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November 17, 1997

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William E. Kennard, Esq.
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Market Distortions Caused by Incentives for Uneconomic Satellite Bypass in the Current Program Access Rules

In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming: CS Docket No. 97-141

Dear Chairman Kennard:

GE American Communications, Inc. ("GE Americom") is deeply disturbed by recent evidence that telecommunications competition is being distorted by the cable program access rules. Specifically, those rules currently apply to cable-affiliated program services if distributed by satellite, but not if distributed by terrestrial networks. As a result, even though terrestrial facilities typically are much less efficient than satellites for point-to-multipoint video distribution, cable program vendors have uneconomic incentives to bypass satellites. Terrestrial carriers are specifically promoting their more expensive transmission services based on the "loophole" in those rules. 1/

The Commission should correct this market distortion immediately before it does more serious damage. The satellite bypass problem is most acute now in the context of regional program channels, but the situation will only expand if the irrational distinction between satellite and terrestrial distribution is not rectified promptly. 2/

1/ For example, we have been told that AT&T has marketed a new terrestrial fiber network among cable headends in the New York metropolitan area on this basis.

2/ We also ask that this problem receive attention in the next report to Congress on the state of cable competition, and hence are filing this letter in that docket as well.

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Defining Program Access Rights in Terms of Satellite Transmission Distorts Three Different Markets

A Commission regulation would rarely last long if it distorted competition in three different markets while serving no public interest purpose. Yet the program access rules unintentionally hit this trifecta. By tying access rights to satellite transmission, the rules manage to damage competition and generate economic inefficiency in three different markets: network facilities, video distribution to consumers, and cable program services.

The "satellite bypass" problem results from an irrational disconnect between the goals of the program access rules and their current implementation. The 1992 Cable Act established program access rights to lower a barrier to new competition among multichannel video programming distributors ("MVPDs"). Congress perceived that cable program services might unreasonably favor affiliated cable distribution companies, either through more favorable carriage terms and conditions, or through outright exclusivity. At the same time, Congress also recognized that program access rights are not in the public interest in all cases. For example, exclusivity can increase the incentive of a programmer to create new services.

Importantly, however, these policy considerations -- both those supporting program access and those supporting exclusivity -- have nothing whatsoever to do with the technical question of how a program service is transmitted to cable head-ends or other local distribution points. It happened that in 1992 all or virtually all non-broadcast program services were delivered to cable systems by satellite. As a matter of convenience, therefore, both the Cable Act and the Commission's rules adopted in 1993 speak of "satellite cable programming" as the primary area where program access generally will apply. This terminology thus reached all cable program services except those developed locally by a particular cable system for its own use. At the same time, the Act gave the Commission the discretion to modify the reach of the program access rules in the future, both to broaden and narrow their scope. 3/

3/ The Commission has authority to waive application of the program access rules to satellite-delivered programming when to do so would serve the public interest. It also has authority to expand the scope of the access rules to reach terrestrially-delivered programming as necessary to meet the purpose of the Cable Act to promote "increasing competition and diversity in the multichannel video programming market." 47 U.S.C. § 548(a). We recognize that the Commission has previously declined "to explicitly extend the program access rules to non-satellite delivered programming." See Open Video Systems, Second Report and Order, 11 FCC Rcd 18223, 18325 n.451 (1996). However, at that time the Commission was primarily concerned with harmonizing video rules applicable to cable and OVS quickly following passage of the 1996 Telecommunications Act. With that work completed, and increasing evidence that satellite bypass is a growing problem, it is timely for the Commission to address this issue more fully.

Recent events (noted below) underscore why the cable program access rules must be transmission technology neutral in every respect. A program distributor's "satellite vs. terrestrial" decision should turn on the inherent merits of each technology, including the relative costs and efficiencies of each transmission mode. Instead, however, the current access rules -- irrationally and unintentionally -- make the "satellite vs. terrestrial" choice determinative of the scope of program access rights. The result is a "triple distortion" of markets:

(1) ***Network facilities competition*** is distorted because programmers are incented to pay higher rates to bypass satellites and use less efficient terrestrial networks;

(2) ***Video distribution competition*** is distorted because MVPD operators cannot get access to certain program services that Congress recognized they needed to create marketable offerings; and

(3) ***Program service competition*** is distorted because programmers who legitimately require the right to offer exclusivity or similar preferences to help market new services are forced to use less efficient terrestrial networks to distribute them.

