COMPETITION IN THE SPORTS PROGRAMMING MARKETPLACE

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COMPETITION IN THE SPORTS PROGRAMMING MARKETPLACE

WEDNESDAY, MARCH 5, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:37 a.m., in Room 2123 of the Rayburn House Office Building, Hon. Edward J. Markey (chairman of the subcommittee) presiding.

Members present: Representatives Markey, Eshoo, Stupak, Stearns, Deal, Cubin, Shimkus, Radanovich, Terry and Barton (ex officio).

OPENING STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF MASSACHUSETTS

Mr. MARKEY. Good morning. Welcome to the Subcommittee on Telecommunications and the Internet. The subject of today's hearing is competition in the sports programming market.

Competition in sports is the essence of the game. In sports there are great teams and dynasties. There are compelling stories of underdogs and come-from-behind victories. There are perennial favorites to win championships, and there are the Chicago Cubs. Yet sporting events are premised upon great feats of athletic prowess and competition being performed upon a level playing field. That level playing field ensures that athletes engage in sporting activities in a manner where their God-given talents and a compelling work ethic and practice can result in success. Competition in the marketplace, on the other hand, is what makes the consumer king.

In our national video marketplace, many programming competitors assert that the playing field is not quite level at present. They argue that compelling content and a solid business game plan do not even the odds against them. The field is unfairly tilted towards cable operators or broadcast networks, competitors claim, by a couple of key factors. One, an inefficient number of cable providers within a market, although there are barriers which as a result competitors can reach consumers, and two, by laws or regulations that either fail to achieve fairness as intended or serve to reinforce the position of incumbent market leaders or risk unduly raising prices. The consumer fan, they say, is the resulting loser in this environment.

We have seen several episodes over the last year in the sports programming marketplace that highlight policy issues for this subcommittee to explore. Early last year there was the issue of Major League Baseball's package of Extra Innings, or out-of-market games slated to be carried on DIRECTV on an exclusive basis, and complaints by Comcast and other cable operators that this was unfair. There was the effort by the Big Ten conference to successfully launch its cable channel through carriage on the most broadly watched tier of major cable systems.

We saw the FCC intervene to declare that the America Channel, which has rights to various sports content, was a regional sports network for purposes of conditions imposed as part of acquisitions of the Adelphia Cable properties by Comcast and Time Warner. These conditions permit unaffiliated sports networks to seek commercial arbitration when a carriage agreement with Comcast or Time Warner cannot be reached. The Commission is now considering proposals to adopt an expedited dispute resolution process for all such unaffiliated programmers, including regional sports networks. And the NFL Channel, in a manner similar to those issues raised by the Big Ten conference, sought carriage on the most broadly watched tier unsuccessfully with several major cable operators.

Cable operators, for their part, have objected to such carriage, arguing that the price that the NFL seeks is too high, or point to the NFL's excusive deal with DIRECTV over the so-called Sunday Ticket, where consumer fans can see all the Sunday football contests, or deals with broadcast networks or ESPN as examples demonstrating that the NFL has other choices in the marketplace to distribute games.

Policymakers have sought to remedy the lack of competition over the years. The program access provisions that I championed as part of the 1992 Cable Act have created competitive alternatives to incumbent cable operators, most notably from satellite providers, but also from cable overbuilders, telephone companies and others.

Today's hearing will provide the subcommittee with an opportunity to examine the effectiveness of these provisions in the law. It will also allow us to analyze the current marketplace for sports programming and assess the continued migration of sports programming from broadcast television to pay TV services, exclusive programming packages, the nature of cable carriage for sports programming, the emergence of conference or league channels and program carriage issues generally.

In the absence of sufficient competition, the role of this subcommittee historically and the role generally of the FCC has often become that of referee. Most refs simply prefer that the athletes just play the game and don't like to intercede, but the refs are here to step in when unfair play is perceived and to make tough calls at times to safeguard the integrity of the game and in this case to ensure fairness in the marketplace and consumer welfare.

I wish to thank all of our witnesses for their willingness to testify today. I look forward to their testimony.

Mr. MARKEY. And now I turn to recognize the ranking member of the subcommittee, the gentleman from Florida, Mr. Stearns.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. And I thank my distinguished chairman, and I thank him for holding this hearing, this very interesting hearing, and I want to welcome all our witnesses again. Some of them were here I think last week, so it is nice to welcome you back.

My colleagues, the market for sports programming has never been more competitive. I remember when we had the game of the week on network television over the weekend. In my house, ABC's Wide World of Sports was a big deal. But if you didn't like what sport or game they showed, well, you were just simply out of luck in this case. Fans like me did not have many options back then, but that has all changed. Today fans can watch a game almost any night of the week. In fact, my wife says there is too much basketball, football and baseball on television. Many viewers can choose from their cable company, two satellite providers are out there, and now their local telephone company for subscription TV services. So the burden of proof should be on anyone that wants the government to intervene in private negotiation between operators and programmers. It is up to them.

I am interested to hear, of course, why at this point the government would choose to intervene in private negotiations between cable operators and programmers who carry these sports. The rationale for such regulation is rooted in statutory provisions that go back to 1992, where they were adopted when cable operators had 96 percent of the pay television market, and now, my colleagues, satellite providers have 29 percent of the market. Each have more subscribers than all but one of the cable operators today and have much content that cable operators don't carry. Sports programming is also available from phone companies, and of course, we know it is over the Internet, too. The number of nationwide channels has grown from 145 to 565 today, while the percent owned by cable has dropped from 50 to 15.

Now, what this means is that providers have no shortage of content, and programmers have no shortage of outlets, suggesting that requesting government intervention may just be attempts by parties, companies and individuals to get what they want, which they could not obtain through a free market and simple negotiations. If this is just about shifting dollars between companies, I am not sure why the government would get involved also. Distributors and programmers are generally in a better position than the United States Government to make carriage decisions. If a programmer or distributor is dissatisfied, it has plenty of other partners to choose from, and if either misjudges the value of its assets or those on the other side of the table, viewers have other options to go to. In the end, today's market creates the right incentives for distributors and programmers to find the approximate mix of content, carriage and cost, and more importantly, it encourages them to assemble the best packages, or simply create innovative new ones, to win those viewers over.

Now, certain parties argue that a market failure exists and the government should get involved, and that is what the hearing is all about. You know, there is an old story, be careful what you wish for. When it looked like the final regular-season game between the

Giants and the Patriots would only be available to the one-third of the country that has access to NFL Network, the NFL put the game on NBC and CBS as well. Some may advocate that if the government were to get involved, we should always require sports programming to be available free on broadcast networks.

I think one of the questions I have, when the program access rules were adopted in 1992, cable had 96 percent, as I mentioned earlier, of the pay television market and satellite had none at that time, in 1992. In the 16 years since then, satellite operators have captured almost 30 percent of the market and are the second- and third-largest providers. Is this the kind of market where the government needs to be getting involved when you see that simple increase in competition? Increasingly viewers also get television content from the Internet, and so this perhaps is going to be another avenue that people who get the new fiber optics into their home can simply get it through the Internet.

So Mr. Chairman, I think this is a very good hearing. I think, as many members, I am here to learn and see what should be involved, and I appreciate the witnesses here this morning. Thank you.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentlelady from California, Ms. Eshoo.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman, and good morning, everyone. I want to thank you, Mr. Chairman, for again addressing the issue of competition. Today, obviously, we are discussing competition in sports programming.

The Sports Broadcasting Act was passed in response to a court decision which ruled that the NFL's method of negotiating television broadcasting rights violated antitrust laws. The court ruled that the pooling of rights by all the teams to conclude an exclusive contract between the league and CBS was illegal. The Act overruled that decision and permits certain joint broadcasting agreements among the major professional sports. It permits the sale of a television package to the networks, a procedure which is common today. This package system has worked for several decades and allowed the public to watch these games on free over-the-air television.

No longer satisfied with simply selling the rights to games for millions of dollars, the National Football League, Major League Baseball and other leagues are setting up their own cable networks that can bring them millions more in cable subscriber fees, even during the off season. The leagues are building up entities that could eventually be worth billions. These new vertically integrated networks leverage their exclusive content to gain access on cable networks. They often demand access to the basic tier, even though their channels offer very limited new content throughout the year. A policy that relies on pay television may alienate the fans who have made the NFL so successful. For an industry that is so heavily subsidized by the public, I am concerned that it is the public that may ultimately pay the price again.

So I am interested obviously and look forward to the testimony that we are going to hear today, and I thank the chairman for holding this important hearing. I yield back.

Mr. MARKEY. The gentlelady's time has expired, and all time for opening statements has expired.

We will now turn to our very distinguished panel, and we will hear from our first witness, Mr. Ken Ferree, who is the president of the Progress and Freedom Foundation. Welcome, Mr. Ferree.

STATEMENT OF W. KENNETH FERREE, PRESIDENT, THE PROGRESS & FREEDOM FOUNDATION

Mr. FERREE. Thank you, Mr. Chairman. I am Ken Ferree, and I am president of the Progress & Freedom Foundation, and I am here today to tell a cautionary tale about what can go wrong when the government intervenes in the sports programming markets.

Prior to becoming president of PFF, I was chief of the FCC's Media Bureau from 2001 until 2005. In that capacity, I was at least in part responsible for a set of merger conditions that represent the only systematic government intervention into sports programming negotiations. I am now left to wince every time some new disgruntled programmer attempts to stretch that precedent into unrecognizable forms in an effort to strengthen its own bargaining hand.

I said it was a cautionary tale, and caution is what is needed. I sit here stunned that an organization like the NFL, which is one of the greatest marketing machines the world has ever seen, is not above squeezing its imposing presence into a hearing room like this to plead with Congress for assistance in its marketing negotiations. It would make it a farce if it were not so pathetic. In reality, sophisticated entities sit on both sides of the negotiating table when sports programming services and program distributors bargain over carriage. It is unsurprising, therefore, that market negotiations between the two can be intense, confrontational and that they sometimes involve a degree of brinksmanship. That is not saying, however, that the market has failed or that government intervention would be necessary or appropriate, which brings me to my story of a proposed merger, some well-meaning though perhaps naive regulators and the Frankenstein's monster we unwittingly created.

The story begins in the spring of 2003, when News Corporation filed an application with the FCC to acquire DIRECTV from Hughes Electronics. As chief of the Media Bureau, I was asked to oversee the staff work on the application. Over the next several months, our staff, in close collaboration with the Department of Justice, analyzed, among other things, potential foreclosure strategies. Although we found the programming market to be greatly efficient and the proposed combination untroubling in most respects, one narrow aspect of the case did give us cause for concern. Because regional sports networks are comprised of assets for which there are no readily available substitutes, temporary withholding of News Corporation's RSNs from rivals might have been a profitable strategy for the merged entity, allowing it to drive subscribers to DIRECTV. To address this one potential market failure, we crafted what we thought were very narrow conditions that required mandatory arbitration in the event of a bargaining impasse involving News Corporation's RSNs.

Whatever the merits of the News-Hughes decision, it at least cannot be said that the merged entity would have ultimate control both of extremely high value sports programming and the distribution platform. Recent efforts to extend the remedy adopted in that order cannot be sustained on that ground. For example, last year the FCC imposed mandatory arbitration to resolve an impasse between cable operators and the Mid-Atlantic Sports Network, a non-vertically integrated RSN. Although the News-Hughes order was cited as precedent, there was almost no similarity between the potential harm sought to be averted in the first case and the actual breakdown of market negotiations in the second. Most obviously, the MASN case involved no foreclosure by a programmer. Instead, it was alleged the distributors in the MASN case were engaged in what effectively became a lockout, yet we knows from the News-Hughes decision that the failure to carry a regional sports network will lead to subscriber defections, and quickly. The only conclusion to be drawn is not that there was a market failure but that one party to the negotiations, the programmer in this case, simply was overreaching.

The FCC recognized that the rationale for imposing the arbitration condition in News-Hughes was inapposite and stretched in MASN to articulate a new rationale, turning the old one on its head. The theory posited was that although the distributors would suffer considerable harm in the short term by locking out an unaffiliated RSN, they might do so in the hope that they some day could force the RSN out of the market, acquire the rights to carry the teams involved and then recoup earlier losses with rents from the new vertically integrated services.

More recently, even this dubious rationale seems to have been cast aside, as others have asked for arbitration simply on the basis that a cable operator has not agreed to a programmer's demands. For example, as the NFL season neared its final weeks this year, there was concern that a subset of games would not be readily accessible for some because the NFL Network had not reached distribution agreements with several cable operators. Whatever the nature of the disagreement between the cable operators and the NFL Network, it is clear that the dispute did not involve facts analogous to those either in the seminal News-Hughes case or in the mutated stepchild MASN case. The NFL Network, to be sure, owns the rights to some extremely valuable content. The cost then to distributors who do not carry the network must be thought to be substantial, but because the NFL Network lacks vertical integration, the circumstances are not like those in News-Hughes. Moreover, unlike MASN, it cannot plausibly argue that the cable operators are trying to lock the NFL Network out in an effort to drive it from the market and obtain access to the carriage rights for their own networks.

So once again the natural conclusion is not that there is a market failure requiring government intervention but rather that the NFL Network simply was insisting upon rates and terms that the market would not accommodate. It is fair to be sympathetic to fans who subscribe to cable systems that have not acceded to the NFL's demands, but that sympathy is not a basis for regulatory intrusion into negotiations between large commercially sophisticated enterprises.

Mr. MARKEY. Could you please wrap up?

Mr. FERREE. OK. I am sorry. In conclusion, I recognize the disputes involving sports programming often generate emotional consumer responses. The fact is, though, that the sports programming market generally is competitive and fully functioning. Negotiations surrounding sports programming carriage involve hard bargaining by sophisticated parties over complex sets of interests, but the terms of any such carriage are best decided at the bargaining table, not by regulators or arbitrators.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Ferree follows:]

STATEMENT OF W. KENNETH FERREE

Thank you, Mr. Chairman, for your invitation to testify here today on these important issues. My name is Ken Ferree, and I currently am President of The Progress & Freedom Foundation, a think tank here in Washington that studies the digital revolution and its implications for media, communications, and technology policy. Prior to joining PFF, I was a private practice communications attorney, briefly served as the chief operating officer and interim President of the Corporation for Public Broadcasting, and, most pertinently, was the Chief of the FCC's Media Bureau under Chairman Powell. In that role, I lead the staff review of the acquisition of DIRECTV by News Corporation and was therefore at least in part responsible for the imposition of the mandatory arbitration provisions in the Order authorizing that transaction that have since been invoked in several other sports programming disputes.

MARKET FAILURE, OR FAILING THE MARKET?

Indeed, the mandatory arbitration provisions in the FCC's conditional grant of authority for the News-Hughes merger have proven to be so popular with disgruntled programmers that it is a natural place to begin my testimony. Contrary to what sometimes is suggested, the FCC did not find in the News-Hughes proceeding that the sports programming market generally is failing. Rather, in most cases, the sports programming market functions quite efficiently, ensuring wide-spread carriage of sports programming services, on multiple platforms, to consumers at reasonable rates. The specific set of circumstances surrounding the proposed acquisition of DIRECTV, a program distributor, by News Corporation, which had interests in a number of regional sports networks ("RSNs"), defined an exception that, we felt, warranted government intervention in the form of mandatory arbitration provisions.

Allow me to emphasize that this was very much of a departure for the FCC. Although the Commission has long enforced a set of statutorily-defined program access rules, which forbid exclusive agreements and certain other discriminatory practices involving satellite-delivered, vertically-integrated programming, the government generally has not otherwise injected itself into contract negotiations between programming suppliers and cable or DBS service providers.

The discretion the government has shown has been a proven success. In the past ten years, the number of cable programming networks has grown from 145 to 565, while vertical integration has decreased (in 1996, nearly 50% of networks were vertically integrated, today less than 15% are). Simultaneously, competition in programming distribution has become a reality (DIRECTV and EchoStar are now the second and third largest distributors of video programming), and large communications companies like AT&T and Verizon have recently entered the video market in earnest.

Having said that, the programming market, like any other, can fail under certain circumstances. In the News-Hughes decision, the Commission found, following an exhaustive examination of the effects of foreclosure by programmers (the withholding of programming from one or more distribution platforms), that although permanent foreclosure was not likely to be a profitable strategy for a vertically integrated News Corporation, temporary foreclosure of access to its RSNs could be profitable, allowing it to drive subscribers from rival distributors to DIRECTV. That is, losses that News Corporation might suffer during the withholding period could be more than offset by gains in DIRECTV subscriber fees.

There were important analytical bases for that conclusion. First, the FCC found that the temporary foreclosure strategy would work only for programming services with the most high-value content. Based on data from prior cases, the Commission concluded that, for the vast majority of program services, subscribers simply will not suffer the transactions costs associated with changing distribution platforms when faced with the loss of a single programming service. Thus, losses incurred by a programmer that withholds its content from a distributor are normally unlikely to be recouped in any economic time frame (and of course, if the content is withheld permanently, losses will never be recouped).

RSNs, on the other hand, are (in the words of the FCC) "comprised of assets of fixed or finite supply—exclusive rights to local...sports teams and events—for which there are no acceptable readily available substitutes." Sports programming also may be differentiated from general entertainment programming in that it is extremely time-sensitive. There is no substitute for a playoff game on the day it is contested. As a result, owners of that content wield a significant amount of market power. When regional sports programming is withheld from a particular distributor, substantial subscriber defections to competing platforms may be expected.

Second, and importantly, for a temporary foreclosure strategy to be effective, the programmer must be able to reap the benefit of any subscriber defections that it can motivate. That is, the programmer must be vertically integrated with the competing distribution platform to which disaffected subscribers will flee.

It is fair to argue whether these conditions were met satisfactory to warrant imposition of a mandatory arbitration provision in the News-Hughes case. Whatever the merits of that initial decision, however, it at least cannot be gainsaid that the merged entity would have ultimate control both of extremely high-value sports programming and a distribution platform in the markets in which the programming was most highly prized. Recent efforts to extend the remedy adopted in that order cannot be sustained on that ground.

For example, last year, in an order approving asset transfers to Comcast and Time Warner as a result of the Adelphia bankruptcy, the FCC imposed mandatory arbitration to resolve an impasse between the cable operators and the Mid-Atlantic Sports Network ("MASN"), a non-vertically integrated RSN that owned the rights to, among other things, the Washington Nationals and Baltimore Orioles baseball games. Oddly, although the News-DIRECTV merger order was cited by the Commission as precedent for its decision, there was almost no similarity between the potential harms sought to be averted in the first case and the actual breakdown of market negotiations in the second.

Most obviously, the MASN case involved no foreclosure by a programmer—the potential harm sought to be remedied in the News-Hughes case. Instead, it was alleged, the distributors in the MASN case were engaging in what effectively became a lock-out. Indeed, because MASN owns no distribution facilities in the relevant region, there is no chance that it could have used temporary foreclosure to affect the downstream distribution market in its favor. Yet, we know from the FCC's findings in the News-Hughes case that RSN programming is highly valued by subscribers and that the failure to carry the programming will lead to subscriber defections. The only conclusion that can be drawn is not that there was a market failure or that there were anticompetitive forces at work but that one party to the negotiations (the programmer in this case) simply was overreaching and demanding more than the programming was worth in the market.

The FCC, to its credit, recognized that the rationale for imposing the arbitration condition in News-Hughes was inapposite in the MASN case and stretched to articulate a new rationale by turning the old one on its head. The theory posited in the MASN Order was that, although the distributors would suffer considerable harm in the short term by locking out an unaffiliated RSN, they might do so in the hope that they someday could force the RSN out of the market, acquire the rights to carry the teams involved for their own vertically-integrated services, and then recoup earlier losses with rents from the new vertically-integrated services.

Without belaboring the point, there are reasons to question the plausibility of this potential scenario, not the least of which is that it is completely lacking in any analytical foundation. Yet even this dubious rationale seems now to have been cast aside, as the NFL Network and others have asked for arbitration simply on the basis that a cable operator has not agreed to a programmer's demands. For example, as the NFL season neared its climactic final weeks this year, there was concern among policy-makers and fans alike that a subset of the games would not be readily accessible for some because the NFL Network had exclusive rights to those games, and it had not reached agreement with several large cable operators for widespread distribution. Whatever the nature of the disagreement between the cable operators and the NFL Network, it was clear that the dispute did not involve facts analogous to those either in the seminal News-Hughes case or the mutated step-child MASN case.

The NFL Network is not vertically integrated with any multichannel distribution platform, and its programming is not of such regional interest as to render it vulnerable to a lock-out scenario such as that posited in the MASN Order. The NFL Network, to be sure, owns the rights to extremely valuable content. The cost, then, to distributors who do not carry the network must be thought to be substantial. Indeed, because the network is carried on at least one national distribution platform (i.e., DIRECTV), disgruntled consumers have the option of changing service providers rather than miss their favorite teams or important games. But because the NFL Network lacks vertical integration, the circumstances are not like those in News-Hughes, where one might fear that the NFL Network was engaged in temporary foreclosure in order to benefit its downstream properties.

Moreover, unlike the MASN case, it cannot plausibly be argued that cable operators which do not come to terms with the NFL Network are trying to lock them out in an effort to drive the NFL Network from the market and obtain access to the carriage rights for their own networks. There is no evidence to suggest that the network's lack of carriage on the cable systems in question poses any threat to its existence or, if it did fail, that the cable operators would have any realistic chance of obtaining the rights to the underlying content.

That is, once again, the natural and logical conclusion from the facts presented is not that there is a market failure requiring government intervention, but rather that the NFL Network simply was insisting upon rates and terms that the market would not accommodate. It is fair to be sympathetic to the fans who subscribe to cable systems that have not acceded to the NFL Network's demands, but that sympathy is not a basis for regulatory intrusion into negotiations between large, commercially sophisticated enterprises.

To the contrary, the cable operators' refusal to accept the demands of the NFL Network suggests that the market is working efficiently, not that it has failed. The cable industry in particular has been struggling to control consumer prices in the face of increasing costs for programming and expanded services. By holding the line on new programming costs—particularly programming such as that on the NFL Network which appeals to a defined subset of consumers—the cable operators may be able to help control against cable rate increases for all subscribers.

In short, there are powerful forces acting on both sides of the bargaining equation. On the one hand, sports programming networks own extremely valuable content, which, generally speaking, distributors wish to carry. On the other hand, program distributors are under tremendous pressure to control consumer rates; limiting programming costs is perhaps the most direct means of achieving that end. The market, not regulatory authorities or appointed arbitrators, is best positioned to balance those interests.

This analysis also helps inform the debate surrounding two other issues that arise in disputes over the carriage of sports programming: whether distributors should be prohibited from carrying sports programming on a special tier, and whether the government should require programmers and/or distributors to offer services on an "a la carte" basis. Both queries should be answered in the negative.

TEARS FOR SPORTS PROGRAMMERS, OR TIERS FOR SPORTS PROGRAMMERS?

Sophisticated entities sit on both sides of the negotiating table when sports programming services and program distributors bargain over carriage. Large program distributors obviously have a measure of leverage by virtue of their access to the end-user viewers. On the other hand, sports programming services control uniquely popular programming assets for which there are no close substitutes. It is unsurprising, therefore, that market negotiations between the two can be intense, confrontational, and that they sometimes involve a degree of brinksmanship. That is not saying, however, that the market has failed or that government intervention in these negotiations would be necessary or appropriate.

As noted above, program distributors are under intense pressure to contain subscriber rates. One means of controlling base rates that all subscribers pay is to segregate niche programming services to special tiers, which allows the distributor to pass the costs of carrying the programming on to only those who most value it. Niche sports programming services, such as the NFL Network, are particularly amenable to special tier placement because their most popular content is seasonal, it appeals to a well-defined subset of the entire subscriber base, and it is expensive to produce and, therefore, distribute. In those circumstances, it may well be more economical to require those fans that highly value the content to bear the cost of its creation and distribution rather than requiring all subscribers to shoulder that burden.

Naturally, that conclusion does not sit well with content owners, which would prefer that their services be carried on the basic tier. Basic tier carriage provides a much larger potential base of viewers, and it allows the cost of producing and distributing the content to be subsidized by subscribers who would otherwise not be willing to pay separately for the programming. One can well understand bare-knuckled bargaining by sports programming services in an effort to force basic tier carriage. Too often now, though, when such bargaining fails and they cannot achieve their sought-after ends in private negotiations, programmers raise importunate pleas to Congress and the FCC for help. Those pleas should find no sympathetic ear.

Government intervention in programming disputes may be appropriate where one party or another will benefit from a breakdown of market negotiations. In those cases, a plausible argument can be made that the market is prone to fail and that consumers will suffer as a result. In the disputes over tier placement that we have seen to date, however, there is little evidence that any of the parties involved will reap any kind of advantage from a bargaining impasse.

To the contrary, the negotiations in these cases involve the balancing of competing interests in providing compelling programming to subscribers, controlling basic tier costs, managing system capacity, and remaining profitable going-concerns. And because so much is at stake both for the content owners and the distributors, there is tremendous pressure on both parties to complete negotiations. Although neither party may be entirely satisfied with the result, that is the nature of free market negotiations. Government intervention to prohibit or limit the use of special sports programming tiers can only serve to mute market signals and drive the process to a less efficient outcome.

PRIX FIXE OR A LA CARTE?

Similarly, just as government intervention into the sports programming markets to prohibit or limit the use of sports tiers would be unnecessary and potentially counter-productive, mandated "a la carte" pricing at the wholesale or retail level would likely decrease programming diversity, increase vertical integration in the programming and distribution markets, and increase consumer costs.

For the majority of programming services, the incremental cost of programming and/or the widespread, year-round appeal of the programming content make retail bundling an attractive, efficient, economical, and consumer-friendly means of distribution. Bundling can lower transactions costs, allow programmers to achieve economies of scale, enhance consumer convenience and, perhaps most importantly, allow for appropriate pricing differentiation. In effect, bundling allows each of us to enjoy our favorite programming whether or not it can alone attract large audiences.

This model breaks down, however, when a niche programming service is both of limited appeal and expensive to produce and distribute. This, of course, describes many RSNs and other specialized sports programming services. In those cases, as explained above, it likely will benefit consumers to allow distributors to carry the programming service on a special tier. For other types of programming, though, including general entertainment programming, consumers likely benefit from bundled offerings.

Similarly, bundling at the wholesale level can facilitate the realization of scale economies and lower transactions costs, both of which, at least potentially, can redound to the benefit of consumers. Further, as the FCC found when it studied this issue in 2004, some wholesale bundling is a function of the statutory retransmission consent process, which appears to be working as Congress intended to facilitate the introduction of new programming services and allow for non-cash compensation for the carriage of broadcast outlets. Of course, to the extent other forms of wholesale bundling or tying arrangements are being used for anticompetitive purposes, antitrust remedies remain available.

