

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Gemstar International Group, Ltd. and Gemstar Development Corp.)	CSR 5528 - Z
)	
Petition for Special Relief)	
)	
Time Warner Cable)	CSR 5698 - Z
)	
Petition for Declaratory Ruling)	

MEMORANDUM OPINION AND ORDER

Adopted: December 4, 2001

Released: December 6, 2001

By the Commission:

I. INTRODUCTION

1. By this *Order*, we consolidate the above-captioned proceedings involving Gemstar International Group, Ltd. and its wholly owned subsidiary Gemstar Development Corp. (collectively “Gemstar”) and Time Warner Cable (“Time Warner”). Initially, Gemstar filed a petition asking the Commission to order Time Warner Cable to discontinue removing data provided by Gemstar in the vertical blanking interval (“VBI”)¹ of local broadcast television stations carried on Time Warner’s cable systems. The petition was placed on public notice and a time frame was established for filing comments and reply comments.² Subsequently, Gemstar filed a motion to withdraw its petition. Prior to the Commission’s

¹ A vertical blanking interval is the interval between television frames in which the picture is blanked to enable the trace (which “paints” the screen) to return to the upper left hand corner of the screen, from where the trace starts, once again to paint a new screen. Newton’s Telecom Dictionary (11th Ed. 1996). This time period is the equivalent of 21 scanning lines. The VBI is used to transmit data to organize the television picture, as well as other data. For example, Line 21 of the VBI is reserved for distribution of closed captioning information. *Implementation of Section 305 of the Telecommunications Act of 1996 – Video Programming Accessibility*, 11 FCC Rcd 19214 (1996).

² See *Petition for Special Relief Seeking Commission Order to Discontinue Stripping Information from Broadcast VBI*, Public Notice, DA 00-670 (rel. Mar. 24, 2000). Comments in support of Gemstar’s petition were filed by the Association for Maximum Service Television (“MSTV”), Consumer Electronics Association (“CEA”), Circuit City Stores, Inc. (“Circuit City”), Thomson Consumer Electronics, Inc. (“Thomson”), and jointly by Benedek Broadcasting Corp., the Chronicle Publishing Co., LIN Television Corp., Midwest Television, Inc., and Raycom Media, Inc., (“Broadcast Group”). The National Cable Television Association (“NCTA”) and Time Warner filed comments opposing Gemstar’s petition. Gemstar, CEA, the Walt Disney Company, Thomson, and the National Association of Broadcasters (“NAB”) filed replies supporting the petition. Time Warner and NCTA filed replies

(continued...)

issuance of a decision on Gemstar's motion, Time Warner filed a petition requesting that the Commission issue a declaratory ruling determining that EPG information such as that provided by Gemstar is not entitled to mandatory carriage. Time Warner's petition incorporates by reference all documents filed in connection to Gemstar's petition. Time Warner's petition also was placed on public notice.³ Because the issue of Time Warner's obligation to carry Gemstar's VBI material is addressed in both proceedings, we see good cause to consolidate the records related thereto. We grant Gemstar's motion to withdraw its original petition. Nonetheless, due to the common issue presented by the petitions, we will consider the record generated by Gemstar's petition in our resolution of Time Warner's petition. For the reasons discussed below, we grant Time Warner's petition in part and deny it in part.

II. BACKGROUND

2. Electronic Program Guides ("EPGs") are on-screen directories that assist viewers in sorting through, and selecting from, the programming available to them.⁴ Gemstar is the developer of *Guide Plus+*, a proprietary EPG that provides viewers information on current and future programming.⁵ A microchip encompassing the EPG technology is built into the televisions and VCRs manufactured by companies that have a licensing agreement with Gemstar.⁶ Gemstar sends material to the microchip through the VBI of the signal of over-the-air broadcast stations with which it has entered data carriage agreements. Gemstar typically contracts with two local broadcasters in each market to carry identical material on each broadcast stations' VBI.⁷ Gemstar's data contains programming updates as well as other additional material such as program promotions and advertising.⁸ Gemstar's material is transmitted on the broadcast VBI four times per day and is stored in the receiver.⁹ Gemstar states that "[i]f a *Guide Plus+* television set is turned on during these transmissions, the program updating information will be downloaded so long as the set is tuned to the channel in which the information is being transmitted. If the set happens to be turned off during the transmission of EPG-related information, then the set automatically will tune to a channel providing the data in the VBI and the information will be downloaded at that time."¹⁰ If the

(...continued from previous page)
opposing the petition.

³ NCTA and EchoStar filed comments supporting Time Warner's petition. NAB and Gemstar filed comments in opposition to Time Warner's petition. Time Warner, Gemstar, and National Datacast, Inc. filed replies.

