S. HRG. 109–762

COMPETITION IN SPORTS PROGRAMMING AND DISTRIBUTION: ARE CONSUMERS WINNING?

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

NOVEMBER 14, 2006

Serial No. J–109–119

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

32–152 PDF WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
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TUESDAY, NOVEMBER 14, 2006

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:01 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter and Feinstein.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. The Judiciary Committee will now proceed with our hearing on the National Football League and its practices on pay television. Nine days from today, on Thanksgiving Day, the NFL on its own network, the NFL Network, will begin showing what is called the Thursday-Saturday package, and this will doubtless have the effect of raising subscription rates for consumers who watch football very materially. This hearing will examine whether the so-called Sunday Ticket is a violation of the antitrust laws, whether the new Thursday- Saturday package is a violation of the antitrust laws, or whether the two in combination violate the antitrust laws, and whether or not additional legislation is necessary.

Professional sports in America has a unique position. Other businesses—and it is acknowledged that professional sports does constitute a business, but other businesses are subject to the antitrust laws. But by virtue of a special exemption under legislation enacted in 1961, professional sports may combine and deal with the networks in a way which other businesses cannot. We will be examining today the question as to whether there is any exemption from that statute, but it appears to me on the face that there is not.

There is no doubt that America has a love affair with professional sports. Perhaps it could be more accurately called an addiction, maybe even a drug addiction. But there is no doubt that people are attracted to the televising of sports, especially the National Football League, where the Super Bowl has consistently been the highest-drawing television program that is on the air.

In 1999, the Court of Appeals for the Third Circuit handed down a decision saying that DIRECTV's Sunday Ticket was not exempt under the 1961 statute, that the 1961 statute covered broadcast

television where there were sponsors and did not cover pay television. And, in fact, Pete Rozelle testified at the hearings when that legislation was enacted that it did not cover pay television, and those were the findings of the House Judiciary Committee as well.

A key issue of the entire arrangement turns on which of the subscribers are required to pay for the additional coverage. Comcast, illustratively, has three tiers of coverage: one is what is called analog, where you have about 24 million subscribers; another is digital, with about 11 million subscribers; and a sports tier, which has less than 1 million. Efforts are being made by cable companies to carry the new Thursday-Saturday package on their sports tier, but that is being resisted by the NFL.

The result is that if it is covered on the basic package, many more people have to pay the fare, whether they want the NFL or not, if they already get the cable coverage. One question which will be pursued here is: Why has the Sunday Ticket not been available for competitive bidding? The Committee is advised—and we will be pursuing this more specifically—that the NFL told Comcast they wouldn't entertain a bid from Comcast. And the question obviously arises: Why isn't the bidding open? And why isn't the bidding competitive?

We will be pursuing another hearing on this overall subject on December 7th on the question of vertical integration, which poses some different issues with the Yankees and their television station, where it is reported that their TV station is now worth more than the baseball team, and the vertical integration which involves the Braves and the vertical integration which involves Comcast with the Philadelphia sports teams.

Let me yield at this time to the Senator from California.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman, and let me thank you for holding these hearings. And I gather from what you say there will be a series of them, and I think that is good. I would like to urge that they be widened somewhat, and I am very concerned. I happen to be a big NFL fan. You know I was mayor for 9 years. I had the privilege of going to the Super Bowl several times. The San Francisco 49ers have become a treasured value in San Francisco. And I have been very disturbed to learn that the 49ers are countenancing a move outside of the city. And I began to take a look at what has happened, and what I find is that with Major League Baseball you had one move during this period of time, and with the major league football there have been seven moves during a period of time: the Oakland Raiders to Los Angeles in 1982, the Baltimore Colts to Indianapolis in 1984, St. Louis Cardinals to Tempe in 1988, Los Angeles Rams to St. Louis in 1994, the Raiders to Oakland again in 1994, the Cleveland Browns to Baltimore in 1996—and in that case they did not take the name essentially with them—and the Houston Oilers to Nashville in 1997.

Major league football is a very important factor to big cities of America. It is the great leveler in a diverse city. People come to-

gether. They mourn the losses. They share the pride of the wins. Once in a while they go to the Super Bowl, and there is a tremendous investment of the cities of America in their teams. And when a team just announces that it may pull out and go to another community and take the name of the city and the name in this case of the heritage of the city with them, it causes great consternation.

I have my staff, Mr. Chairman, looking at the law. It is my view that the league should approve all moves. It is my view that these constant moves are not healthy for the communities. And I have deep concern over the taking of the name of a team—in this case, the San Francisco 49ers. 49er is the tradition of the city. San Francisco is the city of the Gold Rush. This has been with us for more than a hundred years. You cannot move to Santa Clara and call yourself a 49er. You are not. And you certainly can't call yourself the San Francisco 49ers. You are not.

So it seems to me that we ought to look at legislation which would prohibit the taking of a city's name outside of its jurisdiction without the approval of that city. I have always contended that major league sports isn't like Post Toasties. It isn't a commodity. It is a very ethereal, general concept that so deeply enriches a city. I was passionate about this when I was mayor, and I am passionate about it as a U.S. Senator.

I pulled together the owner of the 49ers, whom I respect very much, John York—I have known the family for a very long time—and the mayor, Gavin Newsom, this past Friday to try to see if negotiations couldn't resume, and I believe they will resume. I understand the mayor may be meeting with Mr. York again Wednesday. And I am very hopeful that something can be worked out.

But this U.S. Senator intends to fight every way I possibly can to keep the San Francisco 49ers in San Francisco and to see that this kind of move of just picking up and leaving a city can really be modified to the point where, if the name is going to go, the city provide some approval.

So I wanted you, because we have worked closely together on a number of other issues, to know that and to know my deep concern, to thank you for holding these hearings, and I hope they can be expanded.

Chairman SPECTER. Well, thank you, Senator Feinstein. You have raised some important issues. And this Committee held hearings in the early 1980s on the subject you referred to, and at the same table, we had Pete Rozelle and Al Davis when they came in to testify about the move of the Oakland Raiders—I think the table is the same; the witnesses are just different—and when there was a threat to move the Philadelphia Eagles. And I share your passion and I share your concern for the hometown team. When there was a move to take the Eagles to Phoenix in the early 1980s, I introduced legislation to take away the antitrust exemption unless major league football, the NFL, respected the hometown teams.

I believe that sports franchises are—I put it in the terms, perhaps unduly legalistic, as opposed to Post Toasties, "affected with the public interest." And I still recall, as do many people, the move of the Brooklyn Dodgers to Los Angeles. Walter O'Malley got a lot of real estate, and Brooklyn lost their baseball team. And the Giants followed suit. And I am sure you opposed the move of the New

York Giants to San Francisco at that time. And then the Colts left in the middle of the night with Irsay to go to Indianapolis. And then we had the rash of stadium building where we spent $1 billion in Pennsylvania and a lot of it has come out of the taxpayers. I introduced legislation when that wave started to condition the antitrust exemption on Major League Baseball and the NFL paying three-quarters of the stadium costs. The NFL has a multiyear, $24 billion television contract, and they can afford to build their own stadiums, and they can afford to leave teams in place. I agree with you totally.

The more imminent problem is the problem as to what is going to happen to cable subscribers all around the country. People are going to want to see this Thursday-Saturday package, and the NFL has sued Comcast involving this matter. We are soon going to explore that. And I cannot find out what that lawsuit is about. It is under seal. They have docket entries so you can see that there is a lawsuit, but it is under seal. So the public has a really major interest, and there has been a concern that the attitude of professional sports is that the public be damned. And that is highly questionable in a context where you have this unique status of an antitrust exemption.

Well, we are going to talk—

Senator FEINSTEIN. If I may?

Chairman SPECTER. Sure, you may.

Senator FEINSTEIN. Thank you very much. I would just say that I agree with everything you have said. I would really like to work with you in this regard. You clearly have the background, the history, and have done much more in the arena than I.

As you know, our side of the aisle has the organizing meeting at 9:30 this morning, so I look forward to speaking with you in the coming days and seeing what we might be able to put together for the new Congress. And I thank you very much.

Chairman SPECTER. Well, thank you, Senator Feinstein. We had set this hearing thinking that the organizing meetings were going to be on Wednesday and not on Tuesday. And as it works out, as usual, there is a disagreement between the parties as to when to organize. We can disagree on almost everything. The Democrats are organizing on Tuesday and Republicans on Wednesday. But your organization meeting may not take too long, and if you have the time and inclination, come back. These men will be here for a while.

Senator FEINSTEIN. Thank you. Thank you very much.

Chairman SPECTER. We now turn to our first witness, Mr. Jeffrey Pash, Executive Vice President and General Counsel of the National Football League. Prior to coming to the NFL, he was Senior Vice President and General Counsel to the National Hockey League, had been a partner at Covington & Burling, graduated from Harvard College and Harvard Law School.

Thank you for joining us, Mr. Pash, and we look forward to your testimony.

STATEMENT OF JEFFREY PASH, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL FOOTBALL LEAGUE, NEW YORK, NEW YORK

Mr. PASH. Thank you, Mr. Chairman, and good morning. I appreciate the opportunity to talk about our television policies today. They have been, as you indicated, reviewed over many years in many different forms, and the conclusion I think has been that these policies are consistent with the public interest, they are responsive to consumer demand, and they provide NFL fans with exceptional access to television at little or no cost.

We are, like any sports league, a unique business entity. Our teams jointly produce a product that no team could produce on its own. And, in turn, we compete in a broad entertainment marketplace that includes other sports products and all kinds of entertainment products.

Let me touch on three points before we get to the questioning: first, just an overview of NFL TV policy; second, the Sunday Ticket package; and, third, our new NFL Network.

The centerpiece of NFL television policy is the free, over-the-air broadcasting of NFL games. Every NFL regular season game and every post-season game is televised on free, over-the-air television. As a general matter, a fan in a particular city will have available 90 or more games on free television during the course of the year. That will include all of that local team's away games, all of the home games if they are sold out, a wide range of other NFL games, and all playoff games. Thus far this year, every game has been sold out and has been televised locally in the home city.

This is true even of games that are shown on ESPN or on the NFL Network. Those games are simultaneously broadcast over the air in the home cities of the participating teams. So the game last night between Tampa Bay and Carolina was shown nationally on ESPN and also on over-the-air television in those two communities. That is a unique requirement. It is not imposed by any other league. It is not imposed, to my knowledge, in the context of any other sports television product.

Second, with respect to NFL Sunday Ticket, that is, as the Chairman knows, a satellite package that allows fans to view out-of-market games that would not otherwise be available in their home community. So a fan in Washington, for example, would ordinarily on Sunday see the Redskins and one or two other games. If that fan purchases Sunday Ticket, he can see any NFL game being played on that day.

NFL Sunday Ticket is structured to supplement but not displace the broadcast packages. No fan has to purchase Sunday Ticket in order to see the local teams' games, the prime-time contests, any of the post-season games, or a wide range of other games. Those 90 games I referred to are available without regard to whether a fan purchases Sunday Ticket or not. It does not displace the primary role of broadcast networks or local affiliates. It expands output and enhances consumer choice, which is precisely what the antitrust laws encourage firms to do. And as DIRECTV's testimony makes clear, it has also promoted broader competition in a broader television marketplace.

Finally, with respect to the NFL Network, the NFL Network was started 3 years ago. It is a year-round channel devoted to football. It is currently available in approximately 40 million homes, both on cable as well as DIRECTV and EchoStar. Interestingly, DIRECTV and EchoStar, for example, as is also true of the telephone companies that carry the NFL Network, have included it on their basic tier at no additional cost to consumers, no up-charge whatsoever for any of those homes.

While we have allowed cable companies to launch the network on widely distributed digital tiers, we have not been willing to do so on the sports tiers. We do not believe the pricing of those sports tiers or the very narrow distribution of those sports tiers is consistent with the interests of our fans or, frankly, with our own interests. We have always tried to have broad-based distribution of our product, and those sports tiers are not broadly based.

Later this month, we will begin live telecasts of a package of eight regular-season games. Those games will also be shown on over-the-air broadcast in the home cities of the competing teams.

We are in the midst, as you know, of some difficult negotiations with cable systems over carriage of the network. Those are tough commercial negotiations. They are not unusual or unprecedented in the context of sports or television. There have been similar disputes in the past between cable systems and other rights holders. As a general matter, they get resolved when one party or another reassesses and modifies its positions. But they do not raise antitrust issues and do not get resolved by reference to the antitrust laws. They are commercial disputes that get resolved in the ordinary course.

We believe that our use of the NFL Network, Sunday Ticket, and our broadcast package, which is where the overwhelming amount of our television product is placed, is consistent with the public interest and with the antitrust laws as they have developed over the past 45 years.

Thank you.

[The prepared statement of Mr. Pash appears as a submission for the record.]

Chairman SPECTER. Mr. Pash, why do you say or fundamentally how can you say that not offering the Thursday-Saturday package to a sports tier is consistent with the fans' interest? By way of definition, if you have it in the basic package, everybody has to pay for it whether they want to watch the games or not, whether they are a football fan or not. If they could select their menu a la carte, it would be the channels they wanted. So how can you say it is consistent with the fans' interest when, if you put it on a sports tier, only the fans who wanted to watch the games would be paying for them and not everybody have to pay for them to get the basic coverage?

Mr. PASH. Well, the interest of fans, I think, Senator, is best served by broad distribution. That is why so many cable channels are carried on a basic tier. We do not have an a la carte model. This is not about a la carte. This is not selecting the NFL Network.

Chairman SPECTER. Well, why not? Why is it in the fans' interest to have to pay for the Thursday-Saturday package when they do not have any interest in professional football? Why not let the peo-

ple who want it—we are not talking about going a la carte all the way. We are talking about two different tiers: the basic package everybody has to pay for, and a sports tier, where you have those who are identifiable as wanting the sports would pay for what they see.

Mr. PASH. Well, they do not have to pay for it. If you look at DIRECTV and you look at EchoStar, the NFL Network and these eight games are available on the basic tier. When EchoStar added the NFL Network earlier this year, there was no increase in charge to the consumers. There was no increase in charge to the subscribers for DIRECTV. The telephone companies that are carrying this on their basic tier, they do not charge the consumers anything extra for it. That is a false dichotomy. That is not how it has to work out. It can be part of the basic cable charge, or it can be part of the basic digital tier charge. There is no reason why there has to be a separate package, and four of the five largest distributors in the country carry the NFL Network without imposing a separate charge. It is a false dichotomy.

Chairman SPECTER. Which cable companies carry it without any additional charge?

Mr. PASH. There is no additional per subscriber fee passed through on Cox, on Comcast; there was not on Adelphia before Time Warner took over the Adelphia systems and dropped the NFL Network; and there is not on DIRECTV; and there is not on EchoStar.

Chairman SPECTER. Well, you mentioned Comcast. Is it true that the NFL has sued Comcast?

Mr. PASH. Yes, we are in litigation with Comcast.

Chairman SPECTER. And what is the thrust of that litigation?

Mr. PASH. It is a contract dispute involving whether Comcast has the right to tier the NFL Network starting next year.

