Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of: Implementation of the Cable Television Consumer Protection And Competition Act of 1992 Development of Competition and Diversity In Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition	)	CS Docket No. 01-290

To: The Commission

<u>REPLY COMMENTS OF SES AMERICOM, INC.</u>

SES Americom, Inc. ("SES Americom"), pursuant to Section 1.415 of the Rules of the Federal Communications Commission (the "FCC" or "Commission"),[1] hereby submits these Reply Comments in response to the Notice of Proposed Rulemaking (the "<u>NPRM</u>") issued by the Commission on October 18, 2001, in the above-captioned matter.[2]

I. <u>INTRODUCTION.</u>

SES Americom is one of the largest U.S. providers of fixed satellite service ("FSS") transponder capacity for the transmission of satellite cable programming and satellite broadcast programming to cable head ends and broadcast network affiliates across the United States. SES Americom's satellites transmit television programming to approximately 10,000 cable head ends serving over 80 million subscribers. Its parent company, SES Global, is the

1 47 C.F.R. § 1.415.

2 <u>Implementation of the Cable Television Consumer Protection And Competition Act of 1992</u>, Notice of Proposed Rulemaking, FCC 01-307, CS Docket No. 01-290 (Oct. 18, 2001).

premier global FSS operator, providing satellite services in North America, Latin America, Asia, and Europe through 29 wholly owned geostationary satellites.[3]

SES Americom is submitting these Reply Comments in partial support of certain comments filed in this proceeding on December 3, 2001. Several commenting parties requested that the Commission extend beyond October 5, 2002, the current prohibition -- contained in Section 628 of the Communications Act of 1934,[4] which section was adopted as part of the Cable Television Consumer Protection and Competition Act of 1992[5] -- against exclusive contracts for satellite cable or broadcast programming between cable operators and their programming affiliates. Many of these commenting parties also requested that the FCC close the "loophole" in the law that allows circumvention of the exclusivity prohibition by the distribution of cable and broadcast programming terrestrially, instead of via satellite, thus placing such distribution outside the purview of the exclusivity laws. [6]

SES Americom expresses no opinion regarding whether the FCC should extend the exclusivity prohibition beyond the sunset period set forth in the statute. If the Commission decides to extend the exclusivity prohibition, however, the FCC should close the terrestrial distribution loophole. This "escape clause" creates an unintended and inefficient incentive for

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[3] SES Global also has indirect investment interests in 13 additional spacecraft.

[4] 47 U.S.C. § 548.

[5] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[6] The comments addressing the terrestrial loophole issue include those filed by EchoStar Satellite Corporation, National Rural Telecommunications Cooperative, RCN Telecom Services, Inc. ("RCN"), Broadband Service Providers Association ("BSPA"), Independent Multi-Family Communications Council, Gemini Networks, Inc., World Satellite Network, Inc. ("WSNet"), Carolina BroadBand, Inc., Seren Innovations, Inc., and Braintree Electric Light Department.

cable operators to elect terrestrial means instead of satellites for the distribution of programming to cable head ends and broadcast network affiliates, thereby artificially distorting the television programming distribution market -- to the detriment of SES Americom and similarly situated U.S. FSS operators, and to the ultimate detriment of U.S. viewers of television programming.

II. THE COMMISSION SHOULD CLOSE THE TERRESTRIAL DISTRIBUTION LOOPHOLE.

A. The Statute and FCC Decisions.

Section 628(b) of the Communications Act makes it unlawful for cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors to engage in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming."[7] In Section 628(c), Congress instructed the FCC to implement this prohibition by promulgating regulations that, at a minimum, among other things, forbid exclusive contracts for satellite-delivered cable or broadcast programming in areas served by a cable operator, between a cable operator and a satellite cable or broadcast programming vendor in which the cable operator has an attributable interest, unless the FCC determines that such an exclusive contract is in the public interest.[8]

To implement this statutory restriction, the FCC promulgated Section 76.1002(c)(2) of its Rules.[9] Under Section 628(c)(5) of the Communications Act, and Section 76.1002(c)(6) of the FCC Rules, this prohibition will cease to be effective as of October 5, 2002,

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[7] 47 U.S.C. § 548(b).

[8] Id. § 548(c)(2)(D).

[9] 47 C.F.R. § 76.1002(c)(2).

unless the FCC decides that the provision is necessary to preserve competition and diversity in the distribution of video programming.[10]

Because the exclusivity restriction by its terms applies only to programming delivered via satellite, certain cable operators have taken the position that programming distributed to cable operators and broadcasters by terrestrial means is not subject to the restriction. In response to complaints filed against Comcast, based on its refusal to allow direct broadcast satellite service providers to carry certain terrestrially-delivered sports programming, the FCC has taken the position that the exclusivity prohibition applies only to satellite-delivered programming, and therefore does not prohibit the exclusive distribution of programming that is delivered terrestrially to cable operators and broadcasters.[11] While acknowledging that there may be circumstances under which moving programming from satellite to terrestrial delivery could be actionable as "an unfair method of competition or deceptive practice if it precluded competitive MVPDs [multichannel video programming distributors] from providing satellite cable programming," the FCC declined to make such a finding in the case before it, because it believed that the cable operator had not attempted to evade the FCC's Rules.[12]

B. If the Commission Extends the Exclusivity Restriction, It Should Close the Terrestrial Distribution Loophole.

SES Americom urges the Commission to close the terrestrial distribution loophole if the Commission extends the exclusivity restriction beyond the date set forth in the statute. The current rule creates an artificial incentive for cable operators and their affiliated programming providers to forego the use of FSS transponders for the delivery of programming to cable

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10 47 U.S.C. § 548(c)(5); 47 C.F.R. § 76.1002(c)(6).