⁴ In the digital television context, there is no VBI to carry EPG information. Instead, EPG data is part of the program and system information protocol ("PSIP"). *Carriage of Digital Broadcast Signals, First Report and Order and Further Notice of Proposed Rulemaking*, CS Docket No. 98-120, (rel. Jan. 23, 2001) ("*DTV Carriage Order*") ¶ 64.

⁵ Gemstar Petition at 9.

⁶ The manufacturers charge consumers a premium for consumer electronics containing the *Guide Plus+* feature, but there is no additional charge such as a subscription fee to use the feature. *Guide Plus+* is currently available in consumer electronics equipment manufactured by Thomson, Sharp, Sony, JVC, Philips, Zenith, Hitachi, and Matsushita. Gemstar Petition at 9.

⁷ Gemstar has secured broadcast rights from over 500 individual local television stations for carriage of its VBI material. *Id.* at 11.

⁸ Gemstar's VBI material is customized depending on the source, either over-the-air or cable, that the receiver will be using to receive programming. *Id.*

⁹ Gemstar Reply to Gemstar Petition at 15.

¹⁰ *Id.* at 15. According to Thomson, a manufacturer of television receivers containing *Guide Plus+*, their products cannot download the updates if the television is being used. Thomson *ex parte* presentation (*Oct. 31, 2000*).

consumer electronics device does not receive the updated information, *Guide Plus+* is disabled. Time Warner concedes that it has removed Gemstar's material from the VBI of some local broadcast stations it carries on its cable systems. Time Warner argues that it is not obligated by the Commission's rules to carry information that is not program related and will not do so without a mutually beneficial business arrangement with the information provider, i.e. Gemstar.¹¹

III. DISCUSSION

3. As a threshold issue, Gemstar and NAB question whether the Commission should address Time Warner's petition. Gemstar contends that, as a result of the AOL/Time Warner merger, Time Warner is contractually prohibited from stripping Gemstar's VBI material and that it has ceased doing so.¹² Consequently, Gemstar argues that a controversy no longer exists and that resolution of Time Warner's petition would prejudice the resolution of open questions in on-going rulemaking proceedings.¹³ NAB argues that a generalized determination in response to Time Warner's petition regarding undefined EPG information likely will result in greater uncertainty. NAB argues that the Commission must precisely define EPG information in order to avoid industry confusion and disputes between cable operators and broadcasters.¹⁴ In any event, NAB submits that any decision reached regarding Time Warner's petition should not predetermine the FCC's treatment of program-related material in the digital and interactive environments.¹⁵

4. In reply, Time Warner disputes Gemstar's claim that a contractual obligation prevents it from removing Gemstar's EPG material.¹⁶ Time Warner maintains that the continuing nature of the dispute highlights the fact that the issues involved in this proceeding still are very much in controversy and in need of resolution.¹⁷ Further, Time Warner argues that in the digital must carry proceeding, the Commission already has determined that EPG information is not program-related for purposes of digital mandatory carriage.¹⁸

5. At the core of the dispute between Gemstar and Time Warner is the specific issue of whether Time Warner is required to carry Gemstar's VBI material. An extensive record on this issue has been developed and, as indicated by the continued *ex parte* filings both by Gemstar and Time Warner, the issue remains unresolved. Accordingly, we believe that Time Warner's petition presents a controversy suitable for resolution.¹⁹ We note that in the digital television context, the Commission has requested comments on the proper definition of "program-related material" and the types of information that cable operators are

¹¹ Time Warner Comments to Gemstar Petition at 5. Subsequently, Time Warner stated it would stop removing Gemstar's VBI material while the matter was pending before the FCC. Letter from Mark Apfelbaum, Senior Vice President and General Counsel, Time Warner Cable, to Stephen Weiswasser, Executive Vice President and General Counsel, Gemstar Development Corp. (June 15, 2000).

¹² Gemstar Comments to Time Warner Petition at 2.

¹³ Gemstar Comments to Time Warner Petition at 11.

¹⁴ NAB Comments to Time Warner Petition at 5.

¹⁵ *Id.* at 8.

¹⁶ Time Warner Reply to Time Warner Petition at 3.

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 5, citing *DTV Carriage Order* ¶ 64.

¹⁹ 47 C.F.R. § 76.7(a)(1); see also 47 C.F.R. § 1.2.

required to carry.²⁰ That is a distinct question from that presented in this proceeding regarding the analog technology used by Gemstar for its EPG.