Chairman SPECTER. Well, that is precisely the point I am making. Comcast does not want to have it in a tier where people pay for it where the people are not interested in the sporting event.

Mr. PASH. Well, we think that the contract that we signed with Comcast does not permit that, and we have asked a judge to make a ruling on that issue. We think we have already negotiated that issue with Comcast, and there is a dispute about what the contract permits.

Chairman SPECTER. Mr. Pash, do you know if the NFL, through its former Commissioner, Mr. Tagliabue, declined to entertain any bid by Comcast for the Sunday Ticket?

Mr. PASH. I do not believe that we declined to enter a bid. I know there were conversations with Comcast and other cable systems about Sunday Ticket. I do know that we have been quite reluctant, as have our broadcast partners, to have Sunday Ticket go on to cable because we are very concerned that it would really undermine the broadcast television model, including the role the local affiliates play—

Chairman SPECTER. Well, before you give your explanation, let's come back. You used the word "reluctant." Was the reluctance carried to the extent of Commissioner Tagliabue telling Comcast he would not entertain a bid?

Mr. PASH. I cannot say. I was not party to a discussion, whatever discussion Mr. Tagliabue may have had with people at Comcast.

Chairman SPECTER. Well, would you find out about that and let the Committee know, please?

Mr. PASH. Yes, I will.

Chairman SPECTER. And you were starting to describe why you don't want to have it over cable.

Mr. PASH. Right. As I said, Senator, the primary means of our telecast is over free, over-the-air television. That has been the case going back to the 1960s. And we do not want to have Sunday Ticket undermine or substitute for that. We want to preserve the health of the broadcast television model. We want to maintain the local affiliates as the principal means for viewing NFL television. And there is concern on our part, and I think on the part of the broadcast networks, that if Sunday Ticket were to be available on 80 or 90 million cable households, it would seriously cannibalize and undermine the viability of broadcast television. We think our primary responsibility, Mr. Chairman, is to deliver NFL Football to a broad audience through broadcast television.

Chairman SPECTER. Well, how about on 24 million, which is what Comcast has on its basic, or even less than that, 11 million on its digital line, or even less than that, a million on its sports tier?

Mr. PASH. To put Sunday Ticket on the sports tier?

Chairman SPECTER. Well, it is not going to undermine your broadcast television. We are not talking about 80 million. We are talking about a much smaller number. How many subscribers does DIRECTV have?

Mr. PASH. Well, we currently have on DIRECTV about 1.8 million subscribers to Sunday Ticket, and I do not know the total universe that DIRECTV has off the top of my head. I am sure Mr. Fawcett knows. But our Sunday Ticket has about 1.8 million subscribers on DIRECTV.

Chairman SPECTER. 1.8 million?

Mr. PASH. Yes, sir.

Chairman SPECTER. Is that on the basic coverage of DIRECTV?

Mr. PASH. Yes. Well, you have to purchase it. It is a separate package that you purchase.

Chairman SPECTER. So you have DIRECTV on a tiered basis.

Mr. PASH. We have a package of games that can be purchased on DIRECTV, yes.

Chairman SPECTER. Because I have DIRECTV, and I do not have the Thursday-Saturday package.

Mr. PASH. Well, the Thursday-Saturday package, Mr. Chairman, you do not have to buy separately on DIRECTV. Those are on the NFL Network. The NFL Network is on the basic tier of DIRECTV and EchoStar. You do not have to pay anything extra to get the Thursday-Saturday games on DIRECTV.

Chairman SPECTER. Well, what is the basis of the litigation with Comcast? Comcast has the NFL Network, and there is a contention that Comcast wants to put it on the sports tier, and the NFL wants to put it on the broader base, either analog or basic coverage. Isn't that right?

Mr. PASH. Comcast has informed us that they want to put it on the sports tier beginning next year. We want to keep it where it is now. We believe that the contract that we negotiated with

Comcast does not give Comcast the right to move the NFL Network to the sports tier, and that is the question that we have asked the judge to resolve.

Chairman SPECTER. But with DIRECTV, you do permit it to go on just the sports tier.

Mr. PASH. No, Mr. Chairman, that is not correct.

Chairman SPECTER. Everybody on DIRECTV gets the Thursday-Saturday package.

Mr. PASH. That is correct. Yes, sir. The Thursday- Saturday games are available on the basic tier on both DIRECTV and EchoStar.

Chairman SPECTER. Is it true that Cox has it on just the sports tier?

Mr. PASH. No, that is not correct.

Chairman SPECTER. Well, we will take up the Time Warner situation with the Time Warner witness.

We turn now to Mr. Daniel Fawcett, Executive Vice President for Business and Legal Affairs for DIRECTV, Incorporated. Previously, he had been Executive Vice President for Legal and Business Affairs for FOX, served in several positions at FOX, including Senior Vice President for Business and Legal Affairs; a bachelor's degree from Tufts, an MBA from Carnegie Mellon, and a law degree from the University of Pittsburgh.

Thank you for joining us, Mr. Fawcett, and the floor is yours.

STATEMENT OF DANIEL M. FAWCETT, EXECUTIVE VICE PRESIDENT, BUSINESS AND LEGAL AFFAIRS AND PROGRAMMING ACQUISITION, DIRECTV, INC., WASHINGTON, D.C.

Mr. FAWCETT. Thank you, Chairman Specter. My name is Dan Fawcett, as you said, and I am also the head of Programming Acquisition at DIRECTV, and I am happy to be here today to testify on the role of NFL Sunday Ticket in fulfilling the goals of the program access statute and in fostering competition to the incumbent cable providers.

Over the last decade, Congress has helped develop the competitive video marketplace that exists today. In a little over 10 years, DBS—that is DIRECTV and dish, EchoStar—has grown to more than 28 million subscribers. Increased Competition means consumers have more choice; customer service and pricing are more responsive; and technological innovation is flourishing. Because of this competitive marketplace, all Americans, not just DIRECTV customers—are enjoying a better television experience, no matter who their provider.

Congress helped make this possible by enacting the program access provisions in the 1992 Cable Act. The point of the Act was to ensure that new entrants had access to programming that cable operators would otherwise withhold. Congress, therefore, required that programming owned by cable be made available to all competitors on nondiscriminatory terms.

Yet when adopting the program access provisions, Congress treaded carefully, and rightfully so. It did not prohibit all exclusive arrangements. It instead sought to encourage the development of unique product offerings, such as local news. And because it was principally concerned about the abuse of market power, it only pro-

hibited exclusive contracts by dominant cable operators for programming owned by cable.

On the other hand, Congress recognized that exclusive contracts could enhance the competitive viability of new entrants, like DIRECTV.

Perhaps the best example of an exclusive arrangement helping, and not harming, competition is the NFL Sunday Ticket. DIRECTV was able to get a foot in the door of this highly concentrated industry by offering unique content like Sunday Ticket. The introduction of competition from DBS in turn has forced cable to innovate and become more responsive to customers' concerns. This is exactly what Congress had in mind when it enacted the program access provisions.

DIRECTV believes that Sunday Ticket raises no meaningful antitrust concerns. To the contrary, it has served the purpose of the antitrust laws by contributing to a competitive marketplace for video services.

The same cannot be said for cable. Cable has found ways to evade the law and harm competition. They have used the terrestrial loophole to deny programming they own to DBS providers in places like Philadelphia and San Diego. They have also imposed substantial and arbitrary price increases for home team sports events in places like Chicago.

A comparison of the differences between Sunday Ticket and these kinds of anti-competitive arrangements by cable exemplifies this point. One key difference is that DIRECTV has less than 15 percent market share. By contrast, in Philadelphia, where Comcast has given itself exclusive rights to the Phillies, the Flyers, and the 76ers, Comcast has a 70-percent market share. It owns the programming. It even owns a controlling interest in two of the three teams. This was clearly not an arm's-length negotiation.

Another key difference is that Sunday Ticket is a premium package of out-of-market games that historically did not exist and, as Mr. Pash said, complements and supplements the NFL's basic broadcast packages. It allows football fans to see games that are not broadcast in the regions where they live. As a native of Pittsburgh and a diehard Steelers fan, Sunday Ticket allows me to watch the Steelers from my house in Los Angeles. But in all markets, every football fan can still enjoy watching his home team play on free, over-the-air television. My father in Pittsburgh watched the Steelers on free, over-the-air television through Comcast Cable until last year when I forced him to switch to DIRECTV.

By contrast, in Philadelphia and elsewhere, incumbent cable operators deny local fans the right to see their home team unless they subscribe to cable. So in Philadelphia, the only way you can watch the 76ers and the Phillies and the Flyers is by subscribing to Comcast.

You have called this hearing today to look at whether consumers are the winners when it comes to competition in sports programming and broadcasting. The answer is simple. When programming is available in a fair and open bidding process, consumers clearly benefit. As Congress envisioned, competition thrives and consumers have more choice as each competitor strives to provide innovative content programming and service. When the incumbent provider,

however, uses its entrenched market power to deny certain must-have programming to competitors, consumers only lose.

Congress should act steadfastly to ensure that providers don't use their market power to artificially limit choice and raise prices, and DIRECTV is eager to work with Congress to ensure that the vision of the program access rules is fulfilled by closing the terrestrial loophole. And DIRECTV urges this Committee to consider examining any antitrust concerns raised by the cable industry's abuses of its market power.

Thank you, Senator. I am happy to answer questions.

[The prepared statement of Mr. Fawcett appears as a submission for the record.]

Chairman SPECTER. Well, thank you, Mr. Fawcett. You say that Congress should act to see to it that prices are not raised. Isn't what is happening now with the Thursday- Saturday package on the NFL Network going to result in prices being raised as the NFL insists, as Mr. Pash has just testified, on putting that program on a broad base on basic coverage and not permitting you to go on a limited sports tier so the fans, the people that want it pay for it, but the others don't have to?

Mr. FAWCETT. Well, I think, first of all, our packages at DIRECTV will not increase as a result of the Thursday- Saturday package, which is eight games that are included on the NFL Network, which you as a DIRECTV customer—

Chairman SPECTER. Well, okay, yours may not be, but right now Time Warner is refusing to carry the Thursday- Saturday package because it is going to raise prices. And Comcast is in litigation, started by the NFL, because they want to carry it on a sports tier so the only people who pay for it are the ones who want it. So if the NFL has its way, won't prices be raised?

Mr. FAWCETT. Well, first of all, Senator, I believe that it is somewhat ironic that Comcast and Time Warner are wanting to put the NFL Network in a sports tier when they with their own sports networks require that distributors carry it on basic cable. Comcast, for example, in all of its regional sports network—its Outdoor Life Network, which is now called Versus, its Golf Channel—they require carriage on basic cable, not on a sports tier.

Chairman SPECTER. Okay. Aside from the irony—and we will come back to that.

[Laughter.]

Chairman SPECTER. Aside from the irony, aren't prices going to be raised? I mean, I liked your line where you said Congress ought to act if prices are going to be raised. It looks to me like prices are going to be raised. It looks to me like Congress ought to act. It is your idea, Mr. Fawcett, not mine.

Mr. FAWCETT. Yes, Senator. I think that certainly our costs increase, but we do not pass along costs of programming in our basic tier to consumers. If it is in a sports tier, the price that we would charge would be very— first of all, the networks wouldn't allow it or wouldn't want us to do it. And the prices that they would charge for that service on an a la carte basis would be very high and they wouldn't have their advertising revenues to make it a viable business model.

So virtually every sports network with live professional games of a major league are carried on basic cable. The Sunday Ticket package is an ancillary product of out-of-market games, not games of the local professional teams. In Chicago, for example, where I am talking about prices increasing is where Comcast takes over the regional sports network in Chicago and doubles the price to people like DIRECTV, which it can afford to do because it has 60 or 70 percent of the Chicago market, and requires—you know, arbitrarily increases the price for that must-have local programming, that is, the games of the Black Hawks, the Cubs, the White Sox, and the Bulls.

That is certainly must-have programming, and in those types of situations, yes, prices are increasing, and that is because of the terrestrial loophole and the dominance of cable and local markets which, after the Adelphia transaction, are staggering.

Chairman SPECTER. Okay. Let's come back to the irony now—the irony of Comcast raising prices. Do you think Comcast is violating the antitrust laws?

Mr. FAWCETT. No. I am not suggesting that. The irony is that when it doesn't—MASN, for example, the Mid-Atlantic Sports Network, which is carrying the Washington Nationals and the Baltimore Orioles, Comcast refused to launch that on its cable systems in this area and then ultimately, as part of the Adelphia transaction, agreed to launch it, but then it passed on a $2 price increase to its customers.

Chairman SPECTER. Well, you are talking about Comcast having a regional sports network, and you referred to Chicago, you referred to Philadelphia. And you say that they are raising the prices. It is vertical integration, and as I said earlier, we are going to take that up on December 7th. But since you brought it up, I would like to pursue it a little further now. And that is, since, as you say, Comcast is raising the prices, but you say the antitrust laws are not being violated, do you think Congress should modify the antitrust laws to deal with that kind of vertical integration which results in increased prices?

Mr. FAWCETT. I am not an expert in the antitrust area, Senator, so I am not suggesting that.

Chairman SPECTER. You are not an expert in the antitrust area? You have a law degree from the University of Pittsburgh.

Mr. FAWCETT. I do.

Chairman SPECTER. You are the Executive Vice President for Legal Affairs at DIRECTV. Aren't they dodging the antitrust issue all the time at DIRECTV?

Mr. FAWCETT. Again, I have some knowledge of the antitrust laws, but I am not an antitrust expert, and obviously we have a number of issues—

Chairman SPECTER. Well, let me ask you to study that issue, do a crash course—we have had crash courses around here before—on antitrust law and follow up the testimony which you have offered with respect to—you are defending your conduct by bringing up the conduct of Comcast, so I would like to get your view on that.

We turn now to Mr. Landel Hobbs, Chief Operating Officer of Time Warner Cable, had been Vice President in the Financial Analysis Operation with AOL Time Warner, had been Chief Ac-

counting Officer for Turner Broadcasting Systems; bachelor's degree in business administration from Angelo State University in Texas.

Thank you for coming in today, Mr. Hobbs, and we look forward to your testimony.

STATEMENT OF LANDEL C. HOBBS, CHIEF OPERATING OFFICER, TIME WARNER CABLE, NEW YORK, NEW YORK

Mr. HOBBS. Thank you, Mr. Chairman. My name is Landel Hobbs, as you said, and I am Chief Operating Officer at Time Warner Cable, the Nation's second largest cable operator. I want to thank you for inviting me to appear here today to discuss the question of how consumers are faring in the current marketplace for sports programming.

From Time Warner Cable's perspective, the answer to the question of whether consumers are winning is yes and no.

On the one hand, consumers who enjoy sports programming clearly are winning in that there is a staggering amount and variety of sports programming available to them on broadcast television, cable, satellite networks, and increasingly through the Internet. On the other hand, over the past few years, Time Warner Cable has been monitoring and trying to deal with two troubling trends relating to sports programming that are less than ideal for consumers.

