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February 22, 2002

By Hand Delivery

William F. Caton
Acting Secretary
Federal Communications Commission
445 12th Street, S.W., Suite TW-A325
Washington, D.C. 20554

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FEB 22 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules, CS Docket No. 98-120*

Dear Mr. Caton:

Please find enclosed for filing in the above-referenced proceeding the original and four copies of Time Warner Cable's Supplemental Comments in Response to Supplemental Comments of Gemstar-TV Guide International.

Also enclosed is one extra copy of the comments for date-stamping. Please date-stamp and return that extra copy in the self-addressed, stamped envelope that has been provided.

If you have any questions, please call me at 202-326-7945.

Very truly yours,



Henk Brands

Enc.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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OFFICE OF THE SECRETARY

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

TIME WARNER CABLE'S
SUPPLEMENTAL COMMENTS IN RESPONSE TO
SUPPLEMENTAL COMMENTS OF
GEMSTAR-TV GUIDE INTERNATIONAL

Time Warner Cable ("TWC") respectfully submits these supplemental comments responding to Gemstar-TV Guide International's supplemental comments in support of Gemstar's petition for reconsideration.¹ Gemstar presses yet more paper on the Commission advancing its meritless — and now twice-rejected — contention that its electronic program guide ("EPG") should be entitled to must-carry rights.

The Commission has correctly ruled — in both digital and analog contexts — that EPGs are *not* "program-related" for purposes of Section 614(b)(3)(A) of the Communications Act, 47 U.S.C. § 534(b)(3)(A). In its ruling in this docket, the Commission unequivocally held 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

¹Supplemental Comments of Gemstar-TV Guide International, Inc. to Petition for Clarification or, in the Alternative, Reconsideration, CS Docket Nos. 98-120, *et al.* (FCC filed Jan. 18, 2002) ("Gemstar Supp."). Gemstar requests that its filing be treated either as supplemental comments or as an *ex parte*. *See id.* at 1 n.1. Whichever way the Commission decides to treat Gemstar's filing, TWC requests parity of treatment.

requirement.” *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, ¶ 64 (2001) (“*Digital Order*”); *see also id.* ¶ 61 (to be program-related, material must be “related to the broadcaster’s primary digital video programming”). The Commission subsequently applied the same logic — based on the same statutory text — to hold that Gemstar’s EPG also is not entitled to analog carriage.² The Commission was correct in both instances.

In its latest filing, Gemstar again claims that the Commission should jettison the *WGN*³ test that it has long used to determine program-relatedness. According to Gemstar, the *WGN* test “is not flexible enough” to bestow regulatory favors that would give Gemstar’s product free cable carriage. Gemstar Supp. at 3. Those and other EPG-related issues have been extensively briefed in both this and the analog EPG docket. In each, Gemstar’s arguments were soundly rejected. For a full rebuttal of Gemstar’s arguments, TWC respectfully refers the Commission to its prior orders as well as to TWC’s pleadings in both proceedings.⁴

²*Gemstar International Group, Ltd. and Gemstar Development Corp., Petition for Special Relief; Time Warner Cable, Petition for Declaratory Ruling*, Memorandum Opinion and Order, CSR 5528-Z & CSR 5698-Z, FCC 01-354 (rel. Dec. 6, 2001) (“*Analog EPG Order*”).

³*WGN Continental Broad. Co. v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982).

⁴In *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120 (digital EPGs), *see* Reply Comments of Time Warner Cable at 28-29 (FCC filed Aug. 16, 2001); Time Warner Cable’s Opposition to Petitions for Reconsideration at 15-18 (FCC filed May 25, 2001); Reply Comments of Time Warner Cable at 34-35 (FCC filed Dec. 22, 1998). In *Gemstar International Group, Ltd. and Gemstar Development Corp., Petition for Special Relief; Time Warner Cable, Petition for Declaratory Ruling*, CSR 5528-Z & CSR 5698-Z (analog EPGs), *see* TWC’s Opposition to Petition for Reconsideration (FCC filed Jan. 23, 2002) (noting (at 3) that “Gemstar has filed approximately twenty pleadings and ex parte submissions exhaustively detailing its position”); TWC Ex Parte Letter (FCC filed Aug. 24, 2001); Reply of Time Warner Cable (FCC filed June 28, 2001); TWC’s Petition for Declaratory Ruling (FCC filed May 9, 2001); Ex Parte Letter (FCC filed Mar. 16, 2001);

Because Gemstar’s current comments raise no new issues, it suffices briefly to reiterate the main reasons why Gemstar’s position is contrary to Section 614 and therefore must be rejected — regardless of whether *WGN* supplies the applicable test.

