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1117 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
Tel: (202) 562-6000
Fax: (202) 562-6291
WWW.CVB.COM

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 7, 2002

BY HAND DELIVERY

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

Dear Chairman Powell and Commissioners:

Gemstar-TV Guide International, Inc. ("Gemstar"), recently completed a round of helpful and informative *ex parte* visits with the offices of each of the Commissioners and with the General Counsel concerning inclusion of electronic program guides ("EPGs") in the definition of "program-related" material that is entitled to carriage by cable systems under the 1992 Cable Act and the Commission's rules in the digital context. In those visits, we found wide appreciation of the benefits that independent digital EPGs confer on the public and of the contributions they make to a competitive marketplace and to the deployment of advanced technology to all Americans. There was also recognition that: (1) Congress gave the Commission substantial leeway to adopt a test for program-relatedness appropriate to the digital context; and (2) as the Commission intended when it adopted must carry regulations, the test for determining program-relatedness must flexibly accommodate technological advances, which digital of course is. We also encountered a number of thoughtful questions, which this letter addresses.

Question: How does digital EPG technology differ from analog EPG technology for purposes of the cable carriage issue?

Answer: In the digital world, an EPG is assembled from data transmitted to the television receiver along with a digital broadcast signal at times when bandwidth use is low, to be called up

later by the viewer and reassembled by the program guide service.¹ Transmitting information about a program at the same time the program is being viewed is not possible using digital technology because use of digital channels is fluid and data about various TV-station and cable program offerings is transmitted in "bursts" of aggregated information to maximize efficient use of digital spectrum. The bursty transmission of bits that is the hallmark of digital technology is quite different from the technology of early analog EPG systems, where information could only be transmitted in a single stream simultaneously with the underlying programming. An unduly limited interpretation of program-related for digital would stymie innovative EPGs and other program-related services that are spectrum efficient, enhance consumer welfare, and fall squarely within the intended meaning of program-related.

Question: To determine program-relatedness in digital, why shouldn't the Commission use the same test it adopted in 1993 for analog?

Answer: The short answer is that the approach the FCC adopted in 1993 supports cable carriage of Gemstar's EPG services. When Congress used the term program-related in the 1992 Cable Act, there was an existing judicial definition of that term that had been laid out in the 1982 *WGN* case. The service that that decision concluded was program-related, like Gemstar's EPG, included information about future programming and not merely about the very program in which the material was displayed. Judge Posner determined that inclusion of future program data did not preclude his finding that the service was program-related.²

In implementing the 1992 Cable Act, the Commission decided to rely on *WGN* for "guidance" in determining program-relatedness. It also said it would apply the *WGN* standard flexibly, and not as the sole test, to accommodate technological innovations and that it was not adopting a hard and fast definition of program-relatedness.³ On reconsideration, the Commission explicitly pointed out that in the *WGN* case, material relating to future programming was held to be program-related.⁴ The Commission also reaffirmed that it would follow a flexible approach and held that there would even be instances in which a service would not meet the *WGN* three-prong test but would still be considered program-related. Thus, it specifically determined that Nielsen Source Identification Codes are program-related despite failing to satisfy any of the *WGN* factors, in part because they provide important information useful to broadcasters and

¹ This is the way that closed captioning information is transmitted in the analog context today.

² See *WGN Continental Broadcasting Co. v. United Video Inc.* 693 F.2d 622, 627 (7th Cir. 1982).

³ 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) ("Carriage of information on a stations's [sic] VBI is rapidly evolving: thus, we believe no hard and fast definition can now be developed.").

⁴ See *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, 6732 (1994) ("The court accepted [information about] WGN's future programming schedules as an 'integral part of the program.'").

cable operators.⁵ Surely, in the digital context, where Gemstar's EPG data occupies an infinitesimal amount of cable capacity, a digital EPG represents the kind of innovation and evolution in technology that the original *WGN* standard was intended to accommodate and that in implementing the 1992 Act the Commission said it would accommodate.⁶ Thus, the definition of program-relatedness spelled out by the *WGN* court and adopted as guidance by the Commission in implementing Congress's mandate is not a barrier to, but rather supports, a holding that digital EPGs are program-related. Furthermore, the intent of the must carry requirement is to preserve consumer access to all free, over-the-air broadcasting. EPGs facilitate, and in the digital environment are essential to providing, viewer access to all broadcast programs in furtherance of this statutory goal. Allowing cable operators to disable an independent EPG would undermine that purpose.

Question: If Congress intended for cable operators to carry EPG services that include information about programs other than the program in which they are displayed, why didn't it use the term "programming-related material" instead of "program-related material"?

Answer: The premise of this question is that "program-related" connotes singularity, and therefore, in order to be entitled to carriage, an EPG may only display material related to the very program then being broadcast. But as demonstrated above, when Congress used the term program-related in the 1992 Cable Act, the term had been defined in the 1982 *WGN* case as expressly including information not only about the particular program in which the material was displayed, but also about future programming. Thus, the concept of program-related, on which Congress relied, did not distinguish between "program" and "programming." The Commission has likewise used "program" and "programming" interchangeably, sometimes defining an EPG as an "electronic program guide" and other times as an "electronic programming guide."⁷ Neither Congress nor the Commission has made a distinction between these two terms, and there is neither legislative mandate nor other justification to resolve digital television policy based on this distinction.