11 DirecTV, Inc. v. Comcast Corp., 15 FCC Rcd 22802, ¶ 12 (2000).

12 Id. at ¶¶ 13-14.

operators and broadcasters, in favor of terrestrial means, so as to avoid the exclusivity restriction. This practice harms SES Americom and other U.S. FSS providers by reducing the market for the transmission of television programming via satellites. By encouraging programming companies to choose a means of transmission based on the availability of a regulatory loophole, instead of selecting based on such market factors as price, availability and service quality, the rule serves as an obstacle to the efficient operation of the television programming distribution market.

The Commission has previously recognized the strong incentive on the part of cable operators and their affiliated programming vendors to move programming to terrestrial distribution channels in order to have the option of providing such programming on an exclusive basis. In response to a Petition for Rulemaking filed by Ameritech New Media in 1998, the Commission stated: "we believe that the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace."[13] Similarly, in its Seventh Annual Report on the state of competition in the MPVD market, the FCC again referenced the potential for terrestrial distribution to have a substantial impact on such competition, and promised to monitor this issue in the future.[14]

C. The FCC has the Requisite Authority to Abolish the Loophole.

Some of the FCC's past pronunciations on the terrestrial loophole issue, as well as many of the comments referenced above, suggest that the FCC may view the eradication of the terrestrial loophole as an action beyond the Commission's jurisdiction, to be addressed, if at all,

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13 Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, 13 FCC Rcd 15822, ¶ 71 (1998).

14 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report, 22 Comm. Reg. (P&F) 1414, ¶¶ 15, 182 (2001).

by Congress. In the Comcast order, for example, the FCC decided that "the language of Section 628(c) of the Communications Act expressly applies to 'satellite cable programming and satellite broadcast programming.'"[15] Similarly, the NPRM states that "Section 628(b) applies only to satellite programming."[16] On the other hand, the FCC has acknowledged its power under Section 628 to address the terrestrial distribution problem, promising, for example, that, in response to any trend of cable operators' switching to terrestrial delivery for the purpose of evading the Commission's rules, the FCC would "consider an appropriate response to ensure continued access to programming."[17] Additionally, in the Comcast case discussed supra, the FCC concluded that, under certain circumstances, the "moving of programming from satellite to terrestrial delivery could be cognizable under Section 628(b)."[18]

Clearly, as acknowledged by the Commission, and as explained in detail by several commenting parties, Section 628(b) provides the FCC with broader authority than is set forth in Section 628(c), to ensure that cable operators and vertically integrated programming vendors do not engage in unfair practices that harm the market for the delivery of programming.[19] As demonstrated by these commenting parties, Section 628(c) was not meant to limit the FCC's ability to proscribe harmful distribution arrangements to programming delivered by satellite, but merely to establish minimum safeguards to be implemented by the Commission.

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15 Comcast, 15 FCC Rcd 22802, at ¶ 12. See also RCN Telecom Services of NY, Inc. v. Cablevision Systems Corp., 16 FCC Rcd 12048, ¶ 14 (2001).

16 NPRM at ¶ 3.

17 Seventh Annual Report, 22 Comm. Reg. (P&F) at ¶ 182.

18 Comcast, 15 FCC Rcd 22802, at ¶ 13.

19 See, e.g., Comments of RCN at 29-35; Comments of BSPA at 12-19; Comments of WSNet at 7-8; Comments of Carolina BroadBand at 7-9; Comments of Seren Innovations at 13-22.

Given the Commission's broader jurisdiction over cable operators' distribution practices, the FCC should, if it extends the exclusivity proscription, determine that exclusive arrangements between cable operators and their affiliated programming providers for the distribution of programming are unlawful, regardless of how such programming is delivered to cable head ends and broadcasters.

D. Application of the Exclusivity Restriction Should Not Turn Only on the Switching of Distribution Means.

Assuming that Section 628(b) gives the Commission the jurisdiction to expand the current exclusivity restriction to prevent harm to competition in the MPVD market, there is no principled basis for not extending the exclusivity restriction to terrestrial distribution, in order to avoid distorting the market for the distribution of television programming to cable head ends and broadcasters. Nor is there a reasonable basis for focusing, as the Commission did in Comcast and in its recent MVPD report, on the migration of programming from satellite to terrestrial delivery as the only actionable exercise.[20] Clearly, such a migration analysis could never be applied to new programming offerings distributed originally by terrestrial means, which new offerings may be the very programs that cable operators most wish to offer on an exclusive and discriminatory basis.

In circumstances where programming is in fact moved from satellite to terrestrial distribution, the FCC has indicated that it would consider whether the move was made for the improper purpose of evading the exclusivity restriction.[21] Besides it being both time consuming and difficult to prove that the migration of programming to terrestrial distribution in any particular instance was motivated by a desire to avoid the FCC's exclusivity restriction, the

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[20] See text at notes 17-18, supra.

[21] See Comcast, 15 FCC Rcd 22802, at ¶¶ 13-14.

Commission should not place itself in the burdensome position of having to use its scarce resources to adjudicate complaints about the motivation behind a change in the mode of distribution, when the intent of the exclusivity restriction can be implemented unambiguously by eliminating the terrestrial loophole.

III. CONCLUSION

The Commission's program access rules, as currently structured, create unintended incentives for cable operators and their affiliated programming suppliers to deliver programming via terrestrial means instead of through satellites. As such, the rules introduce inefficiencies into the market for the distribution of television programming to cable head ends and broadcast network affiliates. The terrestrial loophole should therefore be eliminated, clearing the way for satellite and terrestrial service providers to compete against each other on a level playing field, based on price, service offerings, and service quality.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2002, a copy of the foregoing Reply Comments of SES Americom, Inc. was submitted electronically to the Federal Communications Commission, and served by hand on each of the persons listed below:

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