The first is the spiraling rise in costs that affects every level of the sports food chain and which ultimately must be paid by consumers.

The second trend is the ever increasing fragmentation of television sports rights that has undoubtedly added to the increases in costs that consumers are being asked to bear.

An example of both of these trends is the decision by the NFL to take eight games that were previously available on broadcast or other programming services and put them on the league-owned NFL Network while simultaneously demanding that distributors pay a significantly higher price for the network and refusing to allow the network to be carried on any tier other than the one reaching virtually all customers.

There is also another disturbing element to this situation. The NFL is preventing individual teams that want to do deals for non-game content from entering into any agreements with cable operators unless they also carry the league's NFL Network.

In the setting of a Congressional hearing, the question, of course, is: What, if anything, should Government regulators do about these problems? We believe that the best thing that Government can do is to leave the solutions to the marketplace. Government favoritism can serve only to deprive consumers of the full benefits of today's vigorously and highly competitive video distribution marketplace. Thus, Government should not only refrain from additional regulation, but also should re-examine existing rules to make sure they are not contributing to any problems or tilting the playing field in favor of some participants against others?

In particular, while I am not an expert in antitrust law, it seems important to make sure that certain exemptions granted to sports leagues are not reducing competition and contributing to the esca-

lation in prices to consumers or reducing their viewing options. In addition, Government should examine whether the imposition of access obligations and anti-exclusivity rules on some video distributors but not others is warranted and how it contributes to problems in the sports and video marketplaces.

We recognize that the marketplace is not always perfect. We are not always able to obtain the carriage terms that would allow us to give our customers everything we would like to while keeping down our costs. But whatever the shortcomings of the marketplace, they pale in comparison to the shortcomings that result from attempts by Government to impose outcomes by regulatory intervention.

In closing, let me add one final thought. Government should be especially wary of the claims of some companies that rush into advocate Government intervention when it would restrict their competitors, but vehemently oppose such regulation when it would apply to them. In particular, it is simply disingenuous for DIRECTV, which is larger than Time Warner Cable, and every other video distributor but one, to claim here and elsewhere that it is in need of special Government protection against exclusivity while continuing to enter into exclusive agreements itself and demanding that it be left free from any similar restrictions.

Indeed, DIRECTV's exclusivity with the NFL applies not only against cable operators that are generally a fraction of its size, but also against the Nation's other smaller DBS provider. And it is competitively far more significant than any exclusivity about which it complains.

It is now well past the time for DIRECTV to recognize that it can no longer credibly play the new entrant card. Time Warner Cable has never acted in such a disingenuous manner but, rather, has consistently been of the view that the marketplace is generally the best regulator, and the marketplace functions the best when any truly necessary Government intervention, absent any special circumstances, applies equally to all players.

Thank you.

[The prepared statement of Mr. Hobbs appears as a submission for the record.]

Chairman SPECTER. Mr. Hobbs, what are the core considerations that Time Warner has in declining to take on the Thursday-Saturday package?

Mr. HOBBS. The programming is too expensive.

Chairman SPECTER. Too what?

Mr. HOBBS. Expensive.

Chairman SPECTER. Too expensive.

Mr. HOBBS. The value equation is out of whack. So for our customers for the eight games, eight out-of-market games that they will see in their own local hometowns, it is just too expensive. And I have heard a lot today about other people not raising prices. Anytime your costs continue to escalate at increasingly rising rates, like sports programming, especially targeted sports programming, it causes you eventually to raise rates. Some people may not do it through a sports package, but I would suggest that people do raise their prices, and that is because their costs are growing.

So that is what happens when you have programming that is too expensive.

Chairman SPECTER. Well, isn't it true that Time Warner has sought to have the Thursday-Saturday package but on a sports tier?

Mr. HOBBS. We think that by placing this type of sports programming, that is very targeted, in a sports package benefits all of our customers because it allows those who actually want to see the programming to pay for it if they would like it, and those that don't have to bear the burden of the cost.

Chairman SPECTER. Well, where you have the NFL in effect raising prices and limiting distribution without any countervailing reasons for it, don't you have a violation of the Sherman Act rule of reason? That may be beyond your own training, but you have been in this field a long time. The Sherman Act does not—we do not deal here with what we call a per se violation, that is, an automatic violation. But isn't that really subjected to the rule of reason? And don't you have at least a prima facie showing of a violation there when prices are raised and distribution is limited without any countervailing business purpose?

Mr. HOBBS. You are right, you are outside of my expertise—I am not an attorney, but what I would say is that from our perspective, let's let the marketplace handle that question. Let's let our consumers handle that question. We balance those things every day, so when we have this type of programming that is so expensive and NFL would like it on a broadly distributed basis, so many people who don't watch the programming have to pay for it, our view is no, let's give the consumers what they want. The people who want the programming should be able to get this in a sports programming package, and that would take care of it. The marketplace would deal with the issue.

Chairman SPECTER. Did Time Warner have an opportunity to bid on the Sunday Ticket, which went to DIRECTV?

Mr. HOBBS. I am sure we did. We did not bid on that package. Again, we look at economics, and we look at the impact on our customers.

Chairman SPECTER. The Wall Street Journal today reports that the NFL left on the table as much as $400 million during its last round of television right negotiations to reserve for its fledgling cable network the eight season games. Do you think that that is accurate?

Mr. HOBBS. That is what has been reported. What I do know is that based on our negotiations, what they want out of us, this would make this particular programming in the top five in terms of how expensive it would be. Compared to everything else we carry, this would be in the top five in terms of expense. And yet the ratings at this point are not even in the top 30.

Chairman SPECTER. Well, you have taken a resolute position here, and the NFL may have a little different view as to how it is going to work out. The Times quotes two of the owners of the NFL teams saying that there may be some short-run holdouts but in the long run they have a real plan. And they cite Marc Ganis, a sports marketing consultant, saying that, "The cable companies won't be shooting themselves in the foot. The cable companies will be shoot-

ing themselves in the chest." And this is in the context of the NFL speculating—they use the words "can hope"—that the fans will cry, "I want my football," pressure their cable companies to make a deal, or threaten to switch to another provider.

How do you evaluate the aspect of your customers switching to another provider to get from another provider what they cannot get from you?

Mr. HOBBS. We have to evaluate those trade-offs every day, and, again, it comes back to analyzing the type of programming, the cost, and the impact on all of our customers, not just the ones who like football.

For example, there are a lot of our subscribers who love football, which everyone here acknowledges. But from our research, there may be 75 to 80 percent who aren't as enamored with football. So we have to keep those customers in mind as well. So that is the reason we made the decision we have.

Chairman SPECTER. Do you think the quotation by Marc Ganis as it appears in the Wall Street Journal that the cable companies won't be shooting themselves in the foot but shooting themselves in the chest is inaccurate?

Mr. HOBBS. It is inaccurate, in my view.

Chairman SPECTER. Shooting yourselves anywhere?

Mr. HOBBS. It would be painful. But, no, we are comfortable with our decision.

Chairman SPECTER. We now turn to our final witness, Professor Roger Noll, professor emeritus at Stanford University, where he taught for 22 years, Senior Fellow at the Stanford Institute for Economic Policy Research, and one of the Nation's foremost experts in sports economics and regulatory policy, has authored 11 books in these areas; a bachelor's degree in mathematics from the California Institute of Technology, and a Ph.D. in economics from Harvard.

Thank you for being with us today, Professor Noll, and we look forward to some real expert guidance here. It is up to you.

STATEMENT OF ROGER NOLL, SENIOR FELLOW, STANFORD INSTITUTE FOR ECONOMIC POLICY RESEARCH, STANFORD, CALIFORNIA

Mr. NOLL. Thank you very much. I appreciate the opportunity to speak on this issue. I have been here many times talking about antitrust issues in professional sports, and, indeed, my interest in professional sports was created by Sam Ervin when he was considering the proposed merger of the two basketball leagues 35 years ago. That is what got me into this interesting area.

I have been teaching the Sports Broadcasting Act for 40 years to my undergraduates because it illustrates everything that can possibly go wrong with legislative antitrust exemptions. And what I want to do today is put the current disputes that are going on in professional football in a much larger context. I think these disputes are useful in causing a re-examination of policy, but the reality is this is all within the context of some much bigger issues, and that is what I want to focus on.

When the Sports Broadcasting Act was passed, there were many fewer teams. There were two competing football leagues. There were no significant multichannel video distribution systems. The

only ones that existed at the time were systems that did nothing other than retransmit over-the-air television. There were no cable-only channels, and there was no satellite broadcasting.

All of these are important because they get to the point about what did Congress do in 1961 and what is the implication of that today. Congress did pass a law that reduced competition, but there were still two competing football leagues. And, indeed, there were two competing basketball leagues. And as we know, in the 1960s and 1970s, there were entries of other competing leagues.

When leagues compete to sell their broadcasting rights, the implication of an antitrust exemption is much less significant. That is to say, two isn't as good as four or five, but it is better than one.

Likewise, at the time the Act was passed, there was no conception of what the world would look like when cable and satellite companies were competing for viewers, which, if you remember, has only been going on for less than a decade. It has only been in the current millennium that the satellite companies began to retransmit local broadcasts and to offer a realistic competitive alternative to cable television. And now I think it would be an overstatement to say this is a competitive industry, but it is three, and that is a lot better than one.

So the world has changed in dramatic ways. The bargaining strength of existing sports leagues relative to broadcasters has increased dramatically because each sports league is a monopoly, but the broadcasting environment is much more competitive than it was at the time the Act was passed.

One could make something of an argument to say a world of three networks and two leagues was similar to bilateral bargaining. But that isn't the right way to think of it today when we have four networks instead of three, many more strong, independent over-the-air channels, and in every major metropolitan area in the United States three competing multichannel video distribution systems. Hence, the validity of the Sports Broadcasting Act has changed. Whatever it was to begin with, it requires re-examination.

The right template that we economists use for deciding whether an action such as the creation of the NFL Network is pro- or anti-competitive is whether there is a profit-enhancing reduction in output. It seems to me, without having done the analysis—I would ask you to collect the data—that the NFL Network is a profit-enhancing reduction in output in the sense that the eight games that are on NFL Network, will be available to fewer people than had those games been offered on broadcast television. Now, that, I think, is the right template to think about this issue.

One last point. It seems to me, because of the equities involved in the Sports Broadcasting Act and the reliance for over 40 years of both broadcasters and the leagues on this Act is great, I would suggest that the appropriate mechanism is sunset—that is to say, Congress should enact a law saying the Act will expire in 5 years, which will force Congress to re-evaluate the Act from ground up over the next few years and see if all the changes I described say that, no, this thing really should be put to bed.

[The prepared statement of Mr. Noll appears as a submission for the record.]

Chairman SPECTER. Mr. Noll, thank you very much for those insights. Do you have any suggestions as to which way Congress ought to go on revising the 1961 Act?

Mr. NOLL. Yes. My personal belief is that it was a mistake to begin with because it did have the profit-enhancing quantity reduction. The passage of the Sports Broadcasting Act led to an elimination of the then common way to sell broadcasting rights, which was consortiums of teams.

The but-for would is either professional sports prior to 1962 or current collegiate sports because of the NCAA case. In these cases consortiums of teams, in order to get a reasonable broadcast schedule available, sell collectively their broadcast rights, but they still compete because the number of consortia is large enough to create a competitive market.

In the NCAA, for example, each major conference sells television rights. And in professional sports, prior to the passage of the Sports Broadcasting Act, there were four consortia of professional sports teams that sold national broadcasting rights.

That would be the world we would have, and it seems to me that in a world of many channels and many competing MVDS operators, the whole issue of exclusivity, for example, would go away. If DIRECTV had exclusivity to 20 percent of the NFL and Dish-TV has another 20 percent and then three television networks had 20 percent more each, the whole issue of exclusivity would be much less important if there were competition in the selling of the national broadcasting rights.

Chairman SPECTER. Well, if we just repeal the 1961 Act, the antitrust laws would then be violated by the joint action of the NFL teams, NFL members, which is what the United States District Court for the Eastern District of Pennsylvania found back in 1961, which led to the adoption of the statute.

Mr. NOLL. In order for it to be an antitrust violation for the NFL to negotiate as a league for broadcasting rights, one has to prove that televised professional football games are a separate relevant market. Every time that issue has been litigated, it has been determined to be a separate relevant market. And in that case, without the antitrust exemption, not only the NFL but Major League Baseball and the NBA all would be in violation of the antitrust laws if they sold their broadcasting rights nationally as a league-wide consortium.

Chairman SPECTER. Professor Noll, would you think that it would make sense or be appropriate to condition the antitrust exemption on, say, the franchise move limitation, which Senator Feinstein suggested earlier?

Mr. NOLL. No, I do not believe that is appropriate, and that is because it is making mistake number two to deal with mistake number one. The antitrust exemption in broadcasting is more harmful, as I said before, because of the antitrust exemption that was granted to the AFL and NFL to permit them to merge.

One reason people care a great deal about losing a team, as Senator Feinstein said, is the issue of naming. The Cleveland Browns name is a good example. But the main issue is the inability of a city to find a replacement. Many cities that are viable locations for major league professional sports teams do not have one because

monopoly leagues create scarcity in teams to give each individual team more bargaining power over a locality to get a stadium subsidy.

The presence of Los Angeles as an area without an NFL team is the universal golden threat point for every NFL team in the country: Give me my stadium or I go to LA, which is obviously an attractive option. So I don't think to use one antitrust exemption to deal with a problem created by the other is the right way to go. I think the right way to go is more competition.

Chairman SPECTER. How about conditioning the antitrust exemption on the teams or the NFL paying for their own stadiums as opposed to imposing a tax burden, as four sporting teams did—two in Pittsburgh and two in Philadelphia—on the taxpayers of the Commonwealth of Pennsylvania?

Mr. NOLL. That would have been a great idea in 1990. Unfortunately, almost all teams in all sports have gotten their nice new subsidized stadium. Actually, some NFL teams did not get a subsidy, but most of them did. In all the major professional sports, nearly one hundred new arenas and stadiums have been built in the past twenty years. Eighty percent of the teams are already playing in their subsidized arenas. So, unfortunately, those horses have left the barn.

Chairman SPECTER. Well, they may come back. The Vet in Philadelphia was opened in 1971, and we have already torn it down and built two new stadiums.

Mr. NOLL. That is exactly right. There—

Chairman SPECTER. So we may be looking at building two new stadiums 25 years from now.

Mr. NOLL. Yes, the useful life of a stadium is about 25 to 30 years, and sometimes it has been even shorter than that. And you are right, eventually teams will be back at the well. But that is a very slow process. One of the problems that Philadelphia and San Francisco find themselves in is that by being the last cities to replace an old stadium, an obsolete stadium, their teams are at a competitive disadvantage. And it is not obvious that preventing the last two or three cities from having new stadiums is pro-competitive.

It would have been pro-competitive to do something about the subsidies right at the beginning, but now that almost all the teams have them, the few that do not are disadvantaged relative to their subsidized brethren.

Chairman SPECTER. Mr. Pash, is the Wall Street Journal accurate today that the NFL left $400 million on the bargaining table during this last round of television rights negotiations to reserve for its fledgling cable network the eight Thursday night/Saturday night package?

