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

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JAN 25 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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:	)	CS Docket No. 00-96
	)	
Local Broadcast Signal Carriage Issues	)	
	)	
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

SUPPLEMENT TO COMMENTS OF
GEMSTAR-TV GUIDE INTERNATIONAL, INC.

Jonathan D. Blake
Jennifer A. Johnson
COVINGTON & BURLING
1201 Pennsylvania Avenue NW
Washington, DC 20004-2401
Tel.: 202-662-6000
Fax: 202-662-6291

Counsel for Gemstar-TV Guide International, Inc.

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Summary

Congress and the Commission intend for digital television to expand the array of content and services available to the American public. The Commission's interpretation of the statutory term "program-related material" in the digital television context will be critical to whether these congressional and Commission goals are achieved. The Commission's decisions about the types of material subject to mandatory carriage in a digital environment have the potential either to foster the digital television transition by protecting broadcasters and viewers from cable interference with free, broadcast-delivered digital content, or to thwart the transition in its nascent stages by granting cable operators the right to deny their subscribers access to digital content and services over-the-air broadcasters wish to provide.

In its initial comments and reply comments in this proceeding, Gemstar expressed the view that the Commission's framework for evaluating "program-relatedness" in the analog context, the *WGN* test, could be adapted to the digital environment consistent with the intent of the must carry statute and the congressional mandate to modify its requirements to reflect new digital technology and services. But the Commission's recent decision applying that standard to an electronic program guide in the analog context now demonstrates that the *WGN* test, as conceived by the Commission, is unable to accommodate digital modes of transmission and advanced digital services and that its continued use would contravene the statutory objectives underlying the requirement to carry program-related material. Accordingly, the Commission should abandon the *WGN* test altogether and take a fresh look at the concept of program-relatedness in light of the mandates of the must carry statute and the goals of the congressionally-mandated DTV transition.

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To: The Commission

SUPPLEMENT TO COMMENTS OF GEMSTAR-TV GUIDE INTERNATIONAL, INC.

Last summer, Gemstar-TV Guide International, Inc. ("Gemstar") submitted comments and reply comments[1] to the Commission in response to its *Further Notice of Proposed Rulemaking*[2] regarding how it should interpret the statutory term "program-related material" in

[1] *See* Comments of Gemstar-TV Guide International, Inc., CS Docket Nos. 98-120, 00-96 & 00-2 (June 11, 2001) ("*Gemstar Comments*"); Reply Comments of Gemstar-TV Guide International, Inc., in CS Docket Nos. 98-120, 00-96 & 00-2 (August 16, 2001) ("*Gemstar Reply Comments*").

[2] *See 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 [sic] Rulemaking, 16 FCC Rcd 2598 (2001) ("*First Report and Order*" and "*Further Notice*").

the digital context. Gemstar submits this supplement[3] because a recent decision applying the Commission's program-related standard in the analog context has substantially impacted Gemstar's view of the viability of this standard for digital television.[4]

I. The *WGN* Test Is Not A Viable Standard For Determining Program-Relatedness In The Digital Context.

In its *Memorandum Opinion and Order* in CSR 5698-Z ("*Analog MO&O*"),[5] the Commission applied the *WGN* test for program-relatedness to determine that cable operators are free to strip electronic program guide ("EPG") information from the vertical blanking interval ("VBI") of local analog broadcast signals carried on their cable systems. The Commission's application of the *WGN* test in the *Analog MO&O* was narrowly tied to the particular facts of *WGN Continental Broadcasting Co. v. United Video Inc.* ("*WGN*"),[6] the 1982 Seventh Circuit copyright case from which the FCC derived its program-related standard. In particular, the Commission's application of the *WGN* test in the *Analog MO&O* was controlled by an attempt to draw too close an analogy between the functionality of Gemstar's technology and the teletext at issue 20 years earlier in *WGN*. Using the same approach in digital would yield an unduly restrictive interpretation of program-related that would blink at the innovations of digital technology and frustrate access to the rich array of potential digital services that Congress intended for the public to enjoy.

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[3] Gemstar is filing these supplemental comments because of recent developments that substantially bear on the issues under consideration in this proceeding and the positions that Gemstar has taken and respectfully requests that the Commission accept them as such. Should the Commission decline to do so, Gemstar respectfully requests that they be included in the record for this proceeding as a written *ex parte* submission.

