

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 02-145
Competition in the Market for the)	
Delivery of Video Programming)	

REPLY COMMENTS OF GEMSTAR-TV GUIDE INTERNATIONAL, INC.

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SUMMARY

Gemstar –TV Guide International, Inc. (“Gemstar”), a pioneer developer and provider of electronic program guide (“EPG”) technology, equipment and services, responds to the Commission’s EPG competition questions at *Notice, para. 23*, and to certain aspects of opening comments of others. As the only provider of EPGs that are unaffiliated with multichannel video program distributors (“MVPDs”), and the only provider of EPGs to over-the-air viewers, Gemstar provides its perspective and data for the Commission’s report to Congress.

Gemstar offers its own branded EPGs directly to consumers who purchase Gemstar-capable receivers or set-top boxes. These EPGs provide viewers complete on-screen program schedule information, information about programs in progress and future programs, and the ability to access and organize programs by category and in several other ways. Customers access this information by remote control device. A data flow updates the information at least daily and is carried in the vertical blanking intervals (VBIs) of cable-retransmitted television broadcast signals. In the digital environment the data is transmitted via the PSIP within such signals. Gemstar also licenses its technology to MVPDs and others who offer their own branded guides that compete with Gemstar’s own EPGs. Gemstar-branded EPGs operate with all delivery technologies (cable, over-the-air and satellite), are advertising-supported, free to the consumer and localized to each viewer’s television market.

Strikingly, no MVPD or other opening commenter addressed EPGs beyond a perfunctory mention, and none answered the Commission’s questions on EPG competition. In fact, competition in the EPG market remains in 2002 under the threat of

anticompetitive extinction. AOL Time Warner illustrates this threat: in the past it has invaded broadcast signals transiting its systems pursuant to must carry or retransmission consent to remove Gemstar's EPG data from VBIs, and has indicated, this year, its intention to do so again in the future, including in digital. The result of this destructive behavior is to disable Gemstar's EPG and rip from consumers' television sets a service they have selected and paid for via their equipment purchases. Another result is to reduce consumers to a single EPG choice: the one owned and offered by its MVPD.

The unrestrained threat of such cable operator activity threatens competition not only in the EPG market, but in the program distribution market itself. The Commission has recognized that MVPDs can misuse their proprietary EPGs to filter and prioritize the programming listed and described in the guide, i.e., to make cable-affiliated programming more easily accessible and attractive in the cable-affiliated EPG than programming from other sources. The ability and incentive of cable operators to discriminate in this way has been prohibited by Congress and the Commission in other contexts similar to Gemstar's, such as the Commission's recent extension of program exclusivity restrictions and in its unaffiliated EPG protections from open video system MVPDs.

The Commission's report to Congress would be incomplete without inclusion of this unmitigated threat to competition in both the EPG and program markets. Action by the Commission to prohibit the disabling of EPGs unaffiliated with MVPDs is essential to competition and long overdue.

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Gemstar-TV Guide International, Inc. (“Gemstar”), a pioneer in the development and provision of electronic program guide (“EPG”) technology and services, submits these Reply Comments to provide information on EPG competition issues requested by the Commission¹ and to respond to certain initial comments by others.

I. INTRODUCTION

By making it easy for television viewers to identify, organize, select, and access the expanding universe of available video programming in a way that is helpful and convenient to them, EPGs are an important part of the video programming market. EPGs display on television screens up-to-date information about all programming that is available in that community at any given time by whatever method (cable, over-the-air or satellite) the viewer receives television service. Viewers access and interact with this EPG data by using a push-button remote control device that interacts with equipment in the television receiver or converter box.

¹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, MB Docket No. 02-145, FCC 02-178, rel. June 14, 2002 (“Notice”).

It is striking that in opening comments MVPDs say little in response to the Commission's explicit request for information on EPG competition issues. Incumbent cable operators, in fact, are silent on EPG competition issues. For example, the National Cable & Telecommunications Association ("NCTA"), the cable industry's primary trade association, mentions EPGs in its opening comments only to note that one of its members, Cablevision Systems Corporation, offers what NCTA refers to as a "click and view" on-screen programming guide to 500,000 Long Island households as part of its iO Interactive Optimum Digital platform.² Comcast Corporation states only that it provides an EPG to its customers.³ While incumbent cable operators ignore EPG competition issues, Everest Connections, a new cable overbuilder in the Kansas City metropolitan area, notes in its opening comments that, unlike the incumbent cable operators, it offers its subscribers two different EPGs.⁴

The Satellite Broadcasting and Communications Association states only that its members provide EPGs,⁵ and the largest distributor of programming by satellite, DIRECTV, Inc. comments only that it provides a single, proprietary EPG to its customers.⁶ In its review of all opening comments, Gemstar has found no other information provided in response to the Commission's EPG competition questions.