6. Arguably, Time Warner's petition, by asking for a determination regarding the carriage status of EPG "information such as that provided by Gemstar,"²¹ implicates EPG material other than Gemstar's. As stated above, however, Gemstar uses a particular analog technology and video channels for delivery of its EPG material and the record in this proceeding is limited to those facts. Accordingly, to the extent that Time Warner's petition requests a Commission determination regarding any question related to material other than Gemstar's VBI material, the petition is denied.

7. Turning to the specific issue regarding Gemstar's VBI material, Gemstar makes several arguments in support of its position that Time Warner is required to carry Gemstar's VBI material. First, Gemstar argues that Time Warner's actions violate the Commission's rules requiring mandatory television broadcast signal carriage ("must carry"). Second, Gemstar contends that Time Warner is impeding the retail availability of competing navigation devices. We evaluate each of these arguments in turn.

A. Must Carry

8. Pursuant to Section 614 of the Communications Act of 1934 ("Communications Act"), as amended, and implementing rules adopted by the Commission, a broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market.²² Specifically, cable operators are required to carry the primary video, accompanying audio, and line 21 closed caption transmission, in its entirety, of local commercial stations in fulfilling their must carry obligations.²³ Cable operators also are required, to the extent technically feasible, to retransmit program-related material carried in the VBI.²⁴ Carriage of other non-program-related material in the VBI (including teletext and other subscription and advertiser-supported information services) is at the discretion of the cable operator.²⁵ Time Warner seeks a ruling that Gemstar's VBI material is not covered by the signal carriage obligations of Section 614.

9. In implementing Section 614, the Commission determined that, to avoid inconsistency with copyright law, the factors enumerated by the United States Court of Appeals for the Seventh Circuit in *WGN Continental Broadcasting Co. v. United Video Inc.* ("WGN")²⁶ should be used in deciding whether

²⁰ *DTV Carriage Order* ¶ 122.

²¹ Time Warner Petition at 1.

²² 47 U.S.C. § 534.

²³ 47 U.S.C. § 534(b)(3)(A).

²⁴ *Id.*

²⁵ *Id.*

²⁶ 693 F.2d 622 (7th Cir. 1982). The Commission originally cited the WGN case at 685 F.2d 218 (7th Cir. 1982), which was the original citation to the case prior to rehearing. See *Implementation of the Cable Television Consumer Protection Act of 1992 – Broadcast Signal Carriage Issues*, 8 FCC Rcd 2985 n.235 (1993). Upon rehearing, the Seventh Circuit affirmed the WGN factors in *WGN Continental Broadcasting Co. v. United Video Inc.*, 693 F.2d 622 (7th Cir. 1982). In a subsequent Order, the Commission cited the rehearing decision. *Implementation of the Cable Television Consumer Protection Act of 1992 – Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723, 6732 n.128. ("*Must Carry Order*").

material in the VBI is program-related and therefore entitled to mandatory cable carriage.²⁷ *WGN* addressed the extent to which the copyright on a television program, the 9:00 News, also included material in the VBI of the signal.²⁸ The *WGN* court set out three factors for making this determination. First, the broadcaster must intend for the information in the VBI to be seen by the same viewers who are watching the main program. Second, the VBI information must be available during the same interval of time as the main program. Third, the VBI information must be an integral part of the main program.²⁹ The Commission noted that there could also be instances in which material that does not fit squarely within the factors listed in *WGN* would be program-related.³⁰ We evaluate the must carry status of Gemstar's VBI material under the factors of the *WGN* test.

1. The VBI information is intended to be seen by the same viewers who are watching the main program.

10. Gemstar argues that broadcasters intend for viewers to access its EPG as they continue to watch the broadcaster's programming.³¹ Gemstar submits that its EPG contains a picture-in-guide feature that allows the viewer to view the guide concurrently with the carrier station. Gemstar concedes that viewers of other stations also can access its EPG, but argues that the carrier station benefits when non-viewers peruse its program offerings.³² Thomson contends that broadcasters that agree to carry Gemstar's VBI material know that their viewers will use the guide to access detailed programming content and scheduling information.³³ Thomson argues that there is no requirement under the *WGN* test that the viewer identify which broadcaster is delivering the VBI data.³⁴

11. In opposition, NCTA maintains that broadcasters who transmit Gemstar's VBI material do not specifically intend that their viewers watch *Guide Plus+*, and would prefer that viewers consult the program guide when watching the video programming of some other broadcaster or cable network.³⁵ NCTA argues that Gemstar's VBI material is intended for a general audience that includes the viewers of the broadcast signal in which it is inserted, without any regard to whether the *Guide Plus+* users ever watch, or even tune to a particular broadcast signal. Time Warner argues that to the end user, it is entirely irrelevant, if not impossible, to discover which video signal supplies the VBI information, and if a

²⁷ The determination regarding the usefulness of the *WGN* test was made by the Commission in *Implementation of the Cable Television Consumer Protection Act of 1992 – Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2986 (1993). The specific factors of the test were delineated by the Commission in the *Must Carry Order*, 9 FCC Rcd at 6732.