[4] Gemstar believes the recent case was wrongly decided and has sought reconsideration of it. *See* Petition for Reconsideration of Gemstar-TV Guide International, Inc., CSR 5528-Z and CSR 5698-Z (Jan. 7, 2002). Even if the decision is reversed, Gemstar believes a new approach to what is treated as program-related in the digital environment would be more likely to serve congressional objectives.

[5] *In re Gemstar International Group, Ltd. and Gemstar Development Corp., Petition for Special Relief; Time Warner Cable, Petition for Declaratory Ruling,* CSR 5528-Z and CSR 5698-Z, Memorandum Opinion and Order (rel. Dec. 6, 2001) ("*Analog MO&O*").

[6] 693 F.2d 622 (7th Cir. 1982).

When the Commission issued its *First Report and Order* in the digital cable carriage proceeding, it determined that "[d]ue to the technical differences between digital and analog transmission," the concepts used to define program-related material in the analog context "cannot transfer directly into a digital environment."[7] While the Commission indicated that it expected to rely on "the same factors enumerated in *WGN*, that are used in the analog context to determine what material is considered program-related,"[8] it went on to request comment in the *Further Notice* on "the proper scope of program-related in the digital context,"[9] noting that "digital television offers the ability to enhance video programming in a number of ways."[10]

The Commission must develop digital carriage standards – including the test for program-related material – not in the abstract or by reference solely to principles created in the analog environment, but in terms of digital television's potential for enhancing the public's access to a broad range of free television content. The Commission itself emphasized this point in the *Analog MO&O*, noting that "the proper definition of 'program-related material' and the types of information that cable operators are required to carry" in the digital television context "is a distinct question from that presented in this proceeding regarding the analog technology used by Gemstar for its EPG."[11] On this point, Gemstar agrees. The promise of digital

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[7] *First Report and Order*, 16 FCC Rcd at 2623.

[8] *Id.* at 2624. On April 25, 2001, Gemstar filed a Petition for Clarification or, in the Alternative, Reconsideration, on this issue urging the Commission to clarify that the *First Report and Order* neither prematurely decided that the analog test for determining "program-relatedness" would be imported to the digital environment nor selectively applied that test to determine that digitally delivered EPG information is not program-related. *See* Petition of Gemstar-TV Guide International for Clarification or, in the Alternative, Reconsideration in CS Docket Nos. 98-120, 00-96 & 00-2 (Apr. 25, 2001). On January 18, 2002, Gemstar filed comments to supplement this petition because the Commission's decision in the *Analog MO&O* substantially bore on the issues raised there. *See* Supplemental Comments of Gemstar-TV Guide International, Inc. to Petition for Clarification or, in the Alternative, Reconsideration in CS Docket Nos. 98-120, 00-96 & 00-2 (January 18, 2002) ("*Supplemental Comments on Reconsideration*").

[9] *Further Notice*, 16 FCC Rcd at 2651.

[10] *Id.*

[11] *Analog MO&O* ¶ 5; *see also id.* ¶ 6 ("As stated above, however, Gemstar uses a particular analog technology and video channels for delivery of its EPG material and the record in this proceeding is limited to those facts. Accordingly, to the extent that Time Warner's petition (continued...)

television must not be squelched by outmoded standards that fail to reflect the unique characteristics of, and expanded opportunities made possible by, digital technology.[12]

In its comments on the *Further Notice*, Gemstar urged the Commission to require cable operators to carry the entirety of each broadcaster's free, over-the-air digital signal, noting that this approach would avoid much of the controversy over program-related content, would free the Commission from what would otherwise be a difficult referee's role, would spur content innovation in broadcasters' program-related services, and would maximize the value of these services to the public.[13] At the same time, while not endorsing continued use of the *WGN* test, Gemstar expressed the view that the *WGN* framework could be adapted to the digital environment, so long as it was applied dynamically to reflect advanced digital technology and congressional goals for digital television service. In those comments, Gemstar relied on the Commission's stated intent to apply the *WGN* test dynamically in light of evolving technology. Gemstar files this supplement because it is now clear that the *WGN* test is too inflexible for the digital context. The Commission's decision in the *Analog MO&O* demonstrates a view of the *WGN* standard that is irreconcilable with digital technology and that has led Gemstar to conclude that use of the *WGN* test in digital will thwart – rather than further – the statutory objectives of the must carry requirement.[14]

II. The Commission Has A Statutory Obligation To Adapt The Cable Carriage Standards To Ensure Consumer Access To Enhanced Digital Television Offerings.