CONCLUSION

Although disputes involving sports programming often generate emotional consumer responses, the fact is that the sports programming markets generally are competitive and fully-functioning. Negotiations surrounding sports programming carriage involve hard bargaining by sophisticated parties over complex sets of interests. The terms of any such carriage are better decided at the bargaining table; government intervention rarely should be necessary.

Thank you.

Mr. MARKEY. Thank you, Mr. Ferree, very much.

Our next witness is Mr. Glenn Britt. He is the president and the CEO of Time Warner Cable. Welcome, Mr. Britt.

STATEMENT OF GLENN A. BRITT, PRESIDENT AND CEO, TIME WARNER CABLE

Mr. BRITT. Good morning, Mr. Chairman, Ranking Member Stearns and members of the subcommittee. My name is Glenn Britt, and I am president and CEO of Time Warner Cable, the Nation's second-largest cable operator, and I want to thank you for inviting me here today to share our perspective on the evolving sports programming market.

Americans' love of sports is well documented, and the development of cable and satellite television has provided new outlets for sports teams and their fans. These new outlets have generally been positive, offering viewers opportunities to watch sporting events that previously might not have been available on broadcast TV. However, the past few years have been marked by a new trend, the movement of live sporting events from broadcast and broadly themed cable channels to league and team-specific channels. The leagues and teams have developed a strategy in order to maximize their financial returns, and this is perfectly appropriate. And of course, this is the goal of all businesses, to do well for their shareholders. That is my goal as well. Although negotiations between distributors and programmers may seem a little messy at times, Congress has wisely recognized that the marketplace, not regulation, produces the best results for consumers over the long run.

Lately, however, some parties have been calling for new legislative and regulatory involvement in how distributors package and price services. These regulatory proposals include conflicting demands for mandatory a la carte on one hand and forced carriage of services on broadly distributed tiers on the other hand. In reality, deciding what services to carry and how to price and market them is a very complex process that involves lots of editorial and business judgments, and we think these judgments are best made in the marketplace. Thus, we believe that the NFL in particular is being disingenuous when it calls on the government to compel distributors to carry the NFL Network on a broadly distributed tier while at the same time they limit the distribution of NFL Sunday Ticket to one carrier, DIRECTV.

Our goal at Time Warner Cable is to balance the needs and interests of our entire subscriber base to sports fans and non-sports fans alike, and one way we sought to do that is by creating separate sports-themed packages. These packages include networks such as NBA TV, the Tennis Channel and other high-cost or limited-appeal sports channels. By congregating these channels on a separate tier, we are able to hold down the cost of the service for most of our subscribers, and more than ever we have been talking about competition, and our business is driven by competitive necessity to offer consumers the best programming options in terms of carriage and packaging. The programmers, as well as customers, have a range of options. These include over-the-air television, two national satellite providers, the two largest phone companies, and of course, there is always the Internet, so there is a lot of choice.

We have got to give our customers the services they want at a fair price or they can take their business elsewhere, and they do take their business elsewhere. One way we make our service appealing to customers is that we invest considerable resources in the creation of local channels that provide community-oriented news and information not found elsewhere. Some of these channels feature high school, collegiate and minor league professional sports which are highly valued by the local customer base, and these channels wouldn't exist without our commitment, and much of this programming simply would not be available to anyone. I think this is a good example of a marketplace at work as intended by the Congress.

In conclusion, although many television viewers are passionate about sports and sports programming, Congress has made the right choice in relying on the marketplace to make the best decisions for these viewers. Thank you.

[The prepared statement of Mr. Britt follows:]

TESTIMONY OF GLENN A. BRITT
PRESIDENT AND CEO
TIME WARNER CABLE

COMPETITION IN THE SPORTS PROGRAMMING MARKETPLACE

before the

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET
COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENATATIVES

WASHINGTON, DC

MARCH 5, 2008

Good morning Mr. Chairman, Ranking Member Stearns, and members of the Subcommittee. My name is Glenn Britt, and I am President and CEO of Time Warner Cable. Time Warner Cable is the nation's second largest cable operator and the fourth largest multiple video programming distributor, serving approximately 13.3 million subscribers in 33 states. I want to thank you for inviting me to appear here today to share Time Warner Cable's perspective on sports programming and the video marketplace.

America's love affair with sports is well documented. Sporting events are undeniably an important element of American culture – a shared bonding experience for families, communities, and, in an Olympic year such as 2008, the entire nation. And it is because of sports' undeniable appeal that Time Warner Cable offers its subscribers a wide variety of sports-related programming, from the many high school sporting events that we feature on free, local video-on-demand channels to the carriage of a host of channels devoted in whole or in part to all manner of professional and amateur sports.

Sports television, which is nearly as old as television itself, has evolved over the years. The development of cable television has provided new outlets for sports teams and their fans to enjoy live events and related programming. These new outlets have generally been positive – offering viewers opportunities to watch sporting events that previously might not have been available on free, over-the-air broadcast television.

In the past few years, however, a new trend has developed: the movement of telecasts of live sporting events from broadcast and broadly-themed cable sports channels to league and team-specific channels. The leagues and teams have developed this strategy in order to maximize their financial returns. This is perfectly appropriate; it is the goal of all business to do well for their stakeholders. And Congress has wisely determined not to expand the role played by government in such matters, but rather to rely on the dictates of a vibrant marketplace to produce the best results for the viewing public.

Lately, however, there have been new and contradictory calls for more government intervention in the programming marketplace. On the one hand, some have called on the government to require distributors to offer all channels on an *a la carte* basis. Conversely, others, especially some sports leagues and teams that have started their own programming services, have called on the government to require distributors to carry some (but not all) of their programming services on broadly distributed tiers. The best answer, though, is not to pick winners and losers – either between sports programmers and distributors or, more importantly, between sports fans and those non-fans who would be forced to subsidize that programming.

Any governmentally-mandated "one size fits all" approach – whether it calls for mandatory *a la carte* or for forced basic tier carriage – would ignore the fact that determinations regarding what programming services to carry and on how to price and market them involve complex editorial and business judgments that are best made without government intrusion. For example, as a number of independent studies have consistently shown, mandatory *a la carte* would result in consumers paying higher prices with less choice. While there may be limited situations in which *a la carte* carriage of a particular channel makes sense, that decision involves multiple factors – including the cost, breadth of appeal and nature of the programming in question – that should be left to the discretion of the party with the most direct relationship with the consumer.

The same factors – and not government mandates – should determine whether a channel is offered on a broadly-distributed basic tier or on a less widely distributed basis. The NFL in particular is being especially disingenuous in appealing to the government to compel distributors to carry one of their services – the NFL Network – on broadly-distributed tiers while simultaneously defending its right to limit distribution of its more appealing service – the NFL Sunday Ticket Package – to a single distributor, DirecTV.

For its part, Time Warner Cable's goal in providing sports and other programming to our customers is to offer the best possible mix of programming at the best possible prices. In doing this, we try, among other things, to balance the needs and interests of our entire subscriber base – sports fans and non-sports fans alike. One way we have sought to achieve this objective is by taking advantage of the flexibility offered by digital technology to create separate sports-oriented packages containing single-sport networks such as NBA TV, the Tennis Channel, and other sports-themed channels that are expensive or feature programming with limited local appeal to the subscribers in a particular area. By congregating these relatively high-cost channels with specialized appeal on a separate tier, we are able to hold down the cost of service for the rest of our subscribers.

Providing customers with a diverse mix of desirable programming with the best possible pricing and packaging is not merely an objective for Time Warner Cable and other cable operators, it is a competitive necessity. More than four years ago, the Federal Communications Commission concluded that "the vast majority of Americans enjoy more choice, more programming and more services than at any time in history." Since that time, of course, the marketplace has become even more intensely competitive, with the continued growth of DirecTV and Dish Network – now the second and third largest multichannel video providers in the country – as well as the entry into the market of well-financed telephone companies and the increasing use of the Internet and other new platforms to distribute video.

The simple truth is that unless we offer customers the services that they want at a fair price, they can and will take their business elsewhere. Indeed, despite our best efforts, Time Warner Cable, like other major cable companies, continues to lose basic subscribers. The cable industry as a whole lost 500,000 basic subscribers in 2007 and Time Warner Cable alone lost over 130,000 basic subscribers during just the last six months of the year.

This means that, more than ever, Time Warner Cable has to offer customers the best possible programming options in terms of both carriage and packaging. Indeed, as the facts above make clear, if we based our carriage-related decisions on other factors, such as whether we had an ownership interest in a particular service, rather than on our assessment of what mix of programming and prices best meets our customers' needs, we would be severely disciplined in the marketplace.

This is the case with respect to sports programming as well as to all the other programming that we carry. In fact, Time Warner Cable has very few investments in services featuring major league sporting events. What we have done – and are proud of – is invest considerable resources in the creation of locally-originated channels that provide the type of community-oriented news and information programming not found elsewhere. Sports programming makes up only a very small portion of the content of most of these channels. Even where we have created a local sports-themed service, the featured sporting events are, for the most part, of very local interest, including high school, collegiate, and minor league professional sports.

None of Time Warner Cable's locally-produced channels, whether sports-themed or not, are "regional sports networks" as that term is commonly understood in the industry. Nevertheless, taking advantage of an overly-broad definition of an "RSN" adopted by the FCC in its order approving our Adelphia transaction, MASN, a regional sports channel that features coverage of the Washington Nationals and Baltimore Orioles baseball teams, has invoked a provision in that order allowing it to bring an arbitration claim against us. Citing Time Warner's Cable's creation and operation of a news and information channel whose programming is infrequently preempted by professional basketball games, MASN's complaint alleges that Time Warner Cable has engaged in wrongful discrimination by declining to provide it with analog carriage on our systems in North Carolina – systems that are located hundreds of miles away from the home markets of the teams featured on MASN. Although the FCC has wisely suspended this part of the Adelphia order and has barred future arbitration claims like this from going forward, this particular proceeding was grandfathered.

The facts of this case illustrate how Time Warner Cable seeks to put the interests of its customers first in its programming decisions, not that it can or does engage in any sort of improper discrimination. For that reason we are confident that we will ultimately prevail in the case on the merits. But it should never have gotten to this point. While the marketplace may seem "messy" at times, our experience has been that, in the long run, carriage agreements can be and are worked out to the mutual satisfaction of the parties without the government getting involved in the process. Indeed, the MASN case demonstrates that government intervention in this area not only is unnecessary, but also that such intervention can encourage some parties to make baseless claims. Defending against such claims is costly and time-consuming. Moreover, since all litigation creates uncertainty, this type of ill-advised regulation can end up saddling consumers with higher costs and worse programming choices than would be the case if the government left carriage decisions to be resolved by the best regulator of such matters – the marketplace.

In conclusion, although many television viewers feel passionately about sports and sports programming, Congress has wisely decided generally to leave program carriage decisions to the marketplace. It is that marketplace that will best assure that both sports fans and non-fans alike are offered the best possible programming options. Moreover, the government should be especially wary of calls for it to intervene made by parties who seek such intervention as a means of advancing their business objectives – but who oppose regulation when it would apply to them. Finally, to the extent that government does choose to intervene, it must be sure to apply the same rules to all parties. Regulations that favor some competitors over others serve only to deprive consumers of the full benefits of the vibrant competition that exists today in the video marketplace.

Mr. MARKEY. Thank you, Mr. Britt, very much.

Our next witness is the commissioner of the National Football League, Mr. Roger Goodell. We welcome you, sir.

STATEMENT OF ROGER GOODELL, COMMISSIONER, NATIONAL FOOTBALL LEAGUE

Mr. GOODELL. Thank you, Mr. Chairman, Ranking Member Stearns and members of the subcommittee. Thank you for inviting me to testify here today. I am Roger Goodell, and I am commissioner of the National Football League. I have filed written testimony that I ask be made part of the record. I want to highlight a few key points before taking your questions, though.

First, Comcast and Time Warner, the two largest cable companies, use their bottleneck power to control access and discriminate against independent programmers. The NFL Network and consumers who want to view NFL programming have been victims of this discrimination. NFL Network has been treated in a manner that is sharply different and clearly less favorable than the treatment given competing sports networks that Comcast and Time Warner own, channels such as Versus, the Golf Channel, Sports New York. Those networks are carried on basic tiers, while the NFL Network has no carriage on Time Warner and has been relegated to a premium sports tier by Comcast.

Second, beyond the damage this discrimination causes independent programmers, it seriously hurts consumers and our fans as well. This is true for two reasons: first, because these anti-competitive practices stifle the development of independent programming like the NFL Network, it could and should be made available to the public, and second, because these practices drive up the prices that the public has to pay for independent cable programming.

Third, let me be clear on what we are and what we are not seeking. The NFL does not seek new legislative remedies for these abuses. In 1992, Congress held that this discriminatory conduct was illegal and directed the FCC to adopt and administer fair, expeditious and effective complaint procedures to prevent cable carriage discrimination, but the FCC's procedures have turned out to be far too slow and ineffective. Only three complaints have been filed, and none has made its way to final resolution. The FCC itself has recognized the need for reform. We ask the committee to exercise its oversight authority to encourage the FCC to adjust its procedures so that independent programmers have a meaningful remedy for cases of discrimination.

In similar fashion, we are not asking Congress or the FCC to mandate that NFL Network or any other independent programmer be carried on a specific tier of cable service or at a specific rate or on specific terms. We believe that those decisions should be made in negotiations unaffected by discriminatory conduct that protects cable companies' own networks. We are confident that in an environment free of unlawful discrimination, NFL Network and other independent programmers will secure fair carriage at a fair price.

The dominant cable companies will offer a long list of excuses. They will call NFL football, the most popular sports programming in the country, niche programming. They will say the NFL Network is too expensive. They will say they are protecting consumers against increasing costs they don't want, and they may talk about NFL programming such as NFL Sunday Ticket. Each of these excuses should be seen for what it is: an effort to divert attention from the real issue, which is unlawful discrimination by cable companies in favor of their own networks and the resulting harm to consumers and independent programmers. Each of these excuses should be evaluated in light of how the cable companies treat their own networks. If NFL football is niche programming deserving only of placement on a premium sports tier, why do Comcast and Time Warner carry their own sports channels on basic tiers? Comcast and Time Warner treat sports programming as niche programming except where they own the sports channel, in which case sports programming becomes core programming that must be carried on the basic tier and available to all cable subscribers.

This is not a hypothetical problem or one limited to the NFL Network. In a recent arbitration decision, Time Warner was found to have discriminated against an independent sports programmer, MASN. In the case of NFL Network, the situation is almost identical. The NFL should also receive a fair process. Comcast and Time Warner either refuse to discuss carriage or have insisted on relegating the NFL Network to expensive premium tiers in order to protect their own competing services. If the NFL Network's highly rated programming can't crack cable's bottleneck leverage, other independent programmers like the Black Television News Channel, which contributes importantly to program diversity, will not be able to do so. Congress and the FCC understand this, and the FCC needs to apply its procedures in a manner consistent with Congress's objectives. NFL Network is only part of our television business. The core of that business is and will continue to be free, over-the-air television. As a result, as long as there is reasonable remedy action available, we can persevere and challenge such unlawful conduct where other independent programmers cannot.

Thank you for inviting me to testify. I look forward to your questions.

[The prepared statement of Mr. Goodell follows:]

Written Testimony of Roger Goodell
Commissioner
National Football League

Before the
Subcommittee on Telecommunications and the Internet
of the
Committee on Energy and Commerce
United States House of Representatives

March 5, 2008

Chairman Markey, Ranking Member Stearns, and Members of the Subcommittee, thank you for this opportunity to address the barriers facing independent programmers who are competing with cable-company-owned networks to offer programming to viewers. Although some of the highest-profile issues in the program carriage area — and the specific issue of concern to the NFL — have arisen in the sports programming market, they are not exclusive to that market. Rather, vertically integrated cable companies can and do impede independent networks and harm consumers across the range of actual and potential cable programming networks.

My focus today is on the consumer protection mandate that Congress imposed on the FCC in 1992 through the Cable Act, when Congress found that cable discrimination against independent programmers is a real and substantial problem and that cable companies often act with the purpose of consolidating and exploiting their bottleneck power. In response, Congress directed the FCC to remedy such discrimination.

The FCC has recognized this directive, but the process adopted by the FCC 15 years ago — as it has been implemented — is ineffective. It is slow, expensive, and inherently protective of cable operators — in a phrase, it is compellingly in need of change. The FCC itself agrees that the process should be modified and said so in its March 2007 rulemaking on this issue, but reform is not yet complete.

I. CONGRESS DIRECTED THAT THE FCC PROVIDE AN EFFECTIVE FORUM TO REMEDY CARRIAGE DISCRIMINATION ABUSES.

Cable operators enjoy a high level of bottleneck power over the means of distributing video programming. The largest cable operators also hold substantial ownership interests in programming networks. Comcast, which distributes programming to 24.2 million subscribers, owns numerous networks, including Versus, the Golf Channel, and E! Entertainment Television. Similarly, Time Warner, which as the second largest cable operator distributes cable programming to 13.3 million subscribers, holds interests in TNT, CNN, SportsChannel New York, and TBS, among other networks. Cable operators that own their own networks have economic incentives to (1) favor their own programming, (2) carry it to as broad an audience as possible, and (3) exclude or disadvantage independently owned networks that compete with cable-owned networks for advertising, programming, and viewers.

The problem of vertically integrated cable operators' discrimination against independent networks is not new. In 1992, Congress amassed substantial evidence demonstrating that cable operators had abused their bottleneck power and had reduced the diversity of programming available to the public.[1] The House Committee on Energy and Commerce determined "that some cable operators favor programming services in which they have an interest . . . and discriminat[e] against rival programming services with regard to price, channel positioning, and promotion."[2] The Senate Committee on Commerce, Science, and Transportation likewise cited "evidence that programmers are sometimes required to give cable operators an exclusive right to carry the programming, a financial interest, or some other added consideration as a condition of carriage on the cable system."[3] Indeed, the Senate Committee concluded that "[a]s a practical matter, it is almost impossible in the present environment to start a new cable [programming] service without surrendering equity to the owners of the monopoly cable conduits."[4] Congress concluded that such practices harm the public through a "reduction in the number of media voices available to consumers."[5]

A large bipartisan majority of Congress passed the Cable Act — 308-114 in the House, and 74-25 in the Senate. As a part of the Act, Congress instructed the FCC to bar cable operators from several practices, including discriminating against independent programmers and demanding financial

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[1] *See* P.L. 102-385, § 2 (Oct. 5, 1922) (Findings).

[2] H.R. Rep. No. 102-628, at 41 (June 29, 1992) (House Committee on Energy & Commerce).

[3] S. Rep. No. 102-92, at 24 (June 28, 1991) (Senate Committee on Commerce, Science, & Transportation).

[4] *Id.*

[5] P.L. 102-385, § 2 (Oct. 5, 1922) (Findings).

interests in independent programming as a condition of carriage. This clear legislative mandate has not been effectuated.

II. THE NFL'S EXPERIENCE DEMONSTRATES THAT VERTICALLY INTEGRATED CABLE OPERATORS CONTINUE TO DISCRIMINATE AGAINST INDEPENDENT PROGRAMMERS.

Discrimination by large cable operators remains a serious problem. The NFL Network and various other independent networks — including the Black Television News Channel, Wealth TV, and the Hallmark Channel — have filed comments with the FCC to share their experiences with discriminatory behavior by dominant cable companies. The FCC needs to implement a process that stops these practices and gives effect to Congress's intent in the 1992 Cable Act. The NFL's experience is illustrative of this need.

Since its launch four and a half years ago, the NFL Network has been recognized as one of the most popular and well-produced cable and satellite sports networks in the United States. Its unique content — not just games, but "insider" coverage of the NFL Scouting Combine, the NFL Draft, team training camps, and much, much more — has been very popular with subscribers to the more than 240 cable and satellite operators that carry the NFL Network. Currently, the Network is received by about 35 million subscribers. And NFL football itself is America's most popular spectator sport. NFL games, including the games carried on the NFL Network, consistently receive high ratings: according to Nielsen, eight of the ten most-watched cable shows in the past 20 years have been NFL games, including the record 17.5 million viewers for the New England Patriots – Baltimore Ravens game on December 3, 2007.

The NFL Network is an important initiative for the League – an essential part of its long-term strategy for maintaining the health of the sport of football; for developing new fans; and for increasing the avid interest of its current fans in the sport. But the NFL Network is by no means the centerpiece of NFL television policy. Rather, that centerpiece is, and long has been, 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 — so most fans will have available 90 or more games available on free television during the course of the year. If the fan lives in an NFL city, this will include all of that local team's away games (even if they are telecast on the NFL Network or ESPN), all of the home games if they are sold out, a broad range of other daytime and prime-time NFL games, and all playoff games. This is unique. No other league offers this level of free over-the-air television programming to consumers.

By their nature, however, broadcast television stations and networks do not focus exclusively on a single program genre or sport. Yet many of our fans want more football programming than broadcast television is able to provide. For those fans, the NFL Network features a full schedule of enhanced football programming, exclusive interviews, retrospectives, and live games. Fans' response to the NFL Network has been dramatic and positive.

The largest cable operators, however, have financial interests in their own sports networks. Those cable-owned networks compete directly against the NFL Network for both viewers and advertisers. Cable-owned networks have different business purposes — they're not focused exclusively on, or intended principally to enhance, the sport of football. But, like most networks that offer sports programming, they would very much like to telecast live games of America's most popular spectator sport. To achieve this objective, the largest, vertically integrated cable operators have followed the same strategy that was so evident to Congress and the FCC 16 years ago — a strategy of aggressive discrimination against the NFL Network and against other independent programmers. They did so — and still do so — by disadvantaging independent programmers like the NFL Network on price, tier position, and even carriage itself. Cable operators favor their own networks over their independent competitors' networks, and independent programmers often have had to yield substantial ownership interests to the cable operators in order to be carried at all, or carried on a basic tier. Failure to yield to cable's bottleneck power would threaten their survival.

A. Comcast

The conduct of Comcast, the nation's largest cable operator, provides one of the clearest examples of cable-operator discrimination. Comcast owns two national sports networks — Versus and the Golf Channel. Both compete directly against the NFL Network.

Comcast has a standard (and unwavering) practice of carrying its own networks — including Versus and the Golf Channel — on its "expanded basic" tiers, which are purchased by more than 22 million homes nationwide. But, in what we believe was a breach of contract, Comcast has moved the NFL Network onto a very narrowly distributed premium tier that costs subscribers almost $7 each month, on top of charges to buy a "digital" tier of programming that is substantially more expensive than "expanded basic."[6] This frustrates viewers' ready access to the NFL Network's programming. Because those networks reach so many more people than the NFL Network, Comcast's networks have an advantage over the NFL Network in competing for advertising revenue, even though the Comcast networks have lower ratings. And it gives those Comcast networks an advantage in competing with the NFL Network for programming offered by third parties like the PAC 10 and Big 12.

The premium tier on which the NFL Network is carried was, when Comcast switched the NFL Network to it, purchased by only about 750,000 of the 24 million Comcast subscribers nationwide. By relegating the NFL Network to this tier, Comcast gave Versus and the Golf Channel a 30-to-1 household-reach advantage over the NFL Network on Comcast systems, and it deprived viewers who do not wish to pay an extra $84 a year of access to the NFL Network. More important, Comcast sacrificed general viewer access to the NFL's highly popular independent sports network and used that network, instead, to draw more

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[6] There are typically four to nine other sports networks on this tier — the Tennis Channel, GOL TV, the Horseracing Network, Horseracing TV, Fox College Sports and Fox Soccer, NBA TV, the NHL Network, and CSTV — none of which approaches the NFL Network in popularity.

customers to the premium tier while still maintaining the larger viewer base of its own sports networks.

Comcast's strategy has worked to its advantage on both the network-owner and the distributor sides of the equation. We understand that subscriber levels for the premium sports tier have more than doubled since Comcast shifted the NFL Network onto it, to approximately 1.7 million. As a result, based on an average fee of $7, we believe that Comcast's discrimination against the NFL Network has generated some $7 million in additional revenue for Comcast each month, the great majority of which is pure profit after deducting the relatively small amount of the fees for the tier's content. While this strategy has been good for Comcast's bottom line, it has been bad for consumers as well as for the NFL Network. Worst of all, the strategy reflects conduct that Congress banned in 1992 and directed the FCC to prevent.

Cable companies often claim that sports channels are not for everybody; that premium sports tiers permit consumers to reduce costs by not paying for sports networks they don't want. In fact, these cable claims ring hollow, as Comcast's movement of the NFL Network to a sports tier illustrates. Comcast did not reduce the price customers paid for its "D2" service tier (where the NFL Network used to be carried) when it moved the NFL Network to a sports tier. Nor did Comcast show any concern that customers were being forced to buy Comcast-owned sports networks that they did not necessarily want: it left Versus and the Golf Channel (both less viewed than the NFL Network) on tiers that virtually all

Comcast customers must buy. Finally, like other cable operators, Comcast generally does not change the price customers pay for broad basic tiers whenever it adds or deletes networks. As a result, adding a network like the NFL's to a basic tier costs subscribers nothing more, while removing a network increases Comcast's profit margin and saves the customer nothing. In short, premium sports tiers, in practice, add to the costs consumers pay for video programming, rather than reduce them. They are cost containment devices — but only for the cable companies who use them to increase their margins on video services, not for consumers.

Comcast now maintains that the NFL Network's content is "niche programming" not suitable for its basic tier, but in December 2005, Comcast offered to pay $1.5 billion over six years to carry just a portion of the NFL Network's schedule — a package of eight live games — on its Versus network, with the objective of driving distribution of that network and increasing the fee Comcast charged to other cable carriers. The NFL rejected the Versus offer for a number of reasons. One of the most telling issues was Comcast's demand that the NFL prohibit the local broadcasters in the competing teams' home markets from carrying the eight games over the air — contrary to the policy that the NFL has followed consistently since it first licensed game telecasts to ESPN in 1987.

Comcast's current refusal to carry the NFL Network on the basic tier and its recent statements that the NFL Network is "niche" programming of limited interest contrast with its strongly-expressed view in connection with the Versus offer that NFL games can drive basic-tier distribution of a network, and its willingness two years ago to pay substantial fees to carry selected NFL Network programming on a basic-tier network that it owns. The sharp change in position can be explained only by Comcast's incentives as a network owner (to achieve wide distribution and disadvantage competitors) and its incentives as a distributor (to persuade consumers to upgrade to more expensive packages). Based on these incentives, it is clear that Comcast's treatment of the NFL Network is the purest form of discrimination of the kind that Congress directed the FCC to prevent.