²⁸ The issue in the *WGN* case was whether television station WGN's copyright of the 9:00 News included teletext sent in the VBI. *WGN*, 693 F.2d at 625.

²⁹ *Id.* at 627.

³⁰ The Commission found that source identification codes, which are used to determine a program's viewer rating, are information that may not precisely meet each *WGN* factor, but are program-related under the statute because they constitute information intrinsically related to the particular program received by the viewer. *Must Carry Order*, 9 FCC Rcd at 6734.

³¹ Gemstar Comment to Time Warner Petition at 17.

³² *Id.*

³³ Thomson Reply to Gemstar Petition at 3.

³⁴ *Id.*

³⁵ NCTA Comments to Gemstar Petition at 7.

particular Gemstar user ever watches the video signal of the station transmitting the Gemstar information, it is a coincidence.³⁶

12. We find that this first factor does not favor a determination that Gemstar's VBI material is program-related. Gemstar states that local broadcasters transmit the *Guide Plus+* VBI material several times each day. Gemstar gives no indication that broadcasters take into consideration the program they are showing during these transmissions. Further, Gemstar fails to make clear whether its "program updating information"³⁷ actually includes information regarding the program being shown during its transmission, or only information regarding programs being shown later in the day. Based upon Gemstar's explanation of its technology, and broadcasters' role in its transmission, it does not appear that broadcasters' have an active role in the transmission of Gemstar's VBI material, but merely pass-through whatever Gemstar sends to them without consideration of their programming schedule. Thus, it does not appear that a broadcaster's decision to transmit Gemstar's VBI material has any relationship to the programming being shown to the viewers during the transmission. Under such circumstances, we cannot find that, during transmission of Gemstar's VBI material, broadcasters specifically intend that such material be viewed by the same viewers who are watching their main program.

2. The VBI information must be available during the same interval of time as main program.

13. Commenters are split regarding whether the second *WGN* factor requires the VBI material to be broadcast simultaneously with the program to which it is related. Gemstar contends that a consumer can watch a program on the channel in which the EPG information is transmitted in a window in the *Guide Plus+* screen at the same time that he or she is reviewing the downloaded program information in the guide.³⁸ Thomson argues that it is of no consequence that the Gemstar data is transmitted and stored, as long as it is available contemporaneously with the video signal.³⁹

14. In opposition, Time Warner maintains that VBI information must be received and viewed at the same time as the main video signal.⁴⁰ NCTA contends that it is not enough under the second *WGN* factor that some viewers might look at Gemstar's EPG at the same time that they are watching the particular channel that is transmitting Gemstar's VBI material.⁴¹

15. The purpose of the *WGN* test is to determine whether material being broadcast in the VBI is program-related. Therefore, we believe that this factor of the *WGN* test requires an evaluation of the relationship between the VBI material and the broadcast programming shown during its transmission. We agree with Gemstar that uses of VBI material after it has been stored in the memory of receiving devices should not bear on this factor because the broadcaster is no longer transmitting such material.⁴² Nonetheless, as Gemstar's concedes, its VBI material is sent typically to two local broadcasters, who in

³⁶ Time Warner Comments to Gemstar Petition at 12.

³⁷ Gemstar Comments to Time Warner Petition at 7.

³⁸ *Id.* at 18.

³⁹ Thomson Reply to Gemstar Petition at 5.

⁴⁰ Time Warner Comments to Gemstar Petition at 12.

⁴¹ NCTA Comments to Gemstar Petition at 8.

⁴² Gemstar Comments to Time Warner Petition at 17 n.42.

turn transmit the material at specified times a day.⁴³ As a result, for most programming, Gemstar's EPG data is not available in the VBI during the broadcast. Instead the material is obtained from the VBI of a different channel at a different time. Thus, the second *WGN* factor does not favor a finding that Gemstar's VBI material is program-related.

