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August 27, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Submission in CS Docket Nos. 98-120, 00-96 & 00-2

Dear Ms. Dortch:

Leading up to the Commission's decision on the important issues at stake in these proceedings, there is the risk that in the prominence given to the "primary video" dispute, the determination of what constitutes "program-related material" in the *digital* context will be given short shrift.

The Commission's decision on the question of *analog* carriage of electronic program guides and the ensuing pleadings and meetings demonstrated that the WGN test historically used to define "program-related," at least as interpreted by the Commission in the Time Warner case (CSR 5528-Z and CSR 5698-Z), has not kept up with analog, let alone digital, technology. Accordingly, in connection with that proceeding Gemstar was asked to suggest a more appropriate definition of "program-related." Gemstar provided that definition in its March 19, 2002 *ex parte* filing in CSR 5528-Z and CSR 5698-Z, which it also copied to the DTV must carry proceeding for inclusion in the record. A copy of Gemstar's March 19 *ex parte* filing is attached.

Gemstar's March 19 submission provides a specific flexible proposal suitable for the dynamic context of digital television. As explained in more detail on pages 9-12 of the attachment, the Commission should adopt a functional approach for determining what is program-related. In particular, it should classify as "program-related" material that is delivered for free in the broadcast signal that enhances: (1) viewer access to programming; (2) viewer awareness of programming schedules, including allowing comparisons among all available programming; and (3) viewer understanding and enjoyment of programming (including through interactive enhancements). Such a flexible, case-based approach to determining what counts as "program-related" will enhance competition, thereby serving Congress's intent to preserve free,

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over-the-air television and permitting the public to have access to the benefits of digital technology.

Please direct any questions to the undersigned.

Respectfully submitted,

Jonathan D. Blake and Ellen P. Goodman

Counsel to Gemstar-TV Guide International, Inc.

Attachment

cc: Chairman Michael C. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Ms. Susan M. Eid
Ms. Stacy Robinson
Ms. Alexis Johns
Ms. Catherine C. Bohigian
Mr. W. Kenneth Ferree
Mr. Rick Chessen

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March 19, 2002

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002

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

***Ex Parte* Communication**

Dear Mr. Caton:

Gemstar-TV Guide International, Inc. ("Gemstar"), recently completed a round of helpful and informative *ex parte* visits with the office of each of the Commissioners and the Media Bureau about its Petition for Reconsideration of the Commission's *Memorandum Opinion & Order* ruling that cable companies could strip program guide information out of the vertical blanking interval ("VBI") of broadcast signals.[1]

During our visits, we found considerable appreciation for the following points:

(1) the *TW* Decision deals a powerful blow to any free, competitive electronic program guide ("EPG") service;

(2) an EPG enriches consumer welfare and enhances viewers' experience;

(3) the demise of independent EPG service would be anti-competition, as well as anti-consumer and anti-innovation;

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[1] *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 and CSR 5698-Z, 16 FCC Rcd 21531 (2001) ("*TW* Decision").

(4) the amount of cable capacity used by carriage of the EPG service in the vertical blanking interval ("VBI") is miniscule (.008% of a single channel) and, moreover, cable systems have no use for the VBI capacity and would have to go to considerable expense and burden to strip it;

(5) marketplace negotiations between broadcasters/Gemstar and cable companies won't resolve the carriage issue because of cable's bottleneck power and anti-competitive incentives;

(6) the interpretation of what is "program-related" in the *TW* Decision, particularly the insistence that the material carried in the VBI relate only to the program on that channel at that time, is unduly constricting, contrary to a common-sense understanding of what "program-related" means, and thwarts consumer-friendly technological advances;

(7) the *WGN* case, to which the Commission in 1993 turned for guidance in defining "program-related,"[2] does not require or even support the result in the *TW* Decision; and

(8) the *TW* Decision could well have come out the other way had broadcasters transmitted program guide material in each program all day, resulting in an inefficient use of spectrum and an unfriendly consumer interface.

Our visits with the Commissioners and the Media Bureau also yielded requests that we focus additional attention on the proper interpretation of the statutory standard, "program-related." Specifically, we were asked to address: (1) the implications of advertising support for a VBI-based EPG; (2) whether or not the statute extends cable carriage protection to program-related material distributed by broadcasters in partnership with third parties like Gemstar; and (3) the degree of relationship the statute requires between the program-related material and the programming that is being transmitted at the same time in the same signal. Section I below addresses these questions of statutory interpretation. We were also asked to be more explicit about how the Commission should implement the statutory conception of program-relatedness if, as we urge, it were to abandon the *WGN* concept. Section II addresses this question.