GE Americom has no direct interest in the scope of program access per se. Again, we recognize that exclusivity can serve a useful function, and that the Commission needs to balance the costs and benefits of access rights in different circumstances.

However, it is absolutely clear that the scope of access rights should not turn on the transmission mode by which a particular program service is delivered to cable head-ends. Rather, the rules should be entirely "transmission neutral." GE Americom is of course not seeking an advantage for satellites. We are only asking the Commission to fix an irrational rule that leads to uneconomic "satellite bypass" and the other market distortions noted above.

"Satellite Bypass" Problems Are Growing

Immediate action in this area is needed before the "triple market distortions" of the current rules begin to take root. The faster the Commission eliminates the linkage between transmission mode and program access application, the less damage to markets will occur.

A year ago the Commission noted complaints from some newer MVPD competitors that certain major program services had been or soon would be moved to terrestrial distribution, thereby avoiding the obligations of the access rules. At that time the Commission found that this problem had not developed to the point where regulatory action was necessary. However, the Commission also stated that it would monitor the situation and intervene in cases involving "moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules to deal with competing MVPDs." 4/

More recently, complaints from MVPD competitors have grown louder. Their comments in this year's *Cable Competition Report* proceeding charge that denials of access to terrestrially-delivered program services are increasing. Cable competitors have brought these same objections to Congressional hearings and have filed formal complaints with the Commission. 5/

GE Americom takes no position in these particular disputes. However, we can see how they would arise given the defects in the current rules. The problem is not solved by the Commission's current case-by-case analysis of whether a particular use of terrestrial distribution is intended to "evade" the access rules. The answer instead is to fix the access rules so that transmission mode does not define the scope of those rules at all.

Commission Action Is Needed Now to Close the "Satellite Bypass" Loophole

The Commission should immediately take two actions to address the "satellite bypass" problem. First, it should open a proceeding looking to make the program access rules "transmission technology neutral." In that proceeding the Commission can develop refinements to the current rules that balance the public interest in program access with competing interests in program exclusivity in certain contexts. 6/

4/ See Third Annual Competition Report, 12 FCC Rcd 4358, at ¶¶154-55 (1996).

5/ See, e.g., DirecTV, Inc. v. Comcast Corp., File No. CSR-5112-P; Communications Daily, October 9, 1997, at 8.

6/ It would be simple for the Commission to adopt a new "bright line" test unrelated to transmission mode. For example, the Commission might decide that access rights should apply to all program services that pass more than a certain number of homes. The Commission might also provide for a simple waiver process so that program services can be exempted from the revised access rules when that course would serve the public interest. See, e.g., 47 C.F.R. §1002(c)(5)(setting forth waiver standards for exclusivity under the current rules). In any event, transmission mode is irrelevant and should not be a defining element of the rules.

Second, and equally important, the Commission should put parties on notice that the "transmission neutral" rules developed in the proceeding will apply to all program services. No "grandfathering" will be allowed for terrestrially-delivered services. Such an announcement now is critical to minimize distortions in the three markets while the rules are corrected. Programmers will be more likely to stop making "satellite vs. terrestrial" decisions based on program access considerations. The Commission also will avoid later arguments from programmers that they relied on the current rules, irrational as they are, when deciding to bypass satellites for terrestrial networks.

GE Americom is certain that the Commission will want to correct the program access rules to make them "transmission technology neutral," and refocus their scope on the factors that actually are relevant to the public interest in video program diversity and competition. We urge that this process begin at once.

Respectfully submitted,

Philip V. Otero

cc: Commissioner Susan Ness
Commissioner Gloria Tristani
Commissioner Michael Powell
Commissioner Harold Furchgott-Roth
Meredith Jones, Esq.