B. Time Warner

Time Warner Cable owns a number of national networks and regional sports networks that compete against the NFL Network in offering sports programming, and it places nearly all of these networks on low-cost basic tiers available to all or nearly all of its subscribers. Time Warner, however, refuses to carry the NFL Network on its basic tier and instead will discuss carrying it only on a sports tier, or at special premium pricing. Time Warner attempts to justify this discrimination by claiming that sports programming is "niche" or "specialty" programming, not appropriate for the basic tier. This purported justification is belied by Time Warner's own conduct.

Time Warner denies independent sports programmers carriage on its own basic tiers supposedly because they offer niche programming, but it carries its own sports programming networks on the basic tiers of its own systems. Moreover, Time Warner itself has demanded — and obtained — basic tier carriage from other cable operators for its own recently-launched regional network, SportsChannel New

York. Again, Time Warner's behavior is easily explained if its differing incentives as network owner (to achieve wide distribution and disadvantage competitors) and as distributor (to persuade consumers to upgrade to more expensive packages) are kept foremost in mind.

Indeed, Time Warner's executives admit that Time Warner's standard policy is to target sports fans for premium — or, in other words, increased — pricing (except with respect to its own sports networks). As Melinda Witmer, Time Warner's Senior Vice President and Chief Programming Officer explained, "We have people who are willing to paint their Winnebago in school colors and park themselves out there. I got to believe that they're willing to pay something extra [for sports programming]."[7]

Time Warner's discriminatory conduct has the clear effect of giving Time Warner-owned networks competitive advantages in the advertising and programming markets at the expense of the NFL Network and the other independent services with which Time Warner networks compete, and at the expense of the viewing public. Like Comcast, Time Warner unfairly uses its power as a bottleneck distributor to reduce the licensing and advertising revenues of its competitors and increase the licensing and advertising revenues of its own networks. Based on its past behavior, Time Warner offers fair, non-discriminatory carriage only in exchange for a financial interest in independent cable

[7] "Sports Nets, Online Networking Among Highlights at SMT," *Sports Business Daily* (Nov. 14, 2007), *available at* http://www.sportsbusinessdaily.com/article/116519.

programmers. This is precisely the kind of conduct that Congress sought to prevent by enacting the Cable Act in 1992.

Earlier this year, an arbitrator of a dispute between Time Warner and another sports programmer, the Mid-Atlantic Sports Network, found that Time Warner had engaged in exactly this practice when it refused to carry that programmer's network except on a premium basis, while at the same time carried its own affiliated sports network on a basic tier: "The conclusion that Time Warner deliberately discriminated against [the independent sports network that competes with its own regional sports network] is inescapable."[8]

C. The NFL's Experiences Starkly Illustrate the Challenges Facing Independent Programmers

Congress' 1992 mandate to the FCC to protect independent programmers through an effective complaint procedure is, at bottom, a consumer protection mandate. Consumer welfare suffers when cable companies act to consolidate and exploit cable's bottleneck power, because:

- consumers do not receive the programming they want (often for extended periods of time as cable "waits out" independent programmers until they agree to the deal that cable wants); and
- if cable uses sports tiers and other carriage strategies, as they have tried to do with NFL Network, consumers end up paying

[8] *See Arbitration Between TCR Sports Broadcasting Holding, L.L.P. v. Time Warner Cable, Inc.*, Interim Award, AAA Case No. 71 472 E 00697 07 (Jan. 7, 2008), attached as Exhibit A.

more to buy the programming that they want, through "upcharges" and "upsells" that increase cable's profit margins.

Congress adopted this mandate in 1992 because, at bottom, the incentives of vertically integrated cable companies with bottleneck positions and power meant that the free market cannot be counted on to protect consumer welfare in these circumstances. In short, this is a case of bottleneck power producing market failure.

Many members of this Committee have certainly heard that, because the NFL is a large organization with highly popular programming, it already has the power to negotiate carriage with big cable companies like Comcast and Time Warner. But if this were true, we would not be here today. In fact, the cable giants' bottleneck leverage gives them the power to discriminate unfairly against independent programmers, even those with programming as popular as that of the NFL. In many cases, cable's power is used to force competitors to give up ownership interests to large cable operators. In other instances, it is used to freeze out other competitors before they become viable. As the arbitrator found in the case of the Mid-Atlantic Sports Network, this latter outcome then permits the cable operator's sports network to "scoop up the rights" to the sports programming in question — which many people believe may be cable's ultimate objective in this case as well.

It is generally understood that a national cable network must reach at least 60 million homes in order to satisfy national advertisers and, in some cases, investors, that the network is competitive. As a result, because Comcast and Time

Warner control access to nearly 40 million of the nation's 95 million pay-television homes, together they command the ability to make or break independent national networks. By shutting the NFL Network out millions of homes, while at the same time advantaging their affiliated networks, Comcast and Time Warner have deprived the NFL Network of the opportunity to compete fairly. Worse, they have prevented the public from accessing their desired programming at a competitive price that reflects free-market factors at work.

Given the effectiveness of these efforts in the face of the popularity of the NFL's programming, how much worse is it for newer, less popular programming networks that, nonetheless, contribute to diversity, like the Black Television News Channel? The NFL has the ability to address this issue in part because the NFL Network is *not* the centerpiece of its business, or even the NFL's television policy. But because their fight is so unequal, smaller programmers like the Black Television News Channel may not have the ability to battle against cable operators' discrimination, even though their objective — diversity of video programming — is so important.

Numerous studies, including one by the Government Accountability Office, demonstrate the scope and severity of cable's discriminatory practices. Exhibit B summarizes these studies. But to cite some highlights, one such study showed that cable operators paid one cent per prime time ratings point to carry one independent programmer's network, while Time Warner's owned TNT network received compensation that was 18 times higher, and Comcast's Golf Channel was compensated at 42 times the independent's rate.[9] The GAO study found that a cable-affiliated network is 27.8% more likely to be carried by a cable operator than an independent programmer's network.[10] These and other disparities demonstrated in these disinterested studies can be explained only by cable operators' preferential treatment of affiliated networks and their discrimination against independent programmers.

III. AS CURRENTLY ADMINISTERED, THE FCC'S COMPLAINT PROCESS IS WHOLLY INADEQUATE.

The discrimination that the NFL Network and other independent programmers are currently experiencing — and its corresponding effects on consumers — is precisely the type of abuse that Congress intended to remedy through the 1992 Cable Act. During the 1992 floor debate, Senator Jack Danforth, Ranking Member of the Senate Commerce Committee, related the example of dominant cable operator TCI, which had been unsuccessful in its efforts to purchase The Learning Channel.[11] TCI dropped The Learning Channel from its cable systems in an effort to devalue it and place the network's owners in a posture where they had no choice but to sell.[12] As a result of TCI's tactics, The Learning Channel lost a third of its business, and TCI subsequently acquired it.[13] The arbitrator in

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[9] Letter from Larry F. Darby and Joseph P. Fuhr, American Consumer Institute, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Nov. 20, 2007).

[10] Michael E. Clements & Amy D. Abramowitz, Gov't Accountability Office, "Ownership Affiliation and the Programming Decisions of Cable Operators," Presented at Telecoms. Policy Review Conference (2004), *available at* http://web.si.umich.edu/tprc/papers/2004/289/TPRC2004.pdf.

[11] 138 Cong. Rec. S400-01 at S426 (Jan. 27, 1992) (statement of Sen. Jack Danforth).

[12] *Id.*

[13] *Id.*

the dispute between Time Warner and the Mid-Atlantic Sports Network less than two months ago pointed to very similar actions by Time Warner under very similar circumstances. Just last spring, Major League Baseball's network, which will launch in 2009, gave up ownership interests totaling a one-third stake in the network to various cable operators and others, resulting in widespread carriage.[14]

Responding to the mandate in the 1992 Act, the FCC adopted rules to deal with complaints of discriminatory cable practices directed at independent cable programmers. But implementation of those rules has been ineffective from their inception and has not resulted in fair, efficient and effective resolution of disputes. The standards are unclear, the historic implementation of the process appears to disadvantage complainants, and complaints simply are not resolved expeditiously. Without prompt access to viewers, independent programmers will fail. Faced with a cumbersome and inadequate FCC remedy, too often they have had to concede large ownership interests to cable operators in order to obtain carriage and thereby survive.

Given the substantial uncertainty and inequity associated with the existing FCC process and the fear (real or otherwise) of retribution, only three program carriage complaints have been filed in the 15 years that these rules have been in force. Not one of these complaints has been resolved by the FCC, and, in

[14] Major League Baseball, Press Release, "MLB announces iN DEMAND deal" (Apr. 4, 2007), *available at* http://mlb.mlb.com/content/printer_friendly/mlb/y2007/m04/d04/c1879904.jsp (announcing agreement between MLB and iN DEMAND, a consortium owned by Comcast, Cox, and Time Warner); Richard Sandomir, "How Baseball Moved Its 24-Hour Channel Into Scoring Position," *N.Y. Times* D2 (May 28, 2007) (reporting that the MLB's agreement with cable and satellite operators would give the operators, collectively, a one-third interest in the channel).

one case, the FCC failed for more than a year even to find that the complainant had met its threshold burden and could proceed with consideration of its case.

In adopting the Cable Act in 1992, Congress recognized that antitrust relief is too slow to deal with the anticompetitive and discriminatory abuses of cable operators against independent networks. Moreover, it is entirely possible that even antitrust relief is unavailable for programmers that are victims of discrimination by vertically integrated cable operators. A recent decision of the United States Supreme Court casts serious doubt on whether an antitrust suit can even be brought to combat discrimination if a federal regulatory agency can remedy the problem.[15] Because the FCC's remedy may be exclusive, it is particularly important for the FCC to get that remedy right.

The FCC has also recognized that its carriage complaint procedures, as currently applied, are ineffective to prevent discrimination. As a result, the FCC has adopted more robust program carriage requirements for regional sports networks in the context of recent high-profile mergers. These enhanced requirements provided independent regional sports networks with effective protection from discrimination through an expedited dispute resolution procedure.[16] The FCC has recognized that an improved procedure must be used to resolve program carriage disputes not involving regional sports networks. But it has not taken the necessary action.

[15] *See Verizon Comms., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

[16] *See News Corp. & DIRECTV Group, Inc.*, MB Docket No. 07-18, FCC 08-66, ¶¶ 87-103 (Feb. 26, 2008); *General Motors Corp. & Hughes Elecs. Corp.*, 19 FCC Rcd 473, 525, 529 ¶¶ 113, 124 (2004); *Adelphia Comms. Corp.*, 21 FCC Rcd. 8203, 8258-77 (2006).

* * *

Dominant cable operators have the motive and the means to discriminate against independent programmers. History demonstrates that they have done so and continue to do so. Congress should ensure that the law it has already passed to curb this abuse is implemented effectively. Accordingly, we urge that Congress remind the FCC that cable carriage complaints are to be handled expeditiously, fairly, and in a manner that ensures consumers are able to enjoy nondiscriminatory access to independent programming.

Chairman Markey and Ranking Member Stearns, I appreciate the opportunity to address this important issue, and I would be pleased to respond to any questions that you and other Members of the Subcommittee might have.

EXHIBIT A

JEROME J. SUSSMAN, Arbitrator
(State Bar No. 49220)
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Santa Monica, CA 90403
(310) 453-6200

BEFORE THE COMMERCIAL ARBITRATION TRIBUNAL

OF THE AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between **TCR SPORTS BROADCASTING HOLDING, L.L.P.,** Claimant, and **TIME WARNER CABLE, INC.,** Respondent.	AAA CASE NO. 71 472 E 00697 07 **INTERIM AWARD**

I, **THE UNDERSIGNED ARBITRATOR**, having been duly designated in accordance with the "Adelphia Order", as hereinafter defined, and having been duly sworn, and having read the submissions of the Parties and duly heard the proofs and allegations of the Parties, do hereby issue this **INTERIM AWARD**, as follows:

Pursuant to the Commercial Arbitration Rules of the American Arbitration Association, a Hearing was held at the offices of Day, Pitney, LLP at One Canterbury Green, Stamford, Conn. on December 17, 2007 at 9:00 AM before Arbitrator Jerome J. Sussman. Appearing for the parties were David Frederick, as attorney for Claimant, and Jay Cohen, as attorney for Respondent. Also present were numerous other executives of TCR Sports and of Time Warner Cable ("Time Warner") as well as additional lawyers from the firms representing the Claimant and the Respondent.

This arbitration is being held pursuant to the order adopted July 13, 2006 by the Federal Communications Commission ("FCC") in the "Adelphia Case" (MB Docket No. 05-192) (herein referred to as the "Adelphia Order"). In that Case, the FCC determined that it would permit Comcast and Time Warner to acquire certain cable television assets then owned by Adelphia Cable and that "To constrain Comcast's and Time Warner's ability to unlawfully refuse carriage to unaffiliated RSNs... an RSN ... denied carriage by Time Warner may submit its carriage claim to arbitration within 30 days after the denial of carriage...." Time Warner asserts that it did not "deny carriage" to Claimant within the meaning of this order, that TCR Sports is not an RSN, and that the claim was not brought within 30 days after the denial of carriage.

Both Claimant and Respondent agreed to waive the time limits on this proceeding that are set forth in the Adelphia Order and Appendices B and C thereto. They also elected to bifurcate the proceedings so that in the first phase the arbitrator was to determine if there had been discrimination by TWC against TCR Sports. If there had been such discrimination, the Parties would proceed to a second phase in which the arbitrator was to determine in a "best offer" arbitration which of the two Parties carriage offers should be effectuated. Appropriately, such an arbitration is generally referred to as a "baseball arbitration" because of its use to resolve baseball salary negotiations.

Both Claimant and Respondent were too cute by half in the maneuvering leading up to this arbitration. That said, I find as follows with respect to these three defenses:

1. **"Denial of Carriage"**: In my view, this is the most difficult issue in this proceeding. Time Warner asserts that because it offered to carry TCR's Mid-Atlantic Sports Network (herein "MASN") on a digital tier there was no denial of carriage. Such a conclusion would elevate form over substance in this matter. Granted, carriage on a digital tier would make MASN's programming available to all those subscribers who can receive the digital signal. However, the evidence indicates that no more than 50% of Time Warner's subscribers in the affected area receive a digital tier of service. This means that under the Time Warner proposal, MASN would be carried to just 50% of Time Warner's potential audience. The evidence clearly indicates that Time Warner carries its own sports network as well as all or, or virtually all, RSNs in its territory

on an analog tier. This would leave MASN as the only RSN that is not available on an analog tier, and it therefore would be available to only 50% of the potential audience. This is exactly the kind of discrimination that I think the FCC intended to prevent. Accordingly, **I find that TWC did deny carriage to TCR.**

2. **Timeliness**: TWC asks that we hold Claimant to the position it took in a letter dated April 24, 2007 from David Frederick, counsel for Claimant, to Henk Brands, counsel for Time Warner, that "Claimant is treating Time Warner's actions as a denial of carriage under applicable statutes and FCC rules." However Mr. Brands promptly replied that this statement was "incorrect" and that "TWC was not aware that ... negotiations had reached an impasse or end." Thereafter, the Parties did negotiate for an additional two weeks through a meeting on May 7, 2007. Since Time Warner did not treat the negotiations as having ended in April but instead continued to meet with Claimant, I should not treat the facts differently than the Parties did. **I find that negotiations ended on May 7, 2007 and that TCR Sports filed its claim on June 5, 2007, which is within the 30-day time period.**

3. **Is MASN an RSN?** Appendix B to the Adelphia Order sets forth in paragraph A the following definition:

> "Regional Sports Network" and "RSN" mean any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association,... and (2) in any year carries a minimum of either 100 hours of programming that meets the criteria of subheading 1 or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1."

Although TWC disputes the conclusion that MASN qualifies as an RSN, the evidence clearly and indisputably establishes that MASN provides live distribution within the Mid-Atlantic States of games of both the Washington Nationals and the Baltimore Orioles, which are both Major League baseball teams; that it carries all of the games of these teams; that these 300-plus games amount to significantly more than 100 hours of programming.

Thus, I find that MASN is a "regional sports network" within the meaning of the

Adelphia Order.

ADDITIONAL FINDINGS OF FACT. Based on the evidence presented and the arguments of the Parties, I make the following additional findings of fact:

4. TWC had both motive and opportunity to discriminate against TCR. The motive comes from TWC's desire to protect and promote its own RSN–News 14 Carolina. While News 14 Carolina is primarily a broadcaster of news, it easily fits within the definition of an RSN set forth above since it provides live broadcast of 50 games of the Charlotte Bobcats, a National Basketball Association team, during each of the past two NBA seasons. Other potential motives also exist: The possibility that News 14–Carolina also wants to acquire added programming for itself including some or all of the Major League Baseball games now broadcast by MASN which would likely become available if MASN were squeezed out of business. While there is nothing in the record to suggest that this is so, the record does show that News 14–Carolina did acquire rights to the Bobcats broadcasts only after C-SET (Carolinas Sports and Entertainment Television) failed apparently because it was unable to secure carriage from TWC, the largest cable carrier in North Carolina. These facts suggest the possibility that TWC is hoping to repeat that scenario here and scoop up the rights to the Washington Nationals and the Baltimore Orioles if MASN is put out of business. By virtue of its dominant position in the North Carolina market place, TWC certainly had the opportunity to discriminate.

5. **It is my conclusion that by failing to offer MASN the possibility of broadcast on an analog tier, while simultaneously distributing its own RSN and all or almost all other RSNs on analog tiers, TWC did discriminate against Claimant.** I agree that TWC is entitled to substantial level of editorial discretion in determining what channels it will distribute and on what tiers, but that discretion must be exercised in good faith. Since MASN alone was singled out for broadcast on a digital tier, that discretion was abused, and I conclude that Time Warner exercised its discretion here with an intent to discriminate.

The conclusion that Time Warner deliberately discriminated against MASN is inescapable from the documents and testimony before me. It is also buttressed by the fact that there were never any real negotiations between the Parties over the carriage of MASN by TWC.

Had there been an intention on the part of TWC to make an agreement instead of merely posturing, an executive or attorney for TWC would have phoned or otherwise contacted a counterpart at MASN to arrange a meeting or conference call to figure out a way to put MASN on the air after receipt of a request for carriage. Instead, it appears that all of TWC's efforts went into figuring out ways to avoid putting MASN on the air. Thus, TWC routinely replied to MASN's requests for carriage by asserting that it was not possible to put MASN on an the much more widely available analog tier, but that they would be glad to discuss carriage on a digital tier. Such a digital tier was available to approximately one-half of all TWC subscribers in North Carolina, which was the area involved. Given the poor results for other RSN's that had been on digital tiers, neither MASN nor I should have considered that a good faith offer. In the absence of any good faith offer to put MASN on an analog tier on any terms or in any part of North Carolina at any time, I must conclude that there were never good faith negotiations between the Parties and that TWC intended to discriminate against MASN.

6. **SECOND PHASE OF THE PROCEEDING.** Since I have determined that TWC discriminated against TCR Sports, the parties are required to proceed to the second phase of this arbitration. Counsel will kindly determine their availabilities as well as the availability of any necessary witnesses so that counsel can have a scheduling conference call with the arbitrator in the next 10 days.

Dated: January 7, 2008

Jerome J. Sussman, Arbitrator

EXHIBIT B

STUDIES SHOWING CABLE OPERATORS' DISCRIMINATORY CONDUCT AGAINST INDEPENDENT PROGRAMMERS

The Government Accountability Office found that a cable-affiliated network is 27.8% more likely to be carried by a cable operator than an independently-owned program network. Specifically, cable operator-owned channels are carried 72.4% of the time, compared to 44.6% of the time for independent networks. This statistic does not reflect discriminatory pricing or discriminatory tier positioning. Michael E. Clements & Amy D. Abramowitz, Gov't Accountability Office, "Ownership Affiliation and the Programming Decisions of Cable Operators," Presented at Telecoms. Policy Review Conference (2004), *available at* http://web.si.umich.edu/tprc/papers/2004/289/TPRC2004.pdf.

Other studies similarly demonstrate the cable distribution industry's consistent bias against carrying independent programming and the dominant cable operators' insistence on carrying independent channels on less favorable terms than they apply to their own networks. *See, e.g.*, Dong Chen & David Waterman, "Vertical Ownership in Cable Television: A New Study of Program Network Carriage and Positioning," Presented at Telecoms. Policy Research Conference (2006), available at http://web.si.umich.edu/tprc/papers/2006/544/Chen-Waterman-Vertical%20integration-8-06.pdf; Jun-Seok Kang, "Reciprocal Carriage of Vertically Integrated Cable Networks: An Empirical Study," Presented at Telecoms. Policy Research Conference (2005), available at http://web.si.umich.edu/tprc/papers/2005/423/TPRC_FINAL_Submission_Jun.pdf.

Finally, an economic analysis submitted to the FCC showed that one independent programmer received average compensation of about one cent per prime time rating point, but the average compensation for Time Warner's TNT network was 18 times greater, and Comcast's Golf Channel was compensated at 42 times the independent programmer's rate. Letter from Larry F. Darby & Joseph P. Fuhr, American Consumer Institute, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Nov. 20, 2007).

Mr. MARKEY. Thank you, Mr. Goodell, very much.

Our next witness is Mr. George Bodenheimer. He is the president of ESPN Incorporated. We welcome you back.

STATEMENT OF GEORGE BODENHEIMER, PRESIDENT, ESPN, INC.

Mr. BODENHEIMER. Thank you, Mr. Markey and other members of the subcommittee. My name is George Bodenheimer. I am co-chair, Disney Media Networks and president, ESPN and ABC Sports.

It is really a pleasure to be here today to testify before an avid Red Sox fan, although if you believe Hank Steinbrenner, all I have to do is walk through our own studios to find those. I appreciate the invitation very much to speak with you today about sports programming. I have spent my entire professional career in the business of providing quality sports programming to American viewers. I know the passion that fans of all kinds feel about their favorite teams and players, and I also know that this passion carries over into issues about how and when they are able to watch those teams.

I believe that the most significant point I can make to you today is to affirm that the markets for cable and satellite programming and distribution are more competitive than ever before. Take a look at the competitive environment for distribution of subscription television. There was a time when American consumers had few, if any, alternatives to the local cable system. Successful public policy initiatives by Congress have changed the competitive landscape for the vast majority of consumers.

Today most Americans may choose between multiple subscription TV providers, including cable systems, two national satellite systems and, increasingly, phone companies. As a result of this competition, subscription television today is absolutely one of the best entertainment values available to American consumers. Likewise, the competition among channels offering sports programming is more vibrant than ever. When ESPN launched in 1979, there were many skeptics who questioned the demand for a broad-based sports channel. Today there are dozens of national and regional channels, including those launched by major professional sports leagues, college conferences and several major cable operators. It is truly a great time to be a sports fan.

In a tough business climate, it is tempting for parties who do not get the deal they want to ask the government to intervene. I wish I could say that ESPN has been able to get every deal we have sought over the years, but that is simply not the case. There are lots of other parties out there competing for the right to carry games, and there are lots of other channels seeking carriage on cable and satellite systems, but that is how markets work. Given the fierce competition in both programming and distribution, I strongly urge you to refrain from intervening in these markets. Several of the issues that you are examining today have again raised questions about the need for government involvement. Our overarching view is that these should be resolved through direct negotiation and not government intervention.

I also want to note that none of these issues directly involves ESPN. ESPN is America's most popular national broad-based sports channel. ESPN is the only channel that includes national telecasts from all of the following: the National Football League, Major League Baseball, the National Basketball Association, men's and women's NCAA college sports, NASCAR, plus America's favorite sports news program, SportsCenter. ESPN is not a niche channel. We are currently distributed to more than 96 million American households, and in the fourth quarter of 2007, 87 percent of subscription TV households watched ESPN. Eighty-seven percent of subscription cable TV and satellite households watched ESPN in fourth quarter of 2007. The wide appeal of our programming is undeniable. Through arm's-length negotiations with its distributors, ESPN's value as part of the expanded basic tier has been well established for over 28 years. Just last week, cable operators responding to an industry survey ranked ESPN as having the highest valuation ever for any cable channel.

We have entered into long-term carriage agreements with almost all cable and satellite distributors. We voluntarily negotiate for carriage by the country's smallest cable operators through the National Cable Television Cooperative. This agreement gives small operators the buying power of our largest distributors. ESPN does not have exclusive distribution agreements with any cable or satellite distributors.

To be clear, we believe that carriage issues are best resolved through free market negotiations, but should the committee disagree and believe some action is necessary, we urge you to recognize that the remedies proposed to address these issues are a particularly poor fit and should not apply to ESPN. For example, some have suggested that sports programming be relegated to sports tiers. We don't believe that tier placement should be mandated for anyone. The market should determine these issues, and we think your constituents would be particularly concerned about forcing very popular sports programming like ESPN on a separate tier.

Thank you, and I would be happy to answer any questions the members of the committee may have.

[The prepared statement of Mr. Bodenheimer follows:]

STATEMENT OF GEORGE BODENHEIMER

Thank you, Mr. Markey and other members of the Subcommittee. It is a pleasure to be with you today. My name is George Bodenheimer. I am Co-Chair, Disney Media Networks and President, ESPN and ABC Sports.

I appreciate the invitation to talk with you today about sports programming. I have spent my entire professional career in the business of providing quality sports programming to American viewers. I know the passion that fans of all kinds feel about their favorite teams and players. And I also know that this passion carries over into issues about how and when they are able to watch those teams.

While we are here to discuss sports on television, it is important to recognize that technology is having an enormous impact on how fans enjoy sports—while television is still critically important, we also reach our consumers on the Internet, through mobile devices, on the radio, and in print. ESPN's mission statement makes this objective very clear: "To serve sports fans wherever sports are watched, listened to, discussed, debated, read about or played."

ESPN's efforts are one example of how The Walt Disney Company has been a pioneer in finding new ways to get content to consumers how, where, and when they want it: not just on television, but also on computers, mobile phones, and iPods. Technology and robust competition for the attention of consumers are changing the ways that content is made available. For example, about 18 months ago, ABC television launched an online broadband player on ABC.com. Viewers can watch full-length episodes of primetime television shows for free whenever they want to view them. In the short time since its launch, the player has served over 240 MILLION episode requests.

I believe that the most significant point I can make to you today is to affirm that the markets for cable and satellite programming and distribution are more competitive than ever before.

Take a look at the competitive environment for distribution of subscription television. There was a time when American consumers had few, if any, alternatives to their local cable system. Successful public policy initiatives by Congress have changed the competitive landscape for the vast majority of consumers. Today most Americans may choose between multiple subscription TV providers including cable systems, 2 national satellite systems and, increasingly, phone companies. And these providers offer a variety of rate plans from basic tiers and low cost satellite packages offering 40 channels for $19.99 a month, to larger and more expensive packages with hundreds of channels. As a result of this competition, subscription television today is one of the best entertainment values available to American consumers. For sports fans, in particular, a typical expanded basic level of service offers hundreds of games and thousands of hours of commentary and analysis each year at a monthly price that is less that the cost of single ticket to many professional sports events

Likewise, the competition among channels offering sports programming is more vibrant than ever before. When ESPN launched in 1979, there were many skeptics who questioned the demand for a dedicated sports channel. Today, there are dozens of national and regional channels with a vast array of sports programming. Rights holders—including the major professional sports leagues and college conferences—and several major cable operators have launched their own sports channels. Add to this the astounding amount of live game, highlight and news coverage on the Internet, on radio and in print and it is beyond question to say that it is truly a great time to be a sports fan.

