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

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

SUPPLEMENTAL COMMENTS OF THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION

When Congress enacted the analog must carry requirement in 1992, it recognized that adjustments would be necessary to accommodate the differences in digital technology. It therefore directed the FCC to examine all of its carriage rules, including the definitions of "program-related material," "primary video," and other statutory terms, at the time it adopted a digital standard to determine what changes would need to be made.[1] The Commission took an important first step toward fulfilling this mandate by opening the *Further Notice* proceeding in

[1] *See* 47 U.S.C. § 534(b)(4)(B) ("At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.").

this docket to undertake a searching evaluation of how to interpret what material should be considered "program-related" in the digital context.[2]

Last year, the Association for Maximum Service Television ("MSTV")[3] filed comments, reply comments, and a petition for reconsideration and clarification in the above-captioned dockets with respect to the Commission's DTV signal carriage requirements.[4] Among other things, MSTV urged the Commission, consistent with 47 U.S.C. § 614(b)(4)(B), "to move beyond the *WGN* factors [for determining the program-relatedness of digital content] because they are inappropriate and unworkable in a digital environment."[5] The FCC's recent application of the *WGN* standard to determine that an advanced analog electronic program guide ("EPG") is

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[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, 2651 (2001) ("We seek comment on the proper scope of program-related in the digital context.") ("*Digital Must Carry Order*" and "*Further Notice*").

[3] MSTV represents nearly 400 local television stations on technical issues relating to analog and digital television services. It has frequently commented on the need for the FCC to ensure that the entirety of DTV signals passes undegraded through the cable plant to the consumer. *See, e.g.*, Comments of MSTV, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GEN Docket No. 00-185 (Dec. 1, 2000); Joint Broadcasters Comments, *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 00-39 (May 17, 2000); Reply Comments of MSTV, *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120 (Dec. 22, 1998); Comments of MSTV, *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120 (Oct. 13, 1998).

[4] *See* Reply Comments of NAB/MSTV/ALTV in CS Docket Nos. 98-120, 00-96 & 00-2 (Aug. 16, 2001) ("MSTV Reply Comments"); Comments of NAB/MSTV/ALTV in CS Docket Nos. 98-120, 00-96 & 00-2 (June 11, 2001) ("MSTV Comments"); NAB/MSTV/ALTV Petition for Reconsideration and Clarification in CS Docket Nos. 98-120, 00-96 & 00-2 (Apr. 25, 2001) ("MSTV Petition for Reconsideration").

[5] MSTV Comments at 37.

not program-related underscores this point.[6] MSTV therefore submits these supplemental comments[7] to emphasize that, consistent with the statutory requirement that the Commission adapt its analog carriage rules to reflect changes brought about by the transition to advanced digital technologies, the FCC should recognize that "the transition to *digital* transmission requires the Commission to move away from the narrow *WGN* factors."[8]

I. APPLICATION OF *WGN* IN THE DIGITAL CONTEXT WOULD HAVE BROAD NEGATIVE IMPLICATIONS ON BROADCAST VIABILITY AND THE EVOLUTION OF DIGITAL SERVICES

An underlying premise of the 1992 Cable Act is that cable subscribers should be able to receive via cable the same features and functionality that they would receive over the air.[9] Congress, after evaluating evidence establishing that consumers would not use A/B switches to alternate between cable and over-the-air signals, recognized that such a principle is necessary to preserve the viability of local broadcast stations.[10] Otherwise, cable operators would exercise their gatekeeping power to block subscribers from receiving information, including program-

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[6] *See 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*").

[7] MSTV is filing these supplemental comments because the Commission's decision in the *Analog MO&O* highlights points MSTV made in earlier filings in this proceeding and respectfully requests that the Commission accept them as such. Alternatively, the Commission could include them in the record for this proceeding as a written *ex parte* submission.

[8] MSTV Comments at 38.

[9] *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189-90 (1997); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662-63 (1994).

[10] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(18), 106 Stat. 1460, 1462 (1992) (stating that "the 'A/B' input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest"); H. Rep. No. 102-628, at 54 (1992) (providing survey results demonstrating that consumers are not willing to use A/B switches); S. Rep. No. 102-92, at 45 (1991) (explaining that consumers do not use A/B switches and concluding that "[t]he technical and economic complexities involved with an A/B switch make it an unworkable solution").

related material transmitted in the vertical blanking interval, that is available to them free over the air. The same objectives should drive the Commission's adaptation of the cable carriage requirements to new digital technology. The Commission should therefore take appropriate action to ensure that cable operators pass through program-related material in the digital regime in a nondiscriminatory manner.

As MSTV explained in its comments in this proceeding, digital modes of transmission are different from analog. Delivery of digital services to a consumer requires an association or linking of the corresponding elements.[11] Digital transmission relies on the caching capabilities of receivers to transmit information at times when bandwidth use is low, to be assembled and called up later, when bandwidth traffic may be too high to allow for simultaneous transmission of the material with the programming it supports. In the *Analog MO&O*, the Commission applied the *WGN* factors narrowly to determine that an advanced analog EPG that relies on technology that is in some respects similar to digital, in that it involves transmitting programming information at various times to be assembled later and incorporated into an updated EPG, could not be program-related.[12] This decision illustrates how a rigid interpretation of *WGN*, a copyright-based standard that relies on content determinations, exacerbates the defects inherent in the standard. It demonstrates why its application in the digital context would mean that the inventive and beneficial services enabled by digital technology, such as news targeted to specific communities or geographic regions, might never become a reality. Such services are as related to a news program on the main channel as WGN's teletext was related to its news broadcast; however, the Commission's interpretation of *WGN* in the *Analog MO&O*

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[11] *See* MSTV Comments at 38.

