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 November 5, 2001

BY HAND DELIVERY**RECEIVED**

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Ms. Magalie Roman Salas
 Secretary
 Federal Communications Commission
 445 12th Street, S.W. – The Portals
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

**Re: *Ex Parte* Presentation Regarding CSR 5698-Z
 Petition for Declaratory Ruling of Time Warner Cable,
 and CS Docket No. 98-120, Carriage of Digital Television
 Broadcast Signals**

Dear Ms. Salas:

On October 5, 2001, Time Warner Cable filed an *ex parte* notice indicating that it had met with the mass media legal advisors for Commissioners Abernathy, Copps, and Martin regarding the above-captioned Petition for Declaratory Ruling, CSR 5698-Z. For the most part, the arguments summarized in Time Warner's filing simply repeat arguments that Gemstar already has refuted on the record in this proceeding. Specifically, Gemstar already has demonstrated why free, broadcast-delivered EPG information is entitled to carriage under Section 614 of the Communications Act and the Commission's *WGN* test. Gemstar's prior filings in this proceeding have shown why Time Warner's interpretation of the *WGN* test is flawed; why its characterization of Gemstar's EPG as an "information service" is inaccurate; and why its citations to the legislative history of the 1992 Cable Act are inapposite. Gemstar also has demonstrated why grant of the requested declaratory ruling would contravene the congressional directive to assure the commercial availability of navigation devices, including competing EPGs, pursuant to Section 629 of the Communications Act. Those arguments have been thoroughly addressed on the record and need not be repeated here.

What must be addressed, however, are certain inaccurate and irrelevant factual assertions set forth in Time Warner's *ex parte*.

First, Time Warner cites to Gemstar's comments in the interactive television proceeding (CS Docket No. 01-7) in which Gemstar described a series of next-generation interactive television services that Gemstar could offer in the future *using technology other than the broadcast VBI*. Time Warner quotes this description of possible future non-VBI services to demonstrate that Gemstar's EPG services are not "program-related" and therefore not entitled to analog VBI carriage under the Cable Act. But this is a flagrantly and knowingly misleading statement of Gemstar's position, which is *not* that those future services would or could be carried on broadcasters' VBI. Gemstar's interactive television comments made plain that these interactive services would be provided "through a combination of downloaded data transmissions, electronic 'triggers' embedded in analog or digital television broadcast signals, computer processing capability and a two-way

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connection (primarily using two-way paging frequencies),”¹ But Time Warner omitted this portion of the sentence it quotes, *apparently in order to misrepresent Gemstar’s position.*

The next-generation services Time Warner references simply are irrelevant for the purpose of evaluating the analog EPG material at issue in this proceeding. The EPG at issue in the present proceeding is a free, broadcast (*i.e.*, one-way) television service, not an interactive two-way service characterized by the features described by Gemstar in the interactive television notice of inquiry proceeding.² Consumers in the marketplace today depend on the EPG material delivered through the VBI of free analog broadcast signals, not the variety of future interactive (non-VBI) services cited by Time Warner.

Second, Time Warner cites the agreement it had with StarSight with respect to a *subscription* service developed and deployed before Gemstar acquired that company. That deal predated Gemstar’s ownership of StarSight,³ was based on a sharing of subscription fees between StarSight and Time Warner, and was not renewed because the StarSight service was no longer marketed. That arrangement has no bearing on the issue here, which is the delivery of EPG material to consumers as a part of the *free* broadcast signal.