In a tough business climate, it is tempting for parties who do not get the deal they want to ask the government to intervene. I wish I could say that ESPN has been able to get every deal we have sought over the years, but that is simply not the case. There are lots of other parties out there competing for the right to carry games. And there are lots of other channels seeking carriage on cable and satellite systems. But that is how markets work. Given the fierce competition in both programming and distribution, I strongly urge you to refrain from intervening in these markets.

Several of the issues that you are examining today have again raised questions about the need for government involvment, including: the carriage of channels covering single sports, teams or conferences; the carriage of regional sports channels; and various exclusive agreements between programmers and distributors. Our overarching view is that all these should be resolved through direct negotiation and not government intervention. I also want to note that none of these issues directly involves ESPN.

ESPN is America's most popular (and for cable companies—most valuable), national, broad-based sports channel. ESPN is the ONLY channel that includes national telecasts from all of the following: the NFL, Major League Baseball, the NBA, men's and women's NCAA college sports, NASCAR plus America's favorite sports news program "SportsCenter." An increasing amount of this programming is produced in high definition, which we believe has had a profound impact on consumers' decisions to purchase high definition televisions.

ESPN is NOT a "niche" channel. In the 4th quarter of 2007, 87% of subscription TV households watched ESPN. The wide appeal of our programming is undeniable. Through arm's length negotiations with its distributors, ESPN's value as part of the expanded basic tier has been well established for over 28 years.

ESPN is not just the most popular sports television network. It is among the most popular of all television networks—broadcast or cable. Just last week, cable operators responding to an industry survey ranked ESPN as having the highest valuation ever for any cable channel. Operators rated ESPN first in nearly every category, including: "Importance for Subscriber Acquisition and Retention," "Perceived Value," and "Programming that Generates Local Ad Sales Revenue," among others.

We have entered into long term carriage agreements with almost all cable and satellite distributors. We voluntarily negotiate for carriage by the country's smallest cable operators through the National Cable Television Cooperative. This agreement gives small operators the buying power of our largest distributors. ESPN does NOT have exclusive distribution agreements with any cable or satellite distributors and is offered to ALL of these companies.

To be clear, we believe that the issues raised for discussion by the Committee are best resolved through free market negotiations. But should the Committee disagree and believe some action is necessary, we urge you to recognize that the "remedies" proposed to address these issues are a particularly poor fit for—and should not apply to—ESPN. For example, some have suggested that all sports programming be relegated to sports tiers. We don't believe that tier placement should be mandated for anyone. The market should determine these issues, and we think your constituents would be particularly concerned about forcing very popular sports programming, like ESPN, onto a separate tier.

Thank you, and I would be happy to answer any questions the members of the Committee may have.

Mr. MARKEY. Thank you, Mr. Bodenheimer, very much.

Our next witness is Mark Cooper. He is the director of research for the Consumer Federation of America, a frequent visitor to this committee, and we welcome you back. When you are ready, please begin.

STATEMENT OF MARK COOPER, PH.D., DIRECTOR OF RESEARCH, CONSUMER FEDERATION OF AMERICA

Mr. COOPER. Thank you, Mr. Chairman and members of the committee. I greatly appreciate the opportunity to appear before you today to express yet again the consumers' frustration with the cable industry. The focal point of today's hearing epitomizes the broader problem. The cost of the monthly cable bill for the most popular basic bundle has more than doubled since the passage of the Telecommunications Act of 1996. Embedded in those monthly bills are the dramatically increasing costs of sports programming, which consumers are forced to buy in the big bundle. The incredible escalation of sports salaries is funded by the viewing public, the vast majority of whom, if given the opportunity, would not in fact choose to purchase those channels.

Competition is the consumer's best friend, but the sports video programming market is a rat's nest of anti-competitive, anti-consumer structures and practices. On one side we find dominant programmers like network broadcasters with carriage rights or sports entertainment companies who hold exclusive rights to home team broadcasts which are must-have marquee programming for local cable operators. On the other side, we have gatekeeper cable companies with market power over access to local video customers who themselves are increasingly going into the regional sports network business. On a third side, we find the leagues, who are seeking to monetize their own market power in exclusive sports networks.

The programmers and the cable operators combine to restrict consumer choice and increase prices. The programmers ask for more and more, and the cable operators give because they know they can just pass those costs through to the consumer in the price of the bundle, and while consumers suffer pain in the pocketbook, independent programmers also suffer at the hands of the gatekeeping network operators. Getting into the bundle and onto the systems owned by the two dominant cable operators is a necessary condition for national programming success. Not one national network has achieved an audience reach of sufficient size to sustain quality programming without being carried on both

Comcast and Time Warner. In short, cable operators can make or break programming by deciding whether programming is carried and where it is placed.

The best solution to the problem is simple: give consumers real choice. Unleash consumer sovereignty in a big way by requiring cable operators to allow consumers to buy on a stand-alone basis any program that the cable operators have chosen to put in a bundle. This is called mixed bundling: give me a choice for one if they are trying to force me to buy all. Let consumers choose the programming they want to pay for, and it will become immediately clear that the vast majority of subscribers would not pay the current price of the most popular sports programming channels that they are forced to buy in the big bundle.

If programmers face the true elasticity of consumer demand, prices would decline and choices would expand. As video revenues decline, so too would the grossly inflated packages that the leagues and the players get, especially the highest paid players. The same set of teams and players who take the field today would take the field if consumer choice had cut the packages in half, because the current packages include a substantial excess profit that is extracted from consumers. Shaquille O'Neal and Alex Rodriguez would play just as hard for 1 million as they do for 20 million. In point of fact, there is a good theory in labor economics which suggests they would play harder if they were only paid $1 million instead of the $20 million.

If Congress and the FCC are unwilling to free consumers from the broad tyranny of the cable bundle, they could more narrowly require sports programming to be pulled out into a separate tier. This would at least allow those who have no interest in sports programming to avoid paying for it, thereby giving the leagues and the programmers a smaller pie to fight for. It would also reinvigorate the option of free, over-the-air programming, because then you would have a real choice between selling it to the people who are willing to pay for it and making it broadly available.

If Congress and the FCC are unwilling to empower the consumer to choose, thereby unleashing the power of the demand side, the least they can do is ensure that there is supply-side competition. Broadcasters and cable operators should not be allowed to restrict supply-side competition by putting their programming in the big bundle and forcing competing programming into more expensive tiers. If they offer any sports programming, they should offer all of it in the same place so that we can have a level playing field for competition. We believe that this would enable new programming to reduce the market power of programmers with preferred access to carriage. Spreading the sports viewing audience across programming that is targeted geographically and by sport will erode the viewership of the handful of programmers who have been favored by access. That would lower prices and expand real choice to consumers. Thank you.

[The prepared statement of Mr. Cooper follows:]

Testimony of

DR. MARK N. COOPER
DIRECTOR OF RESEARCH
CONSUMER FEDERATION OF AMERICA

on behalf of

THE CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION AND FREE PRESS

on

COMPETITION IN THE SPORTS PROGRAMMING MARKETPLACE

Before the

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET
COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES

March 5, 2008

Mr. Chairman and Member of the Committee,

My name is Dr. Mark Cooper. I am Director of Research for the Consumer Federation of America (CFA).[1] I appear today on behalf of Consumers Union[2] and Free Press,[3] as well as CFA. I greatly appreciate the opportunity to appear before you today to express, yet again, the consumers' frustration with the cable industry.

Over the past quarter century, since the deregulation of cable in 1984, consumer advocates have complained loudly about the abuse of market power in the multi-channel video programming distribution industry (MVPD) and the Congress has repeatedly become involved in attempting to address this nagging problem. The causes of the problem are clear, as are the solutions, but neither Congress nor the FCC has been willing to act to break the stranglehold that the cable industry has on the consumer's video pocketbook. It is time to act.

The focal point of today's hearing is a good example of the broader problem in the industry. The cost of the monthly cable bill for the most popular basic cable bundle has more than doubled since the passage of the Telecommunications Act of 1996 (see Appendix A). Embedded in those monthly bills are the costs of sports programming, which consumers are forced to pay for in the bundle. The incredible escalation of sports salaries is funded by the viewing public, the vast majority of whom, if given the opportunity, would not choose to purchase those channels.

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[1] The Consumer Federation of America is an advocacy, research, education and service organization established in 1968. CFA has as its members some 300 nonprofit organizations from throughout the nation with a combined membership exceeding 50 million people. As an advocacy group, CFA works to advance pro-consumer policy on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts.

[2] Consumers Union, the publisher of Consumer Reports®, is an independent, nonprofit testing and information organization serving only consumers. CU does advocacy work from four offices in New York, Washington, San Francisco, and Austin. CU's public policy staff addresses a broad range of telecommunications, media and other policy issues affecting consumers at the regional, national and international level.

[3] Free Press is a national, nonpartisan organization working to increase informed public participation in media and communications policy debates.

Competition is the consumers' best friend, but, unfortunately, the sports video programming market is a rats' nest of anti-competitive, anti-consumer structures and practices. On one side we find dominant programmers like network broadcasters with carriage rights or sports entertainment companies who hold exclusive rights to home team broadcasts, which are must have, marquee programming for local cable operators. On the other side we have gatekeeper cable companies with market power over access to local video customers. Increasingly, cable operators are also becoming regional sports network providers. The programmers and the cable operators combine to restrict consumer choice and raise consumer prices. The programmers ask for more and the cable operators give more because the cable operator force the consumer pay more for sports programming by increasing the cost of the bundle. They maintain their ability to push prices up by controlling and restricting access to the bundle in two ways, denying consumers choice and forcing consumers to buy the whole bundle and the keep independent programmers out of the bundle. We have described this anti-competitive, anti-consumer structure in detail in our comments to the FCC in the horizontal limits proceeding, an excerpt of which is attached as Appendix B. We have also submitted a complete copy for the record.

Occasionally, the excess profits created by the abuse of market power attract the attention of entrepreneurs, as it should in our capitalist economy. Sometimes the incumbent programmers and the cable operators will get into a squabble – as in the dispute between Yankee Entertainment Sports and Time Warner. Unfortunately, they find it attractive and have the market power to resolve their differences by simply putting their hands deeper into the consumers' pockets. Appendix C presents our analysis of the cost to consumers in the case of the highest cost sports network.

Occasionally, the sports leagues and teams, with their own market power created by antitrust immunity (blessed either by explicit, congressional grants of monopoly or lax court oversight over restraints on trade) try to pull their programming out into separate network offerings. They seek to monetize their monopolies in a new way, as in the dispute between the NFL and cable over placement of exclusive NFL programming. They want a larger share of the excess profits, but the cable operators defend their own profits by raising consumer prices and they get away with it because there is insufficient competition to restrain the price increases.

The problem starts at the point of sale, where consumers have, at best, a very small number of choices for multi-channel video programming. The market power of cable built up over the years through a shifting set of anti-competitive practices including franchises and refusal to sell marquee programming – first general entertainment, then home team sports – has allowed it to create huge bundles of programming that have grown far beyond anything the typical consumer wants or watches. Weak competition between cable and satellite does not restrain price increases because satellite operators have little interest in ability to drive down monthly bills.

While consumers suffer pain in the pocketbook, independent programmers also suffer at the hands of the cable gatekeepers. Getting into the bundle and onto the systems owned by the two dominant cable operators is a necessary condition for programming success. Not one national network has achieved an audience reach of sufficient size to sustain quality programming without being carried on both Comcast and Time Warner systems. In short, cable operators can make or break programmers by deciding whether programming is carried and where it is placed. The big Bundle of basic cable is dominated by fewer than half a dozen major broadcaster/movie programmers, who account for three quarters of the video market place, a situation that began to develop in the mid 1990s and has been firmly in place for half a decade (see Appendix D).

Cable operators do not have the interest of the consumer at heart when they resist the efforts of independent programmers, like the America Channel, from getting carriage in the big bundle. The America Channel is the quintessential example of the gatekeeping power of the cable operator. Denied access to cable systems for years as an entertainment channel, it was reborn as a sports programming channel that threatens the cable operators regional sports networks. Even though the dominant cable operators had agreed to conditions in recent merger proceedings that would have opened up the regional sports market to entry, the cable operators have reneged on their promise. While the plight of America's Channel epitomizes the dire circumstances in which independent programmers find themselves, the problem is pervasive. Our recent study of minority-targeted programming found that independent minority-owned, minority-targeted programming simply does not get carriage in the big basic bundle (see Appendix E). Relegated to digital and high priced tiers, we find that this programming accounts for only 3.7 percent of carriage, when the targeted groups represent over 30 percent of the national population and the members of these groups are required to pay an average of $43 to get minority-owned, minority-targeted programming.

The easiest way for cable operators to preserve their share of the excess profits and avoid dissipating the profits squeezed from consumers due to lack of competition – i.e. lower the cost to consumers – is to prevent new entry or relegate it to the back of the bus. By restricting the quantity and type of sports programming in the bundle they maintain the squeeze on consumers and preserve the excess profits available. By excluding independent programming from the bundle, cable operators protect their own sports offerings. The league-based programmers are not looking out for the consumers either, since their fundamental goal is to capture a larger share of the excess profits.

The current system where the cable operators and dominant sport programmers force consumers to pay ever increasing prices for a restricted set of choices is the worst possible for the consumers.

The best solution to the problem is simple, give consumers real choices -- unleash consumer sovereignty in a big way by requiring the cable operators to allow consumers to buy on a stand alone basis any program that the cable operators have chosen to bundle. This is called mixed bundling and we have explained its consumer and competitive benefits in detail in the cable *a la carte* proceeding at the FCC. Appendix F provides a brief explanation of how mixed bundling will affect consumers and the industry. Let consumers choose the programming they want to pay for and it will become immediately clear that the vast majority of subscribers would not pay the current price of the most popular sports programming that they are forced to buy for in the big bundle. This will break the upward spiral of prices. Leagues demand more and more for sports programming and cable operators pay more and more because they know that they can just pass it through to the consumer who is a captive of the big bundle. If consumers had real choices, that pass through would meet real resistance.

If sports programmers faced the true elasticity of consumer demand for their products, prices would decline and choices would expand. As video revenues declined, so too would the grossly inflated packages that the leagues and the players get, especially the highest paid players. Shaquille O'Neal and Alex Rodriguez would play just as hard for $1 million as they do for $20 plus million. Actually, there is a solid theory in labor economics that suggests they might play even harder. The same set of teams and players take the field today would take the field if consumer choice cut the TV packages in half because the current packages include a substantial amount of excess profits extracted from consumers through restricted choice at the point of sale.

The claim that cable has to aggregate audiences with big bundles to recover its fixed cost and create audiences for new networks might have made sense in a linear world of few choices where cable sold a single product composed of a small number of channels. Whatever the validity of the argument back, then, the world has changed. Cable can recover its fixed costs from three completely different services – video, high speed Internet, and telephony. It offers hundreds of channels, an increasing number of which are not linear, but on demand. Technology has crated a niche market world where the transaction costs of choice have decline sharply and each network can contribute to joint and common costs. The old explanation has become a convenient excuse for preserving a marketing scheme that costs consumers dearly.

If Congress and the FCC are unwilling to free the consumer from the broad tyranny of the cable bundle, they could more narrowly require sports programming be pulled out into a separate tier. This would at least allow those who have no interest in sports programming to avoid paying for it, thereby giving the leagues and the programmers a smaller pie to fight over. In the case of the professional leagues, Congress could certainly argue that since it has granted them immunity from the antitrust laws, it needs to do something to protect the public from their market power.

If Congress and the FCC are unwilling to empower the consumer to choose, thereby unleashing the power of the demand-side, the least they can do is ensure that there is more supply-side competition. Broadcasters and cable operators should not be allowed to restrict supply-side competition by putting their programming in the big bundle and forcing competing programming into more expensive tiers.

Demand-side approaches are preferable because they force the programmers and the leagues to take a hard look in the mirror. Who do they think their audience really is and what is the audience willing to play? The supply-side approach could be beneficial in the long term by allowing new programming to reduce the market power of programmers with preferred access to carriage. Spreading the sports viewing audience across programming that is targeted by geography and sport may erode the viewership of the handful of programs that have benefited from the restriction of consumer choice.

Appendix A:
EXCERPT FROM
TIME TO GIVE CONSUMERS REAL CHOICE

(Analyzing and Updating Cable Price Increases)

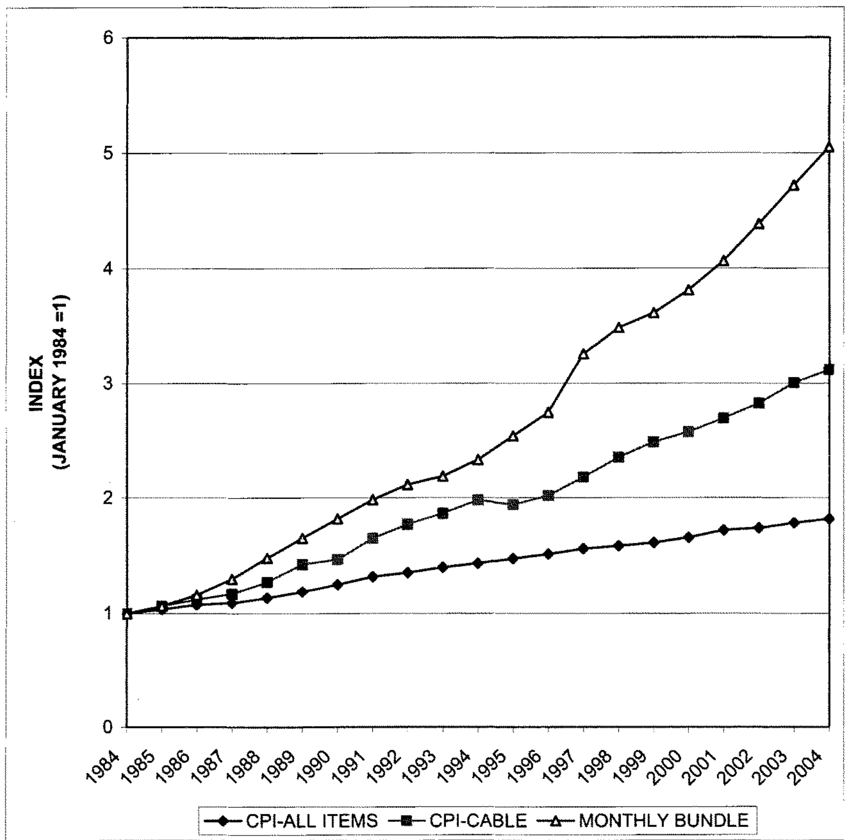
A. THE LONG-TERM PROBLEM OF CABLE BUNDLING

The cause of the twenty year long struggle over deregulated cable prices, and the intense scrutiny that is now being applied to bundling, can be readily appreciated by examining the long-term trend of cable prices (see Exhibit V-3). The sharp difference between the BLS-quantity adjusted price and the total bundle price underscores the problem consumers confront as a result of the bundling. The price of the bundle has increased more than 60 percent faster than the BLS cable index. Over a twenty year period, when the CPI for all items was increasing by a compounded annual rate of 3.1 percent, the BLS cable price index increased by 5.9 percent, and the bundled price increased by 8.4 percent.

If we make a quality adjustment to the bundle price based on total TV viewing, we still find a major problem (see Exhibit V-4). The average annual price increase for the viewing adjusted bundle is 7.7 percent. In other words, it is about 2.5 times the rate of inflation, sustained over twenty years.

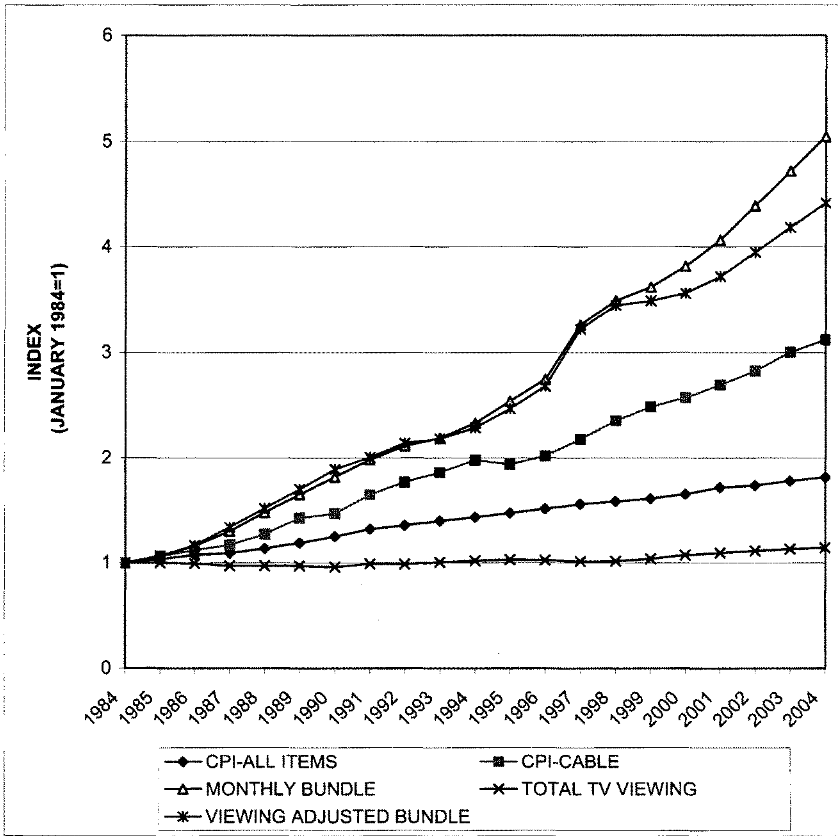
The data suggests that cable operators have pushed prices into the range where there is price resistance (i.e., the more elastic portion of the demand curve). That does not mean the abuse has stopped, it simply means it may not grow as quickly as in the past, but cable operators are aggressively finding ways to keep their producer surplus growing, like rebundling (retiering) programming to drive penetration of digital tiers. Bundling is one of the strategies that monopolists use to extract consumer surplus and the evidence is consistent with such an interpretation in this case. Of course, real competition would be better still, but after two decades of failure of competition to develop and with the cable operators extending the anticompetitive, anti-consumer business model to the Internet, the need for action is critical.

Exhibit V-3: Cable TV Prices



Sources: Bureau of Labor Statistics, Data base, Kagan Associates, *History of Cable TV Subscribers and Revenues;* Federal Communications Commission, *Report on Cable Prices*, various issues.

Exhibit V-4: Cable TV Prices and TV Viewing



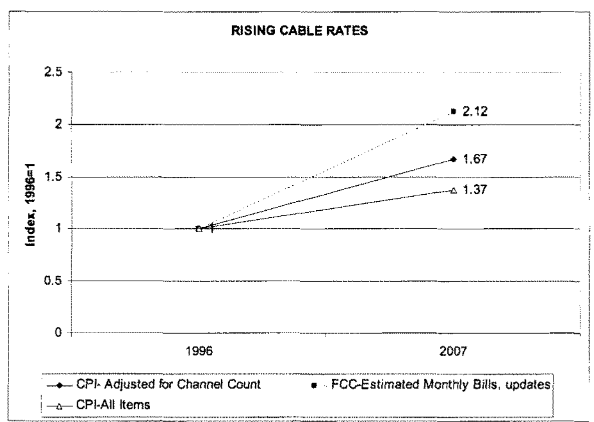
Sources: Bureau of Labor Statistics, Data base, Kagan Associates, *History of Cable TV Subscribers and Revenues;* Federal Communications Commission, *Report on Cable Prices*, various issues; U.S. Census Bureau, *Statistical Abstract of the United States*, "Media Usage and Consumer Spending," various issues; Veronis Schuler Stevenson, *Communications Industry Report: Forecast Summary, 2003.*

Update of pricing patterns from Chris Murray to Chairman Markey, February 21, 2008

On an inflation-adjusted basis, according to the Bureau of Labor Statistics (BLS), cable rates have increased more than 72% since Congress called for cable industry deregulation in 1996. Inflation was 35% during that same period. In other words, cable rates have increased at more than double the rate of inflation since 1996.

Furthermore, our research shows that actual rate increases in nominal terms are significantly more than the BLS numbers, because BLS adjusts the rate increases, factoring in a discount for additional channel offerings. BLS computes a "quality-adjusted price," dividing the number of channels by the price consumers pay. This assumes there is full value for every channel added. In other words, BLS assumes that WE, TruTV and TV Land are equal to ESPN, CNN and Discovery in value. If we drop BLS's "quality adjustment" on cable prices, cable rate increases go from double the rate of inflation to triple the rate of inflation since 1996.

More to the point, as long as the cable operators force people to buy channels they don't watch, it's the full price of the monthly bill that hits consumers in the pocketbook, not some theoretical per-channel price. Most consumers watch the same 17 channels[4], yet they are forced to pay for all of them. If consumers can't buy cable television on a per-channel basis, what does some theoretical per-channel price really mean?



Sources: Bureau of Labor Statistics, Consumer Price Index; FCC, Report on Cable Industry Prices, various issues; Monthly bill increases 2005-2007 are projected at the same rate as CPI cable.

[4] http://www.gao.gov/new.items/d048.pdf

APPENDIX B:

EXCERPT FROM
COMMENTS OF CONSUMER FEDERATION OF AMERICA,
CONSUMERS UNION AND FREE PRESS
IN THE MATTER OF THE COMMISSION'S CABLE HORIZONTAL AND VERTICAL OWNERSHIP LIMITS AND ATTRIBUTION RULES
MM DOCKET NO. 92-264

(Describing the Major Anti-consumer, Anti-competitive Structures and Practices in the Multi-channel Video Programming Distribution industry)

Consumers have seen their monthly bills for basic and expanded basic cable skyrocket, doubling in the past decade. They are forced to buy larger and larger bundles of programs to keep receiving the small number they actually choose to view. Year-after-year, the increase in basic monthly bills fuels increased cash flow in the industry, contradicting claims that programming expenses are driving up price increases. Over this period, cash flow per subscriber per year has increased by 90 percent.

Independent programmers continue to find it difficult if not impossible to gain carriage on cable systems. Year-after-year, independent programmers watch cable operators favor the programs they own by giving them carriage in the basic and expanded basic tiers. Broadcasters, who have been given must-carry and retransmission rights also are far more likely to succeed in gaining carriage on cable systems than an independent programmer. Affiliated programming is nine times as likely to be carried as independent programming in national markets. As a result the same half dozen programmers affiliated with cable operators or broadcasters completely dominate the TV dial, accounting for eighty percent of prime time viewing, programming budgets and cable subscribership. Not one national network has achieved an audience reach of sufficient size to sustain quality programming without being carried on both Comcast and Time Warner systems.