Mr. PASH. I have not seen the articles. I do not know the source of the—

Chairman SPECTER. I had not seen it until a few moments ago. It is just in today's paper. It was not even in my briefing materials. The Wall Street Journal did not let me know in advance.

Mr. PASH. As I say, I have not—

Chairman SPECTER. Aside from what the Wall Street Journal knows, you know more about what the NFL left on the table than the Wall Street Journal does, presumably.

Mr. PASH. Well, I know we could have sold those eight games to other carriers. We could have sold them to cable carriers. There were a number of reasons why we did not want to do so, including the fact that the cable carriers, some of the ones we were talking to about them, did not want to simultaneously broadcast them on over-the-air the way we do with ESPN and the way we do with the NFL Network.

Chairman SPECTER. They did not want to broadcast them simultaneously? What did they want to do?

Mr. PASH. They wanted to have them exclusively on cable so that the only way you could watch those eight games is if they were on cable. There would not be a simultaneous over-the-air broadcast in the competing cities. That was one consideration for us.

Another consideration was we are trying to develop the NFL Network. We are trying to build that as a new entrant into the television world. We think it has got a lot of high-quality programming. It is growing. It is getting better in terms of the quality of the programming and the quality of the offerings. We think by having the games on the NFL Network it is a good value proposition. We obviously have disagreements with some cable carriers, with other cable carriers, and with satellite carriers we don't have those disagreements. But we do think there is a good value proposition there.

Chairman SPECTER. Well, your last answer raises the question as to where the NFL Network is heading. We already see the NFL Network on this Thursday-Saturday package raising prices. What is next? What does the NFL Network have in store which will pose problems for Time Warner and other cable companies to have to raise their prices and pass them on to the consumer? Is the NFL Network heading for more programming, which will cost the consumers more money?

Mr. PASH. Well, as I say, Mr. Chairman, I don't think that the NFL Network and price increases automatically go hand in hand, and the experience of many other cable companies demonstrates that, and the experience of the satellite companies demonstrates that. And that is the current state of the record.

Chairman SPECTER. Well, how can you say that in the face of what Mr. Hobbs testified to, which is perfectly obvious, that when you have increased costs, you have to pass them on? How can you say it is not going to cost the consumer more money?

Mr. PASH. Well, because I—

Chairman SPECTER. May the record show that Professor Noll thought that was very funny, and I am going to come back to you, Professor Noll, to explain your smile.

Go ahead, Mr. Pash.

Mr. PASH. Because I look at the experience of four other large distributors that have put the NFL Network on a broad distribution tier and have not raised their prices to consumers.

Chairman SPECTER. Can you give me a few examples of that?

Mr. PASH. Yes, sir: DIRECTV, EchoStar, Cox, Comcast— four of the five largest distributors.

Chairman SPECTER. Isn't Comcast demonstrably different in the current contest you have with them as to whether it is going to go on the sports tier or some broader coverage tier?

Mr. PASH. Well, I don't know how that litigation will end up. I accept that. But as we—

Chairman SPECTER. Well, wait a minute. How the litigation is going to end up is what the judge says, but Comcast thinks they are going to have to raise their prices, or they would not be defending that lawsuit.

Mr. PASH. Well, I don't know. They may feel as though they can raise their prices more by putting it on a sports tier. They may feel that an underutilized sports tier that has relatively unattractive programming on it today will become much more attractive and bought at a much higher rate for much more money if all of a sudden it includes NFL programming, which is the most attractive programming out there in the sports world.

Last week, the highest rated broadcast television program was an NFL game, and the highest rated cable television program was an NFL game. And if those are forced onto a sports tier, it may well be that you will see consumers paying more money for it. But to date, the carriers that have put the NFL Network on a basic tier have not done that, and so I do not think it is inevitable that one leads to the other.

Chairman SPECTER. Professor Noll, you have heard the conflicting testimony of Mr. Hobbs and Mr. Pash. What is your view?

Mr. NOLL. Senator, you get an A in my course. You are the good economist.

Here is what is happening in multichannel video distribution: We have gone from one to three in urban areas. That has reduced the profit margins of incumbent cable companies. Companies like Time Warner and Comcast are subject to much more competition than they were 10 years ago. Because their profit margins have gone down, not all of the increase in programming costs have been passed on to subscribers due to increased competition between cable and satellite services.

Nevertheless, holding the extent of competition constant, when a pay-TV service adds another channel, its costs go up on a per viewer basis. All else equal, that causes the pay-TV service to raise price. Indeed, economics research has shown that higher programming costs, all else equal, cause higher subscription prices.

A final complication arises when a pay-TV service obtains a highly popular type of program on an exclusive basis. For example, if DIRECTV succeeded in having the NFL Network exclusively in Philadelphia, DIRECTV's market share in Philadelphia would go up while Comcast's and Dish-Tv's shares would go down. In this case DIRECTV could earn its current markup on a larger number of customers, and so it could be the case that its profits would not be undermined by taking on an expensive channel and not raising its price.

But in the long run, Time Warner or Comcast have to respond with something in kind to attract those viewers back. The nature of the competitive process is to drive prices to costs. if programming generally becomes more expensive, prices will go up.

Chairman SPECTER. Mr. Pash, do you disagree with the conclusion of the Court of Appeals for the Third Circuit, Federal Court of Appeals, that the DIRECTV arrangement is not cleared by the 1961 antitrust exemption?

Mr. PASH. Well, we certainly accept that conclusion as the law in the Third Circuit. We did not seek further review of that opinion, and as I am sure you know, Mr. Chairman, we ultimately settled that litigation so there were no further appeals or further review. So we accept that decision.

Chairman SPECTER. Well, it is obvious that you accepted it when you did not apply for certiorari, correct?

Mr. PASH. CORRECT.

Chairman SPECTER. You did not ask the Supreme Court of the United States to review it.

Mr. PASH. That is correct.

Chairman SPECTER. Well, when you say in that jurisdiction, that is the prevailing law in the country generally, isn't it?

Mr. PASH. This is the only court of appeals opinion that addresses that issue; that is correct, Mr. Chairman.

Chairman SPECTER. Well, if you do not ask the Supreme Court to review it and if you accept it, that is that nationwide, isn't it?

Mr. PASH. Well, that is where we are right now. As you know, of course, Mr. Chairman, sometimes appellate courts in different parts of the country see issues differently.

Chairman SPECTER. But if there is a disagreement with the court of appeals, you ask the Supreme Court to review it. They may not, but at least you asked them, which you did not do in this case.

Mr. PASH. Which we did not do in this case. As I say, we settled the litigation so there was no need to ask for any further review.

Chairman SPECTER. The specific language of the 1961 Act grants the exemption for sponsored telecasting where there are commercials, and the House Antitrust Subcommittee found flatly, "The bill does not apply to closed circuit or subscription television." And Commissioner Rozelle conceded on the record that the bill "covered only the free telecasting of professional sports contests and does not cover pay TV." So all of that leads to the conclusion that the Sunday Ticket is not covered by the exemption.

That then leads you to considerations as to the rule of reason. The Sherman Act prohibits any contract, combination, or conspiracy that unreasonably restrains trade, and the Sunday Ticket would not be, as I referred to earlier, a per se violation, which means automatic on its face. It would be subjected to the rule of reason. And that turns on whether there is reduced output and fixed prices without any corresponding justification.

Doesn't that pretty much indicate that the Sunday Ticket is a violation of the Sherman Act?

Mr. PASH. I would say precisely to the contrary, Mr. Chairman. Sunday Ticket is as clear a pro-competitive act as could be imagined. It increased output. It enhanced consumer choice. It delivered a new product that did not previously exist. It allowed consumers, particularly commercial establishments, to legally obtain a product that the only way they had been able to obtain it before was by violating the copyright laws, and the FCC has repeated looked at this question and identified Sunday Ticket as a pro-competitive,

output-enhancing step. They have identified it as a key point in allowing satellite to grow and become an effective competitor to cable and restrained pricing in the way that Professor Noll has talked about on several occasions. I think it frankly would be difficult to think of something that is more pro-competitive than creating this new package.

Chairman SPECTER. Would your answer be different if it were established as a conclusive fact that Commissioner Tagliabue told Comcast they could not bid on Sunday Ticket?

Mr. PASH. No, Mr. Chairman, it would not. It would not. Exclusivities are perfectly acceptable. That was reviewed as recently as 2 years ago by the FCC, and the FCC specifically commented that it was perfectly lawful for DIRECTV to purchase Sunday Ticket on an exclusive basis.

Chairman SPECTER. Did the FCC have before it the fact that the NFL through its Commissioner said Comcast could not bid?

Mr. PASH. I don't know if they had that particular statement before them or not, but it is true—irrespective of whether that was said or not, or when it was said, it is true that exclusive arrangements in the television industry have been in existence for decades and are well respected and considered lawful and pro-competitive.

Chairman SPECTER. Professor Noll, how would you apply the Sherman Act's rule of reason to Sunday Ticket, realizing that the NFL litigated, lost in the court of appeals, then settled the case?

Mr. NOLL. The relevant benchmark for whether an action is pro- or anti-competitive is the circumstance that would prevail in a competitive world. The argument that NFL Sunday Ticket increased output is correct, but it increased output in a monopolized market. The issue is what is the alternative in the absence of monopolization, and in the absence of monopolization, the market for televised NFL games would be like other pro sports were or like college sports are today. For example, if all broadcasting of college football games were put together into a single package priced at $150 a month and shown exclusively through DIRECTV, the effort would be a profit-enhancing reduction on output.

From my perspective, if one adopts the right counterfactual, the right but-for world in the competitive environment, it is obvious that NFL Sunday Ticket is a palliative compared to the output and prices that would exist in a competitive environment.

Chairman SPECTER. Mr. Hobbs, you are satisfied to leave it all to the market. Do you think in light of the Third Circuit's opinion that the 1961 Act does not apply to Sunday Ticket and a class action brought and settled by the NFL that there is any basis for concern about an antitrust violation here?

Mr. HOBBS. Our view is that we are fine with exclusivities, as long as everyone has the same approach and rules. So we are fine with people having exclusive programming. Again, as long as every party is treated the same way, then we are fine.

Chairman SPECTER. Well, would that require that the NFL entertain bids from other than DIRECTV?

Mr. HOBBS. Yes.

Chairman SPECTER. And if they do not?

Mr. HOBBS. Then I think it does continue to cause problems.

Chairman SPECTER. Well, anybody else have any additional comment you would care to make?

[No response.]

Chairman SPECTER. Thank you very much for coming in, gentlemen. The Judiciary Committee is going to be looking at the vertical integration issue, and we are going to be studying the ramifications of the Thursday-Saturday package and DIRECTV, and we are intrigued, to put it mildly, by what the NFL has in mind. The Wall Street Journal quotes Mr. Jones and Mr. Kraft, the owners of the Dallas Cowboys and the New England Patriots, as saying they are willing to take some short-term losses for some long-term gains. So we will see what happens next. And the Judiciary Committee will continue to be vigilant on this important subject.

Thank you all very much. That concludes our hearing.

[Whereupon, at 10:26 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

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Landel C. Hobbs
Chief Operating Officer

December 19, 2006

The Honorable Arlen Specter
Attention: Barr Huefner
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Specter:

As you requested, enclosed please find corrections to my testimony before your Committee as well as responses to the Committee members' follow up questions.

Thank you for giving me an opportunity to testify. Please feel free to contact me if I can be of further assistance.

Sincerely,

Landel C. Hobbs

LCH:ds
Enclosures

1. You indicated in your testimony that you've attempted to negotiate with individual teams to obtain programming. Please describe the type of programming you were trying to obtain.

   TWC has attempted to obtain various types of non-game programming from some individual teams. This includes coaches' and owners' shows, player and cheerleader profiles and coverage of team practices.

2. Have you ever attempted to obtain live game programming from an individual team? If so, what was the response of the team or teams with which you attempted to negotiate? And, the response of the NFL?

   No, TWC has not attempted to obtain regular-season live games from any individual team, because the NFL has made clear that the individual teams do not have the right to distribute such programming.

3. Do you think the NFL member teams should have an antitrust exemption that would allow them legally to engage in joint negotiations with cable and satellite companies? In other words, should the reach of the Sports Broadcasting Act be expanded?

   As I stated in my testimony, TWC believes that business matters should generally be left to the marketplace. This means also that the antitrust laws, which are intended to protect the free marketplace, should generally be applied equally to all competitors. TWC, therefore, believes that the antitrust exemption in the Sports Broadcasting Act should not be expanded but that, if anything, Congress should examine whether that Act should be repealed.

4. Would you say that the NFL has been able to offer a "take it or leave it" deal with respect to the NFL Network? Do you think that the NFL would be able to do so if you were able to negotiate with individual teams?

   We do not believe that the offers have been on a "take it or leave it" basis. We do believe, however, that the NFL Network has shown very little flexibility as to what tier of carriage they would agree to in an affiliation agreement. This has been made clear not only in our discussions, but also in the NFL's public statements, including its testimony before this Committee. All other things being equal, there would probably be greater flexibility on this point if teams were required to negotiate individually.

Senator Specter
Competition in Sports Programming and Distribution: Are Consumers Winning?
November 14, 2006

Questions for Daniel Fawcett (DIRECTV):

1. You testified that the NFL Sunday Ticket has made DIRECTV more competitive. Would you prefer to be able to negotiate with individual teams to carry other types of programming? Do you think the NFL has excessive bargaining power because of its ability to insist on negotiating on behalf of all the member teams to the exclusion of individual negotiations?

   - DIRECTV believes that it is important for consumers to have access to multiple sports programming options. In the case of Sunday Ticket, the package allows fans to view out-of-market games that would not otherwise be available in the fans' local communities. Individual negotiations to obtain these rights would be more complex, less efficient, and more expensive. Thus, the group offering of all out-of-market games in a single package provided viewers with a desirable product that would not otherwise be available. Sunday Ticket programming expands output and promotes consumer choice, which is just what the antitrust laws seek to achieve. The NFL negotiations with respect to Sunday Ticket are an efficient means of ensuring that the full array of out-of-market games are available to a distributor.

2. How do you decide how much to charge consumers for Sunday Ticket? Do you believe the price of the Sunday Ticket would be lower if others, such as Time Warner, also carried Sunday Ticket?

   - We determine the price of Sunday Ticket the same way we determine the price of all our programming packages: after identifying the costs associated with offering this package, we evaluate the potential demand for this programming, and make our best judgment about a retail price that approximately covers our cost. In making this determination, we take into account all the other viewing options available to DIRECTV customers, including the other opportunities they have to view NFL games. We believe that if the NFL was forced to provide NFL Sunday Ticket to cable companies, the result would be an increase in the cost to consumers, since the broadcast networks would no longer be willing to pay as much for free over-the-air broadcast rights and the NFL and its member sports teams would still expect at least the same revenue.

3. If Sunday Ticket were offered by other program distributors, would DIRECTV no longer be able to compete in the broader marketplace?