In determining what material is program-related in digital, the Commission must take into account the goals that Congress and the Commission have set for the digital television

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requests a Commission determination regarding any questions related to material other than Gemstar's VBI material, the petition is denied.").

[12] In its *Supplemental Comments on Reconsideration*, Gemstar discusses in more detail the inherent incompatibilities between the view of *WGN* reflected in the *Analog MO&O* and advanced digital technology and services. *See Supplemental Comments on Reconsideration* at 3-8.

[13] *See Gemstar Comments* at 7.

[14] *See Supplemental Comments on Reconsideration* at 5.

service and the need to preserve the vitality of over-the-air broadcast services in the digital environment. Congress's goals for the digital transition and for broadcasting in general are – as the Commission has recognized – "inherent" in Sections 614 and 615 and other parts of the Communications Act.[15] Congress intended for digital television to greatly expand the quality and range of broadcast offerings available to viewers and at the same time to assist in the preservation of a free, universal broadcasting service. And it directed the Commission to take steps to ensure that these aims were achieved. In particular, Congress anticipated the need to update the carriage standards upon the advent of digital television and included a statutory directive in the 1992 Cable Act to ensure that the appropriate adjustments were made.[16] The Commission itself has well described this statutory obligation: "The Commission is charged with issuing regulations and establishing standards *ensuring the transition to advanced television technology, pursuant to Section 614(b)(4)(B).*"[17] To fulfill its statutory command, the Commission must jettison a view of program-relatedness that is grounded in analog technology and take a fresh look at how that statutory term should be interpreted in light of evolving digital technology.

The prospect of extraordinary innovation for the public was the reason the Commission directed the country's over-the-air broadcast television service to undertake the hugely disruptive and expensive transition to digital television. As the limited offerings available through the broadcast VBI are replaced by the wide and varied program-related enhancements made possible by digital technology, the Commission must adjust the cable

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[15] *First Report and Order*, 16 FCC Rcd at 2600.

[16] To preserve the benefits to viewers of digital's expanded and enhanced offerings, to preserve the public's free broadcast service in the digital world, and to guard against harmful anticompetitive conduct from cable operators in the digital age, Congress required the Commission to adapt analog carriage obligations to reflect the new digital technology. *See* 47 U.S.C. § 534(b)(4)(B).

[17] *WHDT-DT, Channel 59, Stuart, Stuart, Florida; Petition for Declaratory Ruling that Digital Broadcast Stations Have Mandatory Carriage Rights*, Memorandum Opinion and Order, 16 FCC Rcd 2692, 2698 (2001) ("*WHDT-DT MO&O*") (emphasis added) (citing 47 U.S.C. § 534(b)(4)(B)).

carriage standards to ensure that cable subscribers and over-the-air viewers alike are not deprived of the benefits that DTV provides. Congress made clear on the face of the statute that it intended for must carry regulation to ensure that cable systems carry not only broadcast video programming, but also various broadcaster-transmitted enhancements.[18] The Commission must keep these statutory intentions at the forefront as it confronts a technology that was not fully developed when the original cable carriage statutes were enacted and is still in its early days.

The program-related enhancements that the Commission has focused on in this proceeding and that were further described by commenters in response to the *Further Notice* are but the beginning of the advancements that digital technology will bring. Particularly at this delicate point in the DTV transition, it is imperative that the Commission avoid strangling innovation by adopting definitions and standards that grew out of the very limited services analog technology supported. "Congress intended the mandatory carriage provisions to ensure the continued availability to the public of television broadcast service"[19] – initially in analog and, ultimately, during and after the transition to digital. And as the Commission strives to accomplish this statutory goal as broadcasters and viewers move into the digital age, it must take account of "the significant changes to the broadcast and cable industries resulting from the conversion to digital technology."[20] If DTV is to succeed, broadcasters need the flexibility to experiment with free, over-the-air enhancements to their digital programming, without risk that access to the 69 million[21] American viewers who subscribe to cable will be blocked because these enhancements fail to meet a dated and unduly narrow test for program-related material.