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[2] WGN Continental Broadcasting Co. (*WGN*) v. United Video Inc., 693 F.2d 622 (7th Cir. 1982); *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*").

I. The Meaning of the Statute

Implications of advertising support for a VBI-based EPG. Section 614(b)(3)(A) of the Communications Act, as amended, requires cable operators to carry "in its entirety . . . the primary video, accompanying audio, and line 21 closed caption transmission . . . and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers" of qualified local commercial stations. See 47 U.S.C. § 534(b)(3)(A); 47 C.F.R. § 76.62(e). It is within cable operators' discretion to transmit "other material in the vertical blanking interval or other nonprogram-related material (including teletext and other subscription and advertiser-supported information services)." 47 U.S.C. § 534(b)(3).[3]

It is undisputed that it is technically feasible for cable operators to transmit the broadcast EPG. Assuming for the moment that the EPG is program-related material, the question is whether the fact that it contains advertisements disqualifies the EPG for mandatory cable carriage under the statute. There is no reasonable interpretation of the statute that would yield such a result. The statute addresses in the first instance cable operators' obligations with respect to material carried in the VBI and on subcarriers (in addition to the primary video and accompanying audio). The statute goes on to say, in effect, that what it did not expressly identify as being subject to mandatory carriage is not entitled to mandatory carriage. Specifically, "other material" in the VBI as well as "other nonprogram-related material" (presumably carried either in the VBI or on subcarriers) is not entitled to mandatory carriage. The parenthetical in the statute specifies "advertiser-supported information services" only as a type of "nonprogram-related material," not as a limitation on material that *is* program-related. Had Congress meant to limit cable's carriage obligations to program-related material that was non-commercial or

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[3] Since the FCC broadly defined teletext in 1983 as "a data system for the transmission of textual and graphic information intended for display on viewing screens," teletext may be either program-related or non-program related. *See In re Amendment of Parts 2, 73 and 76 of the Commissions Rules to Authorize the Transmission of Teletext by TV Stations*, BC Docket No. 81-741, RM-3727, RM-3876, 53 RR 2d 1309, at ¶ 44 (1983) (clarifying that "teletext data may be related to or associated with a station's normal programming or it may address subjects wholly unrelated to broadcast programs or activities").

otherwise ad-free, it surely could have done so.[4] It did not. The only statutory limitations on the requirement that cable carry program-related material concern the mode of transmission (in the VBI or on subcarriers), not the revenue model.[5] The Commission's orders implementing the statutory provision never suggested that advertiser support would disqualify program-related material from carriage and, in giving such credence to the *WGN* case (in which the program-related teletext would contain local commercials), it implicitly endorsed the inclusion of advertiser-supported material in the concept of program-relatedness.

Implications of Gemstar's participation in the provision of the EPG. The EPG consists of information that is provided for the most part by the broadcasters themselves, including program schedules and descriptions. Gemstar aggregates this data for more than 25,000 local zip codes, provides the software at the station for insertion of the data into the VBI, and provides the intelligence in the receiver for EPG display. The broadcaster and Gemstar thus provide the EPG in partnership with each other and with receiver manufacturers. One Commissioner has asked whether Gemstar's involvement in the development of the EPG information disqualifies the EPG from mandatory cable carriage. There is absolutely nothing in the statute to suggest that this is the case. When the meaning of a statute is plain on its face – in this case requiring carriage of program-related material no matter who is involved in the development of the material – there is no need to resort to its legislative history for interpretive guidance.[6]

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[4] That Congress knows how to delimit powers with express language is a truism of statutory construction. *See, e.g.*, Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1, 19 (1974) (observing "the truism that Congress knows how to deprive a court of broad equitable power when it chooses so to do").

[5] Considering that broadcast programming is advertiser-supported, it is natural that program-related material is supported through the same means. It would have been rather strange for Congress to require broadcasters seeking carriage for their program-related material to cast about for a different financial model. Presumably, had Congress intended to take that step, it would have done so expressly or at least with some comment in the legislative history.