   - Although we believe that the exclusive right to offer DIRECTV's Sunday Ticket gives us one means to differentiate our service from those of our competitors, we don't think that Sunday Ticket is essential to DIRECTV's ability to compete. Less than 15% of DIRECTV customers currently subscribe to Sunday Ticket and

those subscriptions account for less than 5% of our revenue. Notwithstanding the success of Sunday Ticket and other DIRECTV programming, DIRECTV's cable competitors have been able to maintain significantly larger market shares than DIRECTV even though they do not offer this specific programming package. That said, exclusive programming, has long been used by entertainment and media outlets to distinguish themselves from their competitors, and DIRECTV currently would be disadvantaged by the loss of its exclusive for Sunday Ticket.

4. You argue that DIRECTV should be able to carry Comcast Sports Net in Philly, which includes the Flyers, the Phillies and the 76ers. If that is the case, why should Comcast not be able to carry Sunday Ticket? I am not taking issue with the exclusive nature of your contract with the NFL, but on the ability of the NFL member teams to exercise their combined market power by insisting on such exclusivity. Why should the NFL member teams be able to do that?

   - There are three fundamental differences between Comcast's anticompetitive withholding of the regional sports network in Philadelphia, which it owns and controls, from competing distributors and DIRECTV's exclusive programming gained by arms' length negotiations with the NFL, an independent third party. First, unlike Comcast Sports Net Philly, distribution of Sunday Ticket was determined through arms length negotiations. DIRECTV obtained its rights to the Sunday Ticket package of out-of-market games by negotiating in a bidding process against other potential distributors of this programming. DIRECTV ultimately obtained these rights because it made the most attractive offer to the NFL, taking into account other considerations including network bids for over-the-air broadcast rights – not because it was affiliated with the NFL or any of its teams. Second, unlike Comcast, DIRECTV lacks market power. Because DIRECTV represents less than 15 percent of all nationwide pay-TV subscribers, and does not have market power in any relevant market, its offering of Sunday Ticket increases, rather than reduces, competition. Third, unlike Comcast Sports Net Philadelphia, Sunday Ticket adds to the array of consumer choices. Before creation of the NFL Sunday Ticket, out of market NFL games simply weren't available to most viewers. Sunday Ticket was created as a premium service that football fans can choose to purchase in order to see games from outside the region where they live. By contrast, sports fans have historically been able to watch their home teams play regardless of their pay-TV provider – until Comcast decided to make those games unavailable to DIRECTV subscribers.

5. You've argued that Sunday Ticket is pro-competitive because it's a product that consumers want that they could not get before. How come DIRECTV doesn't offer Single Sunday Ticket any more? Or a package that include the games of only a single team?

   - DIRECTV does offer a weekly Sunday Ticket option, priced this year at $39.99. It is not able to offer a package that includes the games of only a single team.

Such an offering would be duplicative of what is already available in each geographic area through over-the-air broadcast television. DIRECTV was not interested in or offered the rights for such a package.

6. I want to assure you that much consideration has been given, and much will be given in the future, to closing the so-called terrestrial loophole, or to similarly ensure competition under the antitrust laws. But, don't you think it is fair to require the NFL member teams to compete fairly, to not bundle games, and to permit individual teams to negotiate independent of competing teams?

   - DIRECTV believes it is important for consumers to have access to multiple sports programming options. In the case of DIRECTV's Sunday Ticket offering, it is important to note that the basic premise of the package, and a significant reason why it has been so popular with viewers, is that Sunday Ticket offers its viewers access to a full slate of NFL games, including out-of-market games that would not otherwise be available to fans and that had not been generally available prior to creation of the package. In order to be able to deliver this product, it is important that the NFL teams be able to negotiate as a single entity, without fear of liability under the antitrust laws. Having to conduct negotiations for Sunday Ticket on a team-by-team basis would be very burdensome and would raise the possibility that all necessary rights could not be obtained.

7. At the hearing, you discussed Comcast's conduct with respect to regional sports networks in Chicago and Philadelphia. Do you think Congress should modify the antitrust laws with respect to vertical integration that results in increased prices? Do you believe Comcast is violating the antitrust laws?

   - DIRECTV believes that Congress or the Federal Communications Commission should put in place a mechanism to ensure that incumbent cable operators do not use their dominant local or regional market share to engage in activities such as raising the price of affiliated RSNs above fair market value or denying access to such programming to cable's competitors. We do not believe a modification of the antitrust laws is necessary for this purpose, though Congressional action may be warranted to close the "terrestrial loophole" and otherwise revise the program access rules.

NATIONAL FOOTBALL LEAGUE

Jeffrey Pash
Executive Vice President

December 20, 2006

Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: "Competition in Sports Programming and Distribution: Are Consumers Winning", Hearing of November 14, 2006

Dear Mr. Chairman:

Enclosed please find my responses to the questions that you sent to me following the above-referenced hearing. As requested, a copy of these responses have also been sent by email to Barr Huefner of the Committee staff.

Sincerely,

Jeffrey Pash

Enclosure

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NATIONAL FOOTBALL LEAGUE

Jeffrey Pash
Executive Vice President

December 20, 2006

The Honorable Patrick J. Leahy
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Re: "Competition in Sports Programming and Distribution: Are Consumers Winning", Hearing of November 14, 2006

Dear Senator Leahy:

Enclosed please find my responses to the questions that you sent to me following the above-referenced hearingof the Judiciary Committee. A copy of these responses have also been sent by email to Bar Huefner of the Committee staff.

Sincerely,

Jeff Pash

Jeffrey Pash/bf

Enclosure

280 Park Avenue, New York, New York 10017 (212) 450-2000 FAX (212) 681-7571

Senator Specter's Hearing Questions

1. **Do you think it would be possible for the NFL to engage in revenue sharing and, at the same time, allow individual teams to negotiate contracts for television rights?**

The collective sale of rights to telecast NFL games serves the interests of consumers by increasing output, enhancing consumer choice, and improving the quality and appeal of the NFL's entertainment product. It also reflects the reality (discussed in some detail in my answer to Question 5 below) that, at least for purposes of television rights sales, the NFL's 32 clubs are joint producers of a single television product – an integrated and inter-related annual series of League-scheduled and League-administered on-field football competitions leading to the crowning of a single champion. While League rules could, in theory, be changed to allow the clubs to negotiate individual television contracts and simultaneously engage in revenue sharing, such a fundamental change in the NFL's business model would sharply disadvantage consumers by both reducing their access to NFL television programming and increasing the cost of available programming. Such a change would also reduce, rather than enhance, competition in the broader television marketplace.

As a threshold matter, individual team negotiation of television contracts would effectively eliminate the current arrangements under which every NFL game is broadcast on free, over-the-air television. The most likely outcome, based on the experience of other sports, is that a significant number of NFL games would instead be telecast primarily or exclusively on another basis – cable, satellite or pay-per- view.

As a result, individual team negotiation of contracts would diminish consumer choice and would almost certainly result in most fans having to pay to watch NFL football while having access to fewer games; it would eliminate the opportunity for fans to see the most exciting national match-up or a preferred regional offering on Sunday afternoons; and it would make it difficult, if not impossible, for many displaced fans to see their favorite team. Individual team negotiation of contracts would sharply limit the League's ability to engage in innovations that improve the product, such as "flex scheduling," which was introduced this year in response to consumer demand in order to enhance our free broadcast offerings. Further, if a broad shift of regular season NFL television to regional outlets were to occur, it would inevitably result in less national exposure for individual clubs, reducing the national interest in, and appeal of, the NFL playoffs and Super Bowl. It is the broad, nationwide interest in those games that makes them such compelling and highly-viewed anchor programming for free over-the-air television.

2. **The Sports Broadcasting Act currently covers only the joint sale of television rights by NFL members to over-the-air broadcasters. Do you believe the Sports Broadcasting Act should be expanded to cover the joint sale of television rights to cable and satellite providers?**

We believe that the Sports Broadcasting Act already covers the joint sale of television rights to cable and satellite providers, whose offerings can and should be viewed as "sponsored telecasts" within the meaning of the statute; as we discussed at the hearing, this is precisely the position we took in the *Shaw* case. We recognize that the Third Circuit disagreed but are hopeful

that, if presented with the issue, other Courts of Appeal would see it differently. We also note that in 1999, the Chairman sponsored legislation that, among other things, would have confirmed and made explicit that the Act applies to cable and satellite programming. We supported that aspect of the legislation at the time and continue to believe that its passage would be in the public interest.

3. **Why did the NFL member teams decide to provide the "Sunday Ticket" exclusively to one program distributor, DirecTV? Is there any reason why the NFL member teams could not have also entered into similar arrangements with other program distributors? [note margins]**

When NFL Sunday Ticket was first launched, only satellite providers were capable of delivering the games on a national basis; no cable company had the national footprint to deliver the games in every area of the country. As I explained in my testimony, we also wanted to maintain the health of a model based on televising every NFL regular season game via free, over-the-air broadcasts.

NFL Sunday Ticket is designed to *complement* our broadcast programming by making available to displaced fans or avid consumers the broadcast feeds of out-of-market games. A multi-provider distribution arrangement would undermine our broadcast programming by shifting viewers away from the broadcast networks and allowing them to watch, via other means of distribution, the broadcast feeds produced by our network partners.

Even if we were successful in negotiating an arrangement with our broadcast partners that would allow multiple carriers to piggyback on their productive efforts, the diversion of viewers and associated advertising revenues from the networks and their local affiliates would undermine our ability to ensure, over the long term, that all NFL games remain available via free, over-the-air broadcasts. (A key goal of NFL television policies has always been to maintain the viability of our broadcast television model and the important role that local affiliates play in televising and promoting NFL football.) Moreover, as a practical matter, such an arrangement would be highly prejudicial to the interests of fans and consumers. It would likely be impossible (and, if possible, substantially more costly) for a fan to secure access to all 32 clubs' games if they were parceled out among multiple cable, satellite and pay-per-view outlets. It is difficult to identify a consumer interest that would be served by such an arrangement.

In this regard, it bears mention that as I explained in my December 13, 2006 letter (a copy of which is attached), in the most recent round of negotiations for Sunday Ticket, we held long discussions with a cable operator (Comcast) addressing the possibility that it would be one of the distributors of NFL Sunday Ticket. When the cable operator chose not to submit a bid for Sunday Ticket, we signed a new contract with DirecTV.

4. **Has an NFL team owner ever come to you or the Commissioner or anyone at the NFL and asked to independently negotiate with a program distributor such as DirecTV or Time Warner?**

We are not aware of any club's asking to negotiate independently rights for regular season game programming. However, as you may know, many clubs have relationships with

local cable companies for other kinds of programming. This programming includes coaches shows, interview programs, news and highlights shows, and other specialty football-oriented programming.

5. **Isn't it true that NFL teams compete both on and off the field? If they also compete off the field, why should they, unlike any other business in this country be allowed to combine to set the price of the product they sell?**

It is true that NFL teams compete aggressively *on* the field. But as I stated in my testimony, off the field, NFL teams are partners in a business venture that competes aggressively with other entertainment providers. As the question suggests, they collectively produce a *single entertainment product* – an annual, inter-related series of professional football games that leads to the Super Bowl championship – that no individual club could possibly produce on its own. Federal courts have recognized this reality for more than 50 years; a recent decision of a federal appeals court deemed collaboration and cooperation among the member teams of a sports league to be "essential"; "a league with one team would be like one hand clapping." *Chicago Prof'l Sports Ltd. P'ship v. NBA,* 95 F. 3d 593, 598-99 (7th Cir. 1996). In this respect, the members of a professional sports league, which George Halas analogized to the spokes of a wheel, are fundamentally different from "any other business in this country."

In the *Bulls* case, cited above, the United States Court of Appeals for the Seventh Circuit suggested that a professional sports league may be "best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment." *Id.* at 600. That conclusion is certainly supported by the principles underlying Section 1 of the Sherman Act, which applies to a "contract, combination or conspiracy between *separate* entities to restrain trade." *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 768 (1984) (emphasis in original). In *Copperweld,* the Supreme Court emphasized that Section 1 of the Sherman Act is concerned with activity that "deprives the marketplace of independent centers of decisionmaking;" it potentially applies only when coordination among separately owned entities represents "a sudden joining of . . . independent sources of economic power." Given the mutual interdependence of the NFL clubs, none of which could possibly present NFL football on its own, these circumstances simply do not exist when the NFL sells its product to the networks.

6. **It is my understanding that, under rule of reason analysis, even a restraint of trade that is on balance pro-competitive must be no more restrictive than necessary in order to survive legal scrutiny. With respect to Sunday Ticket, is it necessary to prevent individual teams from negotiating independently to sell the television rights to their games?**

I respectfully disagree with your premise. Numerous courts have held explicitly under rule of reason analysis that "a reasonable restraint [*i.e.*, one in which the procompetitive benefits outweigh its anticompetitive effects] does not become unreasonable simply because the least restrictive means were not used." *E.g., International Health Care Management v. Hawaii Coalition for Health,* 332 F.3d 600, 608 (9th Cir. 2003).

That having been said, allowing individual teams to negotiate independently to sell NFL Sunday-Ticket related television rights would diminish consumer welfare for many of the same

reasons set forth in response to Question 1, above. As the FCC has repeatedly recognized (and as noted in my testimony), NFL Sunday Ticket is pro-competitive because, among other reasons, it expands output by making more games available to consumers and presenting the games in a package that is consumer friendly. It is clear from our experience and the experience of other sports leagues that the vast majority of consumers prefer a package with all the games. It would be more costly and less efficient for consumers if, in order to secure a complete package of games, they had to secure subscriptions to multiple providers (perhaps multiple cable, satellite and/or pay-per-view companies). In many cases, this would be impossible in the current television marketplace. There is no demand for individual team packages in the NFL, and that is not surprising given that individual team packages in other sports have not succeeded.

7. **Did former Commissioner Tagliabue decline to entertain any cable company's bid for the Sunday Ticket? Has any NFL official or representative ever informed an interested party that bids for Sunday Ticket are unwelcome?**

In response to the Chairman's request at the hearing, I addressed this question in my December 13, 2006 letter, a copy of which is attached.

Senator Leahy's Questions

1. (a) Will the NFL commit to maintaining the Super Bowl on free, over-the-air television during Commissioner Goodell's tenure?

The Super Bowl is consistently the most watched television program of the year – and has iconic status – *because* it is on free, over-the-air television. It is the premier example of the strength of the relationship among the NFL, over-the-air broadcasters, and our fans. We want the Super Bowl to maintain its iconic status and therefore to have it remain on free, over-the-air television for many years to come. We hope that our broadcast partners share our commitment on this issue.

(b) As the NFL makes arrangements to have more NFL games available through pay television, will the NFL commit to maintaining the number of games currently available each week on free, over-the-air television?