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[18] The statute requires carriage of the primary video, accompanying audio, closed captioning "*and*, to the extent technically feasible, program-related material" transmitted by local broadcast stations. 47 U.S.C. § 534(b)(3)(A) (emphasis added).

[19] *WHDT-DT MO&O*, 16 FCC Rcd at 2693.

[20] *Id.* at 2693.

[21] *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Eighth Annual Report, CS Docket No. 01-129, ¶ 16 (rel. Jan. 14, 2002).

III. The Commission Should Rule That Certain Types Of Enhanced Digital Content Fall Within The Statutory Carriage Requirement.

When "program-relatedness" is evaluated in terms of the goals and directives of the must carry statute, including the express obligation to update the carriage requirements to reflect digital television technology, it becomes clear that a range of content should fall within the mandatory carriage obligation. While Gemstar no longer believes that *WGN* represents a useful construct for determining what is program-related in digital, its view of the types of material that fall within the statutory term has not changed. For the reasons articulated in its comments and reply comments, Gemstar strongly believes that certain digital television content – material designed to enhance the viewing experience; expand upon the medium's ability to entertain, inform, and educate; and simplify and improve viewer access and navigation – is so closely tied to the primary digital television service that it constitutes program-related material under the must carry statute and thus is entitled to mandatory cable carriage.

A. EPGs Are Entitled To Mandatory Carriage Under The Must Carry Statute Because Of The Central Role They Will Play In The Digital Television Environment.

Of particular importance to viewers in a digital environment are tools that will assist them in accessing, understanding, navigating and using digital programming and services. Digital television, as the Commission recognizes, "offers the ability to enhance video programming in a number of ways,"[22] but the potentially dizzying array of channels and enhancements will accentuate the importance of tools that organize and help viewers navigate among those many choices. Even in the current analog-based environment of 100+ cable channels, EPGs have shown themselves to be extremely important to viewers.[23] But in digital,

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[22] *Further Notice*, 16 FCC Rcd at 2651.

[23] *See, e.g.*, Comments of Thomson Consumer Electronics, CSR 5528-Z, at 5 (April 13, 2000) (stating that in a recent survey of over 250 buyers of RCA and PROSCAN TVs with Gemstar's *Guide Plus+* EPG: 77% of respondents cited the added convenience of the guide; 96% volunteered that they used to the guide to see what other programming is currently on; 90% use the guide to look ahead to view upcoming program schedules; 81% responded that they used the guide "before watching any TV programming;" and 60% stated that they used the guide between shows, while commercials are on, or while watching other programming).

EPGs will take on a much more central role. Unlike many types of material, their utility relates directly to digital television programming, not to other nonbroadcast services that digital technology makes possible.

In establishing the cable carriage requirements, Congress and the Commission recognized that cable operators could use their bottleneck power to substantially impair the competitive viability of local broadcast stations by repositioning local stations from their customary channels.[24] In the digital environment, interactive EPGs will supplant traditional channel mappings. A cable operator's strong incentive to organize programming on its systems in a manner that steers viewers toward its affiliated programming at the expense of competitive programming will be far easier to effectuate in a digital world where viewers can choose among non-traditional content and services – often identified by non-numeric indicators, such as icons – and where channel and service brands may be unfamiliar. Biased presentation will thrive on consumer confusion and unfamiliarity.

Accordingly, the Commission must adapt the statutory protections afforded to broadcaster channel positioning to the digital environment. This means protecting independent, broadcast-delivered EPGs from cable system interruption. The failure to do so will jeopardize the future of digital television service and undercut the statutory objectives of the must carry requirements. As the Commission has recognized, "Congress . . . concluded that [channel positioning and must carry] regulation is needed to ensure a competitive balance between cable systems and broadcast stations."[25] Without a finding that broadcast-delivered EPGs are program-related, cable operators will reserve the EPG field for themselves and with it the virtually unfettered power to use their own EPGs to influence viewer access to programming. The public's local broadcast service will pay the price: "Limiting the carriage of [interactive

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[24] *See* 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57.

[25] *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast & Signal Carriage Issues*, Notice of Proposed Rulemaking, 7 FCC Rcd 8055, 8056 (1992) (discussing Congressional intent for must carry requirements).

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."[26] In the not so long run, the ultimate loser will be the American public.