[6] *See, e.g.*, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1998) (When statutory language is clear, a court and an agency "must give effect to the unambiguously expressed intent of Congress.").

Nevertheless, in the absence of any statutory language to support its claim that "Congress did not intend to extend the right to demand use of cable VBIs to non-broadcaster third parties," Time Warner Cable turns to and misconstrues the legislative history.[7] The House Report states that the Committee does not intend to require carriage of "secondary uses of the broadcast transmission, including the lease or sale of time . . . for the creation or distribution of material by persons or entities other than the broadcast licensee."[8] The uses which are thus excluded from mandatory carriage – a category which may include services provided by third parties – are "secondary uses." The term "secondary uses" is best understood in the context of the types of services broadcasters were transmitting at the time. When the Cable Act was passed in 1992, the FCC had maintained for seven years rules allowing broadcasters to lease the VBI for "elective, subsidiary activit[ies]" such as "ancillary . . . telecommunications service[s]."[9] These rules were modeled in turn on similar provisions that allowed FM broadcasters to lease their subcarrier capacity to third parties for services like Muzak or data transmissions. In these arrangements, third parties used the extra capacity not needed for the station's broadcast programming to provide services to their own customers on a closed, subscription basis. These subsidiary or secondary uses, which were not even broadcast services, generally were not program-related. Rather, they were akin to the category of "ancillary or supplementary" services that Congress later identified in the digital television context as falling outside the must-carry

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[7] *See* Time Warner Cable Opposition to Petition for Reconsideration, CSR-5698-Z (Jan. 23, 2002) at 7-8 ("Time Warner Cable Opposition"); *see also,* Time Warner Cable Petition, CSR-5698-Z, at 7-8.

[8] 102 H.R. Rep. No. 628 at 93 (1992).

[9] 47 C.F.R. § 73.646(b). These services included "teletext, paging, computer software and bulk data distribution, and aural messages." In 1983, the Commission adopted a very broad definition of teletext ("a data system for the transmission of textual and graphic information intended for display on viewing screens"). In doing so, it acknowledged that teletext services might or might not be related to a station's programming. *See supra* note 3. In 1993, when it adopted the *WGN* guidance, the Commission appears to have reaffirmed this determination that some teletext could be program-related. Accordingly, a service may be program-related even if it belongs to a category of services that is usually "secondary," "subsidiary," or "ancillary." It does not follow, of course, that all services that belong to a category of "secondary," "subsidiary," or "ancillary" services are nonprogram-related.

framework.[10] Ancillary or supplementary services on the digital signal include "computer software distribution, data transmissions, teletext, interactive materials, aural messages, paging services, audio signals, [and] subscription video."[11] Whether denominated "secondary," "subsidiary," or "ancillary or supplementary," the services referred to in the House Report are services that are freestanding and independent of the broadcaster's main programming service. An EPG cannot under any reasonable view be deemed independent of a broadcaster's main programming service such that it might be deemed a "secondary use."

Gemstar's involvement in the EPG service does not alter this conclusion and convert the EPG into a "secondary use." The House Report's reference to services created by and distributed for entities "other than" a broadcaster is an elaboration of one type of "secondary use." Third parties create much of broadcasters' regular programming and advertising, and no one would suggest that this disqualifies the programming and advertising from mandatory carriage. Of course, the closed captioning and Nielsen program identification codes that must be carried are provided by third parties. In fact, as Judge Posner noted in *WGN*, cable operators are not permitted to strip out advertisements from broadcasters' programming.[12] The EPG is created from broadcasters' own information, wholly unlike software or bulk data. It simply cannot be the case, as the Commission itself has previously recognized, that any third party involvement in developing program-related material disqualifies the material from mandatory cable carriage.[13] As with advertiser-supported material discussed above, the threshold question for determining whether or not material that is developed in conjunction with a third party is entitled to carriage is whether or not it is program-related.

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[10] 47 U.S.C. § 336(b)(3) ("no ancillary or supplementary service shall have any rights to carriage").

[11] 47 C.F.R. § 73.624(c).

[12] *WGN*, 693 F.2d at 624-25.

[13] *See In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, Memorandum Opinion & Order, MM Docket No. 92-259, 9 FCC Rcd 6723, 6734 (1994) ("*Analog Must Carry Reconsideration*") ("[I]t is not necessary that the copyright holder in the main program and in the material in the VBI be the same.").