It bears emphasis that no NFL game is televised on a pay-per-view basis. Instead, all regular-season NFL games are now shown on free, over-the-air television, and that all NFL post-season games (including the Super Bowl) are shown exclusively on free, over-the-air television. Free, over-the-air broadcasting of every regular season and post-season game is the centerpiece of the NFL's television policy. As a result, during each week of the regular season, at least three (and in most markets, four or five) games are available via free, over-the-air broadcasting to every fan. Over the course of a season, NFL fans in general have available on free television 90 or more regular and post-season games, a far higher percentage of the League's schedule than that of any other sports league, and truly avid fans have pay-television access to all of the rest of the League's games through NFL Sunday Ticket and other complementary NFL television offerings.

The NFL's long-standing commitment to mass distribution of the bulk of its games via free, over-the-air television will not diminish as long as the broadcast industry remains healthy, vibrant, and interested in NFL telecasts.

2. (a) What plans does the NFL have to make available instantaneous statistics to satisfy these fans?

(b) Does the NFL agree that real time statistics from NFL games, for use in games such as fantasy football, are public and can be used by anyone?

The NFL does *not* agree that *during the time that a game is being played*, detailed game statistics and information are in the public domain. This position is supported by black-letter law dating back to the early days of radio, the first medium that permitted instantaneous distribution of information from sporting events. Those cases hold that because sports clubs and leagues create, promote, and operate sporting events, they have a property interest in "pictures, descriptions, and accounts" of the event while it is in progress and "for a reasonable time following the game" (quotes taken from what remains the leading case on this issue, *Pittsburgh Athletic Company v. KQV Broadcasting Company,* 24 F. Supp. 490 (E.D. Pa. 1938)). After this

protected period, the information moves into the public domain. (This protection is comparable to that afforded to real-time stock quotes, while quotes made available for no charge on non-subscription internet sites are typically delayed for 20 minutes; instantaneous quotes are available on a licensed basis.) The principle underlying these holdings is one seeking to curb "free-riding": If third parties are able freely to exploit for their own profit data and content that others have invested to generate, they are "reaping where they have not sown" and are unjustly enriched. *See International News Service v. Associated Press,* 248 U.S. 215 (1918); *Morris Communications Corp. v. PGA Tour, Inc.,* 364 F.3d 1288, 1296, 1298 (11th Cir. 2004) (recognizing the PGA's interest in "compiled real-time golf scores" and holding that "[t]he prevention of free-riding. . . provides a valid business justification" for the PGA's restricting real-time access to such data).

That being said, the NFL provides real-time statistics to fantasy players for no charge on NFL.com, licenses third parties to provide less-detailed, but still real-time, statistics to their customers, and also acquiesces in third parties providing freely and without a license certain information (e.g., a game score, or a record-setting touchdown pass) that should be widely and freely available to the public the instant it is generated.

NATIONAL FOOTBALL LEAGUE

Jeffrey Pash
Executive Vice President

December 13, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
711 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Specter:

During the Committee's hearing on November 14, 2006, you asked whether Commissioner Tagliabue ever told Comcast that it would not be allowed to bid on NFL Sunday Ticket. As you requested, I have examined this matter and am pleased to furnish this additional information.

Commissioner Tagliabue did not make any such statement at any time in connection with the negotiations for NFL Sunday Ticket carriage rights which occurred during the late summer and fall of 2004. In fact, when the NFL (through its corporate affiliate, NFL Enterprises) entered into a carriage agreement for the NFL Network with Comcast in August 2004, it agreed to provide post-game highlights via Comcast Video on Demand, along with other "non-traditional" video products (all of which were exclusive to Comcast within its service territories), precisely to give Comcast the opportunity to experience and appreciate the value of unique NFL content. Among other things, the League hoped that doing so would increase Comcast's level of interest in negotiating for NFL Sunday Ticket carriage rights. During 2004, Commissioner Tagliabue also met with Mr. Roberts on several occasions to encourage him to have Comcast recognize the value of NFL Sunday Ticket rights. Further, we committed to Comcast in its NFL Network agreement that the League would not enter into a long-term NFL Sunday Ticket carriage agreement before October 31, 2004, in order to allow Comcast time to negotiate for those carriage rights.

During the months of August, September, and October, 2004, NFL Enterprises engaged in numerous meetings and discussions with Comcast and a cable-industry consortium (In Demand) in which Comcast is a key participant to discuss licensing NFL Sunday Ticket distribution rights to the cable companies beginning with the 2006 season. Throughout this period, the NFL informed Comcast that it was also in discussions with DirecTV concerning an extension of its NFL Sunday Ticket distribution rights. In late October, Comcast – not the NFL– decided not to pursue further negotiations or discussions in light of its understanding of

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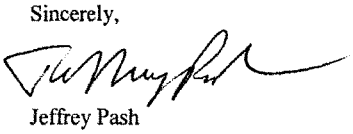
the financial and other commitments it likely would have to make to secure NFL Sunday Ticket rights. Shortly thereafter (on November 8, 2004), the NFL entered into an extension agreement for NFL Sunday Ticket with DirecTV, which agreement remains in place today.

Although Commissioner Tagliabue has no recollection of doing so (and we have no records indicating that he did so), it is conceivable that, in earlier 2002 renewal negotiations for the NFL Sunday Ticket package, Brian Roberts or another Comcast representative might have learned that the then-existing NFL broadcast agreements precluded distribution of NFL Sunday Ticket via cable. Indeed, CBS had specifically advised that it would not agree to our request to waive those provisions at that time. Those preclusions obviously did not apply in 2004, when the NFL Sunday Ticket renewal under negotiation was for seasons not covered by then-existing broadcast contracts.

Accordingly, it is unfounded and inaccurate to suggest that Commissioner Tagliabue – or anyone else at the NFL – has refused to allow Comcast to seek carriage rights for NFL Sunday Ticket.

I hope that this is responsive to your request and appreciate the opportunity to submit this additional information.

Sincerely,



Jeffrey Pash

cc: Honorable Patrick Leahy, Ranking Member

SUBMISSIONS FOR THE RECORD

Written Testimony
Daniel M. Fawcett
Executive Vice President, Business and Legal Affairs and Programming Acquisition
DIRECTV, Inc.
Before the Senate Committee on the Judiciary
"Competition in Sports Programming and Broadcasting: Are Consumers Winning?"
November 14, 2006

Chairman Specter, Senator Leahy, and members of the Committee, my name is Dan Fawcett and I am Executive Vice President for Programming Acquisition at DIRECTV. Thank you for inviting me to testify today on the role the NFL Sunday Ticket played in fulfilling the goals of the program access statute and fostering competition to the incumbent cable operators.

By enacting the program access provisions of the 1992 Cable Act, Congress kickstarted competition in the video marketplace. Congress recognized that new entrants need programming to survive, and that incumbent cable operators had sufficient market power to "kill competition" by withholding key vertically integrated programming. But it also recognized the value of exclusives – especially when used by new entrants to differentiate themselves from their incumbent competitors. Congress thus restricted only incumbent cable operators' exclusive arrangements with programmers they owned. It allowed other exclusives that would promote competition and serve the public interest.

Because of the program access statute, DIRECTV was able to provide the first competitive choice to the incumbent cable operators. The statute gave DIRECTV access to must-have programming that cable would otherwise have withheld, but also permitted

DIRECTV to differentiate itself through arms-length negotiated exclusive deals, such as The NFL Sunday Ticket. The end result: precisely what Congress envisioned – a vibrant competitive marketplace and more choice and better service for consumers. Rather than raising antitrust concerns, the NFL Sunday Ticket has helped promote competition in a market that, for years, had none at all.

The same cannot be said for cable. Unfortunately, in recent years, by consolidating on a regional level, cable operators have found ways to evade the program access provisions and harm competition. They have used the "terrestrial loophole" to deny vertically integrated programming to their satellite competitors in places like Philadelphia and San Diego. They have also imposed substantial arbitrary price increases for home team sports in places like Chicago. This conduct is worlds apart from the out of market NFL package that DIRECTV has used to gain a foothold in the market.

We are therefore eager to work with Congress to close the terrestrial loophole. And we would urge this Committee to investigate the cable industry's abuse of its market power in its control over local sports teams and regional sports networks. Congress should, as it has in the past, encourage fair and competitive means for distributors to differentiate themselves, but it should also put an end to cable's unfair practices that lead to less choice and higher prices for consumers.

I. The Program Access Provisions of the 1992 Cable Act Allowed DBS to Provide the First Competitive Option to Entrenched Cable Providers.

Over the last decade, Congress has helped foster the competitive video marketplace that exists today. With DIRECTV leading the way, DBS has grown to more than 28 million subscribers in just over ten years. Increased competition means that consumers have more choices; customer service and pricing are more responsive; technological innovation is flourishing; and tens of thousands of jobs have been created. Because of this competitive marketplace, *all* Americans – not just DIRECTV subscribers – are enjoying a better television experience.

Congress helped make this possible by enacting the program access provisions of the 1992 Cable Act. The point of these provisions was to ensure that new entrants challenging the cable monopoly had access to the programming they needed to do so. More specifically, Congress sought to:

> increas[e] competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.[1]

Indeed, "the conferees expect[ed] the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies."[2] Congress hoped that, with a level competitive field, new entrants such as DIRECTV could compete

[1] 47 USC 548(a).

[2] House Committee on Energy and Commerce, H.R. Rep. No. 102-862 (Conference Report), 102d Cong., 2d Sess. (1992), *reprinted at* Cong. Rec. H 8308 (Sept. 14, 1992).

on the merits of their offerings, and consumers would benefit from their efforts to win customers from each other.

Congress thus required certain programmers owned by cable operators to make their programming available to all at nondiscriminatory rates and terms. By doing so, Congress specifically "placed a higher value on new competitive entry than on the continuation of exclusive distribution practices that impede this entry."[3] Overall, the statute has been an unmitigated success: Without it, satellite television and competition to cable would never have gotten off the ground.

Yet, Congress treaded carefully when adopting the program access provisions – and rightfully so. It did not prohibit *all* exclusive arrangements. It instead sought to encourage the development of unique product offerings, such as local news.[4] And, because it was principally concerned about the abuse of market power, it *only* prohibited exclusive contracts by dominant cable operators for vertically integrated programming.

In carefully tailoring its program access rules, Congress recognized that exclusive contracts could be a valuable tool to enhance the competitive viability of new entrants.

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[3] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992l Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC 3359, 3384 (1993).

[4] When Congress was drafting the program access provisions in 1992, it wanted to allow exclusive deals for local cable news channels. The idea was that, if a cable system spends a lot of money creating a local cable news channel, it shouldn't have to make that channel available to its competitors. At the time, local cable news was primarily delivered to cable headends over telephone wires. Other programming (such as ESPN, CNN, etc.) was delivered to cable headends via satellite. So Congress decided to restrict exclusive contracts only for "*satellite* cable programming" (that is, "video programming which is transmitted by satellite.").

As Representative Tauzin noted during debate on the House floor, "exclusive programming that is not designed to kill the competition is still permitted . . ."[5] Thus, where a new entrant seeks to obtain exclusive programming to *increase* competition, the program access rules permit it to do so. And even a cable operator is free to bargain for exclusivity to differentiate its service – so long as it does so on a level playing field with an non-cable-affiliated programmer.

The program access rules thus work exactly the way Congress intended them to. They enable satellite providers and other new entrants to provide viewers with "must-have" programming that cable would otherwise keep for itself. Yet, they allow all video distributors to provide a differentiated product that would spur competition.

II. The NFL Sunday Ticket was Precisely the Type of Exclusive Deal Envisioned by the Program Access Provisions to Spur Competition.

Perhaps the best example of an exclusive arrangement helping – not harming – competition is The NFL Sunday Ticket. DIRECTV, as a new entrant, was able to get a foot in the door of this highly concentrated industry in part by offering unique content, such as The Sunday Ticket. These unique offerings helped DIRECTV to differentiate itself and thereby break the stranglehold of the cable monopolies. The cable industry, in turn, found itself forced to innovate and become more responsive to customer's concerns – today offering a competitive, attractive package that includes its own differentiated video-on-demand and bundled internet offerings. This is exactly what Congress had in mind when it enacted the program access provisions. DIRECTV thus believes that the

[5] 138 Cong. Rec. H6534 (daily ed. July 23, 1992).

NFL Sunday Ticket raises no meaningful antitrust concerns. To the contrary, it has served the purpose of the antitrust laws by contributing to a competitive video services marketplace.

A comparison of the differences between The Sunday Ticket and kinds of anticompetitive arrangements in which the incumbent cable operators have engaged with respect to regional sports exemplifies this point. One key difference is that DIRECTV obtained rights to The NFL Sunday Ticket in a fair and open marketplace. DIRECTV, a competitor without market power (only 15% market share nationwide) bid in the open market for this package of out of market NFL games by negotiating with an unaffiliated provider to obtain these rights. Indeed, the most recent bidding process was open to DIRECTV's cable competitors as well.

By contrast, in Philadelphia, where Comcast has given itself "exclusive rights" to the Phillies, Flyers and 76ers, Comcast has a 70% market share. It owns the programming in question. It even has an ownership interest in two of the teams (Flyers and 76ers). Thus, this was not an arms-length negotiation that was open to all competitors.

Another key difference is that the NFL Sunday Ticket is a *premium* package of games that historically had been unavailable to viewers. It allows football fans to see games outside the region where they live. But, in all markets, every pro-football fan, no matter how he chooses to get television – over-the-air, cable, or satellite – can see his home team play.

By contrast, in Philadelphia and elsewhere, incumbent cable operators deny local fans their right to see their home team. The end result: Fans of the Phillies, 76ers and Flyers must either give up the right to root for their home team or give up their right to subscribe to the video provider of their choosing. Nor is Philadelphia the only case. Cox Communications offers its Channel 4 San Diego with exclusive rights to San Diego Padres games only to cable operators. So San Diego sports fans cannot watch their favorite team unless they subscribe to cable.

Most importantly, the NFL Sunday Ticket has helped DIRECTV emerge as a competitor to cable. Cable operators, to the contrary, are withholding vertically integrated sports programming to subvert competition and the intent of the program access provisions. And their efforts have borne fruit. Indeed, the Federal Communications Commission ("FCC") recently found that "the percentage of television households that subscribe to DBS service in Philadelphia is 40% below what would otherwise be expected given the characteristics of the market" than if DBS was permitted to offer Comcast SportsNet Philadelphia.[6] Likewise, DIRECTV's market share in the San Diego DMA is practically half the national average.

[6] *Application for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation to Time Warner Cable, Inc.; Adelphia Communications Corporation to Comcast Corporation; Comcast Corporation to Time Warner Inc.; Time Warner Inc. to Comcast Corporation,* FCC 06-105 (rel. July 21, 2006), ¶ 149.

III. Cable Operators Have Been Able to Subvert Competition Because of Loopholes in the Program Access Rules.

Cable operators have been able to subvert competition in this manner because of what has since come be known as the "terrestrial loophole." As discussed above, in an effort to foster the development of local news channels, the program access rules only apply to programming delivered to cable systems *by satellite*. Because it delivers Comcast SportsNet Philadelphia to its cable systems via fiber, Comcast argues that this RSN is not subject to the program access rules and need not be made available to customers of their competitors. Cox offers its San Diego exclusive on the same basis.