OVERVIEW OF THE MVPD MARKET

In this proceeding, following the intent of Congress, the Commission must focus its attention on whether excessive concentration of cable ownership unfairly impedes the flow of independent programming to the public. However, in its Notice, the Commission recognizes that it must examine the patterns of fundamentally anticompetitive conduct throughout the industry to assess whether limits on the reach of a single cable operator (called horizontal limits) will help to prevent such behavior. Therefore, the Commission has asked a wide-ranging set of questions about the basic structure, conduct and performance of the industry.

1. Lack of Competition at the Point-of-Sale

In these comments we show that excessive concentration of ownership is harming consumers and independent programmers. Local market concentration in the industry – the lack of competition at the point of sale – is the key source of market power over both consumer prices and the terms and conditions imposed on programmers for carriage on cable networks.

2. Concentration in the National Video Market

The ability to control programmer access to the consumer by deciding which programs to carry occurs on a market-by-market basis, but as the number and size of the markets controlled increases, the market power over access to consumers translates into market power over programmers as well. Once cable operators become large enough, the refusal to carry programming, or the imposition of onerous conditions of carriage, undermine the ability of the programmer to succeed. Thus the fate of the consumer and the programmer are linked.

3. Clustering of Systems in Regional Markets

Recent developments in the industry have tied the fate of the consumer and the programmer more closely together in another way. The incessant reduction in the number of cable operators and their increasing size has led to the aggregation of cable systems into clusters of systems. As cable operators gain control of large, contiguous geographic areas, their ability to withhold programming they own from other operators increases. They are also more able to obtain exclusive rights to programming they do not own. Restricting the flow of programming to alternative distribution platforms blunts competition at the point-of-sale increasing the cable operator's market power over consumers and programmers. Consumers find that their alternatives for obtaining television service are restricted, while programmers find that their alternatives for distributing programming to the public are restricted.

Concentration in the national market can harm programmers because of inadequate competition at the point-of-sale. Without a well-reasoned rule in place, in the dozen years since Congress acted, the top four firms in the industry have increased their market share from less than half to about two-thirds. The growth of clustered systems has been even more dramatic, from less than one third of all cable subscribers to over four-fifths.

4. Bundling

Another development that has further restricted consumer choice and programmer access is the cable industry practice of bundling. Cable operators force consumers to buy large bundles of programs in order to obtain the small number of networks that they actually watch. Getting into the bundles that will be widely distributed is a make-or-break threshold for programmers. Access to these bundles is under the control of the cable operator. This practice, which has been prevalent for basic and expanded basic tiers in the past, has recently been extended to digital tiers.

The hope that the expansion of capacity with digital technology would weaken the hold of cable operators has been dashed by the creation of bundles of digital programming. Consumers are forced to buy these bundles if they want the benefits of digital technology. The consumer must now spend about $60 per month and buy about 100 channels in tiers to get digital service. But the typical household watches fewer than twenty channels.

Offering independent programmers the opportunity to sell in the video on demand (VOD) space provides little genuine relief from the stranglehold of the programming cartel. VOD programmers are told to compete for consumer dollars and attention after the cable operators have picked the consumer's pockets and crammed about 100 channels onto the consumer's TV tuner. This is hardly the fair competition for consumer attention that the Congress demanded when it established the objective of this proceeding.

By creating the huge bundles, then controlling which programs are placed in the bundles, cable operators perpetuate their control over consumer pocketbooks and the success or failure of programming. The refusal of cable operators to allow consumers to choose which programs they want to pay for on a program-by-program basis makes it impossible for programmers to sell directly to the public. They must sell themselves, literally and figuratively, to the handful of gatekeepers that control access to the big bundles. Advertisers, looking for national audiences, are unable to refine their message because everybody is forced to pay for everything as a result of cable's bundling strategy. Forced bundling places a premium on carriage on cable systems, in the eyes of the advertisers, rather than actual viewing by the public.

APPENDIX C:

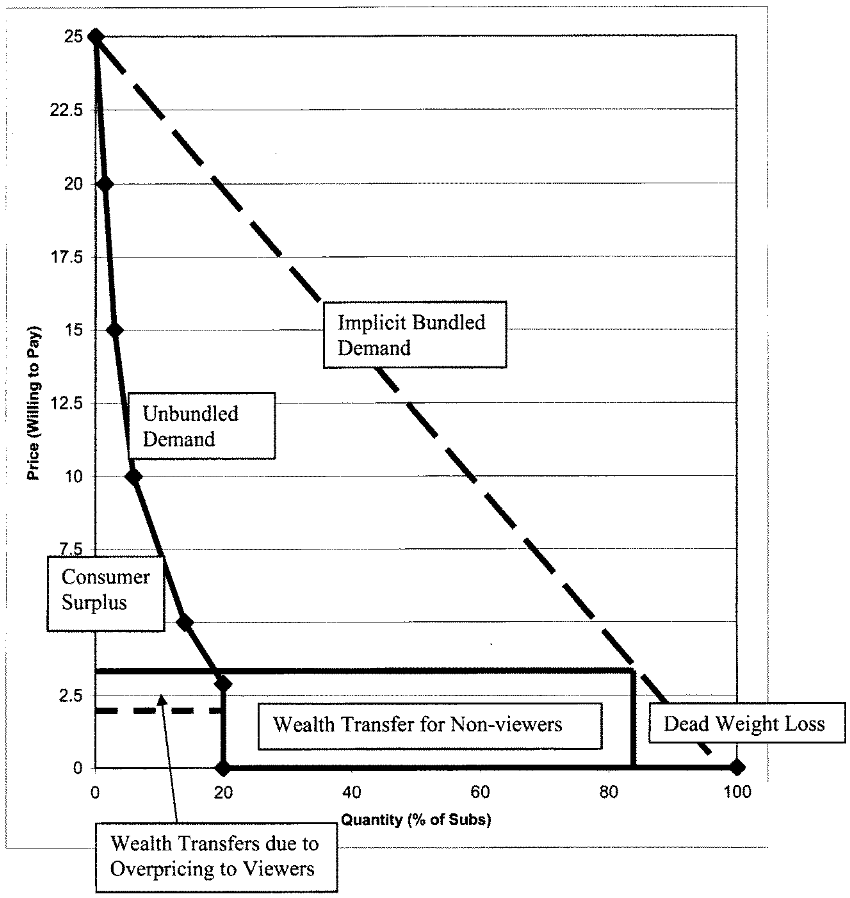
EXCERPT FROM
TIME TO GIVE CONSUMERS REAL CHOICE

(Explaining the Extraction of Consumer Surplus through Bundling)

A recent study by Deutsche Bank of the Cox – ESPN controversy reinforces the conclusion that bundling leads NCTA to overestimate the welfare gains (see Exhibit V-2). ESPN is one of the most popular and the most expensive cable network, yet seventy-eight percent of respondents said that they would not pay $2 per month for it if they were given the choice. Cox confirms this estimate, noting that less than a quarter of its subscribers are "avid sports fans."

There is good reason to believe that the elasticity of demand for ESPN alone is a lot higher than for the bundle and that the bundling of sports programming into the most popular package is harming consumers. The three-quarters of cable viewers who say they would not pay $2 dollars for ESPN, likely the three-quarters who are less than avid sports fans, are paying over $1.5 billion for it in the bundle (at Cox's cost). Exhibit V-2 shows the wealth transfers and efficiency losses associated with ESPN. For every one dollar of consumer surplus, there is at least one dollar of wealth transfer. This does not include the wealth transfers associated with the overpricing of ESPN to those who would take it, which may equal another quarter of the consumer surplus. The deadweight efficiency losses are an additional cost associated with this anti-consumer bundling.

Exhibit V-2: Wealth Transfer and Consumer Surplus For ESPN



Source: Deutsche Bank, *Walt Disney Company*, October 27, 2003, p. 16.

APPENDIX D:

Excerpt from
THE NEGATIVE EFFECT OF CONCENTRATION AND VERTICAL INTEGRATION ON DIVERSITY AND QUALITY IN VIDEO ENTERTAINMENT

Mark Cooper and Derek Turner

Telecommunications Policy Research Conference September 2007
Comments of Consumers Union, Consumer Federation of America and Free Press, In the Matter of Cross-Ownership of Broadcast Stations and Newspaper (etc.) MM Dockets No. 01-235, 01-317, 00-244. MB Docket Nos. 02-121, 02-277

(Describing the Origin and Extent of Domination of the Video Marketplace by a Small Number of Vertically Integrated Programmers)

Within less than a decade after repeal of Fin-Syn and the passage of the 1996 Telecommunications Act, the process of vertical integration and horizontal consolidation was complete (se Exhibit III-2).

Five firms have come to own major studios, broadcast networks and cable TV channels while holding television station licenses as well (see Exhibit III-3). The names are familiar to all in both the television and the theatrical movie space. All of the entities have a presence in each of the major video entertainment areas – network television, cable television and movie production. These firms account for five of the seven studios that produce motion pictures – known as the majors.

The 1990s policy changes triggered a series of acquisitions and product developments over the course of the decade that created a vertically integrated oligopoly in the television industry. Most directly, the networks could monopolize access to audiences in prime time broadcast television, foreclosing the streams of revenue that sustain production of all forms of content.

Each of the big three networks merged with a major studio and acquired cable programming over the course of the 1990s. Fox had taken a different path to vertical integration. After being rebuffed in an effort to acquire Warner studio, News Corp. acquired Twentieth Century Fox and a number of television stations in major markets, both in 1985. Since the late 1970s, Twentieth Century Fox had been one of the least active of the major studios in providing television programming. Fox's focus through the 1990s would not be on original programming as traditionally defined for prime time. It would focus on sports in programming and broadcast duopolies. Interestingly, Fox was vertically integrated but remained below the threshold for being subject to the Fin-Syn rules. For the big three networks who were subject to the rules, the repeal of Fin-Syn made mergers between networks and studies profitable, as self-supply was now allowed for both television and theatrical release. Each has a substantial ownership of television distribution. The four national broadcast networks are represented here. The broadcasters have substantial ownership of TV stations. The fifth entity, Time Warner, is a major cable operator.

As a result of the recent Adelphia acquisition and exchange of cable systems with Comcast, Time Warner dominates the two entertainment centers in the U.S., New York and Los Angeles. It also has a share in the new broadcast network, CW, to which its production operations are providing content. Each of the five also has substantial cable offerings. Indeed 24 of the top 25 cable channels, as measured by homes passed, are owned by these five entities. In terms of actual viewers, as opposed to homes where programming is available, these five entities account for the vast majority – as much as 85 percent of prime time viewing.

Note that each of the entities has a presence in all of the key areas of video product production and distribution (see Exhibit III-4). Each owns studios that produce video product

Exhibit III-2: Mergers, Acquisition and Product Launches in the Creation of the Vertically Integrated Video Oligopoly

	Disney/ABC	Time Warner	Viacom/CBS	G.E-NBC	News Corp
1993	Disney acquires Miramax Films	Turner acquires Castle Rock & New Line			News Corp. reacquires New York Post
1994		Time Warner acquires CPP/Belwin	Viacom acquires Paramount / acquires Blockbuster		
1995			CBS launches UPN		
1996	Disney acquires ABC	Time Warner acquires Turner	CBS acquires Infinity Broadcasting		
1997			CBS acquires American Radio Systems		News Corp. acquires New World Communications / acquires Burnham Broadcasting
2000		Time Warner acquires Times Mirror magazines from Tribune Company	CBS acquires King World / CBS buys Outdoor Systems billboard group / Viacom		
1999				NBC acquires 30% of Paxon	News Corp. acquires Hearst Book Group
2001	Disney acquires Fox Family from News Corp.	AOL acquires Time Warner	Viacom acquires BET		News Corp. acquires Chris-Craft-United Group / sells Fox Family to Disney
2002		AOL Time Warner buys out AT&T's stake in Time Warner Entertainment, creating TimeWarner Cable system		NBC acquires Telemundo / acquires Bravo (from Cablevision)	
2003				GE acquires Vivendi Universal Entertainment	News Corp. acquires stake in DirecTV
2005			Viacom acquires DreamWorks / CBS & Viacom Split (but Sumner Redstone still controlls majority votes in both		
2006	Disney acquires Citadel Broadcasting (Disney 52%) / Disney acquires Pixar	creation of CW Network with CBS (50%) / Time Warner acquires all of Adelphia's cable systems	creation of CW Network with Time Warner (50%)		

Exhibit III-3:
The Vertically Integrated, Video Entertainment Oligopoly

Parent	Television Property	Cable/Satellite	Film Production
News Corp.	35 TV Stations reach 39% of U.S. Households 9 duopolies – NY, LA, Chic. Minn. D.C. Dallas, Phoenix Orlando, Houston Fox Network	Fox News, Fox Movie FX, FUEL, Nat. Geog. Speed, Fox Sports, Regional Sports, College, Soccer DirecTV	20th Century Fox, Fox Searchlight, Fox Television S, Blue Sky Studios
General Electric	27 TV stations reaching ~30% of U.S. households 6 duopolies through Telemudo – NY, LA, Chic., SF, Dallas, Miami NBC Network 30% of Paxson	CNBC, MSNBC, Bravo, Sci-Fi, Trio, USA	Universal
Disney	10 TV stations reaching X% of U.S. households ABC Network	ESPN, ABC Family, Disney Channel, Toon Disney SAOPnet, Lifetime A&E	Walt Disney Touchstone Hollywood Buena vista Pixar Miramax
CBS/Viacom	17 TV stations reaching 39% of U.S. households CBS Network CW King World	Showtime MTV, Nickelodeon BET, Mick at Night TV land, Noggin Spike TV, CMT Comedy Central, Flix The Movie Channel Sundance	Paramount Paramount Home
Time Warner	CW Network	HBO, CNN, Court TV, Road Runner New York News 1 Time Warner Cable 14.5 million subscribers	Warner Bros. Studios, TV Home Video Domestic Pay-TV Telepictures, Hanna- Barbera Witt-Thomas,

Source: Columbia Journalism Review, *Who Owns What*, August 22, 2006.

Exhibit III-4: Vertically Integrated Video Oligopoly Domination of Television and Movie

Production and Distribution (Circa 2001-2003)

	TELEVISION							MOVIES/DVD (U.S. Revenue)	
	Subscribers*		Writing Budgets		Programming Expenditures		Share of Prime Time	Box Office	Video
	# Million	%	$ Million	%	$ Million	%	%	%	%
FOX/LIBERTY	1250	21	236	19	3803	9	3	11	10
TIME WARNER	925	15	206	17	7627	18	10	22	20
CBS/VIACOM	910	15	45	12	9555	22	28	8	7
ABC/DISNEY	705	12	132	11	6704	16	21	20	22
NBC/Universal**	720	12	159	13	3879	9	21	12	15
Subtotal	4315	75	772	72	31568	74	83	73	74
TOTAL	6000	100	1225	100	43212	100	100	100	100
HHI	**1179**		**1084**		**1226**		**1775**	**1213**	**1258**
FOUR FIRM CR	**63**		**61**		**65**		**70**	**65**	**67**

Notes: and sources: * Subscribers includes broadcast and cable homes passed. ** Universal added to NBC to project post-merger market. Federal Communications Commission, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CC Docket No. 00-132, Seventh Report, Tables D-1, D-2, D-3, D-6, D-7; Television Market Report: 2001 (Washington, D.C.: BIA Financial Network, 2001); Comments In the Matter of 2002 Biennial Regulatory Review –MB Docket No. 02-277, MM Dockets 02-235, 01-317, 00-244, January 2, 2003, Bruce M. Owen and Michael G. Baumann, "Economic Study E; Concentration Among National Purchasers of Video Entertainment Programming," Comments of Fox Entertainment Group and Fox Television Stations, Inc., National Broadcasting Company, Inc. and Telemundo Group, Inc., and Viacom; Comments of the Writers Guild of America Regarding Harmful Vertical and Horizontal Integration in the Television Industry, Appendix A. Federal Communications Commission, In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 CS Docket No. 98-82, CS Docket No. 96-85, MM Docket No. 92-264, MM Docket No. 94-150, MM Docket No. 92-51, MM Docket No. 87-154, January 4, 2002; ; Federal Communications Commission, Program Diversity and the Program Selection Process on Broadcast Network Television, Mara Epstein, Media Ownership Working Group Study 5, September 2002, pp. 26. David Waterman, Hollywood's Road to Riches (Cambridge: Harvard University Press, 2005), pp. 21, 25.

APPENDIX E:

EXCERPT FROM
MINORITY PROGRAMMING:
STILL AT THE BACK OF THE BUS
MARK COOPER AND ADAM LYNN
INTERNATIONAL COMMUNICATIONS ASSOCIATION, FORTHCOMING, MAY 2008
FURTHER COMMENTS OF CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA AND FREE PRESS, OCTOBER 22, 2007

(Examining the Carriage Status of Minority-Owned, Minority-Targeted Programming)

This paper examines the issue of minority-targeted programming on broadcast and cable television. It shows that minority owned programming is get little carriage and that minority-targeted programming is still at the back of the bus – severely underrepresented in carriage compared to the size of the minority population and relegated to expensive tiers on cable networks.

- The 192 networks that are deemed minority-targeted represent about 40 percent of the total number of network, but minority-owned, minority-targeted programming accounts for less than 4 percent of the total carriage.

- The more broadly available programming, which is carried on the expanded basic tier, is dominated by a handful of programmers. Four-fifths of the carriage on expanded basic tiers is accounted for by five networks – three owned by broadcasters (Univision and Telemundo (owned by NBC) and one owned by a cable programmer (Viacom).

- In order to gain access to the 98 percent of the minority-targeted programming, subscribers must pay for extra tiers – an average of almost $43 per month.

Results

Although the number of minority-targeted programs is large, they only get about 8.4 percent of the carriage on cable systems. Moreover, 44 networks that are owned in whole or in part by large broadcast and cable entities account for over two-thirds (69 percent) of that carriage.

Adding the minority-owned broadcasters (Univision, Television Azteca) and assuming that all the minority-targeted networks that are not owned by cable or broadcasters, we find that 3.7 percent of the programming carried on cable systems is minority-owned, minority targeted programming. These are low single digits that parallel the problem in the ownership of broadcast outlets. About one third of the minority-owned, minority-targeted programming is accounted for by a single broadcaster – Univision.

As troubling as these results based on carriage are for cable, the above availability analysis still leaves out the problem of placement (although the subscribership numbers include subscribers on all tiers).

Only one sixth of the carriage that minority programming receives is in the expanded basic tier, the tier in which all of the most popular non-minority programming is carried. With approximately 74 channels in the basic plus-expanded basic tier these minority-targeted networks account for about 5 percent of the availability. Moreover, five networks, three owned by broadcasters (Univision and Galavision owned by Univision and Telemundo owned by NBC) and one by a major cable programmer (BET owned by Viacom) account for 80 percent of the carriage in the basic tier.

In order to gain access to the vast majority of minority-targeted programming, the consumer must incur a substantial increase in cost – between $15 and $50 – to buy one of the larger bundles, where about half of the minority-targeted programming is found, or over $10 to purchase programs on an a premium basis.

The most prevalent offer is a separate Latino package, but these too come at a price. The consumer can purchase a Latino package at an added cost above the package price for on average $7.16. The only way to get a lower price for Latino-targeted programming is in combination with various elements. However, these alternatives are still expensive, costing an average of $42.75, as shown in Exhibit 8. Fifteen of the cable systems allow the consumer to purchase basic plus a digital box plus the Latino package for an average cost of $28.16. These "savings" come at the price of not having access to the most popular non-minority-targeted programming. Fifteen of the systems will allow you to include the Latino package in their digital basic package for an average price of $57.35. These packages are not available for the programming targeted at other minorities and many systems do not offer these alternative packages at all.

Every cable customer in America is forced to face the hard reality that they must pay for many channels that do not interest them in order to view the channels that do. This trend is exacerbated for those seeking to view diversity-oriented programming. We demonstrated earlier that few channels aimed at Latino, African American and Asian American audiences make it on to the basic tier of service and many of these channels require an additional per month fee, below we provide a few snapshots of what this looks like from a local cable customer's perspective.

According to the data we compiled, the average cable consumer looking for access to diversity oriented programming beyond what is already available over broadcast (and BET) must subscribe to a digital tier of service with their cable operator. Only Latinos have the "privilege" of tacking on another monthly fee to receive a package of Spanish language channels. This means to get the popular Spanish, African American or Asian channels a consumer will be paying substantially more than a consumer looking for the popular non diversity-oriented networks. Even with an increased monthly bill a consumer is still extremely limited in what they can receive.

APPENDIX F:

EXCERPT FROM
REPLY COMMENTS OF CONSUMERS UNION AND CONSUMER FEDERATION OF AMERICA IN THE MATTER OF COMMENT REQUESTED ON A LA CARTE AND THEMED TIER PROGRAMMING AND PRICING OPTIONS FOR PROGRAMMING DISTRIBUTION ON CABLE TELEVISION AND DIRECT BROADCAST SATELLITE SYSTEMS, MB DOCKET NO. 04-207

(Explaining the Impact of Mixed Bundling on Cable Market Power and Operations).

II. THE IMPACT OF MIXED BUNDLING

AUDIENCES

PENETRATION AND VIEWING UNDER BUNDLING WITH A LA CARTE CHOICE

The NCTA funded experts assume that 50 percent of TV viewers would take the bundle. They assume that an additional 10 to 30 percent of the subscribers choose networks *a la carte*. Thus, penetration is assumed to be between 60 and 80 percent of that found in the bundled environment (see Exhibit 14). The remaining 20 - 40 percent is captives who would escape, given *a la carte* choice.

Generally, the most popular networks are assumed to have higher *a la carte* take rates. This assumption is derived from an examination of the concentration of viewing and brand awareness. Interestingly, devotees are assumed to have a much higher concentration of viewing for the less popular shows. That is, a much smaller percentage of subscribers are assumed to account for half the total viewing. Therefore, even though they lose more subscribers, they should not be assumed to lose more viewers.

If advertisers are paying for eyeballs, not blank TV screens, there should be little change in the revenue flow. If advertisers were paying for blank TV screens, they would not be serving as the rational actors that economic models assume them to be. Paying to air commercials when nobody is watching makes no sense. In a mixed bundled world, what advertisers lose in reach, they make-up in effectiveness (the greater probability that someone is watching).

In fact, the evidence in this proceeding shows quite strongly that advertisers are really and primarily paying for viewers, which is, of course, a subset of the larger group of subscribers (Exhibit 15). Ratings points show a very strong linear relationship to advertising dollars -- much, much stronger than the relationship between subscribership and advertising revenues.

With such a high percentage of viewing carried into the *a la carte* environment, there is little reason to assume that advertising revenues would be lost. Interestingly, in the Bear Stearns analysis, the assumption was that networks would lose a smaller percentage of advertising revenue than subscriber. They assumed one-third of advertising revenues would be lost.

This analysis of audiences hardly seems to portend the disaster that the large cable operators and the dominant programmers predict. The reason is two fold. On the one hand, they assume that a loss of subscribers, without a substantial loss of viewers, undermines network economics. On the other hand, the cable industry has concocted a witch's brew of increasing transaction costs, which they claim will drive prices through the roof. Both of these are based on a series of assumptions that are dubious at best.

NETWORK SUCCESS

> The experts for the large cable operators predict that "widespread network failure and consolidation would likely occur" even under the mixed bundling scenario we have discussed. The critical assumption is that advertisers will not support networks that do not reach 50% to 70% of the nation's TV households. As a result, they are doomed to fail. That is an audience of 50 to 70 million subscribers.
>
> Historically, advertisers have been less willing to support networks with less than 50% to 70% coverage of TV households... Those advertisers that do support networks before they reach 50%-70% distribution do so because they want to "get in early" and develop relationships with networks they expect to grow significantly, and typically pay lower advertising rates than for established networks.

Two years ago, the largest cable operators told the Commission a very different story. One set of experts funded by the second largest cable operator objected to the fact that

> the Commission adopted the conclusion that a new programmer needs 15 million subscribers to insure viability. At that time, 15 million amounted to about 20 percent of MVPD subscribers. The total number of MVPD subscribers continues to increase. There is no indication that new cable services require an increasing number of subscribers, or a constant percent of the increasing total number of MVPD subscribers....
>
> Actual successful entrants follow varied and dynamic expenditure and carriage patterns....
>
> At least nine of the entrants did not reach 15 million subscribers in their first four years, but are still in existence.

Six of the nine that were identified are still in existence with an average of 24 million subscribers, far fewer than the 50 million the industry now claims. The other three have grown to close to 50 million. All are still in existence.

> The expert testifying on behalf of the largest cable operator at the time concluded that "program services can be, and are, viable even if they reach fewer that 15 million United States MVPD. Indeed, a number of services have been in existence for more than five years with fewer than 15 million subscribers."

The 15 million subscriber figure, which the cable industry experts claimed was too high as a standard for ensuring the viability of networks two years ago, would be accomplished by the bundled subscribers alone, for every category identified by the cable industry experts in this proceeding. Regardless of where the number lies, the large cable operators and dominant national programmers ignore the fact that the *a la carte* environment will be much more friendly for programmers who are not part of the big five. The issue is not that networks have to grow – they certainly do – but that the bundled environment favors the dominant national programmers and forces entrants to sell ownership to cable operators to get carriage.

Cable operators favor programming in which they have an ownership interest. They are 64 percent more likely to carry it when this is the case, according to the GAO. Broadcasters have leveraged their rights of carriage to gain preferential rates of carriage (46% according to the GAO), and they own their own studios, so they buy little independent programming.

Because the current system is so discriminatory against independent programming, we believe that *a la carte* could expand the opportunity for independent programming. Programmers who achieved a significant *a la carte* following could gain considerable leverage with advertisers, since they were delivering a dedicated and perhaps distinctive audience with inelastic demand.

An *a la carte* system would temper the power of the big five, making independent programmers more competitive. A mixed tier system would have several specific advantages for independent programmers not tied to the big five:

First, it would expand the market, since some consumers who are priced out of the market by the massive bundle will be brought in. Independent and niche programmers therefore would have a higher probability of success, which would likely lead to increased diversity.

Second, increased access to consumers for independent programmers would also lead to greater diversity. Mixed bundling allows independent programmers to compete for consumer resources and consumer attention sooner. Under the current model, in which cable operators drive new entrants into the video on demand space, the consumer must pay about $65 for the basic, expanded basic and digital tiers, which have a combined 90 networks, before the VOD programmer gets to compete for subscribers. Under mixed bundling, they get to compete after a basic tier and a digital box have been purchased. They compete after a $20 price and 16 networks.