The degree of relationship between the program-related material and the program. One concern expressed in our Commission meetings was whether an EPG is rendered a "secondary use", or otherwise not program-related, because it relates to all television programming, not just to the transmitting broadcaster's programming or the very program in which the EPG information is transmitted. This is a question that has been made central to the understanding of program-relatedness, not by Congress, but by the Commission. If asked whether an EPG that is devoted exclusively to information about television programming is program-related, the person on the street would almost certainly answer yes. Nothing in the statute suggests that Congress had something different in mind than would the average television viewer.

Time Warner Cable persists in arguing that Congress conceived of program-related material extremely narrowly. To support this contention, Time Warner relies solely on House Report language qualifying cable carriage obligations with respect *only* to noncommercial station licensees for reasons that are peculiar to public television's mission and function. Section 615(g)(1) of the Communications Act, as amended, requires cable operators to carry "in its entirety . . . the primary video, accompanying audio, and line 21 closed caption transmission . . . and, to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers, [of qualified noncommercial stations] *that may be necessary for receipt of programming by handicapped persons or for educational or language purposes*." *See* 47 U.S.C. § 535(g)(1); 47 C.F.R. § 76.62(f) (emphasis added). It is the italicized clause that distinguishes the noncommercial carriage provision from the commercial carriage provision. It is thus for the purpose of serving persons with disabilities and language minorities or for educational purposes that the program-related material of noncommercial stations is entitled to carriage – a purpose that is nowhere to be found in the commercial station carriage provisions.

The House Report refers four times to the noncommercial station mission of serving persons with disabilities and language minorities.[14] It notes that "[p]ublic television stations have pioneered the use of broadcast spectrum to . . . serve the special needs of vision-or hearing-impaired viewers [by using the aural subcarrier] . . . [and] PBS serves non-English

[14] 102 H.R. Rep. No. 628 at 101 (1992).

speaking audiences [by using the subcarrier and the VBI]." It exhorts that "[m]inority and physically challenged viewers should not lose these valuable services simply because they rely on cable to gain access to public television programming." While cable operators would not normally be required to "discontinue other uses of the [VBI] or subcarriers in order to retransmit material", such retransmission may be required in the case of "programming provided for handicapped persons or educational or foreign language material." In order to fulfill the service mission of public broadcasting, the House Report stipulates that "[p]rogram-related material [for noncommercial stations] is meant to include integral matter such as subtitles for hearing-impaired viewers and simultaneous translations into another language." It is only after stressing the importance of service to minority and handicapped audiences that the House Report limits – and only in the case of noncommercial stations – the definition of program-related to exclude "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." In context, the limitation can be understood to circumscribe cable's obligations to transmit material that might otherwise be deemed program-related, but is not closely enough associated with service to minorities and handicapped audiences to qualify as program-related under the noncommercial provision. Thus, Congress distinguished subtitles and simultaneous translations from reading lists and game scores only with respect to noncommercial licensees, based on the distinct mission of those licensees.

Time Warner Cable takes the phrase "not meant to include tangentially related matter" out of context to suggest that Congress intended with these words to limit the definition of "program-related" as applied to commercial licensees.[15] However, the phrase about

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[15] Time Warner Cable Opposition at 8. In footnote 3, Time Warner attempts to save its tortured reading of the legislative history by arguing that since both Sections 614 and 615 use the term "program-related", that the legislative history concerning Section 615 applies with equal force to Section 614. Perhaps this would be true if the statutory provisions containing the term "program-related" were identical. But they are not. "The fact that two statutory provisions contain similar or identical language does not mean that they are necessarily subject to the same interpretation, as there are other factors such as the purpose and context of the legislation, its legislative history, etc." Norman J. Singer, 2A Sutherland Statutory Construction, § 46:05, at 176-77 (rev. 2000). The noncommercial provision (Section 615) qualifies the term "program-related" in a way that the commercial provision (Section 614) does not. It is to this qualification that the legislative history relates. Thus, the different meaning that Congress intended to give to (continued...)

tangentially related matter must be read in conjunction with the preceding sentence which defines "integral matter" with reference to "subtitles . . . and simultaneous translations" – material that is peculiar to the mission of public broadcasting and to the purpose for which noncommercial stations' program-related material is entitled to cable carriage.