Notwithstanding the MVPDs' failure to provide information on EPG competition issues, the Commission's report to Congress should contain a full discussion of these

² NCTA Comments at 36.

³ Comcast Comments at 4 n.4.

⁴ Everest Comments at 10.

⁵ Sat. Broadcasting and Comm. Ass'n Comments at 10.

⁶ DIRECTV Comments at 8.

issues because, as we make clear below, EPG regulatory policy will help determine the extent to which the EPG market is competitive as well as whether the video programming market itself is competitive.

II. THE STATUS OF COMPETITION IN THE EPG MARKET TODAY

Gemstar first responds to questions about EPGs raised by the Commission in the *Notice*.

A. Gemstar Offers Two Electronic Programming Guides and Licenses Its EPG Technology to Unaffiliated Companies that Provide EPGs that Compete with the Gemstar EPGs

Gemstar provides two basic EPGs -- Guide Plus+ and TV Guide Interactive.

Though different in some ways, both have several important features in common:

(1) continually updated program schedule information for up to eight days (24 hours per day) for substantially all available channels, and information about programs in progress; (2) program selection for present and future viewing or recording; (3) one-button recording of in-progress and future programs or series; (4) search capability for programs by categories (such as movies, sports, or children's programming), by theme within a category (such as drama or horror), and by title; (5) detailed program information (such as ratings, closed-captioning identifiers, program synopses, and casts); (6) channel set-up capability so that viewers can arrange the order of channels by preference; and (7) a Gemstar parental guide feature providing parents the ability to block certain specific programs or channels by name or certain types of programs by ratings from being accessed by unauthorized members of the family. (For a narrated demonstration of TV Guide Interactive and a tour of Guide Plus+, see <http://www.gemstartvguide.com/footer/demos.asp>.)

Gemstar makes Guide Plus+ available to every TV viewer in America without a monthly subscription fee whether he or she subscribes to any of the MVPD services or relies on over-the-air reception. As a result, absent anticompetitive action to disable it, Guide Plus+ is available free not only to the more than 13 million households that do not subscribe to cable, satellite, MMDS or any other MVPD service,⁷ but also to the 94 million households that subscribe to MVPD service.⁸

GuidePlus+ is available to every TV viewer -- whether or not he or she subscribes to MVPD service -- because Gemstar transmits the GuidePlus data over the vertical blanking interval ("VBI") of one or more television broadcast stations in the overwhelming majority of TV markets in the country. Any consumer who has purchased a TV receiver that contains the hardware and software necessary to receive and store Guide Plus+ data can access and interact with the GuidePlus+ EPG. Gemstar has also licensed a large number of TV manufacturers -- including Thomson (RCA, Proscan), Sharp, Sony, JVC, Mitsubishi, Philips (Magnavox), Zenith, Hitachi and Matsushita (Panasonic) -- to include the necessary technology and equipment in their TV receivers, and consumers have purchased about seven million TVs that contain this technology.

Gemstar provides its second EPG, TV Guide Interactive, to MVPDs rather than to consumers. The MVPDs, in turn, market that EPG to their MVPD customers under their own brand. Gemstar typically delivers its EPG to the MVPD headend by satellite. The MVPD then uses its own network to distribute the EPG to EPG-capable set-top boxes located in the homes of its subscribers, and the MVPD provides its own customer

⁷ See AT&T Comments at 11 (stating that 13.3 million households do not subscribe to any fee-based MVPD).

⁸ See NCTA Comments at 12 (stating that nearly 72 million households subscribe to cable TV and that nearly 22.3 million households subscribe to other types of MVPD service).

support. While Gemstar provides Guide Plus+ to all TV viewers without a subscription charge, a cable operator marketing TV Guide Interactive or any other interactive EPG to its subscribers typically will make that EPG available only to the relatively small percentage of subscribers who pay for that operator's digital cable service.