Cable operators could feel pressures to be more responsive to consumer needs in an *a la carte* environment. In all likelihood, cable operators would still want to sell bundles – and we would encourage them to do so – but they would have to guard against overpricing them and including networks that have no marginal benefit, since consumers could buy networks they did want *a la carte.* Cable operators would come under pressure to remove their own shows from bundles, if the number of consumers who selected *a la carte* for networks not owned by the cable operators was significant.

In short, the market would become more competitive. Large vertically integrated national programmers would be less likely to force large packages of channels into the expanded basic bundle when consumers could choose channels *a la carte.* Programmers would have incentives to create smaller themed tiers, with which consumers could enjoy the efficiencies of tiered packages without the burden of the current system, such as subscribing to many networks that remain unwatched.

Mr. MARKEY. Thank you, Dr. Cooper, very much.

And our final witness, Mr. Derek Chang, is the executive vice president for content strategy and development for DIRECTV Incorporated. We welcome you, Mr. Chang.

STATEMENT OF DEREK CHANG, EXECUTIVE VICE PRESIDENT, CONTENT STRATEGY AND DEVELOPMENT, DIRECTV, INC.

Mr. CHANG. Mr. Chairman, Ranking Member Stearns and members of the committee, my name is Derek Chang, and I am the executive vice president of content strategy and development at DIRECTV. Thank you for inviting me to the hearing today on consumers' access to sports programming.

DIRECTV strives to compete in the marketplace by providing the best television experience in the country. A critical component of this strategy is offering more sports programming and cutting-edge innovation for subscribers. We carry 29 regional sports networks on widely distributed tiers. DIRECTV offers more live HD sporting events than any other provider. We bid on and carry virtually every sports package of additional out-of-market games, including those of the NFL, the NHL, college football and basketball, and even international soccer.

In addition to providing more sports content to our subscribers, we also strive to add value to much of the sports programming that we carry. The introduction of award-winning innovations and features has been critical to our ability to compete and grow in this increasingly competitive video marketplace. For example, nearly all video programming distributors carry the YES Network, but only DIRECTV has partnered with the channel to add bonus camera angles and interactive statistics. Similarly, DIRECTV outbid the cable consortium iN DEMAND for exclusive supplemental NASCAR coverage last year. For years, the cable industry has carried this unique programming but did little with it. DIRECTV immediately added multiple camera angles, real-time stats, team audio and dedicated announcers. In only its first year, NASCAR Hotpass had more than three times the subscribers than when the cable industry had rights to this programming. And new this year, DIRECTV, working in conjunction with CBS and ESPN, will offer an unprecedented level of coverage during the Masters Golf Tournament. This new service will combine CBS and ESPN coverage of the tournament with additional views of the legendary Augusta National Golf Course, hole-by-hole player stats, scores, a course tour, and on-demand Masters video clips. All of this is a critical component of DIRECTV's success. Obtaining the widest range of sports programming made available to DIRECTV in the marketplace and adding value and consumer-friendly features to that programming is precisely how DIRECTV has been able to compete and grow. This unique and innovative programming enhances competition in the entire video marketplace.

Today, our cable and phone company competitors have responded to our leadership in sports programming with unique product offerings of their own. This includes on-demand sports highlights and footage, but it also includes the highly successful bundle of voice, video, and broadband. Dish Network has responded by focusing on lower priced offerings and providing numerous exclusive international channels.

These types of battles among multiple distributors offering differentiated products and services are exactly what Congress envisioned. Increased competition translates into more consumer choice, better customer service and greater technological innovation. DIRECTV's leadership in sports programming and the technical enhancements it has added to that programming would not have happened without fair access to the underlying content, access that would not exist but for the program access provisions of the 1992 Cable Act. In fact, without those provisions, satellite television and competition to cable would never have gotten off the ground.

I would not be sitting here today talking about DIRECTV's success if Mr. Markey and members of this committee had not led the charge to provide consumers with greater access to cable-controlled programming. Congress recognized that new entrants needed programming to survive and also recognized the value of exclusives, especially when obtained fairly in the marketplace. The 1992 Cable Act jump-started competition in the video marketplace. In large part because of the program access provisions, DIRECTV was able to provide the first real competitive choice to the incumbent cable operators. The statute gave DIRECTV and other emerging competitors access to must-have programming that cable competitors might have withheld but also permitted DIRECTV to differentiate itself through exclusive deals negotiated at arm's length with independent programmers such as the NFL Sunday Ticket and more recently the NASCAR HotPass. The end result is precisely what Congress envisioned: a vibrant, competitive marketplace with more choice and better service for consumers.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Chang follows:]

STATEMENT OF DEREK CHANG

Mr. Chairman, ranking member Stearns and members of the Committee, my name is Derek Chang, and I am the Executive Vice President, Content Strategy and Development, at DIRECTV, Inc. Thank you for inviting me to testify today on consumers' access to sports programming.

DIRECTV continually strives to offer more sports programming and programming-related innovations to our subscribers. This improves competition in the entire multi-channel video marketplace. We carry nearly every regional sports network (RSN) made available to us, and we carry all but one of these RSNs on our most widely distributed programming tier. DIRECTV offers subscribers more live HD sporting events than any other provider. We bid on, and carry, virtually every sports package of additional, out-of-market professional games from the NHL and NBA to international soccer.

In addition to providing more sports content to our subscribers, we also strive to add value to much of the sports programming that we carry. The introduction of cutting-edge innovations and features has been critical to our ability to grow and survive in the increasingly competitive multi-channel video marketplace. For example, nearly all multi-channel video programming distributors ("MVPDs") carry the YES Network. But only DIRECTV has partnered with the channel to add bonus camera angles and interactive statistics for our subscribers. Similarly, DIRECTV outbid the cable consortium iN DEMAND for exclusive supplemental NASCAR coverage last year. For years the cable industry had carried this unique programming but did little with it. DIRECTV immediately added multiple camera angles, real-time stats, team audio and dedicated announcers. In only its first year, NASCAR HotPass has more than six times the subscribers than when the cable industry had the rights to this programming. All of this is a critical component of DIRECTV's success. Obtaining the widest range of sports programming made available to DIRECTV in the marketplace, and adding value and consumer friendly features to that programming, is precisely how DIRECTV has been able to compete and grow.

Today, our cable and phone company competitors have responded to our leadership and innovations in sports programming with unique product offerings of their own. This includes on-demand sports highlights and footage, but it also includes the highly successful package of bundled video, phone and broadband access, among others. Dish Network has responded by focusing on lower price offerings and providing numerous exclusive 2nd language channels.

These types of battles between multiple competitors offering differentiated products and alternatives are exactly what Congress envisioned. Accordingly, we think the marketplace is working on behalf of consumers to ensure fair and equal access to critical sports content.

This success is in large part due to the actions of Congress and the ongoing vigilance of the Federal Communications Commission ("FCC") to guarantee such access. In 1992, Mr. Markey and members of this Committee led the charge to provide consumers with greater access to cable-controlled programming by enacting narrowly crafted program access provisions of the Cable Act. 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. At the same time, Congress also recognized the value of exclusives—especially when obtained fairly in the marketplace by those seeking to compete against vertically integrated cable companies with dominant market share. 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.

The 1992 Cable Act kick-started competition in the video marketplace. In large part because of the program access provisions, DIRECTV was able to provide the first real competitive choice to the incumbent cable operators. The statute gave DIRECTV and other emerging competitors access to must-have programming that cable competitors would otherwise have withheld but also permitted DIRECTV to differentiate itself through exclusive deals negotiated at arm's length with independent programmers, such as The NFL Sunday Ticket and, more recently, the NASCAR HotPass. The end result: precisely what Congress envisioned—a vibrant competitive marketplace with more choice and better service for consumers.

* * *

I.DIRECTV provides more sports, more HD, and more innovative award winning sport programming and features than any cable or satellite provider.

DIRECTV has invested billions of dollars over the past three years to vault the company and our subscribers to the front of the high definition content line. That investment and vision has allowed us to broadcast more HD sports programming than any other cable or satellite provider. From fly fishing to fencing, our HD sports offerings are unrivaled.

DIRECTV carries 29 RSNs with the 30th, the Mountain Channel (college sports programming from the Mountain West Athletic Conference), set to launch before the fall sports season. All but one of these are available on our most widely distributed tier of programming reaching the largest number of our subscribers, and 28 are offered in HD.

In addition to RSNs, we have successfully secured the rights to more out-of- market sport subscription packages than any of our competitors, including: NFL Sunday Ticket, NBA League Pass, MLB Extra Innings, NHL Center Ice, NCAA Mega March Madness, ESPN Full Court, ESPN GamePlan, MLS Direct Kick, and CricketTicket. Six of these are offered in HD. We also carry national sports channels like the Golf Channel, a suite of 6 ESPN channels, NHL Channel, NBA Channel, NFL Channel, Setanta Sports, Speed Channel, The Outdoor Channel, and Versus. 14 of these are offered in HD. And, of course, we offer the local and national feeds of the networks, including Spanish language networks, to the vast majority of our subscribers.

But our leadership in sports is not just about carrying more sports than our competitors. It is also about innovating and creating new sports content through our investment and ingenuity. DIRECTV offers a dynamic sports mix channel that features 8 different live sports channels that can be viewed at once and that allow a subscriber to tune directly to the primary channel by clicking on the small picture. The NASCAR HotPass offers multiple camera angles, constant coverage of four drivers in HD each week at every NASCAR race, and the audio and telemetry of 13 different drivers, all while the race is going on over the primary network broadcast. Working in conjunction with the Masters and CBS, DIRECTV will for the first time offer HD bonus coverage of particular holes at Augusta National Golf Course and up-to-the-minute statistics and leader boards. Countless other award winning innovations that bring the passionate sports fan closer to his or her game and maximize their viewing experience abound, from "pitcher cams" to "bracket trackers" to "red zone channels" and "strike zone channels" that take the viewer to live cut-ins of games throughout the country as they happen.

This is not simply good news for DIRECTV's subscribers. This programming, and these innovations, forces our competitors to respond in the marketplace. Some do so through their own innovations. Others do so through bundled offerings. Others do so by cutting prices. Increased competition translates into more consumer choices, better customer service, more responsive pricing and the technological innovation described above. Because of the competitive video marketplace, all Americans—not just DIRECTV subscribers—are enjoying a better television experience.

II. The Program Access Provisions of the 1992 Cable Act are largely responsible for competition in the MVPD marketplace.

DIRECTV's leadership in sports programming, and the technical enhancements it has added to that programming, would not have happened without fair access to the underlying content—access that would not exist but for the program access provisions of the 1992 Cable Act. In fact, without those provisions, satellite television and competition to cable would never have gotten off the ground.

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.

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." Congress hoped that competitors like DIRECTV, who sought to compete with the incumbent cable operators, could do so 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."

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. 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. As Representative Tauzin noted during debate on the House floor, "exclusive programming that is not designed to kill the competition is still permitted . . ." 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 a non-cable-affiliated programmer.

The program access rules thus work exactly the way Congress intended them to. They enable satellite operators 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 spurs competition.

III. 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 the highly concentrated multi-channel video market in part by offering unique content such as The NFL Sunday Ticket. This and other unique offerings helped DIRECTV to differentiate itself and gain market share. The cable industry, in turn, found itself forced to innovate and become more responsive to customer concerns. As a result, today cable offers 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.

The NFL Sunday Ticket has helped DIRECTV emerge as a competitor to cable. It is critical to note that DIRECTV's offering of the NFL Sunday Ticket does not prevent NFL fans from seeing their home teams. Local fans still get to see their teams through their local broadcast network, a right that DIRECTV believes is a fundamental part of America's sports culture. Unfortunately, the same cannot be said of some cable operators who are withholding vertically integrated sports. The most well-known example is Philadelphia, where the incumbent cable provider, Comcast, denies access to Comcast SportsNet to DBS competitors. As a result, fans who wish to see the home teams play, including the Philadelphia Flyers, Phillies and 76ers, have no choice but to subscribe to Comcast. That sort of denial of access to "must-have" local content—as opposed to the out-of-market premium content offered by DIRECTV—is precisely the sort of threat to competition that Congress sought to prevent. Indeed, Comcast's anti-competitive practice is having its intended effect: the 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." Likewise, DIRECTV's market share in the San Diego DMA is practically half the national average due to the local incumbent cable providers' denial of access to the home teams' games.

* * *

A key development in the American economy over the past twenty years has been the rise of a competitive video marketplace. Today, competition means: consumers have more choices than ever before; customer service and pricing are becoming more responsive; technological innovation is flourishing; and tens of thousands of jobs have been created.

This is no accident. Rather, it is the direct result of policies that Congress and this Committee have enacted to promote competition. In the MVPD marketplace today, consumers are courted by multiple providers offering different and unique services surrounding a core package of video programming.

Our cable competitors still possess an overwhelming market share, which can distort competition to this day. But the fact remains that today there is competition where before there was none. This is the success story Congress—and this Committee, in particular—helped write. Thank you once again for allowing me to testify. I would be happy to take any of your questions.

Mr. MARKEY. Thank you very much, Mr. Chang, and that completes all testimony in opening statement form from our distinguished panel. We will now turn to questions from the subcommittee, and the Chair will recognize himself for a round of questions.

We will begin with you, Mr. Britt. Now, what are the criteria in your view that ought to be employed to determine whether a sports channel goes on the most watched tier or a special sports tier? Is it price, and if so, what is that price point? Is it the nature and popularity of that sport? Is it whether the cable operator owns a portion of that sports programming? Could you give us your kind of definition of what it is that qualifies to be carried on different tiers?

Mr. BRITT. Certainly. I think it is a very complex set of decisions. It certainly involves an assessment of the attractiveness of the product in a given market, and there has been some testimony about regional sports in a local market versus national sports. There is certainly consideration of which tier of service the programmer is asking it to be carried on, and certainly price and conditions are a big part of it, so there is all of those things. And quite frankly, there is also the activities of our competitors and how they are packaging and carrying things.

Mr. MARKEY. So could you take the Golf Channel, for an example, and give us an analysis of what are the factors that determine whether it is placed on expanded basic or in another part of the network and contrast that with the Big Ten or the NFL channel and why that might be placed on a sports tier?

Mr. BRITT. Sure. Again, it is those factors that I talked about, so it is a combination of our assessment of appeal, and by the way, the way the market works, we can be wrong about that, and maybe Mr. Chang is right and customers move. That is part of what happens. So it is appeal, it is price and our sense of where it fits. So one point I would make about the NFL channel, in Mr. Goodell's testimony he says that the NFL channel is not the centerpiece of the NFL programming, and in fact, most of their programming is on over-the-air broadcast TV or the channels like ESPN. So he is basically saying it is a niche channel, and we would like to carry that channel, and we would like to carry it on terms that were appropriate for the content.

Mr. MARKEY. Let me go to Mr. Goodell then. When Disney doesn't reach a retransmission consent deal for carriage of ABC, its remedy is to deny the programming to cable operators, and that is often a very powerful remedy, given the popularity of network television, but to a fledgling network or a new channel entrant, what is the effective remedy, Mr. Goodell, that is available if a carriage deal is not struck? What remedy would you recommend?

Mr. GOODELL. Well, the remedy that we recommend is what the 1992 Cable Act discussed, which was that if a cable operator that owns its own channels that are distributing their channels more broadly than an independent programmer, that is discrimination against that independent programmer, and that should not be allowed, that the free market requires that all channels be treated equally, not preferenced to the ones that are owned by the cable operators. From our standpoint, we are not focused entirely on the NFL Network. We have eight games of our 256 games that are on the NFL Network. We do not consider ourselves niche programming. I have never heard that from anyone other than the cable operators who have a great interest in our programming also. We have tremendous high-quality programs in great demand year round for our consumers, and we have gotten great reaction from them and from other programmers about the quality of our programming. So from my standpoint, I would hope that the FCC would look at the procedures that were put in place in 1992 and apply that in this circumstance.

Mr. MARKEY. Dr. Cooper, your quick comment, please.

Mr. COOPER. As I said, I think we need to treat these programs in an equal fashion. Our preference would be to treat them all equally and let consumers choose the ones they want to pay for. If the Congress is not willing to go that far, then we have to either get them all into a sports tier and let consumers then decide whether they want the sports tier, but if we are not going to have a sports tier, the worst possible outcome here is to allow cable operators to continue protecting the incumbents who basically have carriage rights, and so if a cable operator is going to carry its own programming, its own sports programming, it should not be allowed to exclude competitors for that sports programming.

Mr. MARKEY. Thank you, Dr. Cooper.

The Chair recognizes now the gentleman from Florida, the ranking member of the committee, Mr. Stearns.

Mr. STEARNS. Thank you, Mr. Chairman.

Mr. Goodell, the man on your left and the man on your right and Mr. Ferree seem to disagree with you. Dr. Cooper doesn't necessarily agree with you, but he is advocating for a la carte, and Mr. Chang seems to be a mix. So Mr. Goodell, you are the one that is going to have to carry your argument alone here, it appears to me. And I always like to think when people ask for certain things from the Federal Government, I always say to myself, now, if I grant that to him, would it make sense to grant it to other people, too, in a sort of philosophical statement. If it is good enough for you, is it good enough for everybody? So what you are advocating for football, baseball, should have the same opportunity, basketball, tennis, billiards, NASCAR, soccer, golf, fishing. We could go on and on. So what you think is good for the NFL, you also would advocate is good for all these other sports that I mentioned. Is that true?

Mr. GOODELL. Well, Congressman, I think what we are trying to be clear about here is, we are not arguing for government legislation, we are not looking for intervention.

Mr. STEARNS. No, but you are asking that pressure be put on the FCC to set up an arbitration board.

Mr. GOODELL. Well, I think that the 1992 Act actually——

Mr. STEARNS. So you are extending that?

Mr. GOODELL [continuing]. Established procedures for this type of dispute when discrimination occurs.

Mr. STEARNS. You say discrimination, and then you go a little further to talk about sharp differences in the programming and the carriage and everything, but if you made the argument for arbitration, couldn't these other sports also make the same argument once they decide, Gee, we are getting pretty profitable, we want to have our own broadcast network ourselves. Couldn't they go ahead and make the same argument? The thing I worry about is, if all these sports go ahead and do it, then we are going to see a basic cable rate that is going to be so expensive, no one could afford it.

Mr. GOODELL. Well, I understand. We are advocating for all independent networks here. We do agree with that in some cases here, and we are also advocating, and I agree with everybody at this front table, we are arguing for a free market system. That is what we want. We do not want government regulation. The reality of it is though——

Mr. STEARNS. But you want arbitration?

Mr. GOODELL. Sir, if I can finish?

Mr. STEARNS. Yes.

Mr. GOODELL. What we would like is a free market system which allows a market system to work without discrimination and preference for their own channels.

Mr. STEARNS. How are you going to get that without government intervening?

Mr. GOODELL. Again, in the 1992 Act, there were provisions to avoid discrimination that Congress recognized at that time——

Mr. STEARNS. If there is discrimination, why don't you sue under the 1992 Act and take it to court?

Mr. GOODELL. Well, the reality—and I am not a lawyer so let me make that point up front. The reality of it is, Congress established a procedure with the FCC to avoid discrimination and a process for us to follow that. Our option, as I understand it, is to file a complaint with the FCC.

Mr. STEARNS. OK.

Mr. GOODELL. If we go to the court——

Mr. STEARNS. Have you filed that complaint?

Mr. GOODELL. We have not. We are strongly considering that at this point.

Mr. STEARNS. Let me—I don't have a lot of time.

Mr. GOODELL. With respect to, if we file a complaint, if the FCC system doesn't produce a remedy within a certain period of time——

Mr. STEARNS. Then you want the government to step in. You want the FCC to step in and force arbitration?

Mr. GOODELL. We want the FCC to come in and make sure that it is an open and free market as the Congress asked for.

Mr. STEARNS. Now, Mr. Ferree, I understand you were the chief at the Media Bureau at the FCC. Is that correct?

Mr. FERREE. Yes, sir, that is correct.

Mr. STEARNS. Dr. Cooper has made a very strong argument for a la carte, and I understand—maybe you could comment quickly on Mr. Goodell's argument about saying this discrimination exists just quick, and I don't have much time, and then you might want to talk about Dr. Cooper. I understand you wrote a report to indicate that a la carte would in fact hurt the consumer, so just quickly.

Mr. FERREE. Yes, sir, I do have some history with a la carte. I will just comment briefly on Mr. Goodell's statement. Discrimination is—there is nothing with discrimination. It is unreasonable discrimination that causes problems, and the difficulty here is determining what is unreasonable. As he said, they have a handful of games on the network. You know, is that the same as an entire golf season on the Golf Channel? Making those kinds of determinations is quite difficult, and as Mr. Britt said, there are complex sets of factors that go into decisions about where programming is going to—I can't sit here and tell you I know the right answer to that. That is why we have markets. In this case, we have intensely competitive markets.

Briefly on a la carte, in my view, it is a disaster for consumers. He said it will increase choice and reduce price. I don't know how he came up with that. In fact, it probably would increase consumer prices to get anywhere near the kinds of programming you get——

Mr. STEARNS. I have got one more question. You are basically——

Mr. FERREE. But more importantly, it would destroy diversity, which we all purport to cherish.

Mr. STEARNS. Mr. Chang, I just have one quick question for you. DIRECTV is now the second largest pay TV provider, and Dish is the third. Each of you have more subscribers than Time Warner and are available nationwide rather than just regionally. Doesn't that mean if Time Warner decides not to carry the NFL Network, the NFL still has more than adequate distribution options with you and Dish?

Mr. CHANG. They obviously have distribution options with us, because we carry it, and so does Dish. In terms of what is adequate distribution, I guess I don't know what the economics are of the channel and what they require in order to have a successful channel or what they would deem to be success. From our standpoint, from DIRECTV's standpoint, we see the NFL Network as a channel that makes sense for our customers, which is why we have chosen to carry it.

Mr. MARKEY. The gentleman's time has expired.

The Chair recognizes the gentlelady from California, Ms. Eshoo.

Ms. ESHOO. Thank you, Mr. Chairman.

I listened carefully to all the testimony, and I want to thank you all for your varying views. It seems to me that the consumer can get the squeeze at either end of this thing. I think that there are complications at both sides of it, and of course in all of this really is money. I mean, that is really what drives all of this, and that is what I think is causing—I mean, it is great that people make money, I am not opposed to that, but it drives the respective parts of this to do what they do.

I have a question for Commissioner Goodell. I think your argument is that the cable operators are discriminating against the NFL because you are an independent programmer. I mean, that is what I am hearing. It seems to me that that is a little hard to swallow based on fairness and competition because, coming from an organization that has an antitrust exemption when it comes to pooling, I think that antitrust exemption was granted for that. You are an independent programmer with some of the most valuable content on television, and so what I want to ask you is, could a plausible answer to the lack of carriage of your programming be that you are not offering a competitive price? Is that what is——

Mr. GOODELL. It is a very fair question.

Ms. ESHOO. Is that what you are telling us?

Mr. GOODELL. Let me try to—we have reached an agreement with nearly 250 cable operators around the country, all the satellite carriers and the telephone carriers. We recognize that this is a market issue, and price needs to be determined along with distribution. I don't believe this is simply about money. I believe this is about the law, and the law says in 1992 that you cannot discriminate against independent programmers in preference of your own channels that you own, and we believe that is what the fact is. The fact is, they are distributing the channels that they own, their sports channels, more broadly on basic services than the NFL Network, and obviously they have their choice of doing that, but we believe there is tremendous market demand. We believe we have been reasonable in our pricing, and that is reflected in the fact that 250 cable operators and satellite carriers and telephone carriers have picked us up.

Ms. ESHOO. Let me just ask you the following. You are the most successful sports league in our country. Your contracts with broadcast, satellite and cable networks obviously amount to billions of dollars. This past season you, the NFL, made a decision to remove televised games from over-the-air broadcasts and place them on your own network. Why did you make that decision before you signed the carriage agreements with the major cable operators? I mean, it seems to me that there is leveraging, and I understand the leveraging because there is a ton of money in it, but it also, I think, drove NFL fans to clamor that their cable operators carry this. They are really essentially left in the lurch, I think. Can you comment on that?

Mr. GOODELL. Yes. I think we made this decision 2 years ago. This is the second season that we had the eight games on the NFL Network, and we think because of the great demand for NFL programming year round, that our fans want to see more NFL programming on a year-round basis. That is a very smart marketing decision for us, and it actually created a new national platform to allow more people to see more football. The fact is, you can question our business judgment about whether that is a right decision or not, but the reality of it is, it was a decision that we made, and we should have the ability to compete in a fair market where the laws are being followed and we have the opportunity just as any other independent programmer has and be able to compete in a world where we are not at a disadvantage to sports services that are owned by the cable operators.

Ms. ESHOO. Thank you.

To Mister, is it Ferrer?

Mr. FERREE. Ferree.

Ms. ESHOO. Yes. While——

Mr. FERREE. Ferree, like referee.

Ms. ESHOO. I don't know whether I would want you to be the referee.

Mr. FERREE. All right.

Ms. ESHOO. My comment is outside of the scope of this hearing. I just want you to know that I have read what I consider—well, I guess I shouldn't say "rants," but I still will—your local broadcasting in extremis and the other one that you wrote. I think that we have a real problem with these postcard licenses at the FCC. As a matter of fact, I think they are an outrage, and I think that people in our country that own the airwaves deserve better, but I want you to know——

Mr. FERREE. Fair enough.

Ms. ESHOO [continuing]. That I have read them and obviously I don't agree. Thank you.

Mr. MARKEY. The gentlelady's time has expired. The Chair recognizes the ranking member of the full committee, Mr. Barton.

Mr. BARTON. Thank you, Mr. Chairman. You know, when I ask myself why I run for Congress, I need to think of a day like today. As I look down at this panel and we have got these intellectual deep thinkers, we have these business moguls, we have these sports czars, these media masters. None of those guys would pay any attention to us if we weren't Members of Congress, you know. So I want to thank you for this hearing and getting these gentlemen to at least for an hour-and-a-half to act like they care what we think.

Mr. MARKEY. And we wouldn't pay any attention to them if they didn't control sports programming, so it is a two-way street.