Carrying broadcast-delivered EPGs would impose no burden on cable operators.[27] Accordingly, cable operators' only real objection to a finding that digitally transmitted EPGs are program-related must arise from their desire to extend their gatekeeper role, monopolize the EPG market, and control how consumers manage their television viewing experience. Such an enhancement of cable operators' power over the consumer contravenes the intent of the must carry statute and Congress's directive that the Commission adapt cable carriage rules for digital technology in order to expand, not eliminate, programming competition.[28] In light of the fact that carrying digital EPG information imposes no burden on cable operators, the fact that EPG material satisfies any reasonable interpretation of program-relatedness in digital, the value of EPGs to digital viewers, and the difficulty for consumers in obtaining independent EPGs, the Commission should not cabin the scope of what constitutes program-related material so as to exclude digitally transmitted EPG information.

B. A Variety Of Other Digital Content Falls Within The Mandatory Carriage Requirement.

As explained in Gemstar's comments and reply comments, certain other categories of digital material also fall squarely within the statutory carriage requirement – thematically related content offered by broadcasters to help viewers gain insight into and better

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[26] Comments of Consumer Electronics Association, CS Docket 98-10, 00-96 & 00-2 at 10 (June 11, 2001).

[27] "[I]n the digital environment, EPG content like Gemstar's will consume about .0035 (or one-third of one percent) of the 6 MHz bitstream." Comments of the Association for Maximum Service Television, CSR 5528-Z, (April 13, 2000) at 3.

[28] *See, e.g.*, S. Rep. No. 102-92, at 42 (1992); *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 2988 (1993); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 197-98 (1997).

understand the broadcaster's main programming; material provided by broadcasters to retain or attract viewers who are demographically similar to those watching the main channels; and "triggers" needed for the delivery of interactive television ("ITV") services. Broadcasters and programming developers have described a number of viewing enhancements that fall within these categories and that, if free from anticompetitive cable disruption, will facilitate consumer enjoyment and acceptance of DTV. These include interactive enhancements such as playing along with a quiz show; multiple camera angles, isolation views, and statistical and analytical information for sports broadcasts; localized news broadcasts; 24-hour localized weather; and foreign language programming. As Gemstar has explained, "triggers" embedded in a digital news or sports broadcast or an EPG supporting them could, when prompted, cause the delivery of free interactive material to a viewer.[29] These and similar enhancements represent just the sort of services the DTV transition was intended to foster. Cable should not be allowed, for what can only be anticompetitive reasons, to block viewers' access to these free digital television enhancements. An overly restrictive view of program-related material would assure such an outcome.

* * * *

The Commission has a statutory duty to adapt existing cable carriage requirements to take into account the capabilities of new digital technologies, to advance the DTV transition and facilitate the timely and orderly return of analog television spectrum, to promote competition, and to protect the public's interest in receiving the benefits the digital

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[29] Cable operators have expressed intentions to extend their gatekeeper control to foreclose all such interactive prompts. This is particularly troubling because triggers are the critical elements that launch ITV content and link it to the appropriate related video programming. Gemstar has developed its own plans for offering services of this kind, and it is reasonable to assume that broadcasters and others will similarly create ITV content that, by agreement with the applicable program providers, is keyed off triggers embedded in video programming but distributed through two-way services that do not necessarily depend for their delivery on cable bandwidth or a cable-provided set-top box. The cable operator's elimination of such triggers from the programming carried on its system would destroy the ability of virtually all non-cable-affiliated ITV providers to compete against cable-controlled content.

television transition was intended to offer. These goals cannot be met if cable operators are allowed to block consumer access to the very enhancements the digital transition was meant to stimulate and that are essential to achieving consumer acceptance of DTV. We urge the Commission to adopt a definition of "program-relatedness" for digital that takes into account the specific regulatory goals established for digital television and the statutory obligation to adjust the carriage requirements to account for digital technology. The Commission's standard for "program-relatedness" should create an expansive environment for innovation and service that will provide the public with the benefits of digital technology and at the same time ensure that viewers have the advantage of independent navigation as they seek to find and ultimately utilize the content and services that they desire.

Respectfully submitted,

GEMSTAR-TV GUIDE INTERNATIONAL, INC.

Jonathan D. Blake
Jennifer A. Johnson
COVINGTON & BURLING
1201 Pennsylvania Avenue NW
Washington, DC 20004-2401
Tel.: 202-662-6000
Fax: 202-662-6291

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Its Attorneys