⁵ See *id.* at 6734. After the 1994 Nielsen source codes decision, the Commission did not evaluate the program-relatedness of content again until 2001, when it too restrictively applied the *WGN* factors to determine that Gemstar's advanced analog EPG was not program-related. 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, 16 FCC Rcd 21531 (2001) ("*Gemstar MO&O*"). That decision is on reconsideration.

⁶ This is especially so in light of the fact that Congress directed the Commission to adapt its carriage rules to accommodate digital technologies. See 47 U.S.C. § 534(b)(4)(B).

⁷ Compare *In re Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Second Report and Order and Second Memorandum Opinion & Order, FCC 02-230, ¶ 52 (rel. Aug. 9, 2002) (using the term "electronic program guide") and *Gemstar MO&O*, 16 FCC Rcd at 21532 (same), with *In re Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Notice of Inquiry, FCC 02-175, 17 FCC Rcd 11579, ¶¶ 23 & n.20 (rel. June 14, 2002) (using the term "electronic programming guide") and *In re Carriage of the Transmissions of Digital Television Broadcast Stations; Amendment to Part 76 of the Commission's Rules*, Notice of Proposed Rule Making, 13 FCC Rcd 15092, 15129 (1998) (same).

Question: Why is prohibiting the stripping of EPG data necessary to preserve the existence of a free, independent, over-the-air programming guide?

Answer: Unlike cable operators' proprietary EPGs, which are available to subscribers only through cable set-top boxes, Gemstar's EPG service is available for free to any viewer who purchases a Gemstar-equipped television receiver. Pass through of the enabling data over cable, however, is critical. If cable operators block that data, it will result in the unavailability of this service to *any* consumers. This is because of the following: the chip that enables access to Gemstar's EPG service is installed in receivers by manufacturers to be purchased by consumers who desire an independent EPG. If a cable operator does not carry the guide data transmitted in broadcasters' signals, the guide will not work, and consumers who purchased receivers equipped with Gemstar's guide functionality will return them to the point of purchase. When consumers return receivers, manufacturers may cease installing enabling chips in their sets *nationwide*. For example, several years ago, Time Warner began stripping Gemstar's EPG data from broadcast signals in Columbia, South Carolina. Although this action affected only a fraction of one percent of the population of the United States, some manufacturers reacted by deciding not to produce future guide-equipped models, resulting in the unavailability of any program guide to cable-ready and over-the-air customers nationwide who purchased sets from them. Still other manufacturers might have taken the same step, but Time Warner, under threat of possible FCC action, reinstated carriage of the EPG data.

Question: Why doesn't noncarriage of Gemstar's enabling data by DBS providers have the same effect as noncarriage by cable operators?

Answer: Cable consumers frequently purchase EPG-equipped sets because they often cannot receive the cable guide (especially if they have cable-ready sets). By contrast, DBS consumers always have access to a guide through the DBS provider. Therefore, they will not return sets to retailers and thereby trigger decisions by manufacturers to cease equipping sets with EPGs.

Question: Why should the Commission step in now if no cable operator is currently stripping EPG data from broadcasters' signals?

Answer: In the first place, the issue has been primed for decision, and the Commission is required to implement the Communications Act.⁸ In the second place, although no cable operators are stripping at present, Time Warner has stated on the record that it has stripped Gemstar's EPG data and indicated its intention to strip it in the future.⁹ As discussed above, all

⁸ It is well established that the Commission may adopt measures to mitigate the probability that an entity will engage in anticompetitive behavior. The FCC has long recognized that "to promote the policies of the Communications Act, [it] may plan in advance of foreseeable events instead of waiting to react to them." *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc. Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6569-70 (2001) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)).

⁹ See Letter From Marc Apfelbaum, Senior Vice President & General Counsel, Time Warner Cable, to Stephen A. Weisswasser, Executive Vice President and General Counsel, Gemstar Development Corporation, at 1 (June 15, (continued. . .)

that is required for consumers – over-the-air viewers and cable subscribers – to be denied access to an EPG is for Time Warner to begin stripping in a single market. Moreover, in the digital world, an EPG will be essential for navigating the huge number of available channels, some of which may not exist for part of the broadcast day. If Gemstar, the only provider of an independent digital EPG, is driven out of Time Warner's markets, it would result in a snowball effect. Receiver manufacturers would stop producing guide-enhanced sets. At the same time, other MSOs could follow Time Warner's lead and give preference in their proprietary guides to their own channels over those of broadcasters and other programmers. Moreover, failure of cable systems to strip EPGs in an environment where there are few digital sets in subscribers' homes and where the question of whether EPGs should be protected by a carriage obligation is pending before the FCC is hardly indicative of what cable might do if exempted from these obligations.