Mr. BARTON. That brings us to the purpose of the hearing. Now, in the old days, before radio and TV, when professional sports or sports generally got started, if somebody wanted to watch that particular sporting event, they went to the stadium or the ballpark and they charged them a buck or two bucks, and they went in and watched it, and if they didn't want to go, they didn't go. And then some bright fellow decided, you know, people would listen to baseball. Probably the New York Yankees were the first, maybe the Boston Red Sox, I don't know. But lo and behold, people would listen. And then when TV came along, somebody said, well, if they can't go to the game, maybe they would watch it on TV, and they licensed that. Then it has just grown and grown, and so now there is value. As the gentlelady from California pointed out, we have all these negotiations or discussions about who gets that value and how much it is worth and things like that. But we have to remind ourselves, we are talking about sports. It is not a constitutional right that these people force America to watch their activity. You know, if the commissioner of the NFL said Mr. Chairman, I think that you ought to force everybody in America, whether they watch it or listen to it or go to the game, they have to pay so much for each game no matter what, we would be outraged. Now, the reverse is also true. We don't have a right that they have to show us the game, you know. What if I said I have a right to all the sports events in this country and I don't have to pay anything for it? Well, then they would say well, you are crazy. So we get to the purpose of this hearing, which is, where do you set the balance point? And the gentleman at the end, Mr. Ferree, has pointed out that the market generally is working, and I think that is what Mr. Bodenheimer says too, that the market is generally working, and I think that is what Mr. Chang says. In a way, Mr. Goodell says it is working except they won't carry our program on the basic tier so that everybody in America has to pay 10 cents a month or 70 cents a month whether they watch the NFL Network or not. Now, I speak with some trepidation here because Jerry Jones is building his $1 billion stadium in my congressional district, and in fact, I see it every day when I take my son to daycare, this pavilion for all that is positive about America and the extravagance in sports.

But my question, I guess I would ask Mr. Ferree and then Mr. Bodenheimer and Mr. Cooper—who is one of the intellectuals who has expertise on lots of things and we love to have him come see us—you know, what is broken here? I mean, why shouldn't we just let the Mr. Goodells and the Mr. Bodenheimers and the Mr. Changs and the Mr. Britts fight it out and whoever is the best negotiator, that is what is available in the market? What is wrong with that?

Mr. FERREE. Mr. Barton, I won't take up much of your time. I would say nothing is broken here. I would agree with you that I am sure there are important and pressing problems that demand Congress's attention. The NFL's failure to negotiate carriage deals for the NFL Network is not one of them.

Mr. BARTON. Mr. Bodenheimer?

Mr. BODENHEIMER. Congressman, by and large, the American public loves our products, and I say our products collectively. I mean, this industry didn't exist 30 years ago. Now we have nearly 100 million households who are subscribing to subscription television, and over the last 5 years, despite the Internet, despite video games, despite all the new technology offerings, television viewing in this country is increasing. So from my perspective, just from the sports perspective, it has never been a better time to be a sports fan. You can access more product and more distribution manners in more packages for more businesses and distributors than ever before in the history of our country.

Mr. BARTON. My time is expired, but where the NFL Network was available on a sports tier that was discretionary, what percent of the viewers in those markets chose the NFL Network?

Mr. GOODELL. Let me try to answer that. Comcast relegated us to a sports tier just this past year. I believe that they had roughly 750,000 subscribers when they did that. The only information that they report publicly that we have, in November that more than doubled to probably 1.7 or 1.8, so it is clear that they used the NFL programming to drive their digital sports tier, which costs the consumers, depending on the market you are in, $7 to $9 a month. So the consumers are actually paying a larger expense, a larger cost by carrying the NFL Network.

Mr. COOPER. Mr. Barton, let me get the answer. What is broken here is in your sentence, why should we make everybody in America pay 10 cents? It is the everybody part that we are concerned about, and in the case of ESPN it is about 2 bucks, or he can correct me, but I think that is about where it is these days. It is the everybody part. We shouldn't make everybody pay the 10 cents. We should go back to the system that you talked about where everybody had the choice, and we are at a situation with the distribution network in this country where you can in fact give people those choices.

Mr. BARTON. My last question, what does the E in ESPN stand for?

Mr. BODENHEIMER. Entertainment.

Mr. BARTON. Entertainment. I couldn't——

Mr. BODENHEIMER. Man does not live by bread alone or politics alone, Mr. Barton, so in point of fact, the Communications Act, the antitrust laws, they regulate all forms of economic activity, so as a capitalist society we have decided that we want to meet our needs, whether they are for entertainment or food, in a competitive system, and where there are market failures, the Congress has stepped in to say wait, we care enough about it even though it is only entertainment to try and make sure it is a fair market.

Mr. BARTON. Maybe a compromise would be just to have the Cowboys carried by everybody. Maybe that is the compromise. Thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from Michigan, Mr. Stupak.

Mr. STUPAK. Well, thank you, Mr. Chairman. I am sorry I missed part of this hearing, as I was upstairs in a business meeting issuing subpoenas. Let me use a little different approach from Mr. Barton there. He has the Dallas Cowboys, and I have the Green Bay Packers. The Green Bay Packers are owned by a community of 100,000 people. We have a great following. We are a very storied franchise. Even with the loss of Brett Favre yesterday, we will still be there, but how would Green Bay ever be able to keep a team if we had to pay at the stadium, because we would never be able to afford to with the salaries and things like this and salary caps and other things that have helped us to keep our team available? But how would Green Bay ever get seen outside of Green Bay if we don't have them on, let us say, basic cable? And we had a real problem, Joe, this year when Green Bay did play Dallas on the Thursday night game, just trying to allow us who have grown up with the Packers to be able to watch it.

So I find it troubling that even the Government Accountability Office, GAO, report, found that cable networks affiliated with cable operators were 31 percent more likely to be carried than a network without majority ownership, which is in essence the nature of the problem of discrimination against independently owned networks. So it seems to me that cable should be placing networks on the basic tier based on consumer demand. Green Bay certainly would do well no matter where it is, because of such a rich history in football, not whether they own a stake in that network. So how does consumer demand for the NFL Network, Mr. Goodell, compare to that for cable-owned sports networks on the basic tier?

Mr. GOODELL. I think you have hit right at the heart of what our issue here is. We want to operate in a free market system. We want to operate because we believe there is tremendous consumer demand for our product. The reality of it is, despite that demand, there is preference for the cable-owned channels, the sports tiers, and they are more broadly distributed. We believe that is the core of the issue here, because we believe that is discrimination in not allowing broader distribution for the NFL Network, that we know there is great demand for that programming, so I think you hit exactly on the point.

Mr. STUPAK. Well, let me ask you this then, because there has been a lot of discussion about price. In your view, would basic cable go up for consumers if you had the NFL Network on the basic tier, and if so, how much?

Mr. GOODELL. I am not sure I understand the question. I am sorry, Congressman.

Mr. STUPAK. If the NFL Network is carried on basic cable, there has been a lot of discussion that cable rates would go up. What would be the estimate?

Mr. GOODELL. That is actually not true, according to the facts we have. As I mentioned earlier, we have negotiated with over 250 cable operators, satellite carriers and telephone carriers. None of them has had a price increase. And in fact, with the earlier comment about Comcast relegating us to a sports tier, Comcast didn't give a refund to the consumers when they took it off of basic television. They in fact had a price increase when they did that. So the reality is, they saw a motivation here where they could increase their financial return by putting us on a sports tier, forcing the customer who wants NFL product to increase the price and to create greater profits for Comcast.

Mr. STUPAK. Well, let me ask you this. You said you have agreements with 250 cable operators. What is the percentage of the total cable operators? That 250, what percentage is that of the total?

Mr. GOODELL. I don't know the answer to that. We are roughly in 37 million homes, so——

Mr. STUPAK. Thirty-seven million. Can anyone give me—how many cable operators there are, Mr. Cooper, or how many homes have cable? So if they are in 37 million——

Mr. COOPER. If he is in 37 million cable and that is about half——

Mr. STUPAK. About half?

Mr. COOPER. A little bit less than half probably than all the——

Mr. STUPAK. So then the other half is——

Mr. GOODELL. I think the reality of it is——

Mr. COOPER. That is a third then.

Mr. STUPAK. But it seems like the NFL Network is not carried on basic cable by the bigger companies like Comcast, Time Warner. Comcast moved it to a tier. How about Time Warner? Do you carry it?

Mr. BRITT. No.

Mr. STUPAK. No? Charter doesn't carry it either, do they?

Mr. GOODELL. Charter, we had an agreement with. There was a breach of that agreement. We are in discussions. That is clearly a market issue that I believe will get resolved. They don't have the sports channel. The reality we have to get back to here is, it is with Comcast and Time Warner who own sports channels, who distribute them more broadly, and we do not have a fair opportunity in that case, and that is the discrimination we believe is occurring which is against what Congress asked for in 1992.

Mr. STUPAK. Now, the NFL is advocating for arbitration.

Mr. GOODELL. We are looking for dispute resolution. It doesn't have to be in arbitration. We believe that if we are treated with the same open, free market, then our channel will not be discriminated against because it is not owned by cable operators. We only have two operators really that we need agreement here, and it was pointed out by Dr. Cooper, the reality is, you can't start the channel successfully without getting Comcast or Time Warner to give you distribution. They control 40 million homes between the two of them.

Mr. STUPAK. My time is up. Would the Celtics still be going if they didn't make that trade in the off season? Because they are having a very successful year this year. Do you have your own sports carriage up there, Celtics in Boston?

Mr. MARKEY. Oh, the Celtics. I am subscribing to the Celtics.

Mr. STUPAK. See, Green Bay can't do that. We are just too small a market, so that is why we need something on basic cable.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from Georgia, Mr. Deal.

Mr. DEAL. Thank you, Mr. Chairman.

The FCC recently completed a comment period on their notice of proposed rulemaking regarding the practice of programmers tying popular programming with undesired programming. Mr. Bodenheimer, does ESPN offer to cable operators a stand-alone price for ESPN as opposed to a bundle of programming?

Mr. BODENHEIMER. Yes, we do.

Mr. DEAL. I understand that there are non-disclosure agreements that prohibit you from providing exact price quotes on the stand-alone versus the bundle, but can you give us some idea as to what the comparisons might be?

Mr. BODENHEIMER. Well, like a lot of businesses, our job is to distribute as much of our product as we possibly can, as widely as we can, so we are owned by the Walt Disney Company. So between Disney and ESPN, we have over 20 networks that we can package together and offer to Mr. Britt, Mr. Chang, other distributors, and we do that frequently. When someone requests a stand-alone price, we give that to them, and it is certainly within our view a reasonable range, certainly with the law and good business practice. It is within a reasonable range between the package price.

Mr. DEAL. And everybody is bound by non-disclosure as to that. Is that correct?

Mr. BODENHEIMER. That is correct.

Mr. DEAL. Can you tell me if anybody takes the option of the stand-alone versus the bundle?

Mr. BODENHEIMER. Yes, they do. We have about 60 affiliates that take ESPN solo.

Mr. DEAL. About 60?

Mr. BODENHEIMER. Correct.

Mr. DEAL. I understand from the ACA that none of their members apparently take that, so these would be larger cable providers then?

Mr. BODENHEIMER. No, I would suspect they are smaller. I don't have the detail on that, Congressman. I mean, the good news from our perspective is, over almost 30 years we produced very popular programming. So we are very infrequently asked for a price or a negotiation for just one of our services. I have been in the business almost 30 years. I can't recall being in a meeting, and I grew up on that side of the business, where someone said I only want to buy ESPN. They want ESPN–2, they want Classic, they want News, they want the Disney Channel. So that is why it is such an infrequent discussion.

Mr. DEAL. Well, of course, one of those might be that it is just as cheap to buy the bundle as it is to take your price on the separate channels. That is one of the concerns.

Let me ask you this or any others who wish to comment. Are there requirements that cable operators sell the bundled channels to a certain percentage of their customers, or are they required to be on the expanded basic tier?

Mr. BODENHEIMER. It varies by network, Congressman. For ESPN and ESPN–2, we seek to be on expanded basic. For all of our other services, and we have carriage in a variety of packages within Mr. Britt's distribution system and Mr. Chang's for ESPN News and Classic, we are in different package schemes throughout the country.

Mr. DEAL. If a cable operator wants to offer ESPN or the NFL Network or other sports networks as a part of a sports tier or a sports package, why should they not be allowed to do that? If they want to use that type of business model, why should they not be able to offer it without being forced economically to put it on the expanded basic tier along with other bundled programs, Mr. Goodell?

Mr. GOODELL. Let me respond to that. We believe that sports tiers—we don't believe that the cable operators are actually committed to the sports tiers. In fact, it is clear, because they put their sports channels on more broadly distributed services. That is the point here. They are not taking their sports services that they own and putting them on the sports tiers. They are broadly distributing in basic cable and forcing their customers to buy it. What they do do, and they have made comments publicly regarding this, is that because of the high quality of NFL programming and the demand for that, putting it in a sports tier is like an anchor tenant. What it does is, there is so much demand for that that it drives the sports tiers. They make a significant amount of money because they charge the consumer $7 to $10 a month to get that, and they pay us the 60 or 70 cents that they owe us on our distribution, but the reality is, the consumer loses, and that is what is lost here. The consumer is losing by not having the opportunity to get access to that high-quality programming.

Mr. DEAL. Mr. Britt?

Mr. BRITT. Thank you. I would to like to make a couple of points that relate to what Mr. Goodell just said. First of all, it would create the impression that cable operators control a huge number of networks. The reality is, going back to what Mr. Stearns said, there are over 500 networks that exist today, and the cable operators control just a handful of those. In the case of Time Warner, those are things like CNN and TBS and TNT. It is pretty hard to suggest those compete with the NFL Network. We have a minority interest in the Mets Network in New York. That is pretty much the limit of what we own in the sports networks. I can't talk for other cable operators. So I think this picture that is being painted which maybe in 1992 was correct but this picture that somehow cable operators control all this programming and they are discriminating against poor NFL, it just is the wrong picture.

Mr. DEAL. Mr. Chairman, could I ask Dr. Cooper to respond quickly to that?

Mr. COOPER. Yes. The simple fact of the matter is that the Congress created a quasi-property right for the broadcasters by giving them must-carry and retransmission consent. They have become the dominant programmers. If you look at the number of eyeballs, particularly in the expanded basic tier, which is the most popular package, six entities, five entities dominate the viewing and programming in that space. So the other 540 national networks don't get many eyeballs, they don't get carriage. We did a study of minority-owned programming, and we find that there are 192 networks which is about 40 percent of that total number, and they get about 4 percent of the carriage because they get relegated to higher tiers, they don't get carriage in the basic tier. So that domination still persists, even though you have the 1992 Act which opened up and made, as you have heard, some competition possible. The key here is to get a level playing field someplace on that dial, so there are two possibilities. One, let them compete fairly in a sports tier; two, let them compete fairly in the basic tier. The fundamental problem of discrimination is that the network operators, the cable owners, have dominated the basic tier, which is carried to millions and millions and millions of households, and they will not let independent programming get carriage in that tier. That is the distortion in the competition we have in the market.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from Nebraska, Mr. Terry.

Mr. TERRY. Thank you, Mr. Chairman. I appreciate that.

Commissioner Goodell, it is good to see you again this week. What hearing are you going to participate in next week? I hope you just have a home here that you can stay.

Mr. GOODELL. I appreciate the invitation.

Mr. TERRY. There is a truism on Capitol Hill that while everything has already been said, not everyone has said it yet, so it is my turn. The NFL Network Web site says it is the most widely distributed sports network in the history of cable and satellite television. That is a quote off the site. It says that more than 240 pay television providers carry the network, including DIRECTV, Dish, Comcast, Cox, Verizon, AT&T. It says that you are available to 70 million homes and have 41 million subscribers. It says in 2 years you have had subscriber totals that other successful networks took 5 years to reach. According to the Washington Post, the NFL had $3.74 billion in television revenue in 2006 alone, with numbers climbing. If that is the case, why do you think there needs to be government intervention? It seems like everything is working well for you without any intervention.

Mr. GOODELL. Well, let me go back a couple points. One is, there is a little deception there with available to 70 million homes. The fact is, it is not in 70 million homes. The consumer would have to pay an additional fee to be able to get that. I think what is being lost here is the consumer. We believe, and I think the record is clear about the quality and the demand for NFL programming on a national basis, absolutely, but according to Mr. Britt here, we are looking for sympathy. What we are looking for is an open, free market. The Congress recognized that discrimination could occur in 1992. They set up procedures with the FCC to make sure that it was an open and free market. That is all we want is an open and free market. The fact that we have arrangements with 240 cable operators and satellite carriers and telephone carriers is a reality that there is great demand and that we have been correct in our negotiations and that true market factors are leaning to distribution. But with the two large cable operators, they own their own sports networks. They are preferencing those sports networks, distributing them more broadly at the expense of the NFL Network. That is the issue that we are trying to get at here, sir. It is a matter of law. It is a matter of principle. We are not looking for sympathy. We are looking for an open and free market.

Mr. TERRY. So the open and free market would be on a non-pay tier, kind of a basic tier then?

Mr. GOODELL. We are not asking that the government establish what tier it has to be on. What we are asking for is that we are able to negotiate competitively against their own sports networks that they own and are distributing more broadly.

Mr. TERRY. Mr. Britt, reply?

Mr. BRITT. Yes. Mr. Goodell keeps alluding to this vast number of sports networks we own. I am only here representing Time Warner Cable, by the way. I am not sure what those are. We do have a minor interest in this Mets Network in New York, which by the way is carried by all the multi-channel video providers in New

York City, and they carry it on their basic tier, and we have some other minor things in local sports that I talked about before that wouldn't be on TV if we didn't create them. We are not a big owner of regional sports networks or national sports networks, so I am not sure what this——

Mr. GOODELL. Let me try to give some clarity to it. You don't own this, but Comcast does. They own Versus. It is on basic. I do believe you have an ownership interest in TBS and Turner.

Mr. BRITT. Yes, and those are general entertainment channels, not sports networks.

Mr. GOODELL. They do carry sports.

Mr. TERRY. Well, I like this Lincoln-Douglas debate format that you have. It helps us. It really does, so I do appreciate that. I had a great question, but I got drawn into your discussions there. So with that, I only have 37 seconds. There is a worry here that with the NFL channel that there is a slippery slope that we are already going down that will take football off of Fox or CBS or whoever has it this year, and it is going to go all to you have to pay for it. What is your thought on that, and do you think that is good for the NFL?

Mr. GOODELL. It is not good for the National Football League, and I am glad you asked that. It is very important to us, and the basis of our broadcast policy is to stay on broad, free television. We are the one league that continues to be able to do that. All of our games are on free television in the two competing markets, and we continue to honor that. It is important for our growth, and it is important for our fans, so we anticipate and we expect to do that for as long as I can foresee. The NFL Network is to complement that. It is to bring NFL football 365 days a year to an audience that is seeking additional programming which our networks can't carry. They have other obligations. They have news, they have other sports, they have entertainment. The NFL Network is devoted exclusively to NFL football, and we are looking more at college football and high school football, football as an industry.

Mr. TERRY. My time is up, but Mr. Chairman, there are others that—that seemed to have wanted to pique further discussions. Shall I yield back to you and let others——

Mr. MARKEY. Please.

Mr. COOPER. I mean, let me follow up on that. As I said in my testimony——

Mr. MARKEY. The gentleman's time is expired.

Mr. COOPER. I am sorry.

Mr. MARKEY. The Chair will recognize—Mr. Cooper is a veteran of this committee and knows how to squeeze out—there is no one who plays the 2-minute clock better than Mr. Cooper does in testimony before Congress. The Chair recognizes the gentleman from California, Mr. Radanovich.

Mr. RADANOVICH. Thank you, Chairman Markey. I appreciate the fact that this hearing is being held. On the issue of arbitration, Mr. Ferree, you were chief of the FCC Media Bureau when the Commission imposed arbitration obligations on DIRECTV in their merger with News Corp. Are these situations analogous? Can you explain how this might be different than——

Mr. FERREE. No, they are not analogous. As I said in my opening statement, in that case you had a rare combination of control of very valuable programming and some regional sports networks, RSNs, with vertical ownership of a distribution platform that had nationwide distribution, and the concern was, even though we spent months going through econometric analysis of what would happen with different periods of foreclosure, and we found that there was no business reason to do long-term foreclosure even under those circumstances, but there might have been a business reason to do a short-term foreclosure because sports fans are very emotionally attached to their teams, and all you have to do is take the programming away for a short period of time and you will see marked defections to other carriers that have the programming. So the theory was, the merged entity could withhold the regional sports networks from the cable company in a region, it is a narrow region so the losses are not spread over the entire country, and the defections would take place over the matter of a few weeks to DIRECTV, and then lo and behold they do a deal with the cable guy, and they are made whole. In this case, there is no vertical integration. I am sorry.

Mr. RADANOVICH. All right. Thank you very much.

Mr. Bodenheimer, this will be a question for you but also anybody else who wishes to address it. If this access and special privilege, the way I look at it, that we are giving to ESPN or anybody else, what is to prevent Disney or Nickelodeon or anybody else that wants to have that access into the top tier?

Mr. BODENHEIMER. I am sorry. If the question is, are rules enacted that enable any programmer to move into the top tier——

Mr. RADANOVICH. Right, by an act of Congress. I mean, what is to say that other interests can't come in and ask for the same privilege?

Mr. BODENHEIMER. I suppose there is nothing preventing anybody from coming in and asking. You know, we have made a living out of producing the best possible product we can and working as hard as we can to package it, bundle it, promote it and sell it, and it is a—you know, as I said in my opening comments, is the most vibrant marketplace we have ever seen, and we have been at it almost 30 years now. I think for a consumer now, you have more choice than you have ever seen, and I only see that increasing.

Mr. RADANOVICH. So the market works?

Mr. BODENHEIMER. We believe the market is working absolutely very well. As I said, there is product everywhere, on the Internet, the 250 million mobile phones in the United States. I mean, video is coming to your phone. You know, every month inroads are made there in technology. On ESPN.com, today you can have 800 videos you can see for free. On the ABC Player, which Disney launched 18 months ago, we put our big shows, Lost, Housewives, Grey's Anatomy up there, 240 million starts off of that player for free for anybody accessing the ABC.com Player, so for us, the marketplace is absolutely working at lightning speed.

Mr. RADANOVICH. Any other comments on that?

Mr. COOPER. You know, if he has got this incredibly wonderful product, why is he afraid to sell it directly to the public? He has packaged it, bundled it, sold it to the cable operators, all six of them or eight of them, which dominate the top 80 percent. Why is he afraid to be told OK, sell it directly to the public? It can be bundled too, but give the consumer a choice to either get the bundle or buy it or not have it. So the simple fact of the matter, why is he afraid to actually sell it to the public? He has 96 million homes. Do you think he will stay in 96 million homes if he has to sell it to the public? I guarantee you he knows he is not going to get that many people to actually open their pocket and pay him the $2.50 or whatever it costs to get it.

Mr. RADANOVICH. Thanks, Mr. Cooper.

Mr. Goodell, did you want to respond to that as well?

Mr. GOODELL. Yes, I do. I just wanted to make the point that you made to George, which is, we do believe that markets work. Free markets work though. We think that there is a flaw in the market here with respect to the preferences being given by cable operators that own their own channels, which is something that Congress anticipated in 1992 and put in rules with the FCC in 1992. We believe that those rules need to be reevaluated, because they are not efficient. They are not leading to the outcome that I think the Congress wanted, and all we are saying is, we would like to see those rules put in place not to force arbitration and not to force us on a particular tier. Allow that free market to work. In a free market, we believe and we are confident that the NFL product is in great demand by everyone, and in that market, we will succeed.

Mr. RADANOVICH. Thank you. I see my time has expired, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. I got snowed in yesterday, Mr. Global Warming. The St. Louis Post-Dispatch had—Mr. Markey likes to talk about the hottest days of the world in July and says, you know, this is my proof. Well, the headline in the St. Louis Post-Dispatch today was, "Largest snowfall since '93," and I know that is climate change, and that might affect that, I understand that, but that is why I am late. I just flew in because we were snowed in. But it is great to have you all here.

I, too, am skeptical about having government get involved in this private market, should be able to negotiate contracts based upon goods and services and supply and demand works, so my line of questioning will be quick. Mr. Ferree, when the program access rules were adopted in 1992, there were less than 150 national networks, and cable owned half of them. Now there are 564 national networks, and cable owns only 15 percent. With all this additional independent content, isn't vertical integration—I thought I heard someone talking about that when I walked in—less of a concern?

Mr. FERREE. Yes, it is. Yes, it is. The markets are intensely competitive now. In 2002, when I was at the FCC and we looked at extending the program access non-exclusivity provisions, it was a very close call on whether it should have been extended or not. There are now a lot of places to go, and again, it's hard for me to believe that the NFL Network, which as Mr. Goodell said has some of the most popular programming, sports programming in America, is having trouble at the negotiating table getting what they want or getting what the market will bear.

Mr. SHIMKUS. Mr. Bodenheimer, would you agree that in today's market, no matter what kind of programming a consumer enjoys, there is a way for a consumer to find it and get access to it at an affordable price?

Mr. BODENHEIMER. Absolutely. That goes to the comment I was just making. If you want to watch entertainment programming, sports programming, movie programming, news programming, the consumer has never had more choice in the history of the United States than they do today. I mean, it continues to explode.

Mr. SHIMKUS. I am older now, and I remember just the major networks and, you know, the highlight films that we wanted to watch, we were only able to access those on Monday Night Football. At halftime, Howard Cosell would do the highlights from the games. Now, you stumble all over the highlights. I mean, it is impossible not to see somewhere, not only on over-the-air broadcast sports network, but you are just bouncing around even on the Internet.

Mr. BODENHEIMER. And the consumer appears to love it.

Mr. SHIMKUS. I bought my wife a laptop for Christmas, a very nice thing to do. She asked for it. And we have the ability for her to carry it around the house now. We hooked it up so she can get it, and my son has been—some archaic 1992 episode Japanese cartoon that he has been streaming on broadband on this laptop watching whatever this weird Japanese cartoon show is. So I think where there is a will, there is a way, and you can find almost anything you want to see. Do you want to chime in, Mr. Goodell?

Mr. GOODELL. Congressman, if I could just make a couple of quick points. First off, we agree with your statement that highlights are in great demand, other programming. No one ever thought 20 years ago that the NFL draft would outdraw games on other sports leagues, but they do, and I think that is an indication here that we are not niche programming, we are actually in tremendous demand because people want to get more football. They want to get more inside of the NFL, and we respect that, and that is why we created the NFL Network. The second point I want to raise is, you mentioned the point that, you know, many markets, competition should override, and we agree with that. The reality though, there are many markets, particularly where Comcast and Time Warner have, I come from New York, in New York I can't get satellite in New York City. I can't get telephone service yet. There is not great enough competition and great enough alternatives for the consumer to be able to get that. That is why Dr. Cooper testified earlier for an independent channel to make it in today's world, they need clearance still from Comcast and Time Warner. Competition in that market is not great enough, although it is much better and it is certainly improved by all the policies that this Congress has taken——

Mr. COOPER. Mr. Shimkus.

Mr. GOODELL [continuing]. But there is still not great enough competition in those markets.