In addition to outright withholding of programming, savvy cable operators also have resorted to more subtle, but equally anticompetitive, tactics. For example, in 2002, Comcast purchased AT&T, and in the process established a regional monopoly in Chicago similar to its dominance in Philadelphia. Comcast next purchased the rights to the Bulls, Blackhawks, Cubs and White Sox and launched its own sports network, CSN Chicago. When DIRECTV sought carriage of this critical programming, Comcast made it available to DIRECTV – but at double the price DIRECTV had been paying to carry these same games. Unwilling to forgo this must-have programming, DIRECTV had no choice but to accede to the cable operator's demands.

The program access rules do not prohibit this kind of behavior so long as the cable operator pays the same high price.[7] But that restriction is of no concern to the cable

[7] Yet, during the House floor debate on this provision, a number of members cited with objection instances in which cable programmers charged satellite operators up to 500 percent more for programming than they

operator because even inflated payments are simply a transfer of money from one division of the company to another.

Again, unlike the NFL Sunday Ticket, cable operators have used their market share and their ownership of sports teams and regional sports networks to artificially inflate the price of their RSNs. If DIRECTV doesn't pay the higher prices, the cable operator gets a *de facto* exclusive for the channel. If, on the other hand, DIRECTV pays the artificially high price, the cable operator extracts a supra-competitive rate and drives up DIRECTV's costs. This, in turn, makes it more difficult for DIRECTV to compete on price. Either way, the cable operator wins – and consumers lose. And the goals of the program access rules are subverted.

* * *

You have called this hearing today to look at whether consumers are the winners when it comes to competition in sports programming and broadcasting. The answer is simple. When competitive packages of out-of-market games are available in a fair and open bidding process, consumers clearly benefit. As the program access rules envision, consumers get an option of competitive alternatives with differentiated programming, as each provider in the market strives to provide innovative programming and service to its customers. When the incumbent provider, however, uses its entrenched market power to subvert the program access provisions by depriving consumers of the right to root for

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charged their affiliated cable operators. *See, e.g.*, 138 Cong. Rec. H6543 (daily ed. July 23, 1992) (remarks of Rep. Thomas).

their home teams, and increasing the cost of subscribing to an alternative provider, consumers lose.

Congress, therefore, should not impose legislation that restricts fair choice, but should act steadfastly to ensure that the cable providers don't use their market power to artificially limit choice and raise prices. DIRECTV is eager to work with Congress to ensure that the vision of the program access rules is fulfilled by closing the terrestrial loophole. And DIRECTV urges this Committee to consider investigating the anti-trust concerns raised by the cable industry's abuses of its market power.

TESTIMONY OF LANDEL C. HOBBS
CHIEF OPERATING OFFICER
TIME WARNER CABLE

COMPETITION IN SPORTS PROGRAMMING AND BROADCASTING: ARE CONSUMERS WINNING?

before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
WASHINGTON, DC

November 14, 2006

Good morning Mr. Chairman, Senator Leahy, and members of the Committee. My name is Landel Hobbs, and I am Chief Operating Officer of Time Warner Cable. Time Warner Cable is the nation's second largest cable operator and the third largest multiple video programming distributor, serving approximately 14.4 million subscribers in 33 states. I want to thank you for inviting me to appear here today to share with you our perspective on how consumers are faring in the current marketplace for sports programming.

The question posed by this hearing is "Competition in Sports Programming and Broadcasting: Are Consumers Winning?" From Time Warner Cable's perspective, the answer to this question is yes ... and no.

Consumers who enjoy sports programming clearly are winning in the sense that there is more sports programming available to television viewers than ever before. In addition to sports programming that continues to be available on traditional broadcast channels, there is also a staggering amount and variety of sports programming available to cable and satellite subscribers through services such as ESPN, TNT and Versus (formerly Outdoor Life), as well as regional and specialized sports channels. And the Internet continues to change everything. Sports are no exception, with more

and more sports programming becoming available through Internet distribution every day.

Despite these positive developments, in important ways the proliferation of sports programming is not always beneficial for consumers who value sports – or for consumers generally. In particular, Time Warner Cable has been monitoring, and trying to deal with, two trends over the last several years.

The first trend is the spiraling rise in costs. These cost increases mark every level of the sports food chain, from the high and constantly increasing salaries provided to players to the ever-rising prices for television rights charged by leagues to programmers and charged by programmers to distributors. Ultimately, of course, it is consumers who pay the bills.

The second trend is the ever-increasing fragmentation of television sports rights. This includes not only the continuing division of rights among various programming services, but also the proliferation of channels devoted to, and often largely owned by, individual teams. This slicing and dicing of the rights has unfortunately added to the increases in costs that consumers are being asked to bear.

The NFL Network provides an example of these trends. Prior to this year, the network provided no live coverage of regular season NFL games.

This year, the NFL has pulled eight games that used to appear on other broadcasting and programming services and is placing them on the NFL Network, which it owns. While all of these games will continue to be available on broadcast stations in the teams' home areas, the NFL Network is seeking a 250% increase in fees over its 2005 rates and is refusing to allow distributors to carry the service on any tiers except those that reach virtually all customers.

There is another disturbing element to this situation. Individual teams who want to do deals directly with us for non-game content have been precluded from doing so by the League, which will only permit such deals with cable operators who carry their NFL Network.

Having identified these problems, the next question, of course, is what is to be done about them? And more specifically, what role, if any, should policymakers and/or regulators play in addressing these issues?

In Time Warner Cable's view, the government should leave the solutions to the marketplace. This includes not only refraining from undertaking additional regulation, but also reexamining existing rules to make sure government regulation does not contribute to any problems. This review also should include making sure that government policies do not tilt the playing field (a particularly apt metaphor given today's topic) in favor of

some participants and against others. In today's vigorously competitive marketplace, such favoritism can serve only to deprive consumers of the full benefits of that competition.

And make no mistake about it, today's video marketplace is vibrantly competitive. Not only do almost all Americans have the choice among at least one cable and two satellite providers, but their choices continue to proliferate, from entry by the telcos to distribution via the Internet.

We should recognize, however, that existing government policies provide certain specific benefits to sports leagues, most notably certain exemptions from the antitrust laws. While I am not an expert in such matters, it does seem important that policy-makers ensure that these exemptions are not reducing competition among sports teams, contributing to the escalation in prices to consumers, or reducing the viewing options consumers may have.

In addition, access obligations and anti-exclusivity rules have been imposed on some, but not all, video distributors. In particular, cable companies are often saddled with obligations not borne by satellite operators. Not only should additional or new obligations be avoided, but policy-makers should fully examine whether this disparate regulatory

treatment is warranted and how it contributes to any problems in the sports and video marketplaces.

In calling on our government to refrain from regulation, we recognize that the marketplace is not always perfect. As to sports in particular, Time Warner Cable is not always successful in obtaining terms of carriage that are ideal to keep not only its costs down, but also the prices it must charge its customers to recoup them. In addition, Time Warner Cable is not always successful in obtaining other carriage terms, such as tiering rights, that it would like to obtain in some circumstances. And sometimes Time Warner Cable is not able to successfully conclude agreements at all with channels that it would like to provide its customers if it could obtain the rights on reasonable terms. But however great the shortcomings of the marketplace may be, they pale in comparison to the shortcomings that would result from attempts to impose outcomes by regulatory fiat. Such rules and regulations can never make the fine and constantly shifting judgments that are needed to best respond to consumers' needs and pocketbooks. Only self interested players, trying their best to win in the marketplace, can do so.

In closing, let me add one final thought. Government should be especially wary of the claims of some companies that are quick to call for government intervention when it would restrict their competitors, but

vehemently oppose such regulation when it would apply to them. Time Warner Cable has been steadfast in its view that the marketplace is the best regulator, and that the marketplace functions best when any truly necessary government intrusion – absent special circumstances – applies equally to all players.

Statement Of Senator Patrick Leahy,
Ranking Member, Judiciary Committee
"Competition in Sports Programming and Broadcasting:
Are Consumers Winning?"
November 14, 2006

Chairman Specter decided to schedule this hearing and I look forward to hearing his concerns and point of view on this issue. As a legislative matter, the question is whether current law ensures competition and innovation in all sectors of the communications industry and what is in the best interests of the public.

That the Chairman has focused his attention on National Football League programming may be a matter of personal interest, because his state is home to the NFL world champion Pittsburgh Steelers as well as the Philadelphia Eagles, or because NFL broadcasts are routinely among the top-rated weekly programs. Channels that carry NFL games are an important part of the lineup of any video service provider that wants to compete.

At the urging of the professional sports leagues, Congress inserted itself into the sports broadcasting debate more than four decades ago. In 1961, Congress passed the Sports Broadcasting Act, creating a limited antitrust exemption for professional sports teams to pool broadcast rights through their leagues and divide the revenue. It paved the way for telecast agreements between the NFL and free, over-the-air networks; agreements that have made billions of dollars for NFL owners. Watching NFL games has become a weekly Sunday afternoon and Monday evening ritual in millions of American households every Fall.

The recent migration by the National Football League away from free, over-the-air television for transmitting NFL games to the public concerns some fans. The transfer of Monday Night Football, for instance, from free television to ESPN has cut significantly the number of viewers on Monday night. I have no doubt the switch has been lucrative for the NFL and its teams. I doubt whether it meets with universal acclaim among sports fans. I expect more fans would be concerned if there were a prospect that important games, such as the playoffs or the Super Bowl, were to be moved from free network broadcasts to pay-per-view or premium channel events.

The larger issue that the Chairman may be seeking to raise through this hearing is how exclusive deals for video content affect competition among video service providers. Competition law should facilitate new entrants into the highly concentrated video service market, but should not unduly proscribe pro-competitive agreements. The viability of a new video service provider depends on its ability to offer desirable content. In some instances, however, obtaining the exclusive right to transmit certain programming may be the best way for a new entrant into the video services market to distinguish itself and attract new subscribers.

As we move into the 110th Congress, I will consult with the Senator from Pennsylvania, the Senator from California, and the other interested members on our agenda.

TESTIMONY OF JEFFREY PASH, EXECUTIVE VICE PRESIDENT,
NATIONAL FOOTBALL LEAGUE
BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY
NOVEMBER 14, 2006

Mr. Chairman, and members of the Committee, thank you for affording us the opportunity to appear today to discuss the NFL's television's policies. We understand that there are a number of issues on which the Committee has solicited our views and we are pleased to have the opportunity to address your questions and concerns.

NFL television policies and practices have been addressed for more than five decades by the Congress, the Federal Courts, and the Federal Communications Commission. These inquiries have led to the consistent recognition that NFL television policies serve the public interest, are responsive to consumer demand, and provide NFL fans with exceptional access to a wide and growing range of NFL product at little or no cost.

In the course of my testimony today, I will address these matters:

1. An overview of the NFL's current television policy and, specifically, the League's continued commitment to free, over-the-air broadcast television as the primary means of televising the vast majority of the NFL's live television product.

2. The League's development of supplemental television products, including NFL Sunday Ticket and the NFL Network; how these alternatives relate to the League's broadcast packages; and the consumer response to those supplemental offerings.

3. The application of anti-trust principles and the 1961 Sports Broadcasting Act to current NFL television policies.

The Nature of NFL Operations

A professional sports league like the NFL is a unique business entity because it creates and markets a single, jointly-produced entertainment product. The NFL produces athletic competition among its 32 member clubs, none of which can produce and present that product on its own. The NFL sports entertainment product in turn competes in a broad entertainment marketplace, which includes the jointly-produced entertainment products of other sports leagues, as well as other entertainment products of all kinds. It is well accepted that outside a League structure no individual team could produce a product – whether that be a game, a telecast, or something else – that would have significant value or gain much in the way of consumer acceptance.

The entertainment marketplace within which the NFL competes is growing and increasingly competitive. In recent times, each of the four major professional sports leagues has added additional teams, new leagues have been formed, and other sports television products, such as "extreme sports" and NASCAR, have developed as well. Within individual

communities, the number of professional sports offerings has grown considerably. College football and basketball have substantially expanded their presence on television. The increasing number of television channels on cable, satellite and now via telephone companies; the introduction of satellite radio; and the growth of the Internet have all brought vast new entertainment options to consumers. This Committee has examined closely the growth in entertainment options in recent decades and what that has meant for communications and competition policies. Sports leagues have been affected by the same changes in the marketplace that have affected the music business, the movie business, television networks, and virtually every other entertainment producer.

The typical household today has access to between 60 and 400 channels of television programming. In that environment, the size of the audience for many kinds of programming, including sports, can be so marginal and fragmented, that it is of little value to advertisers. They key factor that distinguishes the NFL from other types of programming is its ability consistently to deliver a mass audience.

The NFL's Television's Policies

The centerpiece of the NFL's television policy is free, over-the-air broadcasting of NFL games. Every NFL regular season game and every post-season game is televised on free over-the-air television. Some games, like the Sunday night broadcasts that began this year on NBC, are televised nationally. Other games, like the Sunday afternoon games at 1:00 and 4:00 p.m., are carried on a regional basis or, in the case of games with particular fan appeal, to

broader portions of the country. Every fan continues to have available all of the local team's away games on broadcast television. When home games are sold out at least 72 hours in advance, the home game is televised as well. This season, every NFL game has been sold out and broadcast live in the home city. There have been no local blackouts this year.

Even games that are televised on ESPN as part of our national cable arrangement – an arrangement now in its 20th season – are televised on free over-the-air television in the home cities of the competing teams. Thus, the game last night between Tampa Bay and Carolina was available on over-the-air television in those two communities for any fan who did not have access to cable television. This is a unique requirement that is not imposed by any other league or in the context of any other sports telecast.

This same policy will apply to the games that will be shown, beginning later this month, on the NFL Network. While those games will be available throughout the country via cable and satellite carriers that offer the NFL Network, they will similarly be available on free, over-the-air television in the home cities of the competing teams, on the same basis as if they were televised on a broadcast network or on ESPN.

In short, no fan needs to pay to see a wide variety of NFL games, including all games of the home team. In general, NFL fans will have available 90 or more games on free television during the regular and post-season.

The NFL's television policy, and particularly its overwhelming emphasis on broadcast television, is intended to serve three main goals. First, because NFL teams normally play once each week, we try to make each game a special event and obtain the broadest possible audience for those games. The best way to do so has been, and continues to be, through broadcast television.

Second, we want to encourage strong fan support in each local market. More than five decades ago, it was recognized that one way of accomplishing this was by televising away games into the home market to ensure that fans could see their team play on television even when it was impossible to buy a ticket. Consistent with the 1973 Blackout Legislation, sold out home games are also televised live in the home city. Further, our television agreements provide for live telecasts of all games of all teams. This is a unique requirement in sports, and is fully consistent with our desire to maintain the NFL's status as mass-appeal sport.

Third, the broadcast television agreements generate substantial revenues that are equally shared by the 32 NFL Clubs; thus, clubs like Cincinnati, Green Bay or Kansas City receive the same amount as teams in New York and Chicago. The equal sharing of television revenues is a principal reason why the NFL includes strong franchises in small and mid-size markets like Buffalo, Green Bay and Pittsburgh. Those revenues are used principally to support growing player benefits and salaries under our collective bargaining agreement, which itself is predicated on this equal sharing of media and other League revenues. Television revenue is also used to support stadium construction throughout the League.