[12] *See Analog MO&O*.

suggests that it would not find any of these services transmitted using packet-based digital technology to be program-related. The Commission's application of *WGN* in the *Analog MO&O* highlights how extending the standard to digital would hinder the growth of innovative new digital services before they have even had a chance to get off the ground.

II. THE COMMUNICATIONS ACT DOES NOT SUPPORT APPLICATION OF *WGN* TO DIGITAL

Congress recognized in adopting the must carry requirements that changes in technology would necessitate corresponding alterations to implementing regulations. It therefore directed the Commission not only to adopt rules to enforce the must carry requirement, but also to adapt the regulations as needed to accommodate digital technology. Importing the *WGN* standard to the digital realm unchanged would represent a failure by the Commission to take into account the differences in digital technologies.

Use of the *WGN* factors to determine the program-relatedness of material in the analog or digital contexts is not mandated or even suggested by the statute. In the 1992 Cable Act, Congress directed the FCC to adopt rules implementing the statutory content-to-be-carried requirement, and the Commission decided that *WGN* was the appropriate standard for determining program-relatedness in the analog context.[13] The *WGN* standard is copyright-based, and the Commission relied on it in an effort to ensure that its program-related standard would be consistent with copyright law. The Commission itself was uncertain about how to define

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[13] *See In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues; Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates; Request by TV 14, Inc. to Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market*, Report and Order, 8 FCC Rcd 2965, 2986 (1993) ("*Analog Must Carry Order*"); *see also In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723, 6734 (1994) ("*Analog Must Carry MO&O*").

"program-related" and whether to import the court-created *WGN* copyright test into the must carry context, stating that because "[c]arriage of information on a stations's [sic] VBI is rapidly evolving . . . we believe no hard and fast definition can now be developed."[14] On reconsideration, the Commission clarified that the *WGN* factors are not the exclusive test for determining program-relatedness and found that Nielsen codes are entitled to mandatory carriage without relying on the three *WGN* prongs.[15]

Adoption of the *WGN* standard in the analog context was not statutorily mandated. Extending that standard to the digital context would be inconsistent with the statute because, as explained above, the analog standard is too narrow to accommodate advanced digital technologies. Congress intended for the Commission to make the changes "necessary to ensure cable carriage of [digital] signals," including the program-related content of digital broadcast signals.[16] Choosing to rely on the *WGN* program-related standard in the digital context would represent a failure to follow this legislative mandate. Therefore, as MSTV explained in its comments and reply comments in this proceeding, the Commission should follow the dictates of Congress by accommodating digital technology and adopting a bright-line test that would not leave basic carriage decisions to the cable industry's discretion or require an endless stream of individual content-based decisions about particular programs.[17]

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[14] *Analog Must Carry Order*, 8 FCC Rcd at 2986.

[15] *See Analog Must Carry MO&O*, 9 FCC Rcd at 6734.

[16] 47 U.S.C. § 534(b)(4)(B).

[17] *See* MSTV Reply Comments at 41-42; MSTV Comments at 40-41.

III. ADHERENCE TO *WGN* IN THE DIGITAL CONTEXT WOULD LIMIT THE AVAILABILITY OF PORTABLE AND INTEROPERABLE NAVIGATION EQUIPMENT

Congress also directed the Commission to adopt rules that would assure the availability to consumers of independent navigation devices.[18] Navigation devices include EPGs, which consumers use to find their way through myriad programming choices.[19] But the FCC's application of *WGN* in the *Analog MO&O* allows cable operators to use their control of a bottleneck facility – the cable pipe – to prevent consumers from accessing independent EPGs by stripping out the enabling content. If *WGN* is extended to the digital context, it would mean that a cable operator could interfere with a set-top box's collection of information if, as is often the case in the digital world, program-related information is sent separately (in terms of time) from the main programming it enhances.[20] It would also mean that a cable operator could interfere with a set-top box's ability to send that information to the television receiver, thereby allowing a

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[18] *See* 47 U.S.C. § 549(a) (directing the FCC to "assure the commercial availability, to consumers . . . of . . . equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor").

[19] *See In re Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775, 14820 (1998); *see also* Comments of the Consumer Electronics Association in CSR-5528-Z at 4 ("As the Commission has previously held, EPGs are covered by the requirements of Section 629."); Comments of Thomson Consumer Electronics, Inc. in CSR 5528-Z at 11 ("The Commission has already recognized the public interest benefit in preventing MVPDs from disabling competitively-provided EPGs and related navigational services and expressed a clear commitment to promoting consumer choice by encouraging the growth in the market for electronic program guide services.").

[20] One significant benefit of the digital world is that, assuming that a receiver has memory capacity, it can use caching to store information and call it up to be assembled later. If this ability is stripped out or is effectively disabled, consumers lose one of the major advantages of digital technology.

cable operator to disable independent navigation devices or other equipment that may allow viewers to enjoy digital services in contravention of the Communications Act.

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For these reasons, MSTV urges the Commission to reject *WGN* as the standard for determining program-relatedness in digital and to define "program-related material" in the digital context as all non-subscription material that adds to, supplements, or relates to the program service of the broadcasting station.

Respectfully submitted,

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