3. The VBI information is an integral part of the main program.

16. Gemstar argues that its VBI material is an integral part of the program in which it is transmitted because *Guide Plus+* provides specific information about the program on the station on whose VBI it is being transmitted. Gemstar recognizes that *Guide Plus+* also provides information about programming that is offered by other broadcast stations and cable services. It argues, however, that the fact that the information transmitted also is integrally related to other programming does not undermine its claim that the EPG information is related to the particular program in which it is transmitted.⁴⁴ Gemstar maintains that because some of the material is tied to the broadcast station in whose VBI it has been transmitted, all of its VBI material should be considered intrinsic to the main program.⁴⁵ Further, Gemstar submits that advertising and promotional material are included with its EPG data so that its advertiser-supported service can be provided free to its audience.⁴⁶ Thomson maintains that the information delivered by *Guide Plus+* such as the time the programming is scheduled to be broadcast, list of cast members, plot summaries, and content ratings, is inherently and inextricably linked to the programming it describes.⁴⁷ Disney contends that a decision by a broadcaster to facilitate viewer access to a station's programming at the risk of exposing them to an alternative does not make information any less related to the programming of the station.⁴⁸

17. In opposition, Time Warner submits that the VBI information used for Gemstar's EPG is not an integral part of the program in which it is transmitted because the overwhelming majority of Gemstar's VBI material has nothing to do with the program shown on the local station at the time the *Guide Plus+* information is transmitted.⁴⁹ Time Warner argues that to let the small part of Gemstar's VBI material that does involve information about the actual television program being shown qualify all the material as "program-related" would make the third *WGN* prong an empty formality.⁵⁰ NCTA contends that aggregating the programming information of all broadcast stations and cable networks makes most of Gemstar's VBI material related to programs other than the broadcast program that is being transmitted on the accompanying signal.⁵¹

18. We find that the third *WGN* factor does not support Gemstar's claim that its material is program-related. Gemstar fails to tie its VBI material to any specific program or any specific station. Gemstar concedes that very little of its material is uniquely related to the programming of the broadcast

⁴³ *Id.* at 7.

⁴⁴ Gemstar Petition at 26.

⁴⁵ Gemstar Petition at 26.

⁴⁶ Gemstar Reply to Gemstar Petition at 16 n.51.

⁴⁷ Thomson Comments to Gemstar Petition at 9.

⁴⁸ Disney Reply to Gemstar Petition at 4.

⁴⁹ Time Warner Comments to Gemstar Petition at 13.

⁵⁰ *Id.*

⁵¹ NCTA Comments to Gemstar Petition at 9.

station carrying it. Most of the material consists of information relating to programming on other channels carried by the cable system, as well as advertisements and other promotions that may not relate to any program. Given the number of channels offered by most cable systems, the percentage of Gemstar's VBI material that is related to the program appearing at the same time as the *Guide Plus+* update is *de minimus*.⁵² In fact, Gemstar's VBI material is as intrinsically related to every program appearing on every channel, cable and broadcast, as it is to the broadcast station(s) on which it is carried. In the most extreme example, a consumer could purchase a television that accesses Gemstar's VBI material, connect the television to a cable system, and extensively use *Guide Plus+* without ever watching the station(s) that transmit Gemstar's VBI material.⁵³ The fact that two stations in each market carry the same information further demonstrates the lack of a close connection between Gemstar's VBI material and the main program on either broadcast station during transmission. We observe that the court in *WGN* specifically rejected a "loose and spongy" relatedness test.⁵⁴ Although the court did find that announcements of future programming of the station carrying the VBI material were program-related, that finding is not determinative here. In this proceeding, Gemstar VBI material includes future programming announcements for stations other than the station transmitting Gemstar's data. In sum, there is no more than a remote relationship between most of Gemstar's VBI material and the broadcast station carrying it.

4. Considerations beyond *WGN* factors

19. In adopting the *WGN* test, the Commission clarified that the factors set forth in *WGN* do not necessarily form the exclusive basis for determining program-relatedness.⁵⁵ Gemstar submits that technical developments necessitate expansion of the concept of "program-relatedness" to include any data, such as channel navigation information, program guides, V-chip and closed captioning information, that provide structure to the consumer viewing experience.⁵⁶ Thomson contends that interactive EPGs such as *Guide Plus+* rapidly are becoming a necessity for consumers to navigate a television landscape that routinely includes upwards of 100 channels.⁵⁷ Further, Gemstar argues that requiring carriage of its VBI material is consistent with the rationale of the Supreme Court in its *Turner I* and *Turner II* decisions.⁵⁸ Disney

⁵² 98.6 percent of cable customers subscribe to systems with capacities of 30 channels or more, and 64.2 % of all subscribers are served by systems with capacities of 54 or more channels. *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd 978, 990 (2000).

⁵³ Gemstar describes the operation of its equipment as automatically tuning the receiver to the specified channel "[d]uring periods when the television is not in use (in most homes, during nighttime hours)." Gemstar Petition at 9. This description of *Guide Plus+* operation indicates that the *Guide Plus+* equipped device is designed to overcome the failure of a subscriber to view a particular channel or program.