Section 614(b)(3)(A), which applies to digital and analog signals alike, requires a cable operator to carry the “primary video” of a must-carry-eligible commercial television station. 47 U.S.C. § 534(b)(3)(A).⁵ To the extent technically feasible, a cable system must also carry “*program-related material* carried in the vertical blanking interval” (or VBI). *Id.* (emphasis added). In contrast, carriage of “*nonprogram-related material* (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator.” *Id.* (emphasis added). Gemstar’s EPG (like other EPGs) “provides viewers information on current and future programming” of practically *all* channels on a given cable system (not just the one on which Gemstar’s EPG piggy-backs), much like a printed TV guide. *Analog EPG Order* ¶ 2. “Most of the material [thus] consists of information relating to programming on *other* channels carried by the cable system.” *Id.* ¶ 18 (emphasis added).

As this Commission correctly held, “[t]here is *no language in the statute* . . . to require carriage of non-program-related VBI material broadcast by one station on the grounds that it may be related to the programming of another station.” *Id.* ¶ 21 (emphasis added). Indeed, “Section 614 grants . . . cable operators discretion to carry materials unrelated to a broadcaster’s main program.” *Id.*; *accord Digital Order* ¶ 64 (“program guide data that are

Reply Comments of Time Warner Cable (FCC filed Apr. 24, 2000); Opposition of Time Warner Cable (FCC filed Apr. 13, 2000).

⁵Gemstar has never claimed (and could not claim) that EPGs are part of a broadcaster’s “primary video.”

not specifically linked to the video content of the digital signal being shown cannot be considered program-related”); *see also National R.R. Passenger Corp. v. National Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (“When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. This principle of statutory construction reflects an ancient maxim — *expressio unius est exclusio alterius*.”) (internal quotation marks and citation omitted).⁶

Even if Section 614 were ambiguous and reference to the legislative history were appropriate, that history confirms that the “program-related” standard is not available for use by third parties like Gemstar. The House Committee Report stated: “The Committee does not intend that this provision be used to require carriage of secondary uses of the broadcast transmission, including the lease or sale of time on subcarriers or the [VBI] for the creation or distribution of material *by persons or entities other than the broadcast licensee*.” H.R. Rep. No. 102-628, at 93 (1992) (emphasis added). Similarly, the House Committee explained that program-related material “is not meant to include tangentially related matter such as a reading list shown during a documentary or the scores of games *other than the one being telecast or other information* about the sport or particular players.” *Id.* at 101 (emphases added). If Congress considered that kind of information to be exemplary of non-program-related material, then Gemstar’s information, which is much further afield, plainly cannot be program-related.⁷

⁶In addition, Gemstar’s EPG contains “advertisements and other promotions that may not relate to any program.” *Analog EPG Order* ¶ 18. Section 614 by its terms excludes Gemstar’s “advertiser-supported” EPG from any must-carry requirement. 47 U.S.C. § 534(b)(3)(A).

⁷There is an additional reason why *digital* EPGs are not entitled to carriage. The *only* program-related material that Section 614(b)(3)(A) requires to be carried is that in the VBI.

Gemstar's supplemental comments fail to refute (or even to confront) these controlling principles. Accordingly, this Commission should summarily reaffirm its *Digital Order* and *Analog EPG Order* and again reject Gemstar's request for a result-oriented approach that would contravene the statute.

Because digital signals do not contain a VBI, *see Digital Order* ¶ 64; *Analog EPG Order* ¶ 2 n.4, the Commission may not require carriage of *any* digital "program-related material" unless it is a part of the "primary video." *See Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, Reply Comments of Time Warner Cable at 28-29 (FCC filed Aug. 16, 2001); *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, Time Warner Cable's Reply to Oppositions to Its Petition for Reconsideration at 6-8 (FCC filed June 4, 2001); *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, Time Warner Cable's Opposition to Petitions for Reconsideration at 19 n.25 (FCC filed May 25, 2001); *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, Time Warner Cable's Petition for Reconsideration at 3 (FCC filed Apr. 25, 2001).

CONCLUSION

For the reasons set forth above and in TWC's prior pleadings, Gemstar's petition for reconsideration should be denied.

Respectfully submitted,



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