Failure to prohibit stripping of EPG data would also be inconsistent with the purpose of the statutory carriage requirement itself. It would leave over-the-air broadcasting behind technologically in an environment (digital) where EPGs will be vital because of the multiplicity of services and would thereby threaten the continued vitality of over-the-air broadcasting. Additionally, the carriage rules are intended to ensure not only that cable operators do not disadvantage broadcasters, but also that cable subscribers receive via cable what over-the-air viewers receive via an antenna. To the extent that over-the-air viewers with equipped sets are able to receive Gemstar's EPG, cable subscribers who purchase the same sets should also have available to them that same functionality.

Question: Doesn't prohibiting stripping impose a burden on cable operators?

Answer: Prohibiting stripping does not perceptibly burden cable operators because they must take affirmative steps (and make equipment investments) to strip out EPG information. Moreover, the amount of cable capacity they recover is miniscule (0.004 of a single channel). While cable companies have complained about carrying this data, the fact is that digital technology allows them to transmit 19.28 Mbps from a broadcast station into a stream capable of carrying 26.97 Mbps, leaving 7.69 Mbps of digital capacity unused. This frees them to add at least one, and possibly two or more, standard-definition video streams along with full carriage of the original broadcast stream without trouble. When one considers that the transition to pure digital transmission will relieve cable operators from having to modulate their basic or extended-basic lineups into analog, the amount of additional capacity is multiplied. None of this would be thwarted by a prohibition against stripping EPGs, since the EPG data would be in the broadcasters' video stream. Moreover, passing through Gemstar's digital EPG data does not require extra equipment.

2000) (stating that Time Warner has temporarily suspended stripping but that it "expressly reserve[s]" its right to resume stripping in the future).

Question: Why can't the Commission leave carriage of EPG services to the marketplace?

Answer: Time Warner has sought compensation from Gemstar for carrying its analog EPG data.¹⁰ Despite the fact that the amount of cable capacity used by carriage of Gemstar's analog EPG service is also very small (0.008 of a single channel), the amount Time Warner billed Gemstar is more than \$10 million, which is 200 to 1,600 times more, proportionately, than the amount it charges for leased access capacity in accordance with FCC guidelines. This pricing would not allow Gemstar to remain in business. Consumers in both cable and non-cable homes would lose out, because they would be denied the benefits of a free, over-the-air digital EPG.

Both Congress and the Commission have long recognized that regulation is justified where marketplace inequities result in unfair competition. The market for delivery of cable-based services is one such example, because the bottleneck power of cable operators gives them the incentive to discriminate against unaffiliated service providers. In 1992, Congress noted that they have the incentive as well: "The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems."¹¹

This summer the Commission concluded that the competitive landscape has not improved sufficiently in the subsequent ten years to justify removing regulations. It determined that it should retain program access rules because "in the absence of regulation, vertically integrated programmers have the ability and incentive to favor affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies such that competition and diversity in the distribution of video programming would not be preserved and protected."¹² Cable operators have the same incentive and ability to discriminate against unaffiliated EPGs and in favor of their own as they do to discriminate against unaffiliated cable programmers. Therefore, preventing stripping of Gemstar's EPG advances congressional and Commission objectives, correcting for an insurmountable competitive obstacle in the market for delivery of cable-based services.

The navigation devices statute and accompanying regulations similarly recognize the benefits of ensuring the availability to consumers of navigation devices separate and apart from those provided by cable operators. Preserving the continued access of consumers to Gemstar's independent digital program guide is consistent with the Commission's commitment to ensuring the availability of alternative navigation devices, particularly in light of the FCC's recent recognition of inequities sufficient to justify continued regulation in the cable industry.

¹⁰ See Letter From David Ravi, Director, Programming Services, Time Warner Cable, to Peter C. Boylan III, Co-President, Gemstar-TV Guide International, Inc. (Jan. 29, 2002).

¹¹ 1992 Cable Act §§ 2(a)(5). Congress's rationale applies equally to unaffiliated cable service providers.

¹² See *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Sunset of Exclusive Contract Prohibition Program Access Order*, Report and Order, 17 FCC Red 12124, ¶ 65 (2002).

* * *

The Commission has full authority and jurisdiction, and a great opportunity, to interpret program-relatedness in the digital context in a way that makes sense for, and facilitates the development of, digital services. It should accomplish this objective by remaining true to the original meaning of "program-related" adopted in the early 1990s and not tying its interpretation to an outmoded analog technology.

Please direct any questions to the undersigned.

Sincerely,

Michael D. Berg/axz

Michael D. Berg
SHOOK, HARDY & BACON L.L.P.
600 14th Street, N.W. Suite 800
Washington, D.C. 20005
(202) 783-8400

Jonathan D. Blake/axz

Jonathan D. Blake
Amy L. Levine
COVINGTON & BURLING
1201 Pennsylvania Ave, N.W.
Washington D.C. 20004-2401
(202) 662-6000

Counsel for Gemstar-TV Guide International, Inc.

cc Ms. Jane Mago
Ms. Susan Eid
Ms. Catherine Bohigian
Ms. Alexis Johns
Mr. Paul Margie
Ms. Stacy Robinson
Mr. Kenneth Ferree
Ms. Marlene Dortch (2 copies)