In short, there is no basis in the statute for disallowing the common-sense interpretation of "program-related" to included *bona fide* program guides or for limiting the definition of program-related in the context of commercial stations, as did the *TW* Decision, to material related exclusively to the program in the transmitting signal.[16] Judge Posner, in *WGN*, was not interpreting the Cable Act, which was enacted a decade later. But even if he had been, WGN's teletext service included information about future programming that was not transmitted simultaneously with the VBI.[17] In addition, the Seventh Circuit had before it evidence that WGN's service would include information that had little or nothing to do with any programming transmitted by WGN either contemporaneously or in the future, such as "instant updates or developments in major league baseball" as well as supplemental commercial information such as "local Ford dealership locations."[18]

II. A Better Implementation of the Statute

"Related" is a word that generally is construed very broadly. Webster's II New Collegiate Dictionary defines "related" simply as "connected" or "associated." Given the lack of precision in the statute, it is up to the Commission to define what constitutes a connection or association with a broadcaster's program in light of the objectives of the must carry statute.[19]

"program-related" in Section 615 illustrates that "it is possible to interpret an imprecise term differently in two separate sections of a statute which have different purposes." *Id.*, § 46:06, at 194.

[16] *TW* Decision at ¶15.

[17] *See WGN*, 693 F.2d at 627.

[18] Brief for Plaintiffs-Appellants, WGN Continental Broadcasting Co. v. United Video, Inc., No. 81-2687, at 4 (7th Cir. Jan. 26, 1982).

[19] The must carry provisions of the Cable Act of 1992 were meant specifically to preserve free, over-the-air broadcast television and to protect viewers who rely on it. *See infra* note 27 and accompanying text. Allowing cable operators to strip EPG material will result in EPGs migrating exclusively to subscription services, leaving over-the-air viewers without an EPG (continued...)

Below, we suggest how this term can most sensibly be understood. The Commission wisely decided when it first addressed the meaning of "program-related" that it would allow the definition to evolve with changing conditions.[20] In doing so, it implicitly recognized that being program-related is not an immutable characteristic that can be identified once and for all, but a quality that depends on technology, viewing habits, and program developments. When the Commission looked to the *WGN* test for help in determining what material it would consider program-related, it stressed that *WGN* was only "guidance," was not "the exclusive basis for determining program-relatedness," and must evolve with changing conditions.[21] In addition, the Commission said that other material that did not meet the three *WGN* factors could still be considered program-related.[22] Gemstar consistently contended that the *WGN* test – as the Commission stated it would be applied – was sufficiently flexible to accommodate new types of program-related content and technologies (like the EPG).[23] Now, in light of an actual application of *WGN*, and in response to inquiries during our recent Commission meetings, we propose a new definition of program-related.

The Commission should do two things in adopting a definition of program-related. First, it should focus not on the broadcast material's form, but on how the material functions. Specifically, it should ask whether the material serves to support the consumer in viewing the television service, or takes the viewer into another (ancillary, secondary, or subsidiary) service. This kind of definition has the benefit of working for both analog and digital transmissions and it is capable of supporting different kinds of material, using different technical

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choice and subverting the goals of the Act. *See* Opposition of Gemstar-TV Guide International, Inc., CSR 5698-Z, at 30-37 (filed June 18, 2001) (explaining how mandatory cable carriage of independent EPG material furthers goals of Cable Act) ("Gemstar Opposition"); Petition for Reconsideration of Gemstar-TV Guide International, Inc., CSR 5528-Z & CSR 5698-Z, at 9-10 (filed Jan. 7, 2002) (same).

[20] *Analog Must Carry Reconsideration*, 9 FCC Rcd at 6734.

[21] *Id.*

[22] *Id.* ("We believe there will be instances where material that does not fit squarely within the factors set for in *WGN* will be program-related under the statute.").

[23] *See, e.g.*, Gemstar Opposition at 15-22.

arrangements, over time.[24] Second, the Commission should ensure that its function-based definition of program-related is consistent with the objectives of the must-carry provisions of the Cable Act in that it serves to preserve free, over-the-air television as a competitive alternative to cable.