⁵⁴ *WGN*, 693 F. 2d at 629.

⁵⁵ *Must Carry Order*, 9 FCC Rcd at 6734

⁵⁶ Gemstar Petition at 29.

⁵⁷ Thomson states that its market research shows that 81% of *Guide Plus+* users use the guide before watching any TV programming and 96% use the guide to see what other programming currently is being shown. Thomson Comments to Gemstar Petition at 6.

⁵⁸ Gemstar Reply to Gemstar Petition at 20 citing *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

contends that the term “program-related” should be construed in a manner that would enable broadcasters to offer enhancements to their broadcast signals as part of their free over-the-air service.⁵⁹

20. In opposition, Time Warner argues the Commission cannot change the interpretation of its rules by expanding the concept of program-related without issuing notice and inviting comment.⁶⁰ Further, Time Warner contends that the House Committee Report defines that which must be carried, and it specifically excludes secondary uses of the broadcast transmission and tangentially related matter.⁶¹

21. We do not believe that the definition of “program-related” in the context of the cable must carry rules could reasonably be as expansive as Gemstar contends. Section 614 grants the cable operators discretion to carry materials unrelated to a broadcaster’s main program. As discussed earlier, the vast majority of the material that is sent for use by Gemstar’s proprietary EPG has no connection to the particular broadcast station sending the material. Seeming to concede this point, Gemstar argues that if each individual station transmitted its own Gemstar information in the VBI of that station with the program it was describing, the information clearly would be program-related, and that aggregating the data onto one signal simply is more efficient.⁶² There is no language in the statute, however, to require carriage of non-program-related VBI material broadcast by one station on the grounds that it may be related to the programming of another station. Rather, the statute specifically provides that retransmission of other material in the VBI or other non-program-related material “shall be at the discretion of the cable operator.”⁶³

22. Likewise, we question whether the *Turner* cases have any relevance to Gemstar’s position. In the *Turner* cases, the Court addressed First Amendment challenges to the constitutionality of the must carry provisions of the Communications Act. Neither *Turner* case offers guidance for making a determination as to what type of VBI material is program-related. In Section 614, by contrast, Congress expressly defined that material which is entitled to mandatory carriage and the Commission must implement this statutory provision in a reasonable manner.

23. The Commission’s finding that SID codes are program-related also does not support Gemstar’s position.⁶⁴ Broadcasters insert SID codes, which are used to determine Nielson ratings, into the VBI of each program shown. The Commission found that each SID code was intrinsically related to the particular program with which it was sent.⁶⁵ Gemstar’s VBI material, however, is sent during a particular time of day regardless of the programming broadcast in that time slot.⁶⁶ As discussed above, most of

⁵⁹ Disney Reply to Gemstar Petition at 11.

⁶⁰ Time Warner Comments to Gemstar Petition at 14.

⁶¹ *Id.* at 14, *citing* H.R. Rep. No. 628, 102d Cong., 2d Sess. 93 (1992).

⁶² Gemstar Petition at 27.

⁶³ 47 U.S.C. § 614(b)(3); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. 93 (1992) (“[t]he Committee does not intend that [Subsection (b)(3)(A)] be used to require carriage of secondary uses of the broadcast transmission, including the lease or sale of time on subcarriers or the vertical blanking interval for the creation or distribution of material by persons or entities other than the broadcast licensee.”).

⁶⁴ *Must Carry Order*, 9 FCC Rcd at 6734. Commenters are divided whether the Commission’s finding that SID codes are program-related has relevance to Gemstar’s petition. *See* Disney Reply to Gemstar Petition at 12; NCTA Reply to Gemstar Petition at 2 n.1; Time Warner Reply to Gemstar Petition at 7.

⁶⁵ *Must Carry Order*, 9 FCC Rcd at 6734.

⁶⁶ *See* Disney Reply to Gemstar Petition at 12, Thomson Comments to Gemstar Petition at 10, *citing Must Carry* (continued...)

Gemstar's VBI material has only a remote relationship with the main programming of the broadcast station carrying it. Thus, we do not believe the reasoning affording must carry status to SID codes applies to Gemstar's VBI material. Accordingly, we find that Gemstar's VBI material is not program-related and that retransmission of non-program-related material in the VBI of local television stations is at the discretion of the cable operator.