In addition to providing EPGs to be marketed by MVPDs, Gemstar also broadly licenses the technology it uses to provide its EPGs to companies desiring to use this technology to develop their own EPGs. These companies have used their licenses to develop a variety of competing EPGs, including Ultimate TV (by licensee Microsoft) and AOL TV (by licensee AOL).

The *Notice* asks for information about the extent to which EPGs are supported by advertising and subscriber fees.⁹ Gemstar does not collect subscription fees from consumers who use either of its EPGs, with the sole exception of a legacy service to some 17,000 subscribers to an EPG service that had been provided by StarSight, a company acquired by Gemstar. Rather, Gemstar revenues are generated by advertising that is included in its EPGs as well as from license fees from: (i) manufacturers that incorporate Gemstar's EPG technology and functionality in consumer devices (e.g., TV receivers, VCRs and cable boxes) and (ii) MVPDs who either distribute a Gemstar EPG to their subscribers or use Gemstar technology in providing their own EPGs.¹⁰ Cable operators that provide their own branded EPGs to their cable subscribers typically include the EPG as part of the digital service package for which they charge a monthly subscription fee.

⁹ *Notice* at ¶ 23.

¹⁰ Manufacturer license fees are typically based on the number of units shipped incorporating the licensed EPG technology.

The *Notice* also asks whether EPGs are customized to provide information about the particular video programming available in the community where the EPG is used.¹¹ Gemstar's EPGs are customized for local use. Gemstar purchases programming data and MVPD channel line-up information in electronic format for each TV market. This data is then processed on a market-by-market basis and is transmitted daily to each local market. For example, Gemstar transmits EPG data for its Guide Plus+ service in a given market to the local TV broadcaster (or broadcasters) in that market who have contracted with Gemstar to place that data in their VBI. Similarly, Gemstar transmits EPG data for its TV Guide Interactive service in a given market to the headend of any cable TV system in that market which has contracted with Gemstar to provide TV Guide Interactive to its subscribers under the cable operator's brand.

B. Other EPGs Available in the Marketplace

The *Notice* asks about the number and types of EPGs offered in the marketplace.¹² Generally, EPGs are offered either in the form of passive (non-interactive) scrolling program guides, such as TV Guide Channel which is offered by many cable systems, and interactive EPGs such as those provided by Gemstar.

For viewers who rely on over-the-air broadcasts to receive television service, Gemstar's Guide Plus+ is the only EPG available. For cable subscribers, Guide Plus+ is an independent alternative to whatever EPG the cable operator provides to its subscribers.

¹¹ *Notice* at ¶ 23.

¹² *Id.*

The Commission requested information on whether there are existing or planned EPGs offered by MVPDs.¹³ Several MVPDs currently offer EPGs, including AOL/Time Warner, which compete with those offered by Gemstar. For example, TV Gateway LLC, a two-year old joint venture whose principal owners include cable operators Charter, Comcast and Cox, announced last month an improved version of its TVGateway EPG.¹⁴ Moreover, AOL, an affiliate of Time Warner, owns AOL TV (In most instances, the EPGs are built into set-top boxes which the MVPDs provide with their cable services – typically manufactured by companies such as Scientific Atlanta.). Other cable operators have expressed an interest in developing their own EPGs even though they have not yet done so.

Several companies with no affiliation with an MVPD also provide EPGs. Viewers who receive television programming via C-band satellite have access to a subscription EPG service called SuperGuide offered by SuperGuide Corporation. TiVO and Replay also provide their own EPGs, as do Microsoft (MSN TV and Microsoft IPG), Microsoft, (Ultimate TV) Scientific Atlanta (Sarah), and Pioneer (Passport).¹⁵

¹³ *Id.*

¹⁴ www.tvgw.tv/about.html; www.tvgw.tv/070902.html (news release, July 9, 2002).

¹⁵ While the *Notice* seeks information on the relationship between EPGs and ITV (*Notice* at ¶ 23), the Commission already has proposed to define ITV as “a service that supports subscriber-initiated choices or actions that are related to one or more video programming streams,” and it has held correctly that interactive EPGs of the sort that Gemstar provides fit squarely within this definition. *Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, Notice of Inquiry, 16 FCC Rcd. 1321 at ¶ 6 (2001) (“*Interactive Proceeding*”).

