to protect the development and delivery of these viewing enhancements, while imposing logical limits on cable operators' carriage obligations. Gemstar suggested that the Commission consider whether material is "integral" to a video program under the third prong of the test by looking not merely at the relationship between the main program stream and the content in question but also at Congress's and the Commission's goals for the digital service itself.[14]

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[11] *See Digital Must-Carry Order* at ¶ 62. *See also* Disney Comments at 10 ("To the extent that any weight is to be given to the fact that there is no longer a VBI, the natural conclusion to be drawn is that content that heretofore would have been considered only 'program-related' is now part and parcel of the programming itself.").

[12] *See, e.g.*, Disney Comments at 4-7.

[13] *See Analog Cable Carriage R&O*, 8 FCC Rcd at 2986; *see also, e.g.*, Disney Comments at 7-12.

[14] Gemstar also explained that the first two prongs of the *WGN* test – whether a broadcaster intends the material to be seen by the same viewers during the same time as the main programming – may be applied fairly mechanically and are easily determined. *See* Gemstar Comments at 10.

Any consideration of what is integral to main programs in the digital context must conclude that electronic program guides ("EPGs") – which assist viewers to access, understand, navigate, and use digital content and features – are program-related. Content and feature choices for viewers will explode in the digital world, and EPGs will become indispensable to viewers attempting to enjoy and manage the full range of services and content. If viewers are to have a choice of EPGs – and in particular, the choice of enjoying a *free*, independent EPG – guide information selected by broadcasters and inserted into their free digital signals must be included in the zone of protection the Commission defines for broadcasters' digital content. As one commenting party has noted, "limiting the carriage of [interactive EPGs] would limit the value of DTV for consumers and could provide anti-competitive advantages to cable operators and affiliated program providers, thereby undercutting the viability of free over-the-air broadcasting."[15]

Other parties to this proceeding have described other viewing enhancements that are integral to a broadcaster's main programming in the digital context and are thus program-related within the mandatory cable carriage standard. For example, localized news and weather provide the paradigmatic examples of how the *WGN* test should be applied dynamically to account for new technology. In *WGN* itself, the teletext channel at issue provided, among other things, "local news of Chicago that parallel[ed] the national news carried on the main program."[16] News and weather information tailored to specific geographic areas greatly enhances the utility of television for viewers and is precisely the type of programming advancement that digital technology is expected to deliver. Similarly, foreign language versions

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[15] CEA Comments at 9.

[16] *WGN*, 693 F.2d at 627.

of a broadcaster's programs and program-related material would greatly enhance the viewing enjoyment of persons for whom English is not the primary language. They would assist broadcasters to attract and retain another segment of the potential audience for their main programs and are thus integral to the main programs and entitled to carriage under the statute.

Conclusion

The program-related enhancements that the Commission identified in the *Digital Must-Carry Order and FNPRM* and that were further described by commenting parties in initial comments to the *FNPRM* are but the beginning of the advancements that digital technology will bring. At this time, the Commission cannot anticipate all of the enhancements that will be developed for digital television.[17] But with the hundreds – and soon to be thousands – of options digital television will make available to consumers, one thing is clear: Cable subscribers must not be deprived of the independent EPGs that will be essential to navigating the digital environment. The Commission must apply the *WGN* test in a way that broadly considers what material is integral to a video program in terms of the goals that Congress and the Commission have set for digital broadcasting. Cable subscribers should not be deprived of the enhancements of digital television service – and the tools needed to enjoy those enhancements – simply because they do not meet a dated and constrained application of the test for program-related material.

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[17] *See, e.g.*, NHL/PGA Comments at 9 ("The development of DTV will likely lead to innovations we cannot yet conceive of.").

Respectfully submitted,

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