Each of these three goals remains as important to the NFL today as forty years ago. Our policies over the decades have continued to focus on providing NFL games to the broadest possible television audience, on ensuring that all teams have their games televised, and on generating equally shared television revenues to maintain franchise stability, preserve competitive balance on the playing field, and support our Collective Bargaining Agreement.

Television Policy and the 1961 Statute

The 1961 Act was passed because Congress recognized that without it, many sports teams and their fans would be unable to make effective use of television. For example, in the absence of a single-network package with equally-shared revenues, several NFL teams may well have ceased operations due to their inability to obtain sufficient exposure and revenue from television. Under the Sports Broadcasting Act, the NFL has created the most pro-consumer television plan in sports today. The NFL has maintained its commitment to broadcast television even while the league has grown from 12 teams in 1960 to 32 teams today, and even though network television has experienced dramatic changes and prime time entertainment programming has seen its ratings erode as a result of competition from cable, satellite and other options. Although the 1961 Act applies equally to all sports leagues, no other league today has a remotely similar commitment to broadcast television.

In the 1990's, Congress directed the FCC to study, among other matters, the NFL's operations under the 1961 statue. The FCC's final report in 1994 found that the NFL's

television policies were consistent with the public interest and recommended no amendments to limit the application of the 1961 Act.[1]

Far from moving away from broadcast television, the NFL's current agreements have served to strengthen our relationship with broadcast television. We have for example instituted a new policy of "flexible scheduling," under which teams will be able to "play their way" onto our national broadcast on Sunday night on NBC. This upcoming Sunday will mark the first time that flexible scheduling will be used to substitute a more attractive match-up. The game between the Denver Broncos and San Diego Chargers for first place in the AFC West will be moved from a Sunday afternoon telecast window to Sunday night, where it will be broadcast free to the entire country, rather than simply to certain regions.

The goals of flexible scheduling – which involves only our prime-time broadcast partner and not ESPN or the NFL Network – are threefold: to ensure that high-quality match-ups are made available to the widest possible audience; to showcase "surprise" teams who otherwise would not receive national exposure, which builds interest in those teams before they appear in playoff games televised by our broadcast partners; and to ensure that our prime-time broadcast partner does not suffer from a late season match-up between clubs whose performance has fallen below what was expected when the schedule was developed the previous spring. Flexible scheduling thus benefits both fans and our broadcast partners, and we fully expect it to strengthen the relationship between the NFL and broadcast television in the coming years.

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[1] Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992, Inquiry into Sports Programming, Final Report, PP Docket No. 93-21, at para 61-62 (June 30, 1994).

Through the first nine weeks of the current season, we have seen very strong fan support for our telecasts on all of our television partners. Consider the following:

- Ratings on CBS are up 4 percent over 2005 and 7 percent over 2004; total audience is up 6 percent and 9 percent, respectively.

- FOX is averaging its highest ratings since 2000, and is up 8 percent over 2005.

- The night game on NBC on November 5 was the most watched program in the country that week. Through nine weeks, the NFL is averaging a rating that is 5 percent higher than the comparable prime time program in 2005.

- Audiences for ESPN's Monday night telecasts are up 40 percent over the audience for its comparable Sunday night NFL games in 2005.

These strong performances and growth in ratings and total audience are rare in today's fragmented television environment. They demonstrate the continuing strength and attractiveness of NFL games on television. They also reinforce two key beliefs that underlie our television policy: the NFL's commitment to broadcast television as the best available means of attracting large national audiences for our games; and its belief that careful supplementation of live game telecasts – for example, through NFL Sunday Ticket and

through related programming principally televised on ESPN, NFL Network, and other cable channels – can reinforce game telecast ratings and drive fan interest in football.

NFL Sunday Ticket

NFL Sunday Ticket is a satellite television package that permits fans to view "out-of-market" games. A fan living in Washington, for example, would ordinarily see games of the Washington Redskins as well as one or two other games on Sunday afternoon. That same fan, by purchasing NFL Sunday Ticket, has the opportunity to see any NFL game being played that day.

NFL Sunday Ticket was first introduced in 1994, and approximately 1.8 million homes and commercial establishments currently subscribe to NFL Sunday Ticket. The package is designed to be a service for a limited number of more serious fans who want to watch games not shown by the broadcast networks where they live.

Because NFL Sunday Ticket is available exclusively on satellite via DirecTV, it serves to advance the interests of both the NFL and the federal antitrust laws. NFL Sunday Ticket supplements existing broadcast television. No fan needs to purchase NFL Sunday Ticket in order to see the local teams' games, a national prime time contest each week, a wide range of attractive match ups featuring other teams, and all playoff games. Consequently, NFL Sunday Ticket does not displace the primary role of broadcasters, nor does it displace local affiliates as the means of watching telecasts of the home team's games. NFL Sunday Ticket is accepted by the League's broadcast partners as complementary to their own telecasts. The

FCC reached the same conclusion in its report on sports migration: "As a threshold matter, we do not see the NFL package as a sports migration issue. It appears to be a net addition to output and to the choices lawfully available to dish owners and commercial establishments."[2]

NFL Sunday Ticket also furthers the goals of antitrust laws in at least two important respects. Because it involves the creation of a new product that responds to consumer demand, NFL Sunday Ticket enhances consumer choice by giving the option to view NFL games that are not otherwise televised where they live – an option that did not previously exist. This is precisely the kind of activity that firms are encouraged to engage in by the antitrust laws. By responding to consumer demand and enhancing consumer choice, NFL Sunday Ticket promotes consumer welfare, which is the primary focus of the antitrust laws.

Moreover, as DirecTV's testimony makes clear, NFL Sunday Ticket has helped promote competition in the broader television marketplace. Because NFL Sunday Ticket is uniquely attractive programming available only on DirecTV, it had the clear effect of enhancing satellite as a competitor to cable. Consumers who previously only had access to a single cable option now have a robust alternative in satellite, with unique and attractive programming such as NFL Sunday Ticket. In its Third Annual Report on Competition in the Video Marketplace, the FCC commented on the role of such programming in promoting satellite as a competitor to cable. "DBS providers, which generally are unable to carry local broadcast programming at present, are emphasizing both the technical superiority of their digital service and their unique program offerings (e.g., their comprehensive sports packages)

[2] Inquiry into Sports Programming, at para. 171.

to differentiate their services from those of cable."[3] In its Fifth Annual Report, the Commission found that, "[a]ccording to surveys of DBS subscribers, the primary advantages of DBS are superior channel capacity . . . digital quality picture, CD quality sound, and specialized programming such as exclusive sports packages."[4]

The Commission also addressed the claim that the exclusive contract between the NFL and DirecTV was somehow unfair. In its 1997 Report, the Commission concluded: "We have also consistently recognized, however, that exclusive arrangements can often produce efficiency benefits for the parties involved, and may increase competition, which can produce lower prices and increased choice for consumers in programming and distribution markets."[5]

As the Committee is aware, a consumer class action was commenced in 1997, challenging the legality of NFL Sunday Ticket. The principal claim brought by the plaintiffs was that the sale of all NFL games was a form of "bundling" that was prohibited by the antitrust laws. We believed there were significant legal and factual barriers to class certification, to establishing liability, or to proving damages. At a minimum, plaintiffs would have had to demonstrate how creating a new product that expanded output and consumer choice would be inconsistent with the antitrust laws. It would have also required plaintiffs to demonstrate how creating a new product that avoided frequent copyright violations, particularly by sports bars and restaurants, could offend national competition policy. We also knew, both from our own market research and the experience of other leagues, that what

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[3] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Dkt. No. 96-133, Third Annual Report, 12 FCC Rcd. 4358 at para 125 (1997).
[4] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Dkt. No. 98-102, Fifth Annual Report, 13 FCC Rcd. 24284 at para 63 (1998).
[5] Third Annual Report at para 150.

consumers wanted was the ability to choose to watch any of the dozen or more games played on a Sunday afternoon, and that such a package could be offered much more efficiently than more fragmented offerings.

After several years of litigation, we determined to settle the case, and the settlement was concluded approximately five years ago. The settlement was approved by the supervising federal judge and no antitrust challenge to NFL Sunday Ticket has been brought or threatened since. Under the settlement, the NFL agreed to offer NFL Sunday Ticket on both a season-long and week-by-week basis, and to limit the price of the weekly package to a designated percentage (17.8 percent) of the full season price. DirecTV has continued to offer a weekly-purchase option on these terms under the two follow-on NFL Sunday Ticket agreements signed since the settlement of this litigation. We also made a cash payment to class members and paid the costs of settlement administration and plaintiffs' legal fees.

The federal judge in Philadelphia, as he was required to do, reviewed the settlement to ensure that it was fair and reasonable. The court initially disapproved the settlement, in large part because it provided too much in the way of legal fees for plaintiffs' attorneys. The court specifically commented on "the weakness of plaintiffs' claim" and held that rejection of the settlement would serve the public interest by acting "as an incentive to class action counsel to exercise a high degree of care and diligence before initiating class action litigation." The court held that rejection of the settlement would also protect "defendants from payment of unmeritorious claims simply because the claims are joined and aggregated together with other equally unmeritorious claims."

At the hearing on the settlement approval, "plaintiffs' counsel conceded that the claim faces an uphill climb in establishing liability as well as damages." And plaintiffs admitted "that defendants have a strong argument that their alleged illegal activities are permitted under a rule of reason analysis." There was also a "serious question" of whether class members could recover any damages, or were instead barred as indirect purchasers under the decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). As the judge commented during the hearing on settlement approval, "this is a very weak case."

Following the court's initial rejection of the settlement, the terms were renegotiated and the administrative costs and attorneys' fees were significantly reduced. Although recognizing that "the recovery is modest," the court nonetheless approved the revised settlement because the modest recovery "is a function of the lack of strength of plaintiffs' claim and not a result of unfairness."

NFL Network

Three years ago, the League established the NFL Network, a year-round channel devoted to football. The creation of the NFL Network was clearly a pro-competitive act under the antitrust laws.

We created NFL Network as another means to better serve our current fans, and help develop the next generation of football fans by offering a wide range of innovative football-

oriented programming year-round. The NFL Network's programming lineup includes news and interview programs, documentaries and features, in-depth coverage of the annual NFL Scouting Combine and the College Draft, preseason NFL games, college and youth football games, and rebroadcasts of previously televised NFL games. The overall programming of the NFL Network is of the highest quality, and represents the next stage in the evolution of NFL "shoulder programming" – from syndicated weekly NFL Films shows in the 1970s, to a wide range of programming on third party cable channels (such as ESPN) and local broadcasters throughout the 1980s and 1990s, to a network dedicated to in-depth 24-hour coverage of our sport.

NFL Network is presently available in approximately 40 million homes, on cable as well as both DirecTV and EchoStar (or "Dish Network"). Both DirecTV and EchoStar have included NFL Network on their basic tier, at no additional cost to consumers. This is similarly true of those telephone companies with which we have carriage agreements.

In our negotiations with cable companies, we have allowed the NFL Network to be launched on widely-distributed "digital cable" tiers of service – digital cable being cable companies' next-generation video product, currently purchased by 40 to 50 percent of cable subscribers. We have been willing to do so because we believe NFL Network will help drive consumer adoption of this new technology, directly benefiting both cable companies and consumers in the long run At the same time, we have been unwilling to allow NFL Network to be placed on a separate "sports tier" for which the cable company would charge a substantial separate fee for a very limited number of sports channels. We do not believe that

cable companies' pricing of the NFL Network on such "sports tiers" is in our fans' best interests, nor do we believe that their narrow penetration is consistent with our objective of cultivating mass interest in the sport of football, or with the very high ratings cable telecasts of our games receive. Finally, although we are willing to help drive digital penetration in the short run, we do insist that cable companies ultimately assure us that the NFL Network will be delivered on broadly available tiers of service purchased by a substantial majority of their customers (similar to the carriage already provided by satellite and telephone company video services).

Later this month, the NFL Network will begin televising a package of eight regular season games on a live basis. These games will be shown nationally Thursday or Saturday nights. Each of the eight games to be played this year will also be simultaneously shown on broadcast television in the home cities of the participating teams (subject to the blackout policy) – just as we have done with our ESPN telecasts for the past 20 years. In short, as is true with the ESPN telecasts, no fan will have to pay to see a telecast of the local team's games.

Neither the formation of the NFL Network, nor the decision to place a limited number of games there that are simultaneously carried on an over-the-air basis, raises issues under the antitrust laws generally or the 1961 Act. NFL Network offers new, specialized football programming year-round. It offers an additional outlet for televising high school and college games and has already competed successfully to obtain the rights to several college bowl games. It gives consumers another entertainment option and offers producers another means

of televising their product. More important to us, it offers us a high quality television network dedicated solely to building our sport, which will enable the NFL better to compete in the entertainment marketplace of the future. All of those outcomes are pro-competitive, expand output and choice, and are consistent with broad antitrust policy.

Nor does this eight-game package suggest a broad shift away from broadcast television. As Commissioner Tagliabue said two years ago, "Before we proceed with any new package, we must assure ourselves that is based on sound television premises and that it is structured to complement rather than cannibalize our Sunday and Monday night audiences and move us down the road to commodination." Our telecasts of eight games on the NFL Network (several of which were previously shown on cable television), are a limited supplement to our current broadcast and basic cable offerings, and should be viewed in that light.

NFL Network has also helped promote competition in the broader television marketplace. For example, since adding NFL Network to its basic lineup, EchoStar added approximately 300,000 new subscribers, most of whom switched away from cable television. A significant number – perhaps as many as one third of these new subscribers – switched to EchoStar to obtain the NFL Network. And EchoStar did not increase the price of its basic package when it added NFL Network to its offerings.

Although we are in difficult and at times contentious negotiations with certain cable companies, we continue to work aggressively to secure distribution agreements so that NFL

Network can be available to the widest possible number of viewers throughout the country. Further, while cable companies may argue to the contrary, there is no reason why a cable system's decision to carry NFL Network needs to result in higher rates for consumers; the experience of both EchoStar and DirecTV confirm this.

These are tough commercial negotiations, but that is hardly unprecedented in either sports or television. There have been numerous similar disputes in the past, where cable companies, including Time-Warner, have declined to offer both sports and general entertainment programming because of disputes with the rights-holder. These disputes are generally resolved because one or both parties reassess and modify their positions. They do not raise antitrust issues and do not require intervention of the Congress.

Conclusion

NFL television policies have evolved to reflect changes in technology, the growth of the League, and our increasingly mobile society, among other factors. But throughout the past five decades, we have not lost sight of our principal responsibility – to bring fans across the country a wide range of outstanding NFL television each week, and to keep our game a healthy and robust entertainment product for generations to come. Our current practice of televising all games on free, over-the-air television, combined with supplemental offerings through NFL Sunday Ticket, the NFL Network, and other outlets, certainly meets that responsibility.

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