III. A CLEAR FCC POLICY BARRING CABLE OPERATORS FROM DISCRIMINATING AGAINST INDEPENDENT EPGs SUCH AS GEMSTAR IS NEEDED TO PROTECT COMPETITION IN BOTH THE EPG AND VIDEO PROGRAMMING MARKETS

The Commission's EPG regulatory policy will help determine the extent to which the EPG market is competitive as well as whether the video programming market itself is competitive. Each is discussed in turn.

FCC EPG regulatory policy will help determine the extent to which the EPG market is competitive because without any regulatory controls, there is a serious risk that incumbent cable TV operators will act to remove competition in the EPG market given that they have both the ability and incentive to do so. Incumbent cable operators have the ability to harm EPG competition due to their continued dominance in the multi-channel video distribution market.¹⁶ Cable operators have the incentive to harm EPG competition as they increasingly are developing their own EPGs, and because, as the Commission has already recognized, control of an EPG includes the power to "filter and prioritize" the programming to which the EPG guides the consumer. These same factors -- the cable industry's dominance in the multi-channel video distribution market and its active involvement in a content market -- led the Commission just this summer to reject the cable industry's proposal to repeal a longstanding rule designed to protect competition in the video programming content market.¹⁷ In the present case, it is the cable industry's

¹⁶ NCTA states that the cable TV industry now has 76 percent of the multi-channel video distribution market. NCTA Comments at 2. This is nearly identical to the industry's 78 percent market share one year ago, which the FCC found two months ago was sufficiently large to give the cable industry market power in the video distribution market. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 25 Rad. Reg. (P&F) 818 at ¶ 5 (2002).

¹⁷ *Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act*, CS Docket No. 01-290, FCC 02-176, Report and Order at ¶¶ 18, 33 (rel. June 28, 2002). There, the Commission concluded that video programmers affiliated with incumbent cable operators "retain the incentive and the ability to favor their cable affiliates over . . . other competitive

dominance in the multi-channel video distribution market and its growing participation in another content-related market – the EPG market – that justifies adoption of a Commission policy designed to protect competition in that market as well. Cable operators should no more be permitted to provide only their own video programming than they should be allowed to control the only electronic program guides available to their cable subscribers.

The Commission recognizes the importance of assuring that MVPD subscribers have access to a full complement of EPGs from more than one source, and as a result, it has requested comment in the ITV Proceeding on whether rules are necessary to prevent discrimination by an incumbent cable operator against EPGs and other ITV services that compete with those in which the cable operator has an ownership interest.¹⁸ In response to the Commission's inquiry, Gemstar filed comments urging the agency to adopt a policy barring discrimination to ensure that consumers have access to EPGs in which incumbent cable operators have no financial interest.¹⁹

Although cable operators were silent in their opening comments in this proceeding with respect to their intentions to discriminate against competing EPGs in the absence of a Commission policy barring such discrimination, elsewhere they have been less timid. Time Warner has informed the Commission that it reserves the right to discriminate against Gemstar's EPGs and, by implication, all other EPGs in which Time

MPVDs to such a degree that, in the absence of the prohibition [on discrimination], competition and diversity in the distribution of video programming would not be preserved and protected." *Id.* at ¶3.

¹⁸ *Interactive Proceeding, supra* n.15.

¹⁹ Gemstar Comments in Interactive Proceeding (March 19, 2001); Gemstar Reply Comments (May 11, 2001).

Warner lacks a financial interest as well.²⁰ Cablevision likewise has insisted that the FCC give it complete control over “the selection of [EPGs and other] ITV content . . . provided over [its] network[]” and has informed the agency that it must be permitted to limit EPG and other ITV services on its systems to those developed by its own “technology, content and applications partners.”²¹

Such cable operator insistence on reserving the right to discriminate against competing EPGs is not a mere theoretical demand; Gemstar has firsthand experience with actual EPG discrimination. Although its Guide Plus+ EPG is transmitted over the VBI of one or more local TV broadcast stations already carried by the cable system in a given market, Time Warner has in the past actually stripped the Gemstar EPG from the local TV signals that contain it. Time Warner also has threatened to reinstate that extreme form of discrimination, which disables the EPG and the equipment the consumer has bought in order to receive it.²² In order to be complete, the Commission’s Report to Congress must contain this information since it shows the unabated potential to stifle competition in the EPG market and indeed, to eliminate the very availability of any independent EPG to cable subscribers.