Third, the cable agreements cited by Time Warner in its *ex parte* submission are irrelevant to the issue at hand – whether cable operators are free to strip program-related EPG information voluntarily inserted by broadcasters into the VBI and delivered to viewers as a part of the free broadcast service. The cited agreements are licensing agreements that permit cable operators to offer their subscribers EPGs that incorporate Gemstar’s technology. Even though these agreements generally include contractual commitments by MSOs not to strip, they were not entered into to prevent cable operators from stripping free EPG information from the broadcast VBI – no other cable operator has ever engaged in this practice or asserted the right to do so. And, of course, these agreements fail to protect against the harm to consumers and destruction of a cable-competitive, free EPG service that would result if Time Warner were to engage in stripping. In any event, Gemstar’s ability to enter into business arrangements with other cable operators in no way diminishes the statutory directive to cable operators not to interfere with the delivery of program-related VBI information. Time Warner has no right to extract a benefit for carrying material that consumers are entitled to receive as a matter of law.

What must also be pointed out is that Time Warner’s *ex parte* submission fails to address two basic points – the undisputed harms to competition and consumer welfare that would result from its requested declaratory relief and the pendency of a comprehensive

¹ Comments of Gemstar-TV Guide International, Inc., CS Docket No. 01-7 (March 19, 2001) at 3.

² The interactive features of the guide are a function of the software in the television set that receives the program information.

³ StarSight’s business decisions and plans with respect to EPG service prior to being acquired by Gemstar of course cannot fairly be attributed to Gemstar.

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rulemaking proceeding that provides a far more appropriate forum in which to define the contours of what is "program-related," now and in the digital future.

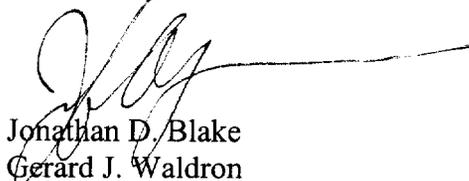
As to the first of these omissions, nothing in Time Warner's *ex parte* letter refutes or even addresses the fundamental competitive issue at stake here. Time Warner's incentives for stripping EPG material out of the broadcast signal have nothing to do with preserving VBI capacity – only one or two lines out of almost 1500 vacant VBI lines in a 100-channel cable system are used to deliver the EPG material. Rather, Time Warner seeks to drive a free, competing EPG service from the market so that cable subscribers will be left with no option but to purchase Time Warner's subscription cable guide. Because manufacturers would not produce and retailers could not market on a national basis an EPG-equipped television set whose EPG feature might be disabled in any local market by cable operators at will, the ruling Time Warner seeks would simply eliminate the only non-subscription EPG option available on the market today and leave non-cable subscribers with no EPG option whatsoever. *And, critically, a decision that sanctions the stripping of free EPG information from the broadcast VBI could strand the millions of consumers who purchased television sets equipped with the EPG they chose in the marketplace.*

Nor does anything in Time Warner's *ex parte* submission respond to Gemstar's essential point with respect to Time Warner's petition for declaratory ruling and the reason why Gemstar withdrew its petition for special relief: *The issue of what is "program-related" and therefore entitled to carriage should not be resolved in the context of this declaratory ruling proceeding, which focuses exclusively on analog carriage issues.* Instead, it should be resolved in the broader context – in the already fully briefed and comprehensive proceeding that explores the meaning of "program-related" (CS Docket No. 98-120, FCC 01-22), which the FCC launched prior to Time Warner's filing the declaratory ruling request. Time Warner's misleading citation to Gemstar's description of next-generation, two-way (not VBI) services in fact supports this important procedural point, because it demonstrates that even Time Warner believes that the Commission should evaluate the issue of "program-relatedness" in a context that extends far beyond its declaratory ruling request.

* * * *

An original and three copies of this *ex parte* letter (two copies for each docket) are being filed with the Secretary's Office in compliance with the Commission's rules.

Respectfully submitted,



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Counsel to Gemstar-TV Guide International, Inc.

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cc: Chairman Michael Powell
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
Susan Eid
Stacy Robinson
Susanna Zwerling
Catherine Crutcher Bohigian
Ken Ferree
William Johnson
Deborah Klein
Ms. Magalie Roman Salas (two copies each for CSR 5698-Z and for
CS Docket No. 98-120)