24. In addition to the must carry arguments detailed above, petitioner and other commenters suggest that there are public policy reasons to require Time Warner to carry Gemstar's VBI material. Commenters contend that action against Time Warner is required to protect the EPG market and to further the transition to digital television.⁶⁷ Commenters also argue that consumers purchasing equipment with *Guide Plus+* have a good-faith expectation that their cable system will support the service.⁶⁸

25. In opposition, NCTA maintains that the sole legal issue in this proceeding is whether or not Gemstar's VBI material is program-related.⁶⁹ NCTA claims that Gemstar's petition merely was a regulatory maneuver to advance the bargaining position of one party to a commercial negotiation.⁷⁰

26. The public policy considerations presented by commenters cannot overcome the determination that Gemstar's VBI material does not meet the statutory criteria for must carry status. As noted above, however, several issues related to EPGs are the subject of ongoing Commission rulemakings.⁷¹ In the context of digital broadcast television stations, we found that program guide data that are not specifically linked to the video content of the digital signal being shown cannot be considered program-related and, therefore, are not subject to a carriage requirement.⁷² Regarding the expectations of consumers purchasing equipment containing Gemstar's EPG, we note that in 1994 the Commission left unresolved the issue of whether EPG material transmitted in the VBI is program-related.⁷³ At that time the Commission advised that such a determination should be resolved via the special relief process. Gemstar's decision to license its technology in light of this unresolved issue was its own business decision. In this

(...continued from previous page)

Order, 9 FCC Rcd at 6734.

⁶⁷ Gemstar Petition at 18; Broadcast Group Comments to Gemstar Petition at 5; CEA Comments to Gemstar Petition at 3; Circuit City Comments to Gemstar Petition at 3; MSTV Comments to Gemstar Petition at 4; NAB Reply to Gemstar Petition at 2; Thomson Comments to Gemstar Petition at 10.

⁶⁸ Circuit City Comments to Gemstar Petition at 2; MSTV Comments to Gemstar Petition at 3.

⁶⁹ NCTA Reply to Gemstar Petition at 8, *citing* 47 U.S.C. § 544(f)(1).

⁷⁰ NCTA Comments to Gemstar Petition at 2. Time Warner maintains that it has consistently informed Gemstar that it is willing to carry its data, but only upon the conclusion of a mutually beneficial business arrangement. Time Warner Comments to Gemstar Petition at 2.

⁷¹ See e.g. *DTV Carriage Order* ¶ 122. See also *Compatibility Between Cable Systems and Consumer Electronics Equipment*, FCC 00-342 (rel. Sept. 15, 2000). In the equipment compatibility proceeding, the Commission indicated its continuing interest in industry implementation of the PSIP agreement, which provides tuning and program schedule information to support the navigation function of digital television receivers, including on-screen program guides.

⁷² *DTV Carriage Order* ¶ 64.

⁷³ *Must Carry Order*, 9 FCC Rcd 6733 n.145.

regard, Gemstar concedes that the *Guide Plus+* system depends on choices made in the marketplace, suggesting that perhaps further negotiations with Time Warner could resolve their dispute.⁷⁴

B. Navigation Devices

27. Section 629 of the Communications Act requires the Commission to assure that “navigation devices” or customer premises equipment (“CPE”), used to access programming and other services offered by multichannel video programming distributors (“MVPDs”) are available for commercial retail purchase.⁷⁵ In adopting rules to implement Section 629, the Commission determined that commercial availability could be achieved by requiring that the security function of converter boxes and other navigation devices be separated from non-security functions.⁷⁶ The Commission adopted other rules designed to foster a competitive market for navigation devices, including Section 76.1201, which gives subscribers a right to attach compatible navigation devices to an MVPD system,⁷⁷ and Section 76.1202, which prohibits MVPDs from taking actions that prevent navigation devices that do not perform security functions from being made available to subscribers from sources unaffiliated with the MVPD.⁷⁸ Regarding EPGs, such as *Guide Plus+*, the Commission stated its commitment to “encourage the development of the market for the provision of EPG services as part of its broader goal of promoting consumer choice.”⁷⁹ The Commission determined, however, that it could not adequately address the extent of any obligation of MVPDs to make EPG services available pursuant to Section 629, or otherwise, at that time due to the limited record on the EPG issue in the navigation devices proceeding.⁸⁰

28. Gemstar maintains that *Guide Plus+* qualifies as a navigation device.⁸¹ Gemstar argues that stripping VBI content, such as the *Guide Plus+* update, affects the commercial availability of a navigation device, which impedes the goals of Section 629.⁸² Gemstar further contends that stripping VBI content prevents consumers from obtaining navigation devices not serving a conditional access function from unaffiliated retail sources, which Gemstar submits is a violation of Section 76.1202.⁸³ Similarly, CEA argues that stripping VBI material takes away information that enables an EPG-capable television receiver.⁸⁴

⁷⁴ Petition at 12.