Any policy that permits incumbent cable operators to strip Guide Plus+ from their cable systems eliminates competition in the short term. Competition in the short term is eliminated if Guide Plus+ is stripped from cable systems since such stripping precludes cable subscribers from accessing any EPG other than the one that their cable operator provides. Guide Plus+ is the only EPG available to the overwhelming majority of cable

²⁰ Reply of Time Warner to Comments on Time Warner Petition, C.S.R. 56698-Z.

²¹ Comments of Cablevision Systems Corp., CS Docket No. 01-7 at 11, 13 (March 19, 2001).

²² See *Ex Parte* filing of AOL/Time Warner in CS Docket No. 98-120 (April 26, 2002).

TV subscribers other than the one provided by the cable operator. A policy that permits incumbent cable operators to strip Guide Plus+ from their cable systems also frustrates EPG competition in the long term by sending a message to cable operators that the Commission will acquiesce to of discrimination against competing EPGs. Consumers also will not want to buy equipment when the services it delivers are subject to elimination by competing providers (see below).

Besides threatening EPG competition, a Commission policy that permits cable operators to strip Guide Plus+ from the VBIs of the local TV stations that carry Guide Plus+ also hurts consumers in other ways. For example, such stripping precludes a majority of the cable system's subscribers from accessing any interactive EPG at all because, as indicated above, a cable operator typically provides its own branded interactive EPG only to the small minority of cable subscribers that can afford or who choose to subscribe to its digital cable service. Stripping Guide Plus+ from a cable system also hurts consumers by destroying the hardware and software investment that many of them have made. As indicated above, consumers have purchased about seven million television receivers containing the special hardware and software necessary to access and use Guide Plus+. When a cable operator blocks Guide Plus+ from its system, that investment becomes worthless as a practical matter to a consumer who has made the investment but subscribes to cable TV service.

Commission prohibition of interference with unaffiliated EPGs not only will help determine the extent to which the EPG market is competitive, it also will help determine whether the video programming market itself is fully competitive. Given the cable industry's market power in the multi-channel video distribution market and the Commission's recent finding that the cable industry has an ownership interest in a

substantial portion of the most popular video programming, cable operators have an undeniable incentive to develop EPGs that “filter and prioritize”²³ programming choices in a way that discriminates in favor of cable-affiliated programs and against programs from other sources. Such discrimination inevitably harms competition in the video programming market by unfairly boosting viewership of programming in which cable operators have a financial interest.

Congress has recognized the risk that MVPDs could use an EPG in which they have a financial interest to harm competition in the video programming market in this manner. As a result, when it amended the Cable Communications Policy Act in 1996 to add a regulatory structure for a new form of MVPD that it hoped would develop – the open video system (“OVS”) -- it included a provision that instructed the FCC to prohibit OVS operators from using their EPG to discriminate in favor of the OVS operator’s programming and against that of any other party desiring to distribute programming over the OVS operator’s system:

“The [FCC] shall prohibit an operator of an open video system from unreasonably discriminating in favor of the operator or its affiliates with regard to material or information ...provided by the operator to subscribers for the purposes of selecting programming on the open video system.”²⁴

²³ See *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120, Notice of Proposed Rulemaking, 13 FCC Rcd. 15092, 15129 (1998).

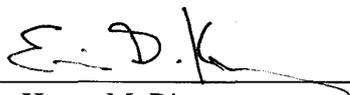
²⁴ 47 U.S.C. § 573(b)(1)(E)(i).

CONCLUSION

EPGs provide consumers with an easy and helpful method of organizing, selecting, and accessing video programming available over-the-air and from MVPDs. EPGs developed by Gemstar exemplify communications services whose development the Communications Act is designed to spur. However, Gemstar urges the Commission to adopt a simple policy that prohibits incumbent cable operators from discriminating against any EPG in which they have no financial interest. A policy of this sort is necessary in order to protect competition in both the EPG and video programming markets. There is competition in the EPG market now, but it is under threat of anticompetitive elimination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Shelia A. Wright, a secretary in the law firm of Shook, Hardy & Bacon, LLP, do hereby certify that I have on this 30th day of August 2002, caused to be mailed by first class mail, postage prepaid, copies of the foregoing Reply Comments by Gemstar-TV Guide International, Inc. to the following:

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