Mr. COOPER. Mr. Shimkus, brands are made——

Mr. SHIMKUS. All right. I am not asking you a question, OK, and I know you have been butting in, even in my short time here. Mr. Goodell had a chance to respond on the consumer end. I will yield back my time, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired, and I am very sorry about the snowstorm that you had in Illinois. I just want you to know that the winters in Boston are now 4 degrees warmer than they were in 1970, so we now have Philadelphia's weather in Boston in the winter, which is kind of nice, but thank God we don't have Philadelphia's football or baseball or basketball teams. So it is kind of working out in the short run, but over time we might prefer the Philadelphia sports teams to the weather that is perhaps heading our way.

We are going to go to a quick second round. We will recognize the gentleman from Michigan, Mr. Stupak, for a second round.

Mr. STUPAK. Thank you, Mr. Markey.

Mr. Britt, if I may, since you are the cable guy here, how many of the channels that Time Warner carries on your basic tier does Time Warner have a majority interest in?

Mr. BRITT. You know, I don't know the exact number, but it is just a handful.

Mr. STUPAK. OK. How about——

Mr. BRITT. Time Warner owns things like TBS and CNN. Those are, by the way, among the very original cable channels from the 1970s and 1980s. They have been carried for many, many years.

Mr. STUPAK. Let me ask it this way, then. Is it fair to say that most of them you carry on your basic cable is network programs that you have an interest in——

Mr. BRITT. No, the——

Mr. STUPAK [continuing]. Whether majority or 13 percent or 17 percent interest?

Mr. BRITT. I am sorry to interrupt. No, that is absolutely not the case.

Mr. STUPAK. How about independent——

Mr. BRITT. We actually own interest in a very small percentage of the networks we carry. That is why we were saying before this 500 networks, Time Warner owns a handful. Actually Dr. Cooper talks about this. Time Warner owns a very few number of channels relative to number of channels we carry. In fact, if we didn't carry the independent——

Mr. STUPAK. Let me ask you this——

Mr. BRITT [continuing]. Networks, we would go out of business.

Mr. STUPAK. Comcast owns quite a bit, and I wish they would have been here, but I understand they couldn't be here today, but is it fair to say that the channels you carry on your basic tier are either owned in part by you or by other cable companies?

Mr. BRITT. No, that is not correct. Most of——

Mr. STUPAK. Give me a percentage. What is truly independent on your basic and owned by another cable——

Mr. BRITT. Well, I guess I have to ask you the definition of independent, because most of the cable networks today, the big ones, are actually owned by the broadcast networks, and that is in Dr. Cooper's appendix. I don't know the percentages.

Mr. COOPER. And they have a property right you create with must-carry for sure.

Mr. STUPAK. Right, they have a property right. OK. Let me ask you this. You know, if we are worried about—it seems to me if we want to clarify whether Big Cable, if you will, are discriminating, if we increase the transparency, so what if we required cable to disclose what it charges for its own networks and what it would charge for independent network, and then if we had that disclosure, wouldn't that see if there is discrimination then going on, Mr. Britt?

Mr. BRITT. I think you would see that the programming we carry is the result of 30 years of dealmaking and the price is all over the place. You would not see a pattern of discrimination.

Mr. STUPAK. Don't you think the consumer who is actually paying the bill, they should have a right to know that?

Mr. BRITT. You actually should ask Mr. Bodenheimer that because every programmer requires us to keep it confidential, so we actually——

Mr. STUPAK. Mr. Bodenheimer, can you comment on it? I guess I am trying to get to—there is a charge of discrimination, not discrimination, we are just doing this. I think Mr. Ferree actually said what the market will bear. Shouldn't the consumer know what the market is having to bear?

Mr. BRITT. I guess I would—let me answer. You know, we are a retailer, so when you go into Macy's and look at shirts, you can go to a different store and look at shirts. You don't ask them to tell you what the wholesale price is and whether they——

Mr. STUPAK. No, but we see the bottom line for that shirt, don't we? When I get my cable bill, I don't see the price for Golf Channel, I don't see what it is for ESPN, I don't see what it is for ABC, CBS.

Mr. BRITT. That is true, because we don't—we sell in lots of different packages. We sell some things a la carte. HBO is a la carte.

Mr. STUPAK. So why shouldn't I know what it is going to cost to buy a package in Northern Michigan?

Mr. BRITT. So we are marketing the way consumers tell us they want things, that Derek Chang's company competes with us. If they thought it was better to package things in a different way, they would do that, and their packaging is different than——

Mr. STUPAK. Well, I think that is why the a la carte movement is picking up steam, because people do want to have the right to pick and choose. I mean, I don't want to watch the Food Channel but I certainly want to watch the NFL Network, but I can't get the NFL Network, but I can get the Food Channel, or home shopping, I couldn't care less. Now, maybe my wife would think otherwise. But shouldn't the consumer really be the arbitrator of what they receive and not receive? It is almost like Mr. Cooper said——

Mr. COOPER. Mr. Stupak, I suggest you do a little exercise about a la carte choice in a digital age. When this hearing is over, go back to your computer and go to the Crayola website. There was a paper done in Mr. Ferree's proceeding called "Why are crayons sold in packages?" If you go to the supermarket, yes, you will see a box of eight or 12 with different selects that it covers. You go to the Crayola website and you can buy on an a la carte basis a combination of crayons from two to 5,000 in a box in colors from one to about 150. It is your choice, every possible selection in between, and that is Crayola crayons in a digital age. It is a physical commodity.

Mr. FERREE. Can I——

Mr. COOPER. That is the real choice.

Mr. FERREE. Because I actually—I mean, I agree with you, and the Internet is the great disruptor here, and it will no doubt drive all of this toward more consumer choice. The question is whether the government steps in now and starts messing with the current packages that again I think are evolving in a fairly competitive market between the DIRECTVs, the EchoStars and all of——

Mr. COOPER. The choice doesn't look anything like what I can get on the Crayola website.

Mr. FERREE. I am completely sympathetic to you, and people forget that I started out saying publicly I am a big fan of a la carte. I would love to have absolute choice. The reality is, when we studied it, what the effect in the market would be to reduce choice, reduce the diversity that I assume we all love—I am an opera fan. I know I am not going to get opera.

Mr. COOPER. Sure, but the FCC changed its mind about that as well in a subsequent study.

Mr. STUPAK. But if you were a cable company and you are carrying your basic sports network, why can't I have all the sports networks there, and I can choose? You carry yours on basic, but then you put it up on tiers where I can't reach it. OK.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentlelady from Wyoming, Ms. Cubin.

Ms. CUBIN. Thank you very much, Mr. Chairman.

I know that the bulk of this hearing has been about access to sports programming, and I don't want to spend any more time on that, as I truly believe that Congress should simply get out of the way and let the free market work in these negotiations. However, I do want to focus for a minute on a different topic that greatly affects consumers' access to local sports, as well as news and public television. The current designated market area system of copyright protection locks out the consumer from making decisions about what programming they would like to watch. In Wyoming, there are some counties that are part of a local, and I put quotations around local, market, that originates nearly 400 miles away and in a different State. That would be like the Washington, D.C., market originating in Boston, and I am sure that the Red Sox nation would think that was OK, but the Nationals' fans might have a different position on that, as do the people in Wyoming when it comes to watching the television that I cited before. The bottom line is this: Just like program access fights, Congress needs to get out of the way of market forces on DMA rules as well. We ought to let consumers decide what is local, rather than Congress deciding what is local for them.

Mr. Chang, in light of this, I would like to ask you about the prospect of DMA reform. As you know, Congressman Ross and I have introduced a bill to help open up DMAs to more market forces, and in the case of satellite television, would opening up the DMA system allow for greater consumer choice in programming available? Moreover, what effect would opening the DMA system have on your business and your subscribers? In other words, I guess I have asked a lot of questions all at once. Can you help explain for this committee why opening up the DMA system is important policy for us to deal with, if you think it is?

Mr. CHANG. Yes. I think you have done a good job explaining what the issue is in terms of people. There are designated market areas by Nielsen, and that is generally how local channels are distributed to those market areas, and if you live in one market area, you can't generally see the programming from another market area, and I think that from our standpoint we clearly abide by those rules and sell our programming that way to the extent that it was available to us to sell programming in a different fashion that would allow more customers to see it from other market areas. You know, within the constraints of our technology, we would probably support that.

Ms. CUBIN. If the DMA system were open to allow for adjacent markets like the Television Freedom Act does, Mr. Ross's and my bill, would that allow DIRECTV to offer more local stations to your consumers than you currently offer?

Mr. CHANG. Not necessarily in every case, but in a large number of cases it probably would, yes.

Ms. CUBIN. Mr. Britt, my intent for the Television Freedom Act was to allow both satellite and cable to offer in-State television programming to consumers who live in Wyoming but are within the DMA boundaries of another State. Can you offer suggestions from a cable standpoint on how to realize that goal? Could I count on Time Warner to work with me and Congressman Ross to help develop a solution to this problem?

Mr. BRITT. Yes, and these are—cable of course is a local business, because cables are local by definition, and the interplay of the definition of DMAs and the copyright laws, all of that is very complex, and I have some familiarity with this issue but not complete, and we would be more than welcome to—eager to work with you on this.

Ms. CUBIN. I think when you learn more of the intricacies of this issue, that you will really want to be on board as well.

Does anyone else have anything else they would like to say about this?

Mr. COOPER. Yes. Your dilemma goes back to the property right that Congress created, and so Congress should not feel hesitant about redefining that property right. The problem is the following, is that you took a commercial definition, DMA, you linked it to the copyright, to the property right, and said a broadcaster could request carriage only in the DMA in which they were located, which is your problem. And fixing that to say a broadcaster can request carriage in any DMA they want would solve your problem, and of course, broadcasters are not going to ask for carriage in markets where they don't have an audience, so it would free up that market decision from what is this misfit between the commercial definition and the property right.

Ms. CUBIN. One statement. Mr. Ross's and my bill simply allows to work with adjacent DMAs, not any DMA that they choose.

Mr. COOPER. But no broadcaster is going to jump a DMA because it just doesn't have an audience that far away.

Ms. CUBIN. Right. Thank you, Mr. Chairman.

Mr. MARKEY. The gentlelady's time has expired. The Chair recognizes the gentleman from Florida, Mr. Stearns.

Mr. STEARNS. Thank you, Mr. Chairman.

Dr. Cooper, just a comment. I remember when we first got our TV, and it was black and white, and we had three or four channels and then after that it got to be 13 and then eventually 30 and now it is 75, and if you are on DIRECTV I guess it is many, many more channels. So I think the market is moving towards that, and if the consumer demands an a la carte and the cable bill keeps getting higher, I think there is going to be a blowback here, and the consumers are going to ask for some change, or they are going to go to DIRECTV, or they are going to go to the Internet. So something is going to happen here. There comes a tipping point. But when Crayola came up with all these things, they didn't have the government step in and claim discrimination for mango color or chartreuse so——

Mr. COOPER. They face real market competition.

Mr. STEARNS. Yes. Well, I think based upon what I told you that there is some market competition out there. For example, this is for Mr. Britt and Mr. Chang. I guess DIRECTV now has about 17 million subscribers, second only to Comcast. Dish is third with 14 million. Do the satellite companies still need the protection of the program access rules which were created when cable had 96 percent of the market and satellite had none? Mr. Britt, I will let you start.

Mr. BRITT. I think that is a good question, and as you know, we are essentially in favor of less government interference, not more, and we are in favor of whatever rules exist being imposed on everybody. So to the extent that there was a decision quite a few years ago now, that that was appropriate, it would seem to us the market has developed in a way that it is no longer appropriate. But——

Mr. STEARNS. So you don't think the satellite companies need the protection of the program access rules. Is that correct?

Mr. BRITT. I am sorry?

Mr. STEARNS. So you no longer think the satellite companies need the protection of the program access rules?

Mr. BRITT. That is correct, because they are bigger than everybody except Comcast.

Mr. STEARNS. Mr. Chang?

Mr. CHANG. I think that the satellite companies do still need the protection of the program access rules in that the program access rules are set up to prevent vertically integrated companies from discriminating against others in terms of taking their product and using it to their competitive advantage, and I don't think the size of a company necessarily matters in terms of what the principle there is.

Mr. FERREE. Mr. Stearns, could I just add one thought to that?

Mr. STEARNS. Sure.

Mr. FERREE. You know, the program access rules of 1992, you know, it was genius. It was absolute genius at that time because of the way the market was structured. The vision that came——

Mr. MARKEY. Thank you.

Mr. STEARNS. Mr. Markey was the originator of that so genius——

Mr. FERREE. I realized that. That is why I said it. But the vision behind it was that the pipes would all compete based on price but all carry essentially the same kind of programming. That is not the way the world has to work. The different access mechanisms, the different distribution platforms could compete on content as well as price, and we may be at a place in the market where it is time to start thinking about allowing them to do that.

Mr. STEARNS. Here are just two general comments. If, for example, everybody is passionate about their sports back in my district as I am sure everybody else is, and I think these fans would get quite upset, and they would call me or call somebody if a highly popular channel like ESPN was moved to a sports tier where they would have to pay more for what they are already enjoying today. There would be a hell of an uproar. So Mr. Bodenheimer, do you agree with that?

Mr. BODENHEIMER. Wholeheartedly.

Mr. STEARNS. But just my last point. As I told the chairman, we were just talking informally, there seems to be another revolution here. I think all of us are tired of flipping through the channels and getting tired with so many channels. It must be extremely frustrating, because now you have high-definition channels, you flip through 13 or 14, then you go back to your analog channels. So once you get all these high-definition channels and you are flipping through those, you get tired of it, so then you go to the Internet and pull up the programming for that day, and then you scroll through all that programming, and it is a lot of scrolling, too, and so you have to say, you know, what am I looking for. I think the next revolution is somehow that you could go to either DIRECTV or to cable or to your Internet and give your preference in a program way, so that instead of flipping through, you would be down to maybe 10, 15, no more than 20 channels through this artificial intelligence, which would decide based upon your past experience. Instead of an a la carte, you could offer the consumer, we will give you a preference price of X dollars based upon your preferences and it will tell you every day what is something that you would enjoy, and I would like to see that. Obviously I would put sports in it, I would put the History Channel, I would put the politics, and so that is—I am just touching on the base of this because it seems to me it is so time consuming to either scroll through looking for the program, looking at the TV Guide or possibly looking at the television itself.

Thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired, and all time for questions has expired. I am going to ask each one of the witnesses to give us a 1-minute summation. We will do it in the same order as the opening statements to tell us what it is that you want us to know as we are completing this hearing. And on the issues raised by Ms. Cubin, I think when Congress revisits the Satellite Home Viewer Act, that her issues are definitely appropriate for that discussion. So we will ask each of the witnesses for their final 1-minute summation to us, and as well if you would give us your prediction as to who will win the NCAA tournament. We will begin with you, Mr. Ferree.

Mr. FERREE. I feel like Hillary Clinton. Why do I always get the first question here? My summation will be quite brief. The market generally works here. That is not to say there can't be market failures, but the market generally works here. I would be hesitant for the government to step in, because God knows where it goes once it starts to create something as we did with the arbitration provisions and the DIRECTV-News Corporation merger. They start to take on a life of their own. I actually am sympathetic to the concerns of Mr. Cooper, and I think a la carte would be a great thing in theory. In practice right now, I don't think it is workable, and it would reduce consumer choice.

Mr. MARKEY. Thank you, Mr. Ferree, very much. I know Hillary Clinton. Hillary Clinton is a friend of mine, Mr. Ferree. You are no Hillary Clinton.

Mr. Britt.

Mr. BRITT. Thank you. I think we have a vibrant market that is at work here. There is a ton of programming, a ton of sports programming, more every year. There are lots of distributors that are competing with each other with varying degrees of success. As in any marketplace, not everybody is always happy with every outcome, and there is sometimes a tendency for those who are unhappy to seek government intervention, but my view is that it is certainly not necessary at this point, and let the market work.

Mr. MARKEY. Thank you, Mr. Britt.

Mr. Goodell.

Mr. GOODELL. Well, Mr. Chairman, thank you again for the opportunity today. I think we all agree that competition is beneficial to consumers. I think we all agree that a free market is beneficial to consumers and to all of us as businessmen. I think the reality here that we have got to keep focused on here is that while there is greater competition and there are greater opportunities for consumers, the reality is, in the 1992 Act there was specific consideration to discrimination, and you know this better than anybody with respect to channels that are owned by cable operators. The facts are clear here that the cable operators' channels, sports channels in particular, are getting greater distribution than those of independent channels. We will survive this, and we are going to succeed long term with greater distribution of the NFL Network, but independent programmers can't survive without distribution on the two largest cable operators, who own their own channels, and we think this is good for consumers. We are not looking for new legislation. We are looking for the FCC to enforce the procedures and the rules that you established back in 1992. Thank you.

Mr. MARKEY. Thank you, Mr. Goodell.

Mr. Bodenheimer.

Mr. BODENHEIMER. Thank you, Mr. Chairman, and thank you also for the invitation to be here with you today. I think the American consumer is served as well as any consumers in any country in the world with the vibrancy of the video marketplace we have going in this country, and that comment is intended to be beyond just the sports business that we are focusing on here today. There has never been more choice advanced by the competition we have and the technology advancements, and I only see that continuing, and I see more choice for consumers down the road, and I think this industry will continue to serve this country very well. Now, on the more important question that you posed, I believe the Connecticut women Huskies are going to win the NCAA championship this year. We televised all 63 or 64 games on ESPN as part of this beautiful, broad, high-value expanded basic package, so enjoy.

Mr. MARKEY. Thank you, Mr. Bodenheimer.

Dr. Cooper.

Mr. COOPER. More competition is not necessarily enough competition. There is clearly more, but is it enough? If cable bills hadn't tripled since the passage of the 1996 Act and the size of the basic bundle hadn't grown to four times the number of programs actually watched, channels watched by typical households, you might have a better case that there is enough competition out there. There is not enough competition to protect the consumer from abuse. The simple solution in today's age, where cable operators cover the fixed costs from three different services, can sell hundreds of channels on-demand, the simple solution is to give consumers choice, make ESPN sell their product directly to the consumer, not indirectly through the cable operators. If you can't bring yourselves to do that, then give me a balanced, level playing field. Let all the program channels compete either in a tier or in basic, and at least we will get supply-side competition.

Mr. MARKEY. Thank you, Dr. Cooper.

And you have the final word, Mr. Chang.

Mr. CHANG. Thank you. On behalf of DIRECTV, again I would just like to thank the committee for the 1992 Cable Act, because I think without that, DIRECTV would not be as competitive as it is, and it might not even exist, and you know, on two fronts, clearly our access to programming owned by the cable companies, and on the second, that our ability to compete by creating differentiated product and content, whether it is through exclusive deals with third parties through independent negotiations or enhancements that we do through our technology that enabled us to compete in a very competitive environment. We at DIRECTV, given the nature of our technology, are not, unfortunately, able to provide certain other services like voice and broadband to the extent that the cable companies and phone companies are, so we pride ourselves on our ability to be able to differentiate our content and really drive that competition across the board. Thank you.

Mr. MARKEY. Thank you very much, Mr. Chang.

Ms. CUBIN. Mr. Chairman.

Mr. MARKEY. The gentlelady?

Ms. CUBIN. I just thought that I should give you some information that you might need. I am pretty sure that the Wyoming Cowgirls are going to beat the Huskies, because we won the NIT last year, and so I am pretty sure we will win the NCAA this year.

Mr. MARKEY. I thank the gentlelady.

Ms. CUBIN. You are very welcome.

Mr. MARKEY. And actually the gentlelady's comment is a good indication of—you know, there is an old saying that a congressional expert is an oxymoron, that Congressmen and Congresswomen are only experts compared to other Congressmen or -women, not compared to real experts, with the notable exception of television and sports, where each of us, like every American, has a clicker on average in their home on an average of 5 or 6 hours a day, which is why the 1992 Cable Act is the only bill which overrode a veto of the first President Bush. He vetoed 35 bills. One was overridden, and it was because members of this committee of the House and Senate and the American people understood that there had been a denial of programming to a satellite industry that was now an 8-foot dish that required a zoning variance in some backyard in Iowa but was really not quite appropriate for Boston or New York on a triple-decker home. So this had a broad-based appeal, and we were able to override the President's veto and create this satellite revolution and many other things that were part of that cable bill, and it all goes to access to content, access to programming, making the consumer king.

I think it is telling that the NFL is testifying here today and that they are having difficulty in the marketplace. We are not talking here about the proverbial kid in a garage or even the Big Ten network. We are talking about the NFL, and it doesn't appear to me that Mr. Goodell particularly enjoys coming back before the Commerce Committee for the second week in a row. So this is a subject obviously that has had a lot of attention from this committee over the years, and it will continue to have our attention because we want to make the consumer king and we want the marketplace to work, and that is ultimately our goal and the only thing that we can really be expected to try to achieve.

We thank each of you for your testimony here today. It has helped us enormously. We will be following up on this hearing in the weeks and months ahead. With the thanks of the committee, this hearing is adjourned.

[Whereupon, at 11:48 a.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

STATEMENT OF HON. JOHN D. DINGELL

From the 1947 World Series between the Brooklyn Dodgers and the Cincinnati Reds, to Billie Jean King beating Bobby Riggs, to the USA Olympic Hockey team beating the USSR, right up to the New York Giants recently beating Chairman Markey's beloved New England Patriots in the latest Super Bowl, many of this country's greatest sporting events have been broadcast free on over-the-air television for all consumers to enjoy.

My constituents in Michigan have reveled in the broadcast of Michigan/Ohio State football clashes, the historic interstate basketball rivalries between the Wolverines and the Spartans, and the triumphs and travails of our professional teams, the Tigers, Red Wings, Pistons, and most recently, our women's basketball team, the Detroit Shock. Our high hopes for our Detroit Lions remain, well, perpetual.

My constituents are no different from those in other districts that are home to collegiate or professional teams: we all want to watch our teams compete.

Today's hearing asks whether these events will continue to be removed from free, over-the-air broadcast television to the detriment of our local communities. Monday Night Football has moved from network television to ESPN. While new conference networks like the Big Ten Network are airing more college sporting events like lacrosse and field hockey, they are also shifting college football games away from broadcast television.

Taxpayers have a vested interest in this question. Taxpayers finance public universities and approve public financing for professional sport venues. Cities, counties, and States have provided support in other ways, including financial incentives and the use of public resources. It is therefore logical and fair that taxpayers should be able to enjoy the fruits of their investments and continue to see local teams in free, over-the-air broadcasts.

I am concerned by the ever increasing migration of sports programming to pay TV. I hope to hear assurances from today's witnesses that marquee sporting events will remain available on free, over-the-air broadcast television. I urge my colleagues to keep a close eye on this disturbing trend.

STATEMENT OF HON. BART STUPAK

Thank you, Mr. Chairman, for holding this hearing on competition in the sports programming market.

While it has never been a question that Northern Michigan residents like their football, last November's Green Bay Packers vs. Dallas Cowboys game proved how much. The game, which was carried by the NFL Network, was almost completely missed by Northern Michigan fans despite a broadcasting agreement the local station had made.

The situation was resolved by last minute cooperation between the local broadcaster and the NFL Network. However it does show how important this issue is to people, and it also shows that with cooperation these types of disputes can be resolved.

In 2006, the NFL Network channel was carried by several cable companies on the basic tier of cable service. However, in 2007, cable companies decided that NFL Network would no longer be viewable on the basic tier by being moved to a new digital sports tier.

As a result, consumers are now required to pay additional monthly fees to enjoy a service that originally was given to them at the most basic tier.

The current disagreement between cable companies and the NFL Network limits the availability of several NFL games. This prolonged dispute has frustrated fans all across the country, and they want it to end. Because these two sides cannot come to an agreement, the consumer is forced to pay the price.

To help resolve this issue, I have written the FCC to request that they appoint an arbitrator to serve as an independent 3rd party. No side is guaranteed an outcome through this process, but it will hopefully bring about an agreement which I think is long overdue.

The NFL Network is not the only independently owned channel to face difficulties in securing carriage agreements.

The FCC has opened a rulemaking proceeding to consider program carriage of independently owned channels. Chairman Martin stated that the current process does not work, and I think we should consider changes that facilitate carriage negotiations to find a common ground.

Under the current process, many independently owned channels feel compelled to consider selling themselves to larger companies in order to increase their leverage. This will lead to further concentration of ownership and will reduce diversity in media and negatively affect consumer choice.

While Congress cannot and should not force a cable or satellite station to carry a certain network, it is my hope that the cable companies and independently owned channels like the NFL Network can negotiate carriage deals that allow consumers more access to programming and sporting events.

STATEMENT OF HON. ED TOWNS

Thank you Chairman Markey and Ranking Member Stearns. I am very pleased that the Subcommittee is holding this hearing. I look forward to learning how our sports programming marketplace is working. Our constituents want to know that they will have access to the games of their choice at a reasonable price.

I also want to welcome the witnesses and thank them for their assistance. Sports programming is some of the most popular on TV. I know I love it. There are many more options of how we can receive it now, too, which reflects the innovation that has happened in the video market in such a short time. Because it is so popular and high quality nowadays, it is also expensive.

Sports fans are an incredibly passionate group, so I look forward to hearing from the witnesses on what role, if any, they think government should play. We must maintain a balance that keeps access to the programming as widespread as possible but maintains the innovation and high quality we have become accustomed to.

Thank you, and I yield back the balance of my time.

STATEMENT OF HON. ELIOT ENGEL

Chairman Markey, Ranking Member Stearns—

Thank you for holding this hearing today.

With the increase in televised sporting events coinciding with the increase in sports networks in recent years, this is an issue well worth examining.

Flipping through my television listings, it seems like there's a new sports channel popping up every day. There are a wide variety of sports channels to choose. From the old standby ESPN, to the Golf Channel, to the relatively new NFL Network, to the ever more popular regional New England Sports Network, which, Chairman Markey, I'm sure you're familiar with, it is no wonder that consumers are confused or have trouble finding the broadcast of the games of their favorite teams.

Today, I hope we can sort through some of the confusion that broadcast, cable, satellite, and now FIOS customers are feeling. Some games are only broadcast on cable, and some are only on satellite.

It should be our goal to make it as easy as possible for sports fans to find the games they want to watch. I'm gratified to see such an excellent panel of experts here today. I am eager to hear their testimony.

Early this year, the Patriots' final game of the season was to be broadcast only on the NFL Network, which many people across the country cannot access. NFL Commissioner Roger Goodell wisely decided to share the broadcast with CBS and FOX, in addition to the NFL Network. This was an historic game that millions of people wanted to watch, and your cooperation and agreement to share the broadcast no doubt won you the goodwill of many fans across the country. It is my hope that networks and cable and satellite providers can work together to ensure that everybody, especially the consumer, wins.

As a diehard sports fan myself, I want to make sure that the millions of other fans across the country are able to watch their favorite team play. If we can do that, then a nation of sports fans will thank us.

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