Gemstar has identified three categories of material delivered for free in the broadcast signal that should be deemed program-related because of the way in which the material functions, without regard to whether it is transmitted in a particular channel at a particular time. This is material that (1) enhances viewer access to programming; (2) enhances viewer awareness of programming schedules, including allowing comparisons among all available programming; and (3) enhances viewer understanding and enjoyment of programming (including through interactive enhancements).[25] The Commission should not be afraid of using definitions that are general and flexible rather than ones that are narrow and obsolete soon after the rulemaking process is completed. Likewise, the Commission should not be afraid that a more general definition will provide limitless opportunities for broadcasters to intrude on cable's capacity. As an initial matter, the Commission can and should elaborate a general definition through actual cases, as it initially intended. This common law development of the "program-related" concept is most compatible with a rapidly evolving technical environment. Moreover, no matter how program-related is defined, the VBI will never be more than a flea on the back of the cable system.[26] While the risk to cable operators from a broad definition of "program-related" is quite

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[24] Analog VBI technology has evolved from the inefficient simultaneity of teletext 20 years ago (the technology on which *WGN* was based) to a "bursty," digital-like, memory-intensive and spectrum-efficient technology that makes Gemstar's *Guide Plus+* EPG possible. Therefore, the determination of what principles for determining "program-related" should replace the outmoded *WGN* test in the context of modern-day analog technology is likely to be the same as or to closely resemble the test adopted in the digital carriage proceeding. *See* Gemstar Opposition at 9-11; Supplement to Comments of Gemstar-TV Guide International, Inc., CS Docket Nos. 98-120, 00-96, 00-2, at 2-4 (Jan. 25, 2002) ("Gemstar Supplemental Digital Comments").

[25] *See* Gemstar Supplemental Digital Comments at 9-10 (summarizing arguments in comments and reply comments for considering certain categories of digital material to be program-related).

[26] If the Commission were concerned that a function-based definition in the digital context would present too much of a threat to cable operators' capacity (because there is no VBI to provide an absolute limit on what must be carried), then the Commission could utilize the same function-based definition as in the analog context but with a capacity cap to limit cable operators' exposure.

small, the risk to the public served by broadcasters from a narrow definition is great because it means that cable is free to prevent broadcasters from enhancing their service when service enhancements are the key to survival in the video marketplace.

To the extent that the new definition of program-related material would allow broadcasters' program guides, interactive television triggers, and informational and educational program enhancements to reach cable viewers, the definition would be consistent with the purpose of the mandatory carriage provisions of the Cable Act. Congress intended for the Act's mandatory carriage provisions to preserve free, over-the-air broadcast television.[27] "Specifically, Congress has concluded that [must-carry] regulation is needed to ensure a competitive balance between cable systems and broadcast stations."[28] It is clear that broadcasters will be at a competitive disadvantage, especially in a digital environment, without the ability to provide their own EPGs and other program enhancements. A definition of program-related material that does not permit broadcasters to offer the same or similar types of services offered by vertically integrated cable operators would be contrary to the basic purpose of the Cable Act's mandatory carriage provisions.

* * *

In sum, neither advertiser support for an independent EPG nor the fact that it is developed as a collaboration between broadcasters and a third party disqualifies the EPG from entitlement to mandatory cable carriage. As for the Commission's overly narrow interpretation of program-related material, the Commission should reconsider its application of the *WGN* test to EPG material in light of its own pronouncements about flexibly applying the test as well as in light of what the *WGN* court itself considered to be program-related. Alternatively, the Commission should adopt a new definition of "program-related" for both the analog and digital

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[27] *See In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, Notice of Proposed Rulemaking, MM Docket No. 92-259, 7 FCC Rcd 8055, 8056 (1992) ("[T]he 1992 Act and its legislative history evidence Congress' conclusion that there is a substantial governmental interest in ensuring that cable subscribers have access to local commercial and noncommercial broadcast stations. Further, the 1992 Act and its legislative history indicate that Congress has determined that the must-carry and channel positioning provisions of the 1992 Act are needed to protect the system of free, over-the-air television broadcasting and to promote competition in local markets.").

[28] *Id.*

contexts that elevates function over form so that broadcasters have the incentive to innovate and the ability to compete with cable in bringing enhanced program-related services, including EPGs, to viewers. If the Commission is unwilling to take these steps in reversing the *TW* Decision, it should at least vacate that decision and consider taking these steps in the context of the digital proceeding in which these issues have been briefed in their fullest scope.

Please direct any questions to the undersigned.

Sincerely,

Ellen P. Goodman /HZ

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cc: Docket Nos. CS 98-120, CS 00-96, CS-00-2
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