⁷⁵ 47 U.S.C. § 549.

⁷⁶ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775 (1998) (“*Navigation Devices Order*”); *see also* Order on Reconsideration, 14 FCC Rcd 7596 (1999).

⁷⁷ 47 C.F.R. § 76.1201.

⁷⁸ 47 C.F.R. § 76.1202.

⁷⁹ *Navigation Devices Order*, 13 FCC Rcd at 14820.

⁸⁰ *Id.* at 14821.

⁸¹ Gemstar Reply to Gemstar Petition at 25.

⁸² Gemstar Petition at 29, *citing* 47 U.S.C. § 549(a); CEA Comments to Gemstar Petition at 3; Thomson Comments to Gemstar Petition at 11.

⁸³ Gemstar Petition at 31, *citing* 47 C.F.R. § 76.1202.

⁸⁴ CEA Reply to Gemstar Petition at 9.

29. In addition, commenters argue that the intentional disabling of independent EPGs will forestall the retail provision of EPG equipment from unaffiliated sources, eliminating the very type of retail market that Section 629 seeks to foster.⁸⁵ CEA argues that not requiring Time Warner to carry Gemstar's data would essentially give Time Warner and similar cable operators a virtual monopoly in the market for EPG equipment and other services.⁸⁶

30. In opposition, NCTA contends that Section 629 was not intended to compel cable operators to carry program services or materials in order to ensure the availability of any equipment, but instead is meant to ensure that equipment necessary to receive and use the program services and material offered by the cable system is available from sources other than the cable operator.⁸⁷ Time Warner submits that the navigation device rules relate to competition in equipment, not services, and that a cable operator's refusal to pass through unauthorized signals on its cable facilities is unrelated to the retail availability of consumer electronics.⁸⁸ Time Warner argues that Section 76.1202 is not a carriage requirement and that when the Commission adopted the rules implementing Section 629, it chose not to adopt a rule proposed by Gemstar that would have required carriage of EPG data.⁸⁹ Further, NCTA maintains that Section 624(f)(1) limits the Commission's ability to impose requirements regarding the content of cable services except as expressly provided in Title VI, and the only provision in Title VI that expressly authorizes mandatory carriage of material that is transmitted in a broadcaster's VBI is Section 614(b)(3), which provides that only program-related material must be carried.⁹⁰

31. We find that neither Section 629, nor the rules adopted by the Commission to implement Section 629, require Time Warner to carry Gemstar's proprietary EPG data. Section 629 is intended to assure the competitive availability of *equipment*, including "*converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.*"⁹¹ The Commission has not found that the right to attach consumer electronics equipment to a cable system can be expanded to include the obligation by cable operators to carry any service that is used by such equipment, nor is the legislative history supportive of such a requirement. Indeed, the scope of Section 629 apparently was "narrowed to include only equipment used to access services provided by multichannel video programming distributors."⁹² Finally, we find that Time Warner's actions are not a violation of Section 76.1202. This rule is intended to prevent a cable operator from excluding competing equipment from subscriber's homes.⁹³ Section 76.1202 does not require carriage of services outside of those chosen by the MVPD in order to assure retail availability of navigation devices.

⁸⁵ Gemstar Petition at 31.

⁸⁶ CEA Comments to Gemstar Petition at 3.

⁸⁷ NCTA Comments to Gemstar Petition at 13.

⁸⁸ Time Warner Comments to Gemstar Petition at 19.

⁸⁹ *Id.* at 17.

⁹⁰ NCTA Reply to Gemstar Petition at 8.

⁹¹ 47 U.S.C. § 629(a) (emphasis added).

⁹² S. Conf. Rep. No 104-230 at 181 (1996).

⁹³ 47 C.F.R. § 76.1203.

C. Conclusion

32. For the foregoing reasons, we conclude that the Commission's rules do not require Time Warner to pass through Gemstar's *Guide Plus+* content that is contained in a broadcaster's over-the-air signal. In this regard, we reiterate that our decision today is limited to the facts before the Commission as presented by the petitions of Time Warner and Gemstar and the record compiled herein.

IV. ORDERING CLAUSES

33. Accordingly, **IT IS ORDERED** that the petition for declaratory ruling filed by Time Warner Cable **IS GRANTED IN PART** to the extent indicated herein and **IS OTHERWISE DENIED**.

34. **IT IS FURTHER ORDERED** that the motion to withdraw filed by Gemstar International Group, Ltd. and Gemstar Development Corp. **IS GRANTED**.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary