

**EXCLUSIVE SPORTS PROGRAMMING: EXAMINING
COMPETITION AND CONSUMER CHOICE**

HEARING

BEFORE THE

**COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION**

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

MARCH 27, 2007

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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**EXCLUSIVE SPORTS PROGRAMMING:
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AND CONSUMER CHOICE**

TUESDAY, MARCH 27, 2007

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m. in room SR-253, Russell Senate Office Building. Hon. John F. Kerry, presiding.

**OPENING STATEMENT OF HON. JOHN F. KERRY,
U.S. SENATOR FROM MASSACHUSETTS**

Senator KERRY. Good morning.

This hearing of the full Commerce Committee will come to order. Thank you very much for being here this morning, I appreciate it.

I want to welcome all of our witnesses, I'm grateful to them for taking time to come in and discuss an important topic—certainly important to fans of baseball, and indeed, I think a lot of sports are interested in what is happening with respect to carriage and access. So, I think this gives us an opportunity to explore, a little bit, where we find ourselves today.

Last year baseball fans were able to buy what are called “out-of-market” games through their cable and their satellite providers. The package of games as it was presented, and is presented, is called “EXTRA INNINGS” and it allows fans around the country to follow their home teams, no matter where they are in the country.

And so, whether a member of the Red Sox Nation, or any other extended fan base, people living in another city, or even another part of the country, get access to those games for about what it costs a family of four to attend one game.

Press reports then indicated that Major League Baseball was close to announcing an exclusive deal with DIRECTV for carriage of these games—and what we want to do today is explore the parameters of this deal a little bit.

Yogi Berra once said, “You’ve got to be very careful if you don’t know where you’re going, because you might not get there.” That sentiment is as timely now as ever. We want to examine where the parties are going, and whether this deal is, in fact, going to get them there. Is it in the best interest of consumers? Does it serve sports fans, and does it serve public interest? These are legitimate questions.

Baseball, as we all know, is an integral part of our culture. Commissioner Selig himself has said that baseball is a social institution with enormous social responsibility, and many of us here agree with that.

Recognizing that, baseball has also benefited from an array of favorable government policies. The sport enjoys a broad antitrust exemption. That allows them to negotiate carriage deals, and gives them tremendous market power.

Baseball has also received billions of hard-earned tax dollars to support stadium construction around the country. Right now, only a few blocks away from here, the new Washington Nationals stadium is being built.

One economist estimates that between 1989 and 2001, 16 baseball-only stadiums were constructed at a total cost of \$4.9 billion; \$3.7 billion of that cost was borne by public revenues, taxpayer money.

We should support baseball, and I happen to personally believe in helping to build stadiums, because I think there's an economic return. I believe baseball, however, ought to also serve the public interest. Therefore, it's fair to expect that they will provide broad access to their games.

Last year, it cost a family of four almost \$180 on average—depends obviously on parking and some other costs, but on average—about \$180 to attend a Major League Baseball game. For a lot of families, and for people living on fixed incomes, the cost of attending a game is getting tougher and tougher. Nevertheless, there were a record number of fans attending Major League Baseball games last year, a reflection of their passion and commitment to the game, and their willingness and ability also, to make choices.

We're now less than a week away from the baseball season, and over 250,000 people will lose access to their team's games as they have experienced them and enjoyed them in the past.

Let me say at the outset—I'm concerned in general about some of the exclusive carriage deals in the sports industry. Obviously, I can understand from an economic point of view how they are good for short-term financial needs or interests of the sports leagues, and they may improve the competitive position of the cable or satellite firms that get those rights. It's not hard to see the business advantages.

But, we also need to discuss the impact of these business changes on the baseball fans. A lot of people are concerned, and have expressed that concern publicly, that when fans lose access to their favorite team, or as they're forced to change their TV service just to see the games, then, that is not necessarily fair. It works a real inconvenience on a lot of people, and many people think that is the wrong choice to provide them.

Obviously sports leagues have tremendous market power. What we need to do is ensure that their market power works in the public interest.

The American people and fans have not been shy about expressing their feelings about this deal. If the truth be told, a lot of baseball fans across the country are disappointed, and some are very angry.

So, as we come here today, we have approximately 250,000 baseball fans that currently pay a premium to see their team, and they will lose access to those games unless they switch to DIRECTV.

My sense is that people should not have to cancel their current service, and switch it in order to be able to gain access to the service they've had, or one they want to have now.

We've heard from a lot of fans, also, who don't have the ability to switch to satellite, even if they want to. So, what we need to do today is look at the long-term interest in the sport, examine this deal, hear from the parties, and really just examine what the end-product of this deal is, and measure it against the public interest that's on the table.

[The prepared statement of Senator Kerry follows:]

PREPARED STATEMENT OF HON. JOHN F. KERRY,
U.S. SENATOR FROM MASSACHUSETTS

I would like to welcome our witnesses. We are conducting this hearing today to discuss sports programming in general—and baseball in particular—a very popular topic this time of year in Massachusetts and all over the country.

Last year, baseball fans were able to buy what are called “out-of-market games” through their cable and satellite providers. The package of games is called “EXTRA INNINGS,” and allows fans to follow their home team. So Red Sox's fans living in Washington or California could still get access to most Red Sox games for about what it costs a family of four to attend a game.

Press reports indicated that Major League Baseball was close to announcing an exclusive deal with DIRECTV for carriage of these games. We will evaluate this deal.

Yogi Berra was once heard to say, “You've got to be very careful if you don't know where you are going—because you might not get there.”

That sentiment is as timely now as ever. We want to examine where the parties are going—and whether this deal will get them there. Is this type of deal in the best interest of consumers? Does it serve the sports fans? These are legitimate questions.

Baseball is an integral part of American culture. Commissioner Selig himself has said that baseball is a social institution with enormous social responsibility. I agree with him.

Recognizing that, baseball has benefited from an array of favorable Government policies. The sport enjoys a broad antitrust exemption. It allows them to negotiate carriage deals, and gives them tremendous market power.

They receive billions of hard-earned tax dollars to support stadium construction. Right now, only a few blocks away from here, the new Washington Nationals stadium is being built. One economist estimates that between 1989–2001, 16 baseball-only stadiums were constructed at a total cost of \$4.9 billion; \$3.7 billion of that cost borne by public revenues—taxpayer money.

We should support baseball, and in return, I believe baseball should serve the public interest. It is fair to expect baseball to provide broad access to their games.

Last year, it cost a family of four almost \$180 to attend a Major League Baseball game. For too many families and people living on fixed incomes, the cost of attending a game is getting out of reach. Still, a record total of 76 million fans attended Major League Baseball games last year.

We are now less than a week away from the baseball season and over 250,000 people will lose access to their team's games.

Let me say at the outset, I am concerned about exclusive carriage deals in the sports industry. These deals may be good for the short-term financial interests of the sports leagues; they may improve the competitive position of the cable or satellite firms that get the rights—I have no doubt that there are business advantages.

But we need to discuss the impact of these business changes on baseball fans as well. I am concerned when fans lose access to their favorite team; or, as we will discover today, they are forced to change their TV service just to see games. That is wrong. That is a sign that the system is not working.

The sports leagues have tremendous market power. We need to ensure that the deals that are cut serve the public interest.

Yogi Berra also was heard saying, “You can observe a lot just by watching.”

Well, the American people are watching, and fans are watching, and they have not been shy to express their feelings about this deal. Truth be told, baseball fans all over this country are disappointed and some are outraged.

As we stand here today, approximately 250,000 baseball fans that currently pay a premium to see their team will lose access to those games—unless they switch to DIRECTV.

Baseball is important to America. I believe that baseball fans living outside the state of their favorite team should continue to have access to Major League games without having to cancel their current service.

Why should fans have to do that? We have heard from many fans that do not have the ability to switch to satellite if they want to. That is not fair, and I'm not sure it is in the long term interest of the sport.

With today's hearing, we will get the facts on the record. And I urge the parties to work together, in good faith, to ensure we have broad carriage of the EXTRA INNINGS package this year.

I welcome our witnesses.

Senator Stevens?

**STATEMENT OF HON. TED STEVENS,
U.S. SENATOR FROM ALASKA**

Senator STEVENS. Thank you, Mr. Chairman.

As I understand it, this hearing focuses on a deal between Major League Baseball and DIRECTV as it relates to out-of-market games, which allows someone that has moved to watch their favorite team from far away.

Now, Alaska doesn't have a Major League Baseball team, so all MLB games are out-of-market for us. But I'm anxious to hear what DIRECTV and Major League Baseball will do to ensure that Alaskans and people similarly situated can take advantage of these offerings.

While we only look at baseball today, exclusive contracts exist in relation to other sports, as well, such as the NFL, and in some instances, cable companies have the exclusive rights to local sports programs, and satellite providers cannot afford to purchase that programming. Of course, Alaskans are hockey nuts, so I don't think we're involved too much in this hearing today, but I do look forward to hearing from the panel, to learn whether they think there should be a role for Congress to play in the sports programming marketplace.

I'm sorry to tell you that we've got two competing hearings, one is where Senator Inouye and I will have to join in after the statements, but I do hope to hear the statements as they're presented by the witnesses. Thank you.

Senator KERRY. Senator Stevens, thank you very, very much. And, I know that Senator Specter is going to be here at some point. He has a competing hearing, and even though he is not a member of the Committee, he did express a desire to come by, and he will do that, as well as a number of other Senators.

I'm delighted to welcome Rob Jacobson, the President and CEO of iN DEMAND Networks; Stephen F. Ross, Professor of Law, Dickinson School of Law, at Pennsylvania State University; Mr. Carl Vogel, Chairman and Vice President, EchoStar Satellite Systems; Robert DuPuy, President and Chief Operating Officer of Major League Baseball; and Mr. Chase Carey, President and Chief Executive Officer of DIRECTV Group. Thank you all for being here, we appreciate it, we'll start with you, Mr. DuPuy. Thank you.

**STATEMENT OF ROBERT A. DUPUY, PRESIDENT AND COO,
MAJOR LEAGUE BASEBALL**

Mr. DUPUY. Thank you, Mr. Chairman, Mr. Vice Chairman. I appreciate the opportunity to appear before you today to discuss baseball's recent agreement with DIRECTV for the MLB Channel, and MLB EXTRA INNINGS package, and outline what we believe are the deal's benefits for the significant majority of our fans, and to use your words, in the best interest of our consumers.

We are particularly pleased with something you didn't mention in your opening statement, Mr. Chairman—that so many baseball fans, will have access to our all-baseball channel when it launches. And we're grateful to DIRECTV for helping us make that happen.

It's important to emphasize at the outset, that our desire is to have as much distribution of our games as possible. Our contract with DIRECTV permits iN Demand, and the DISH Network, to distribute the MLB Channel and the EXTRA INNINGS package, also. We hope that they agree to match DIRECTV's commitment to our fans.

Additionally, we would like to be clear that both iN Demand and the DISH Network were given a full opportunity to participate in negotiations over 9 months for the rights that we were granting.

Bluntly put, this is not a matter of fans being unable to view Major League Baseball's out-of-market games. It is a matter of some fans not being able to watch those games on a particular delivery system.

Out-of-market games are still available. Even if iN Demand and DISH do not choose to participate, they are available on multiple platforms. Baseball provides more telecast to its fans than any other sport. Including local broadcasts, there are about 4,500 television broadcasts per year. After a lengthy negotiation over the renewal of a single complimentary package of games, those games were awarded to DIRECTV. But, even now, the other bidders have been given the chance to match negotiated terms.

If iN Demand and DISH choose not to step up to the plate, fans will still have several options. They can switch to DIRECTV, they can subscribe to MLB.com and watch the games on the Internet, and they can watch the roughly 400 games that every fan, in every major league market has available, without the out-of-market package. That includes virtually every one of the local market games, all of the games that we have on ESPN, Turner and FOX, and the All-Star game and complete post-season. That is an average of two games per day during our season.

Fans can also, of course, listen to local games on the radio, and all of our more than 2,400 regular-season games nationwide, on XM Satellite Radio.

Business arrangements such as our agreement with DIRECTV are not unusual. During the negotiation period, every carrier had an ability to bid, and each of them put in a bid to carry the games exclusively. To watch the Sopranos, you must subscribe to HBO, not Showtime or Cinemax. To watch the NFL out-of-market games, you must subscribe to DIRECTV. To watch the NCAA and NASCAR specialized packages, you must similarly subscribe to DIRECTV.

An even better example involves, ironically, the behavior of two of the members of the iN DEMAND consortium. To watch Phillies games, in Philadelphia—not in Utah, but in Philadelphia—you must subscribe to cable. Comcast, the dominant cable provider in the Philadelphia area, does not make the games available to satellite distributors.

To watch Padres games in San Diego, you must subscribe to cable, because Cox, another member of the iN DEMAND consortium, does not make the games available to satellite. In Philadelphia alone, more than 400,000 satellite subscribers are denied the ability to watch their hometown Phillies, or Flyers, or 76ers because of Comcast. That is more than twice the number of subscribers the entire iN DEMAND syndicate had nationally for the EXTRA INNINGS package last year.

Our agreement with DIRECTV has two principal components. First, DIRECTV will launch the MLB Channel as part of the Total Choice Basic Service with over 15 million subscribers throughout the Nation when the network becomes available. DIRECTV will have only non-exclusive carriage rights for the MLB Channel.

Second, DIRECTV will offer its subscribers the MLB EXTRA INNINGS package, as it has done during each of the last 11 years. We are excited by the launch of the MLB Channel. We consider it a key to reaching the next generation of fans. Achieving carriage of new programming networks is a difficult proposition in today's marketplace, and DIRECTV's commitment to distribute the channel to at least 80 percent of all of its residential subscribers provides an exceptional start for the channel.

It is also to our many fans great benefit that DIRECTV will be carrying the EXTRA INNINGS package. DIRECTV has a proven track record of developing features that significantly enhance the viewing of the telecasts they carry, such as the NFL and NASCAR broadcasts.

It is also worth repeating that all Major League out-of-market games will still be available online through MLB.com, which beginning this season will offer an upgraded picture quality.

In summary, Mr. Chairman, baseball believes strongly in our business judgment, and that the agreement we have reached with DIRECTV will provide real benefits to the greatest number of baseball fans.

Thank you, again, for the opportunity to appear today. I have attached to my written testimony the report on this subject that we submitted to the FCC on March 21, and I would ask that a copy of my full statement and that report be made part of the record of this hearing.

[The prepared statement of Mr. DuPuy follows:]

PREPARED STATEMENT OF ROBERT A. DUPUY, PRESIDENT AND COO,
MAJOR LEAGUE BASEBALL

Good morning, Mr. Chairman. My name is Robert DuPuy, and I am the President and Chief Operating Officer of Major League Baseball. I appreciate the opportunity to appear before you today to discuss Baseball's recent agreement with DIRECTV for The MLB Channel and the MLB EXTRA INNINGS package and to outline what we believe are the deal's benefits for our fans. We are particularly pleased that so many baseball fans will have access to our all-baseball, all-the-time channel when

it launches in 2 years, and we are grateful to DIRECTV for helping us make this happen.

It is important to emphasize at the outset that our deal with DIRECTV permits iN Demand, the consortium created by the cable industry, and the DISH Network to distribute The MLB Channel and the EXTRA INNINGS package also. We hope that they agree to match DIRECTV's commitment to our fans. Additionally, we would like to stress that both iN Demand and the DISH Network were given a full opportunity to participate in negotiations for the rights that we were granting.

I want to make one point abundantly clear. This is not a matter of fans being unable to view Major League Baseball's out-of-market games. It is a matter of not being able to watch those games on a particular system. Out-of-market games are still available, even if iN Demand and DISH do not choose to participate, and are available on multiple platforms. Baseball provides more telecasts to its fans than any other sport. After a lengthy negotiation over the renewal of a single package of games, those games were awarded to DIRECTV, but even then, the other bidders have been given a chance to match the negotiated terms. There is nothing sinister, illegal, wrongful or frankly unusual about that form of business negotiation or result. In fact, as I will explain later, we believe the result is a benefit to our fans.

If iN Demand and DISH choose not to step up to the plate as DIRECTV has done, fans will still have several options. They can switch to DIRECTV, they can subscribe to MLB.TV and watch the games on the Internet, and they can watch the roughly 400 games that every fan in every Major League market has available without the out-of-market package. That includes virtually every one of the local market games (Red Sox fans throughout the Red Sox' home territory are completely unaffected by this deal), all of the games on ESPN, Turner and Fox, and the All-Star Game and complete post-season. Given that our season and post-season are about 200 days, that is about two games per day. Of course, fans can also listen to local games on the radio and all of our more than 2,400 regular season games nationwide on XM Satellite Radio.

As I mentioned, business arrangements such as our agreement with DIRECTV are not unusual. During the negotiation period, every carrier had an ability to bid, and each of them put in a bid to carry the EXTRA INNINGS package exclusively. To watch the Sopranos, you must subscribe to HBO, not Showtime or Cinemax. To watch the NFL out-of-market games, you must subscribe to DIRECTV. To watch the NCAA and NASCAR specialized packages, you must similarly subscribe to DIRECTV. An even better example involves ironically the behavior of two of the members of the loudest complainant here, the iN Demand consortium. To watch Phillies games in Philadelphia (not in Utah, in Philadelphia) you must subscribe to cable. Comcast, the majority owner of iN Demand and the dominant cable provider in the Philadelphia area, does not make the games available to satellite distributors. Similarly, to watch Padres games in San Diego, you must subscribe to cable because Cox, another member of the iN Demand consortium and the dominant cable provider in the San Diego area, does not make the games available to satellite. In Philadelphia alone, more than 400,000 satellite subscribers are denied the ability to watch their home town Phillies (or Flyers or 76ers) because of Comcast. That is more than twice the number of subscribers the entire iN Demand syndicate had nationally for the EXTRA INNINGS package last year. And yet, when after a 5-month negotiation, iN Demand was the unsuccessful bidder, and even after it was given the ability to match the DIRECTV terms and conditions, rather than do so, iN Demand instead complained to Congress for a better business deal than it could negotiate.

As we explained in great detail in our report to the FCC, our agreement with DIRECTV, which covers the years 2007 through 2013, has two principal components. First, DIRECTV will launch The MLB Channel as part of its "Total Choice" basic service—with over 15 million subscribers throughout the Nation—when the network becomes available in 2009. The MLB Channel will be the first and only network dedicated to providing baseball programming 24 hours a day, 7 days a week on a year-round basis. The MLB Channel will likely include regular-season MLB games, as well as a mix of Spring Training games, Minor League games, games of other professional or amateur leagues, highlight shows and other programming that will be designed to appeal to MLB's broad fan base and that would not otherwise be available to them. DIRECTV will have only non-exclusive carriage rights for The MLB Channel, in which it will own a minority stake, and we will aggressively pursue deals with other distributors.

Second, DIRECTV will offer its subscribers the MLB EXTRA INNINGS package, as it has done during each of the last eleven years. This package supplements national and local telecast rights. Again, our agreement with DIRECTV also allows Baseball to license the EXTRA INNINGS package to those entities that carried it

last year, iN Demand and DISH, provided they agree to rates, rights fees and carriage commitments consistent with those to which DIRECTV has agreed. This includes a commitment to distribute The MLB Channel to at least 80 percent of their total residential digital subscribers, which in the case of iN Demand translates to approximately 40 percent of all the subscribers of its owners, a lower threshold than required for DIRECTV, which must distribute it to 80 percent of all of its subscribers. Retaining the ability to license the EXTRA INNINGS package to the DISH Network and the cable universe through iN Demand was something we did because of our desire to provide the greatest amount of baseball to the greatest number of fans.

It bears repeating that nothing in the DIRECTV agreement will affect any of the national telecast rights described above or any club's local telecasts rights. Not a single fan needs EXTRA INNINGS to watch his or her local team's games. This situation stands in direct contrast to the situation in Philadelphia described earlier, where the regional sports network Comcast SportsNet distributes its *local games* only via cable, in an area in which Comcast Corporation, owner of Comcast SportsNet, is the dominant cable provider, and the similar situation in San Diego with Cox Channel 4 and its owner Cox Communications, again the dominant cable provider and again involving *home team* games.

We are excited by the launch of The MLB Channel. Achieving carriage of new programming networks is a difficult proposition in today's telecommunications marketplace, and DIRECTV's commitment to distribute The MLB Channel to at least 80 percent of all its residential subscribers provides an exceptional start for the service. Contrary to statements that iN Demand has made, it has never offered to match this commitment. We hope and expect distribution will increase among other programming distributors. In the meantime, however, at launch 15 million DIRECTV subscribers will receive an attractive selection of games and other Baseball programming. During the course of our negotiations with the other distributors, comments have been made—some might call them threats—to the effect that if we do not acquiesce to the demands of the other distributors and make EXTRA INNINGS available on their terms, then they will never agree to carry The MLB Channel. Notwithstanding these comments, we are confident that The MLB Channel will be of significant interest to a wide audience, reflecting the broad appeal of our game, even broader than some channels that are currently widely distributed by the other distributors.

It is also to our many fans' great benefit that DIRECTV will be carrying the EXTRA INNINGS package. DIRECTV has a proven track record of developing features that significantly enhance the viewing of the telecasts they carry. We were particularly impressed by the types of innovations DIRECTV brought to the NFL's out-of-market package "Sunday Ticket" and NASCAR's "Hot Pass." DIRECTV's plans for the EXTRA INNINGS package include a "mosaic channel" (with up to 8 game telecasts shown simultaneously on a single screen); a "Strike Zone Channel" that provides viewers live cut-ins of games in progress at key points; high definition telecasts; and other innovations to be developed.

We are aware that a limited number of homes in the United States cannot receive satellite delivered programming because of line-of-sight difficulties. We wish that were not the case, but the number of such households is a small fraction compared to the number of households that will receive The MLB Channel beginning in 2009. It has always been Baseball's objective to achieve wide distribution for its telecasts and to serve the greatest number of fans. We believe the launch of The MLB Channel is consistent with that objective and with Baseball's longstanding telecast practices that have generated such an overwhelming number of national and local viewers. Again, we aim to serve the greatest number of our fans, not a small number of distributors.

It is also worth emphasizing that all of the Major League Baseball game telecasts on EXTRA INNINGS will be available online through MLB.TV, which, beginning this season, will offer an upgraded picture quality. With future technological developments, we expect the quality of the online viewing experience of our fans to continue to improve. And with the significant growth of broadband penetration (which is now greater than that of digital cable), the total number of subscribers to our out-of-market packages (MLB.TV and EXTRA INNINGS combined) is likely to reach new highs in the coming years.

In summary, Mr. Chairman, Baseball believes strongly that the agreement we have reached with DIRECTV will provide the most benefits to the greatest number of Baseball fans. Under this deal, we have been guided by this fan-friendly approach because we view that as one of our primary responsibilities and because we believe doing so simply makes good business sense. Under this deal, DIRECTV, a long-standing MLB partner that prides itself on customer service, has made a very sig-

nificant and, in our view, appropriate commitment to its customers and to our fans. As part of this deal, we negotiated to secure for iN Demand and DISH this window of opportunity to continue as distributors of the EXTRA INNINGS package. We continue to hope that they will similarly adopt a customer- and fan-friendly approach and capitalize on their right to “opt-in” to this deal on the fair, reasonable and market-based terms offered. Thank you, again, for the opportunity to appear today. I have attached to my written testimony the report on this subject that we submitted to the FCC on March 21.

OFFICE OF THE COMMISSIONER—MAJOR LEAGUE BASEBALL
March 21, 2007

MONICA SHAH DESAI,
Chief,
Media Bureau,
Federal Communications Commission,
Washington, DC.

Dear Ms. Desai:

We appreciate the opportunity to provide you with information concerning the recently-announced agreement between Major League Baseball (“MLB”) and DIRECTV, as requested in your letter of February 20, 2007.

Our agreement sets forth the terms and conditions under which DIRECTV has committed to carry The MLB Channel and the MLB EXTRA INNINGS package (“EXTRA INNINGS”). In light of these commitments and the opportunity for EchoStar’s DISH Network (“EchoStar”) and iN DEMAND (a consortium comprised of Time Warner, Comcast and Cox) to match these commitments and “opt-in,” we firmly believe that our agreement with DIRECTV best serves not only our legitimate business interests but also the interests of our fans. We remain hopeful that EchoStar and iN DEMAND will capitalize on this opportunity and “step up” for our fans and their customers. However, even if they refuse to match DIRECTV’s commitment, our deal with DIRECTV will still ensure, over the long run, that more of our fans have access to more of our programming and in a more compelling format than ever before. As such, our agreement with DIRECTV is fully consistent with the policies adopted both by Congress and the Commission.

I. DIRECTV’s Commitment to MLB and its Fans

The MLB Channel. DIRECTV will launch “The MLB Channel,” as part of its “Total Choice” basic service package, when the network becomes available in the year 2009. Total Choice currently reaches over 15 million households across the United States. DIRECTV has committed to offering The MLB Channel, during the years 2009–13, in programming packages that reach more than 80 percent of its total residential subscribers. Because DIRECTV will have only non-exclusive rights to carry The MLB Channel, we will aggressively seek to expand distribution of the network through additional multi-channel video programming distributors (“MVPDs”).

The MLB Channel will be the first and only network dedicated to providing baseball programming 24 hours-a-day, 7 days-a-week on a year-round basis; it will serve as the TV home for all baseball fans. While the slate of programs for The MLB Channel is still under discussion, it will likely include regular-season MLB games, as well as a mix of Spring Training games, Minor League games, games of other professional or amateur leagues, highlight shows and other programming that will be designed to appeal to MLB’s broad fan base and that would not otherwise be available to them. The MLB Channel is intended to provide the in-depth televised coverage of MLB, and baseball generally, that fans cannot receive anywhere else, as well as to supplement our inventory of game telecasts. With The MLB Channel, we will no longer be solely dependent upon other networks to ensure that our fans receive the substantial number of MLB telecasts that they currently receive. DIRECTV, as a minority partner in The MLB Channel, will work with us to develop a unique and entertaining service that appeals to our fan base and helps promote interest in baseball at all levels.

EXTRA INNINGS. As it has done during each of the last eleven years, DIRECTV will offer its subscribers the EXTRA INNINGS package for a separate subscription fee during the years 2007–13. That package allows subscribers to view certain telecasts of “out-of-market” MLB regular season games, *i.e.*, games involving teams other than the subscriber’s home team. For example, the EXTRA INNINGS package made available in New York City would not include telecasts of games involving the

New York Yankees and New York Mets, but would include telecasts of games involving other MLB clubs.

We launched the EXTRA INNINGS package in 1996 to supplement and to complement the extensive array of game telecasts that we make available to the public through a variety of sources, and thereby increase the overall output of our game telecasts. In 2007, apart from EXTRA INNINGS, fans in our clubs' markets will have access to an average of more than 400 telecasts of MLB games over a combination of programming services—the FOX broadcast network, the national cable networks ESPN and TBS, superstation WGN, and multiple regional sports networks and over-the-air broadcast television stations. We are proud of the fact that no professional sports league offers its fans more game telecasts than Major League Baseball. Nothing in our agreement with DIRECTV will affect the continued availability of these telecasts.

Nor will anything in the agreement affect the availability of home team MLB telecasts, which are generally the telecasts that are most important to our fans. Indeed, home team games are not available on EXTRA INNINGS. All fans will continue to have access to game telecasts of their home club(s) in their home market without the need to subscribe to EXTRA INNINGS. EXTRA INNINGS simply allows our most avid fans the opportunity to purchase, for a separate fee, an additional package of games over and above the significant inventory they receive as part of their basic cable or satellite service.

II. Licensing of Other Incumbent Carriers

Although we are prepared to accord DIRECTV exclusive rights to EXTRA INNINGS, our objective has always been to provide as much MLB programming to as many baseball fans as possible. Thus, our agreement with DIRECTV allows us to license EXTRA INNINGS to the other incumbents that carried the package last season, *i.e.*, EchoStar and iN DEMAND—as long as they agree before the 2007 MLB season begins to rates and terms consistent and proportionate with those to which DIRECTV has agreed.

Under our agreement with DIRECTV, EchoStar and iN DEMAND will need to commit to a fair allocation of the total rights fees for EXTRA INNINGS as set forth in that agreement, based on the number of digital households that they and DIRECTV serve. Although more subscribers could receive EXTRA INNINGS if they opt-in, the total rights fees paid to MLB for that package would remain the same. And the per sub license fee for The MLB Channel also would be the same for each of the incumbents. To be sure, there would be some differences among the incumbents: (1) DIRECTV had to “step up” and make the initial commitment and thus it effectively “set the market;” (2) having made the initial commitment and certain concessions in the course of negotiations, DIRECTV alone will receive a minority stake in The MLB Channel; (3) EchoStar and iN DEMAND receive the benefit of a “right to match;” and (4) while DIRECTV and EchoStar must include The MLB Channel in programming packages that reach more than 80 percent of their *total* residential subscribers, iN DEMAND's owners and affiliates must include the network on programming packages that reach more than 80 percent of their *digital* residential subscribers only (which currently translates to approximately 40 percent of their total residential subscribers).

Our agreement with DIRECTV was negotiated over the course of months, and, in our view, resulted in “fair market” financial and carriage commitments to MLB and our fans. We would have liked to have commanded higher rights fees for EXTRA INNINGS, but the cost could have included reduced distribution for The MLB Channel. We would have liked a 100 percent penetration commitment for the channel, but we concluded that a penetration commitment in excess of 80 percent was not achievable in this market at this time. We would have liked to lock-up all of these significant commitments from DIRECTV, while at the same time retaining the ability to license EXTRA INNINGS to any other distributor on any terms and at any time. That was not possible, either. So we made what we deemed to be acceptable concessions in order to secure the right to allow EchoStar and iN DEMAND the ability to opt-in during this limited window. While in its final, heavily negotiated form, our deal with DIRECTV may not be perfect from our perspective, it was by far the most fan-friendly arrangement available to us.

EchoStar and iN DEMAND may well be reluctant to distribute The MLB Channel at the required 80 percent distribution. We obviously negotiated hard to obtain that commitment from DIRECTV and believe it represents the penetration that the market will bear. DIRECTV has been a very successful distributor, and we think it's fair to assume that they regularly exercise reasonable business judgment, and did so in making that commitment in our deal. Additionally, in our view, The MLB Channel will provide programming of greater interest to more of the subscribers

served by EchoStar and iN Demand than many of the other networks that are currently distributed to 80 percent of their residential digital subscribers. So, while we understand that distributors often prefer to restrict the distribution of independent third-party networks, the 80 percent penetration requirement should not be a barrier to entry for the other incumbents (and, especially, in the case of the cable distributors who would only be required to deliver 80 percent of their *digital* subscribers).

While EchoStar and iN DEMAND may likewise be reluctant to pay their fair share of the EXTRA INNINGS fees agreed to by DIRECTV, those fees were heavily negotiated and we believe are reflective of market value. In fact, under other proposals, we likely could have matched or even exceeded the fees that DIRECTV is paying for EXTRA INNINGS. And, while the other incumbents may object to being asked to pay the same “per subscriber served” fee as DIRECTV, we believe that this basis of apportionment is entirely fair and reasonable.

The bottom line is that MLB negotiated hard for this “opt-in” window, and we believe it affords the other incumbent distributors an opportunity to better serve our fans and their customers on a fair and reasonable basis.

III. The Benefits of the DIRECTV Agreement

As noted above, our agreement with DIRECTV was the product of free and open marketplace negotiations. We did not negotiate exclusively with DIRECTV. Rather, we approached each of the incumbents that carried EXTRA INNINGS during the 2006 season, *i.e.*, iN DEMAND, EchoStar and DIRECTV. All of our incumbent distributors made bids based upon both exclusive and non-exclusive arrangements, and we fully explored the merits of all of these proposals. While we have finalized an agreement with DIRECTV, the door is still open for iN DEMAND and EchoStar. If iN DEMAND and EchoStar match DIRECTV’s commitment, all fans who received EXTRA INNINGS last season will continue to have access to EXTRA INNINGS through their current providers. However, if iN DEMAND and EchoStar choose not to do so, DIRECTV, which had the majority of EXTRA INNINGS subscribers last season, would receive exclusive rights to EXTRA INNINGS for the years 2007–13. This exclusivity would not be reflective of MLB’s preference. We would strongly prefer that all of the distributors adopt DIRECTV’s fan-friendly approach. Throughout this process, we have been guided by our desire and responsibility to best serve our fans. Our deal with DIRECTV presents us with the top two alternatives for our fans, with the non-exclusive deal resulting from “opt-ins” as our clear preference. To the extent that, as a result of the reluctance of EchoStar and iN DEMAND to make commitments commensurate with DIRECTV’s, an exclusive arrangement with DIRECTV moves up a position to represent the best alternative for our fans, we feel duty bound to capitalize on it.

Our goal from the outset has been to secure distribution of the most MLB programming to the greatest number of our fans. For several reasons, the commitment that DIRECTV has agreed to make is far superior to any other offer we have received to date in terms of allowing us to achieve that goal.

First, MLB has a very broad fan base. Last season, attendance at our games (over 76 million tickets sold) reached an all-time high, the third season in a row that we set a record. Our website, MLB.com, attracted 2.4 billion visitors in 2006. And average household audiences for nationally-televised regular season MLB games in 2006 (on FOX, ESPN, ESPN2, TBS and WGN) were the largest since 2002, while our post-season telecasts reached approximately 150 million viewers. Moreover, fans have year-round interest in the sport of baseball. MLB games are played from the beginning of March (with the first game of Spring Training) to the end of October (with the final game of the World Series), while baseball games from other leagues inside and outside the United States fill most of the intervening months. TV, radio, print and other media feature MLB news coverage throughout the year.

We firmly believe that our substantial fan base deserves to have a 24/7/365 channel devoted to baseball—a channel that also provides our fans and us with a viable alternative as an outlet for game telecasts and reduces the existing dependence upon other networks to satisfy our fans’ desire to receive those telecasts. And, as noted above, we believe the level of interest in this channel will exceed that of many channels currently carried in digital basic packages—a number of which, of course, are vertically integrated with the cable operators that carry them. We want partners, such as DIRECTV, that are willing to make The MLB Channel available to the broadest possible number of households without imposing additional charges upon our fans. In this regard, we are perhaps no different than any other programmer. DIRECTV’s commitment to offer The MLB Channel in programming packages that reach not only more than 80 percent of their subscribers but also more than 15 million households, while at the same time allowing for the “opt-in”

opportunity for our other incumbent EXTRA INNINGS distributors, far exceeded the commitments presented by the other incumbents during our prior negotiations.

As the Commission is aware, independent programmers (such as MLB) face substantial difficulties in bringing new programming services (such as The MLB Channel) to the market. *See generally Notice of Inquiry in MB Doc. No. 06-189*, 21 FCC Rcd. 1229 at ¶ 16 (2006) (seeking to ascertain the nature and extent of such difficulties). Absent DIRECTV's commitment to carry The MLB Channel on its Total Choice platform, those difficulties would have posed significant obstacles to the successful development of a new year-round 24/7 channel devoted entirely to the sport of baseball. DIRECTV's willingness to become the initial distributor of The MLB Channel and to provide the network to the critical mass necessary for its deployment (regardless of whether their EXTRA INNINGS rights were exclusive or non-exclusive) made DIRECTV's offer the clear winner—and it is a key reason why our agreement with DIRECTV will best serve the long-term interests of MLB and its fans.

Second, DIRECTV has done a superior job in successfully promoting subscriptions to the EXTRA INNINGS package. In 2006, for example, DIRECTV accounted for more than one-half of the EXTRA INNINGS subscribers base—even though it had less than one-quarter of all MVPD subscribers nationwide. We believe that DIRECTV has the ability and the desire to invigorate the EXTRA INNINGS package and to ensure that more fans than ever choose to subscribe to that package. Indeed, DIRECTV has a proven track record of developing innovative features that significantly enhance the viewing experiences of premium sports programming. We have been particularly impressed by the type of value added services that DIRECTV has brought to the NFL's out-of-market package "Sunday Ticket" and NASCAR's "Hot Pass"—and by DIRECTV's plans to expand the EXTRA INNINGS options to include: (a) a game mosaic channel (with up to eight game telecasts shown simultaneously on a single screen); (b) a "Strike Zone Channel" that takes viewers to live cut-ins of MLB games in progress at key points; (c) HD telecasts; and (d) other innovations that complement the sport of baseball, entertain viewers and provide fans with significant entertainment value.

Finally, if iN DEMAND and EchoStar do not match DIRECTV's commitment for the carriage of The MLB Channel and EXTRA INNINGS, we hope that those of our fans who are not currently DIRECTV subscribers consider becoming DIRECTV subscribers. DIRECTV has sought to make it as easy as possible for fans to switch to its service. As it has advised the Commission, "consumers can switch to DIRECTV with no start-up costs, no equipment to buy, and no installation charges." Letter dated March 2, 2007 at 5 from Chase Carey, President and CEO of DIRECTV ("DIRECTV FCC Letter"). This would not be the first time that DIRECTV has been the exclusive provider of EXTRA INNINGS. During the 2000 season and the first half of the 2001 season, DIRECTV was the only MVPD to offer EXTRA INNINGS. DIRECTV also has had, and continues to have, exclusive carriage rights to other premium sports packages such as the National Football League's out-of-market package "Sunday Ticket", NCAA's out-of-market "March Madness" package and NASCAR's "Hot Pass".

We recognize that there are some fans who are unable to receive DIRECTV for technical reasons. DIRECTV has estimated the number of such fans who subscribed to EXTRA INNINGS last year to be approximately 5,000. DIRECTV FCC Letter at 5. We also recognize that some number of additional fans may prefer not to change their MVPD service to receive EXTRA INNINGS. We would ask all of these fans to consider subscribing to a comparable out-of-market package that is available online through MLB.TV—an option that was not available when DIRECTV last carried EXTRA INNINGS on an exclusive basis. Beginning with the 2007 season, MLB.TV will offer an upgraded picture quality. With future technological developments, we expect the quality of the online viewing experience of our fans to continue to improve. And with the significant growth of broadband penetration (which is now greater than that of digital cable), the total number of subscribers to our out-of-market packages (MLB.TV and EXTRA INNINGS combined) is likely to reach new highs in the coming years.

If EchoStar and iN DEMAND choose not to match DIRECTV's commitment, we sincerely regret any disruption or inconvenience that would be caused to this limited number of fans by having DIRECTV become the exclusive provider of EXTRA INNINGS. But we cannot put the interests of what we believe are a relatively small minority of fans over what we believe are the best interests of the entire fan base as a whole. While all of our fans are important to us, in our judgment, the benefits of ensuring the successful launch of The MLB Channel as part of a basic service package with more than 15 million subscribers outweigh the unfortunate inconvenience that certain fans will face in obtaining EXTRA INNINGS from a new provider.

DIRECTV has been an outstanding partner to MLB. Like MLB, they believe that being committed to customer-service is just good business, and, regardless of how many “EXTRA INNINGS” distributors we have going forward, we are quite comfortable that our fans will continue to be well-served.

IV. Congressional and Commission Policies

Should DIRECTV receive exclusive carriage rights for EXTRA INNINGS, such rights would be fully consistent with Congressional and Commission policies. Exclusive rights also would be typical of arrangements that are routine in the television programming industry.

In the Cable Act of 1992, Congress specifically considered the issue of when the Commission should prohibit exclusive programming contracts between programming vendors and MVPDs. Congress concluded that the Commission should do so only when the programming vendor was vertically integrated with an MVPD; and the program access rules were upheld as constitutional on that basis. *See* Section 628(c)(2)(D) of the Communications Act, 47 U.S.C. § 548(c)(2)(D); *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996). Even then, Congress recognized that the Commission could make exceptions and permit exclusive contracts after balancing a series of statutorily-prescribed criteria. *See* Section 628(c)(4) of the Communications Act, 47 U.S.C. § 548(c)(4), which includes the need for exclusivity to ensure the development of new programming (such as The MLB Channel).

MLB has no ownership or other financial interest in DIRECTV or any other MVPD, and neither DIRECTV nor any other MVPD has any ownership or other financial interest in EXTRA INNINGS. MLB is precisely the type of independent programmer that Congress determined, in the 1992 Cable Act, should be allowed to enter into exclusive arrangements with MVPDs such as DIRECTV. Over the years, the Commission has repeatedly resisted efforts to expand (or recommend expanding) the prohibition in Section 628(c)(2)(D) to encompass exclusive agreements involving independent programmers. *See, e.g.*, Report and Order in CS Doc. No. 01-290, 17 FCC Rcd. 12124 at ¶ 74 and n. 243 (2002); *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 FCC Rcd. 9978, 1066 (2000). As the Commission has correctly noted, “Such an expansion would directly contradict Congress’ intent in limiting the program access provisions to a specific group of market participants.” 17 FCC Rcd. at ¶ 74.

In supporting that conclusion as well as urging the Commission to sunset the Section 628(c)(2)(D) prohibition on exclusive contracts, the cable industry itself has argued that program exclusivity (such as that accorded for the EXTRA INNINGS package) has numerous pro-competitive and pro-consumer benefits. Indeed, the record in the sunset proceeding (CS Docket No. 01-290) is replete with comments from the cable industry demonstrating the benefits of exclusive programming contracts. *See also First Report and Order in MM Doc. No. 92-265*, 8 FCC Rcd. 3359 at ¶ 23 (1993) (“As a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized.”); *EchoStar Communications Corp. v. Fox/Liberty Networks LLC*, 14 FCC Rcd. 10480 at ¶ 14 (Cable Services Bureau 1999) (“public policy requires minimal regulatory interference with private contracts entered into by consenting parties”). There should be no question that having exclusive rights to the distinctive EXTRA INNINGS package would make DIRECTV a more formidable competitor to a cable industry that currently dominates the MVPD market—and thus help achieve the competitive balance that Congress envisioned when it adopted the 1992 Cable Act. Certainly EchoStar and iN DEMAND recognized as much since they both submitted bids that contemplated exclusive rights for EXTRA INNINGS.

It also should be noted that the decision to accord exclusive rights for sports programming networks is not without precedent in the cable industry. Cable operators themselves have been the beneficiary of exclusive contracts for sports programming, and Congress has not taken any action to prohibit such contracts. For example, Comcast has entered into exclusive cable-only deals for its terrestrially-delivered Comcast SportsNet in Philadelphia, which carries numerous games of the Philadelphia Phillies, Flyers and Sixers. *See EchoStar Communications Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002), aff’d 15 FCC Rcd. 22802 (2000). Likewise, Cox Communications offers its terrestrially-delivered Cox Channel 4 San Diego, with approximately 140 telecasts of San Diego Padres games, on an exclusive basis to cable. *See also RCN Telecom Services of New York, Inc. v. Cablevision Systems Corp.*, 14 FCC Rcd. 17093 (Cable Services Bureau 1999) (upholding refusal to license regional sports networks to certain MVPDs). None of the sports telecasts on Comcast SportsNet-Philadelphia (which includes a significant number of home team games) is thus available to more than 400,000 DBS subscribers in the Philadelphia area; and none of the sports telecasts on Cox Channel 4 San Diego (which also includes

a number of home team games) is available to any DBS subscribers in the San Diego area. The number of DBS subscribers currently affected by these cable-only deals is far greater than the number of subscribers affected by according DIRECTV exclusivity for EXTRA INNINGS.

* * * * *

In conclusion, we recognize and appreciate the interest of the Commission and Members of Congress in our agreement with DIRECTV. For the reasons stated above, we strongly believe that the agreement will benefit not only Baseball and DIRECTV but also the fans on which we depend—and that it would be consistent with the pro-consumer and pro-competitive policies that the Commission and Congress have adopted. Please let us know if there is any additional information that you believe would be necessary or helpful in preparing your report to the Members of Congress that have expressed an interest in this matter. We are, of course, prepared to meet with you and your staff at your convenience to discuss any questions you may have.

Sincerely,

ROBERT A. DUPUY,
President and Chief Operating Officer.

Senator KERRY. Without objection, it will be. Thank you very much, Mr. DuPuy.

Senator KERRY. Mr. Carey?

**STATEMENT OF CHASE CAREY, PRESIDENT AND CEO,
DIRECTV GROUP, INC.**

Mr. CAREY. Thank you. Thank you, Mr. Chairman and Mr. Vice Chairman. And thank you for inviting me to testify today.

My name is Chase Carey, I'm the President and CEO of DIRECTV. I appreciate the opportunity to discuss baseball's recently announced agreement with Major League Baseball.

I'd like to make five points in my opening. First, DIRECTV reached its agreement with Major League Baseball through a fair and open process. Second, we value this programming so highly because we differentiate ourselves with better technology and content leadership, particularly in sports. Third, the Baseball Channel will be a great channel with year-round, 24-hour baseball coverage, a truly new service for our fans. Fourth, DIRECTV has pursued all of our initiatives with the customer in mind, first and foremost. And fifth, our agreements comport with the policies Congress established to create a competitive marketplace. Let me elaborate.

DIRECTV reached its agreement with Major League Baseball through a fair and open process. All of our cable and satellite competitors engaged with Major League Baseball on this package. DIRECTV had no advantage in this negotiation. We simply had greater interest than our competitors. Yes, even today, after all of this time, our competitors can have the EXTRA INNINGS package if they match DIRECTV's offer. To date, they have not done so.

We value this programming so highly, because we differentiate ourselves from our competitors through technological innovation and content leadership, particularly in sports. Cable differentiates itself through the Triple Play bundle. EchoStar does through initiatives such as exclusive international programming. Simply put, this is competition at work.

DIRECTV's strategy has not been merely to provide unique quality and choice in programming, but to invest in new features, like interactivity and expanded coverage. In our agreements with the NFL and NASCAR, for example, we have brought an array of excit-

ing enhancements to fans in the last year. Through our agreement with baseball, we look to do the same thing for baseball fans, bringing more games, more HD, more interactivity, and new types of coverage to fans.

Beginning in 2009, the MLB Channel will feature year-round, 24-hour baseball coverage, a truly new service for baseball fans. DIRECTV is a minority partner in this channel, because we bring unique expertise in sports television, and we will help build the channel. Our equity stake also reflects our willingness to provide the initial subscriber commitment, which is necessary to launch the channel. This is the same type of equity we have received from other channels, and our competitors also get equity interest when they provide launch platforms for new channels.

Our competitors object to the bundling of EXTRA INNINGS rights with distribution for the Major League Baseball Channel. Yet, they know that many channels have been built that way. Comcast bundles its regional sports networks and national channels with emerging channels like G4. Broadcast networks do the same thing with their stations. Dozens of cable networks got their start that way.

DIRECTV has pursued all of our initiatives with the customer in mind, first and foremost. While our agreements may require customers that want EXTRA INNINGS to switch to DIRECTV, we provide the transfer at no cost to the customer, and proudly provide each customer with the high-quality service that continues to beat our competitors in independent research studies. We also took the extra step in EXTRA INNINGS to agree to have the games available on the web.

More broadly, DIRECTV has only pursued potential exclusive arrangements on niche programming, targeted at a small fraction of the audience. EXTRA INNINGS is a premium service, offering out-of-town games. Only one-half of one percent of U.S. households subscribed last year. DIRECTV has not sought exclusives from mainstream, must-have programming like network programming or local sports. Our cable competitors cannot say the same thing.

Finally, our agreement comports with the policies Congress established to create a competitive marketplace. Congress can always change these policies. But, it should do so within a framework of a broader review of competition and access issues. Such an examination might address issues such as the tying of video and broadband access services. Why, for example, does cable consider it fair competition to punish broadband subscribers that do not want their video, but it is unfair competition for us to distinguish ourselves with niche sports packages?

In Washington, D.C., for example, Comcast charges 70 percent more for a customer who chooses stand-alone broadband service. And, if this Committee is concerned about sports programming, it should begin by examining the worst instances of sports withholding. In Philadelphia and San Diego, half a million satellite subscribers cannot watch their home teams.

In summation, we pursued a fair, competitive process where we entered an agreement that enables us to bring exciting, expanded content to baseball fans, and we're committed to do so as seamlessly as possible. Together with MLB, we will provide more

baseball to more fans in a more compelling format than ever before. I'm happy to take any questions from the Committee.

[The prepared statement of Mr. Carey follows:]

PREPARED STATEMENT OF CHASE CAREY, PRESIDENT AND CEO, DIRECTV, INC.

Chairman Inouye, Vice Chairman Stevens, and members of the Committee, my name is Chase Carey. I am the President and CEO of DIRECTV. Thank you for inviting me to testify today regarding DIRECTV's recently announced agreement with Major League Baseball ("MLB") to continue to carry MLB's EXTRA INNINGS package of out-of-town baseball games.

I would like to address four issues today. First, I'll describe the fair, open, and arm's length negotiation for carriage of EXTRA INNINGS—a negotiation resulting directly from the pro-competitive, pro-consumer policies Congress has put in place. DIRECTV has entered into a carriage agreement with MLB, while EchoStar and a consortium of the biggest cable operators remain free to match DIRECTV's offer until Opening Day. So when our competitors complain that they don't have rights to EXTRA INNINGS, what they're really saying is that they'd like to pay less for those rights than DIRECTV—a lament common to many MVPDs in many circumstances.¹

Second, I will address another aspect of competition at work—DIRECTV's plan to transform EXTRA INNINGS from a mere collection of games in low definition to a truly compelling, high definition experience for the most avid baseball fans. Regardless of whether our competitors step up to the plate, DIRECTV intends to make *more* baseball available to *more* fans in a *more* compelling format than ever before. This is a big win for baseball fans.

Third, I'll explain how the competitive marketplace Congress created will ensure that fans of our Nation's pastime will not be left behind. If EchoStar and the cable consortium step up and match DIRECTV's offer, their subscribers will continue to have access to this programming from those providers. If they don't, subscribers who want to switch to DIRECTV can do so seamlessly. The small number of subscribers who do not or cannot switch will be able to watch games over broadband—an increasingly viable alternative to traditional television.

Fourth, while DIRECTV's agreement with MLB is entirely consistent with the policies Congress established to create a competitive marketplace, Congress can always change those policies. But I would respectfully suggest that, if this Committee is concerned about competition and access issues, these issues should be examined within the broader context of communications and competition policy. Such an examination might address topics such as the tying of video and broadband access services, the "slow-rolling" of access to Internet video, tying arrangements for programming imposed by competitors with market power, and home-team sports exclusives. DIRECTV would be happy to participate in such a discussion.

I. DIRECTV Negotiated a Fair and Arm's Length Agreement With MLB; Cable and EchoStar Can Have the Same Deal if They Want It

It is sometimes difficult to remember that, little more than a decade ago, Americans had only one choice of multichannel video provider—the cable monopoly. Today, nearly every American can choose among their cable operator, DIRECTV, and EchoStar. Verizon and AT&T now also offer service in many parts of the country.

These competitors have differentiated themselves in the marketplace. Cable, and now Verizon and AT&T, compete by offering a "triple play" of voice, video and data—a bundle that DIRECTV cannot yet offer on its own. EchoStar has carved out a niche as the low-cost provider, and offers a host of foreign language exclusives. And DIRECTV differentiates itself through an unparalleled selection of sports programming and unmatched technical innovation—including an investment of hundreds of millions of dollars on new satellites to offer consumers their local broadcast stations in HD and over 100 national HD programming services. These unique offerings helped DIRECTV to differentiate itself and begin to break the stranglehold of the cable monopolies. The cable industry, in turn, found itself forced to spend billions to innovate and become more responsive to consumers' desires—today offering

¹ Time Warner's top programming negotiator recently said as much—stating that she was not sure why people have criticized the deal as if it were "rigged" against competition, when the issue really boils down to the "evaluation of whether acquiring programming is too expensive or not." *SkyReport E-News*, Mar. 13, 2007.

a competitive, attractive package that includes its own differentiated video-on-demand and bundled Internet offerings.

Cable, to be sure, still possesses an overwhelming market share, which distorts 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.

And this is the context in which DIRECTV negotiated its agreement to carry EXTRA INNINGS. Several months ago, MLB initiated discussions with a number of MVPDs and their affiliates—including DIRECTV, EchoStar, and iN DEMAND (owned by Comcast, Time Warner, and Cox)—regarding carriage of EXTRA INNINGS. These discussions concerned both exclusive and non-exclusive carriage. Each competitor was given the opportunity to compete for EXTRA INNINGS. And each did.

In the end, despite the fact that it has a modest nationwide market share, only DIRECTV showed an interest in carrying EXTRA INNINGS on terms acceptable to MLB, including helping to launch the MLB Channel and carrying it widely to our subscribers. So earlier this month, DIRECTV and MLB announced that they had reached agreement for carriage of EXTRA INNINGS and the MLB Channel.

That agreement gave DIRECTV's competitors—all of whom had a seat at the table during the first round of negotiations—yet another turn at bat. Until Opening Day, MLB will allow incumbent MVPDs willing to agree to terms equivalent to DIRECTV's carriage arrangement to offer their subscribers this programming. *In other words, Comcast and Cox and Time Warner and EchoStar can provide out-of-town games to their subscribers if they want to.* The agreement says only that they cannot do so on the cheap. So if they agree to pay the price DIRECTV pays, agree to carry the MLB Channel in the same manner as DIRECTV, and agree to comply with the other terms and conditions that apply to DIRECTV, they can carry EXTRA INNINGS. It's their choice. This is why Time Warner's top programming negotiator recently said she was not sure why people have criticized the deal as if it were "rigged" against competition, when the issue really boils down to the "evaluation of whether acquiring programming is too expensive or not."²

Now that both iN DEMAND and EchoStar have access to EXTRA INNINGS on comparable terms and conditions as DIRECTV, we expected EchoStar and the cable industry to stop complaining and start competing. But they haven't. Now they're claiming that MLB's offer to match DIRECTV's terms isn't fair.

They first contend that the agreement is unfair because DIRECTV will have an ownership interest in the *MLB Channel* (not in MLB or the EXTRA INNINGS package). But this isn't unfair at all. To begin with, because of DIRECTV's ownership, MLB cannot offer DIRECTV the MLB Channel on an exclusive basis. If DIRECTV's competitors think DIRECTV's ownership interest is inconsistent with this obligation, they already have an avenue for redress at the FCC.³ Moreover, granting DIRECTV an ownership interest in exchange for its willingness to be the "first mover" in carrying this channel is a very common industry practice. The FCC reports that cable operators own dozens of channels, including many of the most important regional sports networks ("RSNs") such as those in New York, Chicago, Philadelphia, San Diego and Washington D.C.³

DIRECTV's rivals also complain that the distribution requirements for the MLB Channel that DIRECTV agreed to are too onerous. This is nothing but a public relations ploy. If anything, the distribution requirement actually *favours* cable operators. Based on the distribution formula in the agreement, DIRECTV has to distribute the MLB Channel to roughly 80 percent of its total subscribers, while cable operators would have to distribute it to approximately 40 percent of their total subscribers. The very terms for distribution cable denounces as unfair are equivalent to, or in many instances less stringent than, the requirements cable operators demand for the programming they themselves own.

DIRECTV's rivals may not like these terms. But parties who do not like terms of carriage cannot cry foul on that basis alone. This is how programming negotiations work. If an MVPD believes that programming is too expensive, it can choose not to carry the programming. This happens all the time. EchoStar, for example, doesn't carry the YES network for this very reason, so EchoStar subscribers in New York can't watch most Yankees games. MLB's insistence that other MVPDs live by

²*SkyReport E-News*, Mar. 13, 2007.

³*General Motors Corp., Hughes Electronics Corp., and The News Corporation Limited*, 19 FCC Rcd. 473 (2004) ("News-Hughes").

⁴*Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd. 2503 App. C (2006).

the same deal DIRECTV did isn't *unfair*, it is simply the marketplace at work—and surely isn't a subject worthy of Congressional intervention.

II. DIRECTV's Carriage of EXTRA INNINGS Will Be a Big Win for Fans

I do not know whether EchoStar and the cable industry will ultimately match DIRECTV's offer to carry EXTRA INNINGS. I *do* know, however, that DIRECTV has big plans for EXTRA INNINGS—which is one reason why we have (so far) been willing to pay more than anybody else for it. DIRECTV will make more baseball available to more fans in a more compelling format than ever before.

For starters, DIRECTV will add a mosaic channel and a Strike Zone channel (similar to the NFL Sunday Ticket Red Zone Channel) that will deliver live cut-ins of games throughout the country. We will also provide great entertainment to fans with real-time scores, player and team stats and other innovations that complement the sport of baseball. Most importantly, DIRECTV expects to provide most, if not all, games in high definition for the 2008 baseball season—an innovation that most cable operators cannot match.

Moreover, as part of the EXTRA INNINGS agreement, DIRECTV will also make The MLB Channel widely available when the channel launches in 2009.

DIRECTV's transformation of EXTRA INNINGS should come as no surprise. This, after all, is what DIRECTV has done for other programming. For example, DIRECTV recently completely revamped supplemental coverage of NASCAR races. The cable industry had the rights to NASCAR content for years, but did little with this programming and attracted only 30,000 customers in 2006. DIRECTV obtained the rights this year to what is now NASCAR Hotpass, and debuted a service at this year's Daytona 500 that bears little resemblance to cable's bare-bones offering. DIRECTV's NASCAR Hotpass features five dedicated "Driver Channels," each focusing on an individual driver and offering multiple camera angles, real-time stats, team audio communications and dedicated announcer teams. Although the NASCAR season started only recently, *DIRECTV already has more than three times the subscribers to this programming than the cable industry had in 2006.*

DIRECTV expects that once it adds interactive features, high-definition service, and the MLB Channel, many new subscribers will sign up for EXTRA INNINGS with DIRECTV. This will make DIRECTV's service more attractive than our cable competitors. Those competitors, in turn, will have to improve *their* services to keep up. This, again, is the vibrant competitive marketplace that Congress envisioned at work.

III. The Competitive Marketplace Envisioned by Congress Will Provide Numerous Alternatives for Baseball Fans

The same competitive marketplace that permitted DIRECTV to obtain the rights to EXTRA INNINGS in a fair and open manner will also ensure that baseball fans will continue to be able to watch their favorite teams. Right now, both EchoStar and iN DEMAND have the option to continue to provide this programming to their subscribers—if they are willing to pay the fair price negotiated at arm's length between DIRECTV and MLB. Even if DIRECTV remains the only MVPD to carry EXTRA INNINGS, however, non-DIRECTV subscribers will not be harmed in any meaningful way.

First, consumers can switch to DIRECTV with no start-up costs, no equipment to buy, and no installation charges. When they do so, they will get a better service at a better value than is offered by cable. DIRECTV, unlike cable, is 100 percent digital. DIRECTV offers more programming than cable. On average, DIRECTV costs significantly less per channel than cable. And DIRECTV's customer service is second to none—having surpassed the cable industry average in each of the last 6 years.⁵ This, again, is how a competitive marketplace is supposed to work. Unfortunately, cable operators are doing their best to prevent this. Cable, for example, penalizes customers by dramatically increasing the price of Internet service if the customer drops cable's video service. To overcome cable's barriers, DIRECTV has chosen to offer customers who want to switch no up-front costs and more compelling content.

Second, every single game carried on EXTRA INNINGS will remain available online through MLB.com. Internet video is improving dramatically,⁶ and MLB announced its intent to offer upgraded picture quality this season. Thus, subscribers who choose not to (or cannot) subscribe to DIRECTV will still be able to watch the

⁵ See Steve Donohue, "DIRECTV Tops J.D. Power Survey," *Multichannel News*, Aug. 16, 2006, available at <http://www.multichannel.com/article/CA6363083.html>.

⁶ See, e.g., Peter Grant, *Plugging the Web Into the TV*, Wall St. J., Aug. 4, 2006, at A11 (describing the rapid advances in online video, and stating that, with a TiVo device, one "can't even tell whether it came from the TV or off the Internet.").

games of their choice. Here again, however, cable operators are attempting to hinder the marketplace. If cable did not prohibit a direct connection between the Internet and the set top box, MLB.com could easily be viewed on television sets.

Third, the arrangement will not disrupt competition among MVPDs. To begin with, relatively few subscribers are affected at all. Only 230,000 non-DIRECTV customers subscribed to EXTRA INNINGS last year—less than one-half of one percent of all television homes.⁷ DIRECTV estimates that there are relatively few viewers—no more than 3 percent of the cable segment (approximately 180,000 EXTRA INNINGS subscribers)—who cannot receive DIRECTV service. This translates to roughly 5,000 subscribers—each of whom can access the games over the Internet. Moreover, this agreement does not deny a single fan the right to follow his or her home team. In all of its programming arrangements, DIRECTV has been respectful of fans' rights to view their home team sports. EXTRA INNINGS is a premium package of *out-of-town* games—designed to serve baseball's most avid fans without adversely affecting viewership of MLB's national and local telecasts. By contrast, our cable competitors have withheld core home team sports programming from nearly half a million satellite customers in Philadelphia and San Diego.

Fourth, the marketplace will continue to provide subscribers without EXTRA INNINGS a wealth of options for watching their favorite sport. If EXTRA INNINGS were to disappear tomorrow, MLB would still offer more televised games by far than any other U.S. sport. Regardless of the MVPD to which they subscribe, fans throughout the country can watch their home team on broadcast television or RSNs—assuming that cable-affiliated RSNs continue to make their programming available to all MVPDs at non-discriminatory rates. In addition, fans without EXTRA INNINGS can still watch an impressive number of out-of-town games. On average, more than 400 games are televised in each market—on local broadcast television, RSNs, and MLB's national partners FOX, TBS, and ESPN.

IV. A Broader Review of Competition Policy May Be Appropriate

Members of this Committee are naturally concerned about consumer choice and access to content. So is DIRECTV. But Congress cannot examine these issues in a vacuum—and certainly should not start with this arm's length, pro-competitive deal. If it truly seeks to ensure that every American has a choice among video providers and access to content, this committee can choose among any number of issues that affect far more consumers.

If, for example, this committee is concerned about the ability of subscribers to switch MVPDs, it might examine why cable operators dramatically increase the price for their *broadband* service to subscribers that switch from cable to satellite for *video* service. In Washington, D.C., for example, Comcast charges \$33.99 for Internet service when bundled with video and voice, but \$57.95 for stand-alone Internet—a 70 percent increase in price. Even though DIRECTV offers a lower price for a better video service, consumers with cable modems lose money by choosing DIRECTV. If Congress seeks to maximize consumer choice—as it should—cable's tying of Internet and video services is worthy of review.

If this committee is concerned that viewers might be denied access to content they wish to view, it might examine whether cable operators should be able to degrade the service their broadband subscribers receive when accessing video content from non-affiliated websites (or entities that do not pay to ensure access), or preclude such access altogether. As more and more video content migrates to the Internet, cable operators will increasingly have the incentive and ability to determine what their broadband subscribers can and cannot see. A cable operator could even, for example, prohibit a baseball fan from visiting MLB.com (or, more likely, could “slow-roll” communications to that site compared with communications from its own site).

If this committee is concerned about bundling channels in contract negotiations, it might wish to focus more broadly on tying arrangements imposed by parties with market power. For example, Comcast recently required DIRECTV to distribute its “G4” gaming channel to 80 percent of its subscribers in order to continue to carry Comcast SportsNet Mid Atlantic at market rates. A broader examination of arrangements like this would consider the pros and cons of today's programming marketplace and possible ideas for revising it.

And finally, if this Committee is concerned about sports programming, it should begin by examining the worst instances of sports withholding. Congress and the FCC have found repeatedly over the years that cable operators can abuse their formidable market power by arranging to withhold programming they own. And they do that today in Philadelphia and San Diego, where half a million satellite sub-

⁷Not to minimize the inconvenience to these customers, but it is worth noting that tens of millions of subscribers “churn,” switching video providers every year.

scribers cannot watch their *home* teams. Surely that—and not an arm's length, non-exclusive, pro-competitive deal such as that between DIRECTV and MLB for carriage of out-of-town games—is worthy of this committee's consideration.

* * * * *

The video marketplace continues to evolve as competition takes hold under the regime Congress has put in place. DIRECTV's arrangement with MLB is part of that process—the result of fair and open competition for programming that even today remains available to DIRECTV's rivals. DIRECTV intends to upgrade EXTRA INNINGS significantly, giving avid baseball fans more than they have ever had from this package before. We will also make the transition of any subscriber who wants this programming from DIRECTV as seamless as possible. In the end, then, DIRECTV's agreement with MLB is an example of how the competitive marketplace created by this committee is working—not how it needs to be changed.

Senator KERRY. Thank you very much, Mr. Carey, I appreciate it.

Senator KERRY. Mr. Vogel?

**STATEMENT OF CARL VOGEL, PRESIDENT AND
VICE CHAIRMAN, ECHOStar SATELLITE, L.L.C.**

Mr. VOGEL. Chairman Stevens, Senator Kerry, members of the Committee, on behalf of EchoStar Satellite, I want to thank you for inviting our company to discuss the important issue of exclusive programming and its impact on consumer choice.

My name is Carl Vogel, and I am President and Vice Chairman of EchoStar. Since we began offering services 11 years ago, EchoStar's DISH Network has grown to become the fourth-largest multi-channel video provider in the country, serving more than 13 million customers.

Mr. Chairman, I would ask that my written testimony be submitted to the record.

Senator KERRY. It will be.

Mr. VOGEL. Exclusive content distribution deals in any major sport today do not promote competition. They harm existing consumers, while limiting choices in the future. As we sit here today, the deal presented by Major League Baseball is designed to be an exclusive deal for DIRECTV in substance, despite statements to the contrary regarding form and the opportunity to opt-in.

The terms offered by Major League Baseball effectively tie the carriage of the EXTRA INNINGS package today to a firm commitment to launch the Major League Baseball Channel to over 10 million of our subscribers in 2009. We find these demands inconsistent in a climate where Congress, the FCC and the American public are asking for more choice, not less.

Despite these onerous terms, we at EchoStar stand ready to match the current offer, in its entirety, to protect our consumers, and remain competitive. However, in its entirety must be apples to apples, which requires ownership of the Major League Baseball Channel. We have made these points clear to both Major League Baseball and DIRECTV. In response to our request, in a letter dated March 22nd from Major League Baseball, they state they are not in a position to offer any equity in connection with the opt-in opportunity without DIRECTV's consent.

Notwithstanding the irony of a distributor with a minority interest determining the fate of the Major League Baseball Channel, it will be interesting to see whether that consent is forthcoming, and

with what conditions, as DIRECTV reconciles whether it wears its ownership hat for the Major League Baseball Channel, or its hat as a competitive distributor.

With only 4 short days to bring this to conclusion, it appears these negotiations for the EXTRA INNINGS package may need extra innings themselves.

Given this set of circumstances, the deal with Major League Baseball and DIRECTV regarding the EXTRA INNINGS package will likely proceed as an exclusive, disenfranchising over 300,000 consumers nationwide. Numerous distributors, including EchoStar, were part of building the EXTRA INNINGS brand and consumer appeal over the last 10 years. Those customers are now being subjected to an exclusive bait-and-switch by Major League Baseball.

Creating exclusivity with sports content is anti-competitive. It's particularly problematic when that very programming has been available to a number of consumers, from a number of distributors for a number of years.

The EXTRA INNINGS package became available on DISH Network 3 years ago, and many of our subscribers who have chosen this season ticket live in rural areas. These customers most likely have chosen DISH Network as a result of our low prices and flexible packaging. In every case, our customers had the option of choosing DIRECTV, and didn't. This incremental increase in EXTRA INNINGS subscriptions clearly represents the best example, where increasing—rather than restricting—access to sports content has worked for the benefit of consumers.

Major League Baseball now wants to limit access and rationalize the fan displacement by stating DIRECTV will provide equipment and installation free of charge. This alternative fails to recognize any price differentiation between EchoStar and DIRECTV. In many cases, a switch to DIRECTV is tantamount to a 33 percent rate increase, just to gain access to the EXTRA INNINGS package. For Major League Baseball to reach into consumer's pockets, and suggest this is a reasonable choice, is not only disrespectful, but clearly points out Major League Baseball has, in this instance, relegated themselves to a well-compensated sales agent for DIRECTV.

Our motives are very straightforward. We want to compete. In conclusion, we're quite certain that consumers would far prefer a world where exclusives over regional sports, the NFL Sunday Ticket and the EXTRA INNINGS package did not exist. Such relationships currently do not promote competition, but rather limit consumer choice to one provider. This proposed EXTRA INNINGS exclusivity with DIRECTV does not expand the market, it merely provides for the migration of subscribers from many providers to one.

Certainly, exclusive content relationships today may be within the letter of the law, but they can't possibly meet the spirit of Congressional intent.

Thank you, and I look forward to answering your questions.

[The prepared statement of Mr. Vogel follows:]

PREPARED STATEMENT OF CARL VOGEL, PRESIDENT AND VICE CHAIRMAN,
ECHO STAR SATELLITE, L.L.C.

Chairman Kerry, and members of the Committee, on behalf of EchoStar Satellite, I want to thank you for inviting our company to discuss the important issue of exclusive sports programming.

My name is Carl Vogel, and I am President and Vice Chairman of EchoStar. Since we began offering service 11 years ago, EchoStar's DISH Network has grown to become the 4th largest multi-channel video provider in the country serving more than 13 million subscribers.

Exclusive content distribution deals in any major sport today do not promote competition. They harm existing consumers while limiting choices in the future.

As we sit here today, the deal presented by Major League Baseball is designed to be an exclusive deal for DIRECTV in substance, despite statements to the contrary regarding form and the opportunity to "opt-in."

The terms offered by Major League Baseball effectively tie the carriage of the EXTRA INNINGS package *today* to a firm commitment to launch The MLB Channel to over 10 million of our subscribers in 2009. We find these demands inconsistent in a climate where Congress, the FCC, and the American public are asking for more a-la-carte choices.

Despite these onerous terms, we stand ready to match the current offer in its entirety to protect our consumers and remain competitive. However, in its entirety must be apples-to-apples, which will require EchoStar to acquire a *pro-rata* ownership of The MLB Channel. In a letter dated March 22nd, from Major League Baseball, they state they are not in a position to offer any equity in connection with this "opt-in" opportunity without DIRECTV's consent. It will be interesting to see whether that consent is forthcoming, and with what conditions, as DIRECTV reconciles whether it wears its ownership hat for the MLB Channel or its hat as a competitive distributor. With only four short days to bring this to conclusion, it appears the negotiations for the EXTRA INNINGS package may need some extra innings themselves.

Given this set of circumstances, the deal with Major League Baseball and DIRECTV regarding the EXTRA INNINGS package will likely proceed as an exclusive deal, disenfranchising over 300,000 consumers nationwide. Numerous distributors, including EchoStar, were part of building the EXTRA INNINGS brand and consumer appeal over the past 10 years. Creating exclusivity with sports content is anticompetitive; however, it is particularly problematic when that very programming has been available to a number of consumers, on a number of platforms, for a number of years.

The EXTRA INNINGS package became available on DISH Network 3 years ago and many of our 55,000 subscribers who have chosen this season ticket live in rural areas. These consumers most likely have chosen DISH Network as a result of our low prices and flexible packaging. The incremental increase in EXTRA INNINGS subscriptions clearly represents the best example where increasing, rather than restricting access to sports content has worked in favor of consumers.

Major League Baseball now wants to limit access and has rationalized the fan displacement by stating DIRECTV will provide equipment and installation free of charge. This analysis fails to recognize any price difference between EchoStar and DIRECTV. In many cases, a switch to DIRECTV is tantamount to a 33 percent rate increase just to gain access the EXTRA INNINGS package. For Major League Baseball to reach into consumers pockets and suggest this is a reasonable choice is not only disrespectful but clearly points out that Major League Baseball has in this instance, relegated themselves to a well compensated sales agent for DIRECTV.

Our motives are very straightforward. We want to compete.

In conclusion, we are quite certain that consumers would far prefer a world where exclusives over regional sports, the NFL Sunday Ticket and the EXTRA INNINGS package did not exist. Such relationships do not currently promote competition, but rather limit consumer choice to one provider. This proposed EXTRA INNINGS exclusivity with DIRECTV does not expand the market; it merely provides for a migration of subscribers from many providers to one. Certainly, exclusive content relationships may today be within the letter of the law, but they cannot possibly meet the spirit of Congressional intent.

Thank you, and I look forward to answering your questions.

Senator KERRY. Thank you very much, Mr. Vogel. I appreciate it. Mr. Jacobson?

**STATEMENT OF ROBERT D. JACOBSON, PRESIDENT AND CEO,
iN DEMAND NETWORKS, L.L.C.**

Mr. JACOBSON. Thank you, Mr. Chairman, Mr. Vice Chairman, my name is Rob Jacobson. I'm the President and CEO of iN DEMAND.

iN DEMAND is a programming company owned by Comcast, Time Warner Cable, and Cox Cable. We provide a variety of entertainment programming, including sports packages such as NHL Center Ice, NBA League Pass, MLS Direct Kick, and until this season, MLB EXTRA INNINGS.

There has been a lot of controversy about DIRECTV's attempt to get exclusivity for baseball's EXTRA INNINGS package. Baseball recently said it would offer that package to us, but for reasons I'll explain, that offer was unreasonable, and clearly designed to protect the exclusive arrangement that had previously been agreed to by DIRECTV and baseball.

In order to break the log-jam, and ensure that consumers across America have access to the games, last week we made a counter-offer. We agreed to carry EXTRA INNINGS, and the Baseball Channel—a new channel not projected to launch until sometime in 2009—on the same terms as DIRECTV, which is what baseball said, publicly, they were looking for. Our offer was not exclusive. Baseball immediately rejected that offer, and today, we are offering to carry EXTRA INNINGS on the same terms as DIRECTV, and put off the issue of the Baseball Channel until it actually launches. This would ensure that for the next 2 years, at least, all baseball fans would have access to the EXTRA INNINGS package. If we're unable to reach an agreement, and the channel launches, we give baseball the right to cancel the EXTRA INNINGS deal. We think this is a fair compromise.

Let me give you a little history and tell you why our offer is in the best interest of sports fans everywhere. We've offered EXTRA INNINGS on a non-exclusive basis since July 2001. Our most recent agreement with baseball expired at the end of last season. We began discussions with baseball almost a year ago to renew our non-exclusive deal. Last summer, baseball asked whether we'd be interested in offering EXTRA INNINGS on an exclusive basis. We said that would not be in the best interest of baseball fans and would not be viable for us, given the program access rules, which prohibit exclusive contracts for cable-affiliated programmers like iN DEMAND. We expressed a strong desire to continue to license the EXTRA INNINGS on a non-exclusive basis. We even offered a 400 percent increase in guaranteed fees, to no avail.

A major sticking point in the negotiations was baseball's insistence that cable could only carry EXTRA INNINGS if it also agreed to deliver the Baseball Channel to millions of customers, regardless of whether they wanted to view, and pay for, the channel.

In late February, several weeks prior to the announcement of the DIRECTV deal, we made a proposal that ensured baseball would be guaranteed \$100 million annually for EXTRA INNINGS. We also committed that iN DEMAND's owners would distribute the Baseball Channel to 15 million homes at baseball's requested price. We made a binding offer that was non-exclusive, and we did not

ask for an ownership interest in the Baseball Channel. Baseball never called us back.

Eventually, baseball decided to pursue an exclusive agreement with DIRECTV. The public reaction was overwhelmingly negative. In response, baseball and DIRECTV decided to dress up their exclusive deal to make it look like it wasn't exclusive. Baseball said it would give iN DEMAND the opportunity to "match" the DIRECTV deal, but we had to do so by the end of this month, or the games would be unavailable to cable subscribers for the next 7 years. But, baseball's proposal to cable is dramatically more expensive for cable than it is for DIRECTV. In order to get EXTRA INNINGS, baseball is insisting that iN DEMAND's owners pay a disproportionate share of the \$100 million annual cost of EXTRA INNINGS, and carry the Baseball Channel on terms significantly more onerous than DIRECTV. In addition, baseball gave DIRECTV a 20 percent ownership interest in the Baseball Channel, and said it will not offer iN DEMAND a similar interest. Baseball's claim that it's merely asking iN DEMAND and EchoStar to match the DIRECTV deal is wrong. In fact, taking into account all elements of baseball's offer, baseball is insisting that we pay many times more than what it had asked DIRECTV to pay.

Last year, EXTRA INNINGS was available to almost 100 million homes. Under an exclusive DIRECTV deal, it would only be available to DIRECTV's 16 million customers. Over 80 million cable and EchoStar customers would be denied access to the games. This would be especially unfair to the many fans who previously purchased and enjoyed those games.

DIRECTV says there's no harm, because these are only out-of-market games, not "home" games. But, if you're a Red Sox fan living in Washington, D.C., the Nationals are not your "home team." Baseball has a choice. It can offer the games to 100 million homes, or 16 million homes. Either way, it's guaranteed \$100 million per year. We think the choice is obvious. Thank you for the opportunity to testify today.

[The prepared statement of Mr. Jacobson follows:]

PREPARED STATEMENT OF ROBERT D. JACOBSON, PRESIDENT AND CEO,
iN DEMAND, L.L.C.

Mr. Chairman and members of the Committee, my name is Rob Jacobson, and I am President and CEO of iN DEMAND.

iN DEMAND is a programming company owned by Comcast, Time Warner Cable, and Cox Cable. We provide sports, movies, and other entertainment programming through our INHD high-definition channel, pay-per-view, subscription video-on-demand, and out-of-market sports packages. We sell these services to a variety of distributors, including cable, overbuilders, telcos, and DBS. Our sports packages include NHL Center Ice, NBA League Pass, MLS Direct Kick, and, until this season, MLB EXTRA INNINGS. We have been effectively frozen out of negotiations for the NFL Sunday Ticket by the NFL.

There has been a lot of controversy about DIRECTV's attempt to get exclusivity for MLB's "EXTRA INNINGS" package. MLB recently said it would offer that package to us, but for reasons I'll explain, that offer was unreasonable—and clearly designed to protect the exclusive arrangement that had previously been agreed to by DIRECTV and MLB.

In order to break the log-jam and ensure consumers across America have access to the games, last week we made a counter-offer. We agreed to carry EXTRA INNINGS and The Baseball Channel, a new MLB channel not projected to launch until sometime in 2009, on the same terms as DIRECTV—which is what MLB said

publicly they were looking for. Our offer was *not* exclusive. We're ready to execute an agreement by Opening Day. MLB immediately rejected that offer.

Even now, we would enter into a deal for carriage of EXTRA INNINGS on the same terms as DIRECTV. If The Baseball Channel launches in 2009, we would give MLB the right to cancel the EXTRA INNINGS deal if it cannot reach a satisfactory agreement for carriage of the new channel with our owners. This would put off the issue of The Baseball Channel until it actually launches and ensure that for the next 2 years at least, all baseball fans will have access to the EXTRA INNINGS package. We think this is a fair compromise.

Let me give you a little history and tell you why our offer is in the best interests of sports fans everywhere.

We have offered EXTRA INNINGS on a non-exclusive basis since July 2001. Our most recent agreement with MLB expired at the end of last season.

We began discussions with MLB almost a year ago to renew our non-exclusive deal. Last summer, MLB asked whether we would be interested in offering EXTRA INNINGS on an exclusive basis. We said that would not be in the best interest of baseball fans and would not be viable for us given the program access rules, which prohibit exclusive contracts for cable-affiliated programmers, like iN DEMAND. We expressed a strong desire to continue to license EXTRA INNINGS on a non-exclusive basis. We even offered a substantial increase in guaranteed fees—an increase of nearly 400 percent—to no avail.

A major sticking point in the negotiations was MLB's insistence that cable could only carry EXTRA INNINGS if it also agreed to deliver The Baseball Channel to millions of customers, regardless of whether they wanted to view and pay for the channel.

In late February, we made a proposal to MLB that ensured MLB would be guaranteed \$100 million annually for EXTRA INNINGS and committed that iN DEMAND's owners would distribute The Baseball Channel to 15 million homes at MLB's requested price per subscriber—all on a non-exclusive basis. MLB never called us back.

Eventually, MLB decided to pursue an exclusive agreement with DIRECTV. The public reaction was overwhelmingly negative.

In response, MLB and DIRECTV decided to dress up their exclusive deal to make it *look* like it wasn't exclusive. MLB said it would give iN DEMAND the opportunity to "match" the DIRECTV deal, but we had to do so by the end of this month or the games would be unavailable to cable subscribers for the next 7 years. The problem is that MLB is not really interested in a non-exclusive deal with cable and DIRECTV. Its proposal to cable is, in fact, dramatically more expensive for cable than it is for DIRECTV and is unreasonable and unfair.

In order to get EXTRA INNINGS, MLB is insisting that iN DEMAND's owners agree to assume a disproportionate share of the \$100 million annual cost of EXTRA INNINGS and agree to carry The Baseball Channel on terms significantly more onerous than DIRECTV. In addition, MLB gave DIRECTV a 20 percent ownership interest in The Baseball Channel and said it will not offer iN DEMAND a similar interest or comparable economics. MLB's claim that it is merely asking iN DEMAND and EchoStar to match the DIRECTV deal is wrong. In fact, taking into account all of the elements of MLB's offer to us, including the fact that it gave an ownership interest to DIRECTV but refused to give an ownership interest to us, the amount MLB is insisting that iN DEMAND pay is many times greater than what it has asked DIRECTV to pay.

MLB has claimed that we previously made an exclusive offer for EXTRA INNINGS. That is not true. At one point, MLB became concerned that if it did a deal with us, DIRECTV would walk away from EXTRA INNINGS. MLB insisted that if that happened we would have to make up the money it lost because DIRECTV walked away. We agreed to do that, but we never bid for exclusive rights for EXTRA INNINGS, nor did we want exclusive rights.

Last year, EXTRA INNINGS was available to almost 100 million homes. Under an exclusive DIRECTV deal, it would only be available to DIRECTV's 16 million customers. Over 80 million cable and EchoStar customers would be denied access to the games. This would be especially unfair to the many baseball fans who previously purchased and enjoyed those games.

DIRECTV says there would be no harm because these are only out-of-market games, not "home" games. But if you're a Red Sox fan living in Washington, D.C., the Nationals are not your "home" team. If an exclusive deal were allowed to stand, hundreds of thousands of fans across America would no longer be able to watch their favorite teams.

And, we're not talking just about baseball. DIRECTV has out-of-market NFL games and early rounds of the NCAA basketball tournament exclusively. We used

to have a NASCAR package which allowed us to show races from cameras inside the cars. Now DIRECTV has that NASCAR package exclusively. DIRECTV's strategy is to capture exclusivity for high-profile sports across-the-board. That is not fair to consumers.

MLB has a choice. It can offer the games to 100 million homes or 16 million homes. Either way it is guaranteed \$100 million per year. We think the right choice is obvious. On behalf of baseball fans everywhere, we appreciate the Committee's willingness to hold this hearing and we look forward to working with you to find effective solutions to this growing problem.

Thank you for the opportunity to testify today.

Senator KERRY. Thank you very much, Mr. Jacobson.
Professor Ross?

**STATEMENT OF STEPHEN F. ROSS, DIRECTOR AND
PROFESSOR OF LAW, INSTITUTE FOR SPORTS LAW, POLICY
AND RESEARCH, THE DICKINSON SCHOOL OF LAW,
THE PENNSYLVANIA STATE UNIVERSITY**

Mr. ROSS. Mr. Chairman, Senators. Thank you very much, for inviting me today. It's an honor to appear on this side of the table, returning after 20 years of being behind you, when I used to work as a counsel on the Senate Judiciary Committee. It's a pleasure to be back on the Hill.

I've heard all of this testimony about how fair or unfair everybody's being to each other, but the issue before this Committee ought not be who's being fair to competitors, but how they are being fair to the Anchorage resident who, as Senator Stevens correctly points out, is an out-of-market fan for every team. To some of Senator Kerry's constituents' parents, who have retired to Florida or Arizona, and are avid members of Red Sox Nation. To the fan of a club other than the Philadelphia Phillies, who lives in the South New Jersey area, and wants to follow the 76ers and Flyers as well as their favorite team. I have to concede, knowing Minnesota, that I think it's really very public-interested of Senator Klobuchar to be here, since virtually everybody in Minnesota is a Twins fan, but nonetheless, there may be a few recent imports there, or National League fans who can't stand the designated hitter, who want to get out-of-market games there.

And these consumers will clearly be harmed, if they prefer other rivals to DIRECTV, for other reasons—perhaps beyond their control. Moreover, if the other people at this table respond the way that, in an un-regulated, normal marketplace, you would expect people to respond—which is by entering into their own exclusive deal—this will get worse for everyone.

This is not like Sears getting an exclusive with Levi's jeans, where Lee's can respond with an exclusive with Macy's, and consumers simply have to walk across the shopping mall. If Mr. Jacobson's members respond by expanding on the examples that Mr. DuPuy and Carey criticized, and then if Mr. Vogel responds in a similar manner, you really have consumers getting harmed in a very significant way, by this deal.

Unlike the exclusive practices that Mr. Carey discussed, it's far different to try to differentiate yourself with international programming, targeting a completely separate audience, than when you're entering into exclusive deals targeting the same audience. If you are an immigrant, and you enjoy TV from South Asia, you can sub-

scribe to Mr. Vogel's client. If you are interested in some of the high-quality NASCAR programming, you can subscribe to Mr. Carey's programming—these deals we're discussing today apply to millions of consumers, across the board, it's fundamentally different.

This would not be a problem if there were not two fundamental non-competitive marketplace problems. First, this is not really a deal between Major League Baseball and DIRECTV. This is a deal between 30 Major League Baseball owners, who under the common law have the right to sell their games everywhere, and have chosen, all of them, to sell rights exclusively through this particular deal. Some of you might have been as surprised as I was to realize that only half of 1 percent of Americans subscribe to out-of-market baseball, when there are 90 million Americans who no longer live where they grew up. Why don't more Americans watch their national pastime and their favorite team? It's because, they may not be interested in paying \$160 last year, \$200 next year (if you don't get a head start) for EXTRA INNINGS, because they might just want to watch their own team. But, they can't watch only their own team. I cannot call up Frank McCourt—the owner of the Los Angeles Dodgers—and get a deal to watch Dodger games in Central Pennsylvania. The only way to do it is through Major League Baseball, because of an agreement that—with regard to the National Football League—was held illegal in 1953.

Second, this would not be a problem if there was aggressive competition between about 10 retail outlets for cable or satellites, and DIRECTV did not have an opportunity to profit on its Choice package, which is why it's driving—it wants to drive so many people to get its Choice package. If it didn't make extra money on its Choice package, it couldn't have afforded to pass this on to Major League Baseball.

Thus, Mr. Chairman, sports is a unique programming driver. And so, special legislation is justified, if the industry can't work out a deal itself. Now, it may be—from listening to all of these parties—that we're just quibbling about the deal. But, for those of you who were in Washington, D.C. last year, you saw how long it took to work out a deal to get the Nationals to come here over the objections of the Orioles; how long it took for Mr. DuPuy—with brilliant negotiation on his part—to finally put together a package to buy off Peter Angelos; how long it took to have an addition deal to get Washington Nationals games on cable so people in this area could watch Nationals games.

Now, in the end, it all worked out. But the question is, how long should American baseball fans have to suffer while these people at this party finally work out a deal that will achieve Mr. DuPuy's goal of as much distribution of the national pastime as possible?

I'd be happy to answer your questions.

[The prepared statement of Mr. Ross follows:]

PREPARED STATEMENT OF STEPHEN F. ROSS, DIRECTOR AND PROFESSOR OF LAW,
INSTITUTE FOR SPORTS LAW, POLICY AND RESEARCH, THE DICKINSON SCHOOL OF
LAW, THE PENNSYLVANIA STATE UNIVERSITY

Mr. Chairman and members of the Committee:

It is an honor and privilege to be invited to join a panel of industry leaders to offer an independent view, based on over two decades of scholarship and teaching

concerning sports and competition policy, in discussing the impediments to the free flow of interstate commerce as millions of Americans seek ways to take advantage of technological advances to watch non-local Major League Baseball games in their homes.

General Thoughts on Exclusive Dealing

The issue before the Committee today is whether the exclusive dealing arrangement between Major League Baseball (MLB) and DIRECTV, whereby DIRECTV becomes the only source for out-of-market games not shown on national networks, is in the public interest. As the Supreme Court has recognized,¹ exclusive dealing arrangements are both legitimate and indeed can have pro-competitive effects. In traditional markets where consumers have free access to retail markets, the Court has declared that, as a matter of antitrust law (in my view, this reasoning also applies to sound regulatory policy), these arrangements should only be questioned when there is a serious risk that they will foreclose access to supply or outlet by other firms.² Thus, an agreement by Sears to exclusively sell Levi's blue jeans is unlikely to harm consumers; there are ample other retail outlets for Levi's rivals, and ample other jean manufacturers for Sears' competitors. If there are efficiencies in exclusivity, the likely market response is for Lee to reach an exclusive deal with Macy's, *etc.* Consumers unhappy with Sears' selection are only harmed to the extent they have to walk across the shopping mall.

Harm to Baseball Fans

In contrast, baseball fans face significant harm because of various pre-existing agreements as well as the recently announced exclusive MLB/DIRECTV deal. Those who have other reasons to prefer DISH Network or cable must either forego quality telecasts of out-of-market baseball games,³ or suffer exploitation by subscribing to multiple multi-channel video distribution platforms that require the purchase of duplicate programming and unnecessary equipment. The exclusive deal reinforces the harm that already befalls the millions of Americans who do not live within the local media market of their favorite team, because of a horizontal market division agreement entered into by MLB owners that, in the context of football, has been illegal for over 50 years.⁴ There is no public interest justification in forcing consumers to purchase a distribution platform that is inferior for their needs, or duplicate platforms, just to watch their favorite teams. These consumers include:

- Residents in areas with heavy thunderstorm activity (such as Florida) who prefer cable because of concerns about weather-related interference with important sports broadcasts
- Residents of local markets (like metropolitan Philadelphia and southern New Jersey) who are fans of local basketball and hockey teams but out-of-market baseball teams, and would under planned agreements be required to subscribe to cable for some teams and satellite for others
- Virtually all residents of states without a local team (like Alaska, Hawaii, or Nevada) or states with many retirees from other states (like Florida, California, or Arizona): there is no reason that the only way they can watch games of their favorite teams is to acquire a single product, MLB EXTRA INNINGS™, from a single retailer, DIRECTV

¹*Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

²*Id.* At 334.

³Standard antitrust analysis properly focuses on whether a product or service faces competition from "reasonable substitutes" that will draw consumers if there is a small but significant increase in price or decrease in quality of the good or service in question. Courts have generally found that major sports are sufficiently unique in consumers' hearts—baseball is, after all, the national pastime—that a small increase in the price of watching a favorite baseball team will not send enough fans to the library or to cricket websites to render the move unprofitable. *See, e.g., National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984) (college football is a market distinct from professional football or other forms of entertainment); *International Boxing Club v. United States*, 358 U.S. 242 (1959) (championship boxing is a market distinct from non-championship boxing).

Likewise, the issue here concerns quality telecasts to be displayed on television sets of increasing size and clarity. Although some fans may prefer the convenience of watching webcasts of out-of-market games on their computers, or others are willing to endure the significant reduction in picture quality when subscribing to *mlb.com*, these webcasts are not the sort of reasonable substitutes for EXTRA INNINGS™ that either antitrust doctrine or public policy ought require.

⁴*United States v. National Football League*, 116 F.Supp. 319 (E.D. Pa. 1953).

- Consumers in multi-residence dwellings who are not allowed to select their preferred retailer, and where the landlord, homeowners' association, or other decision-maker is insufficiently interested in baseball to switch to DIRECTV

Restraints on Interstate Commerce: Horizontal Market Division

To be clear, the agreement that sparked this hearing did not arise from the free market. First, there is the horizontal market division by MLB owners. Under the common law, the home team owns a property right in the radio and television rights to baseball games.⁵ However, the MLB owners have agreed to significant limitations on these common law rights. Each club will only broadcast games in its assigned geographic territory, licensing the visiting club for the purpose of broadcasting games in its own home territory, and assigning to MLB the exclusive right to sell games not only to free-to-air networks (a right protected by the Sports Broadcasting Act) but most significantly the exclusive right to sell non-network games to satellite or cable only through MLB EXTRA INNINGS™ (which is not exempt from antitrust scrutiny).

Were it not for this web of agreements, the MLB/DIRECTV deal would raise few problems for consumers. Those interested in the convenience of a single package of all out-of-market games could purchase EXTRA INNINGS™ from DIRECTV. A Los Angeles Dodgers fan outside southern California, or someone who simply enjoyed the final years of play-by-play from hall-of-famer Vin Scully, would likely find it possible to purchase Dodger telecasts, acquired from the Dodgers by DIRECTV, DISH Network, or the local cable company. Other intermediaries might offer a syndicate of games in competition with EXTRA INNINGS™.

Antitrust precedents suggest that the MLB agreements are anti-competitive and ought to be illegal. In *United States v. National Football League*,⁶ a very sophisticated district court decision that presaged by 30 years the antitrust analysis of broadcast restraints later adopted by the Supreme Court,⁷ the court noted that sports leagues had a unique interest in promoting competitive balance among member teams so that, to the extent that a rival team's out-of-market telecast would significantly harm live attendance, the league could agree to prevent this. However, the court rejected the NFL's effort to bar out-of-market telecasts that simply competed with the home team's telecast of road games: the only effect there was to limit output and raise rights fees for the home team, a result that was not legitimate or pro-competitive. As later courts have recognized,⁸ leagues can adequately protect competitive balance with regard to television rights sales by revenue sharing, rather than output limits.

The courts have also recognized, in antitrust litigation, that broad licenses awarded by competing copyright holders through intermediaries can be pro-competitive, when these are *non-exclusive* licenses. Thus, the Supreme Court rejected a lower court holding that Broadcast Music and ASCAP violated the Sherman Act by offering a blanket license for the vast majority of copyrighted songs.⁹ On remand, the court of appeals upheld the legality of the arrangement, but only after finding that potential licensees had real alternative ways of acquiring rights.¹⁰ This was because the Justice Department had challenged, many years ago, the agreement among almost all the Nation's songwriters to grant exclusive licenses to BMI or ASCAP—grants akin to the out-of-market assignments that individual team owners have made to DIRECTV—and the parties by consent decree had agreed to limit the license to a non-exclusive grant.¹¹

It is bad enough that these agreements meet the “hallmark” definition of unreasonable restraints of trade, by increasing price, reducing output, and rendering output unresponsive to consumer demand.¹² In fact, these agreements are even more inefficient and anti-competitive than would be the case if all rights to all games were assigned to a single entity. Because the additional costs of showing games to out-of-market fans is virtually zero, such an entity would likely sell, in addition to local rights and EXTRA INNINGS™, other packages to other consumers. For example, there are surely many fans who would pay, on a per game or per team basis, for out-of-market games. These are not authorized now, not because the sale would

⁵ See, e.g., *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490 (W.D. Pa. 1938).

⁶ 116 F. Supp. 319 (E.D. Pa. 1953).

⁷ *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984).

⁸ *Chicago Professional Sports Ltd. v. National Basketball Ass'n*, 961 F.2d 667 (7th Cir. 1992).

⁹ *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

¹⁰ *Columbia Broadcasting System, Inc. v. American Soc'y of Composers, Authors & Publishers*, 620 F.2d 930 (2d Cir. 1980).

¹¹ *CBS v. Broadcast Music*, 441 U.S. at 10–11, citing *United States v. American Soc'y of Composers, Artists & Publishers*, 1940–1943 Trade Cas. (CCH) ¶56,104 (S.D.N.Y. 1941).

¹² *NCAA*, 468 U.S. at 107.

not be profitable, but because the MLB owners can not agree on how to divide the profits.¹³

Insufficient Competition in Multi-Channel Video Distribution

An analysis of the economics of rights sales for out-of-market games demonstrates that the current scheme would be implausible except for two additional deviations from the free market: (1) insufficient competition between DIRECTV, DISH Network, and cable permits excess profits from consumers of “basic premium” programming; (2) by tying the sale of EXTRA INNINGS™ to its “Choice” package, DIRECTV is able to increase its excess profits and the agreement in question reflects a sharing of those increased excess profits between DIRECTV and Major League Baseball.

Although there are important differences in the economics of English football and North American sports, on both sides of the Atlantic we see leagues that offer entertainment products with no reasonable substitutes selling broadcast rights to a major programmer in return for a large, fixed sum of money. Policy questions about exclusive agreements for prime sports programming have also arisen in the United Kingdom, and have been insightfully analyzed in a working paper widely distributed among sports economists.¹⁴ Economists David Harbord and Marco Ottaviani detail the profit-maximizing strategy for the various market participants. First, they note that leagues are likely to sell rights for a fixed rather than per-subscriber fee. A fixed fee avoids the problem of the rights-purchaser tacking on its own excess profits charge to that imposed by the league.¹⁵ Because MLB doesn’t know precisely how many fans will subscribe to EXTRA INNINGS™, or how effectively DIRECTV will market the product, it has an even greater incentive to sell for fixed fees, as the rights-purchaser is better able to accept the risk of marketing the product effectively during the course of the contract. If the rights purchaser is effective in maximizing revenues from resale and advertising, results of which are usually reported in the trade press, the league can profit from the rights purchaser’s success to secure even higher rights fees for the next contract. (For example, the NFL’s first network contract with CBS gave each owner \$300,000/yr. Three years later, the second contract gave each owner \$1 million/yr.)

Next, Harbord & Ottaviani explain why a rights-purchaser, having paid a lump-sum to obtain rights for which there was no substitute, would want to re-sell rights on a per-subscriber basis to its cable and satellite rivals. Ordinarily, they observe, by re-selling to rivals, the rights purchaser increases the marginal operating costs for its rivals at the same time it fetches additional revenue. This “makes reselling more profitable for the firm which acquires the rights, and hence more likely to occur.”¹⁶ Re-selling on a per-subscriber basis results in higher rights fees (because the league can capture a portion of the additional profit to be obtained from reselling on a per-subscriber basis) and maximizes output (more people subscribe).

Applied to American baseball, Harbord & Ottaviani’s analysis suggests that DIRECTV would find it profitable to resell EXTRA INNINGS to cable networks and DISH Network, and that MLB would share in this profit through a higher lump-sum fee for the exclusive rights to out-of-market baseball games. So why have DIRECTV and MLB done the opposite? We can infer from the parties’ preference

¹³There are at least two recent examples of this phenomenon. In 1992, the English Premier League, having agreed to show 60 of its 380 matches exclusively on the BSkyB satellite, rejected BSkyB’s offer to show 90 matches for a 50 percent increase in fees. At about the same time, the National Basketball Association succeeded in strictly limiting the very popular broadcasts of the Chicago Bulls featuring Michael Jordan, despite evidence that Bulls’ broadcasts had minimal effects in other markets, refusing to copy MLB’s practice of taxing superstition revenue.

¹⁴David Harbord & Marco Ottaviani, “Contracts and Competition in the Pay-TV Market,” London Bus. School Dep’t of Economics Working Paper No. DP 2001/5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=289334.

¹⁵This phenomenon is known to economists as “double marginalization.” Suppose the profit-maximizing price for EXTRA INNINGS™ is \$160/year. (Any increase in price reduces demand, unless a product is essential to life. Thus, raising the price from \$150 to \$160 will cause some marginal consumers to discontinue patronage, but if the number is small enough, the increase is profitable. If 100 consumers refuse to go along with the increase, this would cost MLB/DIRECTV \$15,000. But if a 10,000 consumers are willing to pay \$160, this is an additional \$100,000. At some point, the number of consumers discontinuing purchases outweighs the additional income, just short of that point is the profit-maximizing price.) If MLB sold rights on a per-subscriber basis, they would want to fix the price at \$160 minus DIRECTV’s costs. If these costs were \$5/subscriber, MLB would set the rights sale at \$155. However, this would leave DIRECTV with no excess profits. DIRECTV would rather get some excess profits, even at the expense of losing some customers. So DIRECTV would be likely to charge \$170 or more, costing MLB some customers and some profit. These problems are avoided by a lump-sum sale.

¹⁶Harbord & Ottaviani, *supra*, at 8. To the extent that there are strategic gains from raising rivals’ cost, the incentive to re-sell is even stronger.

for an exclusive deal that DIRECTV is willing to forego this opportunity, and indeed pay MLB more than the total amount that MLB might reasonably expect to receive from sales of EXTRA INNINGS through various retail outlets. This is because DIRECTV would prefer to force *some* out-of-market baseball fans to switch their patronage to DIRECTV, rather than obtain *all* the revenue from out-of-market fans, regardless of which “retailer” these fans patronize. DIRECTV’s ability to obtain more revenue from those fans that remain with or switch to DIRECTV than it could by charging the full monopoly price for EXTRA INNINGS™ to all out-of-market fans is most likely due to their ability to obtain even greater super-competitive profits from those that switch.

Suppose one million fans would be willing to subscribe to EXTRA INNINGS™ at \$160 per season, but that 200,000 of these will not patronize DIRECTV (perhaps they fear thunderstorms, prefer programming available only on cable, can’t afford two systems in areas where local cable is unavailable, don’t have a clear south-facing view on their property, must use the system subscribed by the landlord, *etc.*). That’s \$32 million in lost revenue. The exclusive deal means that DIRECTV plans on making this up by obtaining new customers from cable or DISH Network. If 300,000 EXTRA INNINGS customers switch to DIRECTV’s Choice package (at \$480/yr) + EXTRA INNINGS™, that’s an additional \$144 million in revenue (from Choice, not MLB games, which these fans were already purchasing via cable or DISH Network). If DIRECTV’s operational and programming costs in servicing the new customers was not well below \$144 million, this scheme wouldn’t be profitable. Only the excess profits on the Choice package—which baseball fans are required to purchase as a condition of subscribing to EXTRA INNINGS™—is what allows DIRECTV to profitably enter into an exclusive deal.

One other explanation is theoretically possible—that there are huge cost-saving efficiencies from an exclusive dealing arrangement. However, no one has, to date, seriously made this claim on behalf of MLB or DIRECTV.

Summary of Economic Analysis

The foregoing analysis suggests that the MLB/DIRECTV exclusive deal reflects the ability of these sellers to exploit baseball fans because of the lack of any substitute products, and thus impose a monopoly price and significantly reduce output. Out-of-market games will henceforth only be available on DIRECTV, presumably at the monopoly price. The absence of alternative means of obtaining out-of-market games means millions of consumers will pay more. But it also means that output is substantially reduced, because of foregone purchases (all of which would be considerably above the marginal cost of production) from (i) expatriate fans of one particular team willing to pay a lower price to watch their favorite team but unwilling to pay for the EXTRA INNINGS package; (ii) avid fans who have other preferential reasons to prefer to continue to subscribe to cable or DISH Network; (iii) marginal customers of satellite programming, who otherwise prefer DIRECTV’s programming but decline to pay the “basic premium” price charged by DIRECTV because it reflects in part the need to share profits with MLB. This is bad public policy.

Ways That Legislation Can Protect Consumers

There are a number of ways that existing or potential legislation could protect baseball fans against exploitation by inefficient and anti-competitive broadcast agreements:

- *Existing antitrust laws* could be used to invalidate these unreasonable restraints of trade.
- *Specific antitrust legislation* could be enacted to facilitate this result.
- *Regulatory legislation* could minimize the excess profits that satellite and cable providers enjoy from their “basic premium” packages, or could directly prohibit the bundling essential to the exclusivity scheme by requiring “a la carte” pricing.
- *Strategic legislation* could also be introduced by leading members of this committee as a means of facilitating voluntary pro-consumer compliance by industry.

Existing Antitrust Enforcement

As detailed below, even vigorous enforcement of the antitrust laws by the Justice Department would face significant obstacles to quick resolution in time to protect sports fans. Unfortunately, the record of the current Antitrust Division leadership does not lead to a confident prediction of such enforcement. The obstacles to private litigation to effectively protect consumers are even greater. For these reasons, reli-

ance on existing law is unlikely to constitute an adequate public policy response by this Congress.

A government enforcement action should be able to rely on the precedents discussed above to establish that the horizontal restraint among MLB clubs is an unreasonable restraint of trade. The exclusive broadcast territories are neither necessary to promote competitive balance among member teams nor to prevent any efficiency-detracting free riding. The only way in which a club's sale of their games into another geographic market could harm competitive balance would be if the additional revenue generated from these out-of-market rights fees would enable the teams to acquire enough talent to enable them to dominate the league. This scenario is implausible for a number of reasons. There is no evidence that these fees would be significant enough to affect competitive balance. More important, there is no reason why the leagues could not share these revenues, as Major League Baseball has with teams whose games are carried nationwide via locally-based superstations.

Nor can the leagues, in this context, sensibly claim that the restraint is an intra-firm restraint among the "single entity" of the league, rather than the horizontal agreement among independent clubs. Because of the economics of rights sales, a single firm would sell all rights in all games that are going to be televised to the highest bidder, who could then re-sell the games to consumers in a price discriminating manner designed to yield the greatest revenue (noting again that the marginal costs of selling a game once it is being televised is virtually zero). The EXTRA INNINGS package is the only way that out-of-market fans can get games, not because this is DIRECTV's preference, but because it is the choice of the majority of MLB clubs. DIRECTV would clearly be better off if it could price discriminate by selling the EXTRA INNINGS package to those with a demand for over 1,000 baseball games, and selling a smaller package of games (or even individual games on a pay-per-view basis) to its subscribers unwilling to pay for EXTRA INNINGS. Rather, individual games are unavailable to out-of-market fans, despite the potential for profitable sales, because transactions costs prevent owners from agreeing on how to divide the spoils. As a result, the interest of the league-as-a-whole in maximizing revenues from television sales is subordinated to the interests of individual teams in protecting their own local broadcast rights and preventing rivals from attaining a competitive advantage from more successful out-of-market rights sales. This is not the "unity of interest" that the Supreme Court has required to exclude agreements among formally separate entities from review under section 1 of the Sherman Act.¹⁷

Existing precedents with regard to tying arrangements might also support a claim that DIRECTV's practice of bundling EXTRA INNINGS™ with its \$40/mo. Choice package is also unreasonable. However, there are several serious obstacles to successful government prosecution of such a lawsuit. First, MLB could claim that the judicially-created baseball exemption applies to broadcast restraints. Although good arguments can be made that the exemption does not apply,¹⁸ the result is ultimately an uncertain question likely to require ultimate resolution, after years of litigation, by the Supreme Court. Second, although DIRECTV's bundling practices would appear to be unreasonable under existing precedents,¹⁹ these precedents have

¹⁷*Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

¹⁸When the Supreme Court last revisited the issue in *Flood v. Kuhn*, 407 U.S. 258 (1972), the Court explicitly rejected its original holding that baseball was not interstate commerce, instead re-affirming the exemption because of baseball's "unique characteristics and needs" and Congress' "positive inaction" in sustaining the judicial precedents. It is clear that baseball has no unique characteristics and needs with regard to broadcasting, a fact Congress recognized by including baseball as a sport covered by the *limited* exemption for package sales to free-to-air networks contained in the Sports Broadcasting Act. Congress' positive inaction with regard to the baseball exemption, upon which Justice Blackmun relied in *Flood*, related almost entirely to labor restraints. When Congress overturned that specific aspect of *Flood* in enacting the Curt Flood Act of 1995, it is clear that continuing legislative concern almost entirely related to protecting the unique characteristics and needs of minor league baseball, not broadcasting practices that MLB shares in common with the NBA and the NHL.

In addition, lower courts have suggested that the exemption applies only to the "business of baseball" and not to the "business of broadcasting." *Henderson Broad. Corp. v. Houston Sports Ass'n*, 541 F. Supp. 263 (S.D. Tex. 1982). Especially in light of courts' explicit recognition that MLB can lawfully require clubs to share revenues from rights sales, *Chicago Professional Sports Ltd. Partnership*, *supra*, 961 F.2d at 675, there is no reason why subjecting television agreements to standard antitrust analysis would compromise "the business of baseball."

¹⁹The current Supreme Court doctrine is expressed in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). Firms engaged in a substantial amount of interstate commerce may not force consumers to purchase a product, service, or copyright license as a condition of purchasing a more desired license, where the seller has "market power," the arrangement requires the purchase of two "separate products," and the tying is not necessary to introduce a new product or to ensure the reliable use of either. Applying this precedent, it is clear that DIRECTV has market power in the sale of EXTRA INNINGS™, as there are no reasonable substitutes

come under criticism by commentators²⁰ and justices.²¹ Moreover, current regulation of cable and satellite practices by the FCC might be held to preclude antitrust scrutiny of this behavior.

Private enforcement is even more problematic. The obstacles stated above pose major litigation risks that would deter private antitrust attorneys from commencing expensive litigation. Because the proposed exclusive deal is prospective, treble damage relief (and accompanying attorneys fees funded by the damage award) would not be available for that aspect of the challenge. My own experience as a public interest advocate has been that private firms are unlikely to view the grant of statutory attorneys fees provided for in the Clayton Act as a sufficient economic incentive to undertake the costs of uncertain litigation. In addition, private litigation on behalf of consumers who currently patronize DIRECTV would have to confront complex issues that would arise in light of the contract-by-adhesion DIRECTV requires all customers that provides for disputes to be arbitrated.

New Antitrust Legislation

This committee could defer to your Judiciary Committee colleagues, who could consider specific legislation that amended the Sports Broadcasting Act to prohibit the sort of bundling or exclusive dealing practices identified in this testimony. There is a long history of specific legislation enacted by Congress to outlaw specific anti-competitive practices: indeed, the Clayton Act was passed to specifically outlaw tying arrangements arguably illegal under the Sherman Act, over the objections of former President William Howard Taft, who left the White House to accept a chaired professorship at Yale Law School and wrote a book arguing for the adequacy of the Sherman Act on this and other points.²²

Regulatory Legislation

As Judge Richard Posner famously observed, a “firm that has no market power is unlikely to adopt policies that disserve its consumers; it cannot afford to. And if it blunders and does adopt such a policy, market retribution will be swift.”²³ The corollary, of course, is that firms with market power can afford to disserve consumers and market retribution will not be swift.

Either expressly, or by delegation to the FCC, this committee could craft legislation that recognizes that market retribution is not swift in either the market for out-of-market baseball games or the market for delivery of multi-channel video distribution. A variety of regulatory approaches might be considered. I would be pleased to continue to work with you and your staff if any of these are of particular interest:

- *Listed Events Legislation*: A variety of other countries have enacted legislation that specifically requires a variety of important sporting events to remain on free-to-air television, for the benefit of millions of consumers.
- *“A La Carte” Pricing*: Satellite and cable companies could be prohibited from requiring lengthy subscriptions to their “basic premium” packages as a condition of subscription to high-demand sport programming. The analysis above suggests that DIRECTV would quickly lose its incentive to pay MLB for exclusive rights if cable subscribers could, in a secondary market, acquire DIRECTV equipment and then simply subscribe to EXTRA INNINGS™ without having to pay \$40/mo. for Choice.
- *Specifically Ban Sports Exclusivity*: Unlike general delegations contained in the Sherman Act or the Federal Communications Act, Congress is free to write specific legislation to deal with specific industry problems. Based on the economic analysis summarized above, the Committee could conclude that copyright holders and their licensees can fully exploit their intellectual property rights by sale and re-sale and there is no legitimate justification (sharing in excess profits

for out-of-market MLB games. Forcing purchasers of EXTRA INNINGS™ to purchase the Choice package constitutes a tied sale, because there is distinct and separate consumer demand for both products. Finally, there is no need to tie well-established programs in the Choice package with uniquely desirable MLB games in order to penetrate a market, and there are no reliability issues in subscribing to one or the other.

²⁰ See, e.g., Robert Bork, *The Antitrust Paradox*, 365–381 (1978).

²¹ See, e.g., *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 487 (Scalia, J., dissenting); *Hyde*, 466 U.S. at 32 (O’Connor, J., concurring).

²² William Howard Taft, *The Anti-Trust Act and the Supreme Court* (1914).

²³ *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982).

from limited retail competition is not legitimate) for exclusive agreements in this area.²⁴

Strategic Behavior—by Major League Baseball and by the Senate Commerce Committee

Both business and political actors often behave strategically—they act in a way that may or may not further immediate short-run goals in order to achieve long-run objectives. Although MLB owners are rightly accused of being short-sighted and greedy in some instances, there are many other occasions where MLB owners have decided that the long-term health of the national pastime is more important. It is possible that this is one of those occasions: that MLB owners see a strong future in the development of The Baseball Channel, and the exclusive agreement with DIRECTV is simply a negotiating strategy to persuade DISH Network and cable companies to re-sell The Baseball Channel on favorable terms.

If market retribution were swift among cable and satellite programmers, this would not be a problem. If MLB's demands were not unreasonable, then so many consumers would shift to DIRECTV that rival MVPDs would have to go along. If MLB's demands were unreasonable, then DIRECTV would lose so much money that it would eventually back out. However, anyone inside the Beltway is familiar with the lack of swift retribution reflected in the lengthy negotiations that were required before millions of Capital-area baseball fans could obtain Washington Nationals local broadcasts on their stations. The FCC has already recognized that market retribution is not swift in a number of non-sports contexts involving cable mergers, requiring programmers and distributors to either reach agreement on terms or submit their unresolved disputes to binding commercial arbitration.

There are a variety of situations where public policy may require government intervention, but where the best solution would be a voluntary agreement among private parties rather than direct legislation. An excellent example of that technique was recently employed by this committee, when under Senator McCain's chairmanship there were explicit overtures to MLB owners and players to agree on new procedures for steroid testing or face Federal legislative intervention. The result was a voluntary deal that is probably superior to anything Congress could have done.²⁵

Likewise, if it appears that the best resolution of this controversy is voluntary agreement among MLB and the various programming distributors, perhaps this committee could proceed strategically by threatening onerous legislation (barring collective sales of sports broadcasting rights to satellite and cable, mandating a la carte programming, authorizing FCC rate regulation of premium programming, etc.) unless the parties reach a voluntary agreement or agree to submit the matter to binding commercial arbitration.

Conclusion

The MLB/DIRECTV exclusive deal is not like a facially-similar contract between Sears and Levi's. Rather, the deal reflects (1) cartel behavior by MLB clubs in refusing to sell out-of-market rights to their games except via EXTRA INNINGS™ on DIRECTV and (2) a willingness of DIRECTV to share the excess profits it enjoys from its Choice package with MLB. Millions of baseball fans who no longer live near their favorite teams are harmed by their inability to watch their teams' local broadcasts except via EXTRA INNINGS™, and harmed particularly by being forced to do so via DIRECTV. This committee has a variety of arrows in its legislative quiver to protect consumers from this sort of exploitation.

²⁴This legislation would also prevent cable companies from aggressively competing in a consumer-harming way by acquiring their own exclusive sports programming rights and refusing to re-sell to satellite outlets.

Another example, of perhaps little interest to most Americans but of keen interest to millions, especially recent immigrants from south Asia or the United Kingdom, concerns the rights to satellite broadcasting of international cricket matches. Thus, DISH Network obtained exclusive rights for the International Cricket Council's World Cup contests currently being played in the West Indies, while DIRECTV obtained exclusive rights to a large number of international contests throughout the year. Devoted cricket fans need to either subscribe to both or forego the ability to watch these matches in their homes.

²⁵The substance of the agreement, and whether the agreement or proposed legislation accurately reflects the public interest in an appropriate balance between protecting (i) players' health, (ii) the integrity of the game from health-harming, performance-enhancing behavior, and (iii) privacy rights, is of course beyond the scope of this testimony as well as my scholarly expertise.

Senator KERRY. Thank you very much, Professor, we appreciate the testimony very much. We've been joined by Senator Lautenberg, Senator Klobuchar.

Senator Klobuchar, do you have any opening you want to make?

Senator KLOBUCHAR. I'll say a few remarks with my questions, Senator Kerry. Thank you.

Senator KERRY. Thank you very much.

Senator Lautenberg?

**STATEMENT OF HON. FRANK R. LAUTENBERG,
U.S. SENATOR FROM NEW JERSEY**

Senator LAUTENBERG. If I may, Mr. Chairman.

I appreciate the fact that you're holding this hearing—thank you, Mother.

[Laughter.]

Senator KLOBUCHAR. I'm letting that go, Senator Lautenberg.

Senator KERRY. I would, if I were you.

[Laughter.]

Senator LAUTENBERG. With new ways to access TV programming from satellite dishes, digital cable, through the Internet, and even television on cell phones, our ability to access programs seems to be increasing substantially. And it's nearly unimaginable that, as the number of ways to watch this programming increases, it's becoming more difficult for some people to actually watch individual programs. And yet, it appears that this is exactly what's happening.

Mr. Ross noted the New Jersey problem, and we had faced a serious problem—as far as we were concerned—last year. The Rutgers football team finished the season ranked 12th in the country, and was invited to play in the Texas Bowl. You can imagine what kind of spirit followed them from the State of New Jersey.

But, because the NFL owned the rights to broadcast the Bowl, and the League was in a dispute with the cable companies over the new NFL Network, 1.7 million out of a population of 2.5 million cable customers—1.7 out of 2.5 million—had no way to watch Rutgers play in that game.

Well, luckily after a week of negotiations between the NFL and New Jersey's cable companies and my office, we were able to strike a deal that got the game on TV.

Now, I'm a former businessman, and I understand that cable companies, satellite providers and sports leagues all want to turn a profit, that's not an inappropriate thing at all. But, what we must make sure is that the consumer doesn't lose out.

And as I look at Major League Baseball's EXTRA INNINGS deal with DIRECTV, I'm particularly concerned about baseball fans in South Jersey. Now, Philly fans in South Jersey must subscribe to Comcast to watch their team play, because of an exclusive deal, and there's a lot of enthusiasm in South Jersey for the Phillies and the Eagles and sports played in Philadelphia. But, if those same fans want to watch other teams also, they may have to subscribe to both Comcast and DIRECTV, and it's not fair.

And, I do want to add to my comments, the fact that we finally got cable and the National Football League Network really to sit down and figure out a way to present this very exciting, unusual,

unique experience that we had with Rutgers going to the Texas Bowl. It took a lot of hard going, but I think all parties were principled in the fact that they understood that people in New Jersey wanted desperately to see the game, and they did, and so it worked out well.

Mr. Chairman, the same thing needs to happen here. Mr. Ross, I heard you say that exclusivity was not ruled out as a legitimate practice. But, our Committee here is going to stay tuned, based on the leadership of Senator Kerry. We need to make sure that more business opportunity for the leagues and cable companies translates into more choices for consumers.

I've said it before—TV watching has become the principal information dispenser in our world. We see it by the decline in newspaper interest, and the increasing opportunity that cable TV has to present vital matters to the population at large.

And so, when it gets to that kind of a presence, you're looking at something that is almost commodity-like in character. We have to make sure that people aren't deprived of this. Once again, I state that the companies have a right to get a return on their investment and their hard work. But it can't be done without keeping the interests of the public sharply in focus.

Thank you.

Mr. Chairman?

Senator KERRY. Thank you very much, Senator Lautenberg.

I appreciate the testimonies, I appreciate some of the point/counter-point on the deal, and I want to try to see if we can flush this out a little bit, to understand it so it's easy for the consumer and others who are trying to follow it.

Mr. DuPuy, let me just check with you on the guiding principles as you approach this deal. I would assume that you buy into, or support Commissioner Selig's notion of the social institution and public responsibility component of baseball. And, I also assume that as you approach this—or I would hope—that one of the guiding principles is the notion that you want this to be as accessible to as many people as possible.

Mr. DUPUY. We want as much—as many games distributed to as many people as possible. That's correct, Mr. Chairman.

Senator KERRY. Now, just at first blush, sort of a quick take of any laypersons looking at this deal, they look at DIRECTV and they see 15 million subscribers. Now, understandably their notion is here, you're going to market a good product, you're going to do what—and I acknowledge, I think DIRECTV's NASCAR offerings and other things are innovative, creative and interesting. And, it has sparked a kind of consumer response. So, we're assuming there will be some uptake. But, whatever that uptake, however, 15 million is not 75 million. And 75 plus 15 is the 97 plus whatever that is the current universe that is available to America.

So, how, from a layperson's point of view, do you make the judgment and come to the conclusion, "Hey, it's better to narrow this down to 15 million people, rather than to have it available to almost 100 million people?"

Mr. DUPUY. Three points, Mr. Chairman. First of all, we hope that IN DEMAND and DISH opt in. We want it available to all consumers.

Second, it isn't 75 million. It's only available to digital homes, and the digital home universe is less than that. My belief is that IN DEMAND is about 32 million, that DISH is about 13, plus 16 for DIRECTV, so it's about 61 million, versus the 90 or 100 million.

Senator KERRY. Well, let's say—

Mr. DUPUY. But, the third, and—

Senator KERRY. The same principle still applies, though.

Mr. DUPUY. And, we want it available to as many people as possible.

Senator KERRY. But it may not be. As the deal was constructed, it wouldn't be.

Mr. DUPUY. But, the Baseball Channel, 24/7, 365 days a year, will be available to 15 million fans coming out of the box. And we view that as key, and critical to our survival. You heard Mr. Jacobson's disdain for the Baseball Channel. We, as a business matter, view the Baseball Channel as critical to our long-term survival, and in the interest of our fans who want more baseball. And that's why we are willing to do a deal with DIRECTV, who has supported the Baseball Channel, and the launch of the Baseball Channel, to 15 million of our fans.

Senator KERRY. I don't think I read Mr. Jacobson's comments as disdain, and I hope your negotiations aren't in that sort of a state of understanding at this point. I understood it as seeing it as a channel that's down the road. It's not going to be out there until 2009, I believe, is that correct?

Mr. DUPUY. We've had it on the drawing board now for 10 years and—

Senator KERRY. I understand.

Mr. DUPUY. It's launching in 2009.

Senator KERRY. Right. But, his counter-offer—at least on its surface, and I'm not getting into all of the numbers here, and I'm not trying to do a deal/counter deal—but just listening to what I heard, that seemed like a pretty powerful offering to suggest. You're going to get the same money, you get the right of refusal to kick them off if they don't take the channel when it's up, and you have a 2 year basis for the fans to be able to continue to enjoy what they enjoy today.

Now, for a fan consumer, reaching America base—what's the matter with that?

Mr. DUPUY. We believe, number one, that DIRECTV has the right to begin to help us build the channel, and to invest—

Senator KERRY. Well, there's nothing to stop them from doing that.

Mr. DUPUY. Well, it will. Because there's no guarantee—we've seen what other leagues have gone through in their efforts to launch channels. We've seen what's happened with the NFL, we've seen what's happened with the NBA. And there is no assurance that we will gain carriage of the Baseball Channel, which is why we made it a critical element of these negotiations, Mr. Chairman.

Senator KERRY. But again—let's come back to that for a minute—I'm just trying to understand this.

Mr. DUPUY. Yes, sir.

Senator KERRY. What I heard is that you can go ahead and you've got a 20 percent ownership that's going to DIRECTV, you'd

go forth in your joint venture, you'd invest—as you are—in the production of the channel. iN DEMAND, representing those cable interests would have the opportunity to offer the out-of-market games now, this year, next year, and decide whether or not they're going to come in, on what terms, and negotiate with you. If they don't, as I understand it, you can then take away from them the EXTRA INNINGS.

Mr. DUPUY. They've had 9 months to negotiate this transaction, Mr. Chairman. And it seems to me—

Senator KERRY. Well, in fairness, during the period of that negotiation, as I understand it, you had rejected their offering. They offered three times more than what they're currently paying for EXTRA INNINGS.

Mr. DUPUY. Well, I don't believe that to be accurate on the math, but we had a negotiation—

Senator KERRY. Well, let me ask you—am I misinterpreting something, Mr. Jacobson?

Mr. JACOBSON. No, Senator, you've not misinterpreting it. In fact, we've made several offers to baseball, all of which were rejected, and as I mentioned, the last offer that we made prior to our counter-offer last week, we offered 15 million subscribers for the Baseball Channel. We offered up to \$100 million a year for EXTRA INNINGS, no share of the Baseball Channel, non-exclusive, and that offer was not so much as responded to.

Senator KERRY. So, what are we missing here?

Mr. DUPUY. We did respond, Senator. We have a contract with DIRECTV. We offered terms to iN DEMAND and DISH that were in parity with the DIRECTV deal, and iN DEMAND had said no.

Senator KERRY. So, what it seems—iN DEMAND said no to the parity, but when you say parity, parity is not parity if they don't get ownership.

Mr. DUPUY. Well, I disagree with that, sir.

Senator KERRY. Why is that?

Mr. DUPUY. Well—

Senator KERRY. That's sort of apples and oranges, isn't it?

Mr. DUPUY. No, I don't—

Senator KERRY. Well, you had one deal with DIRECTV, but you're saying, "if you offer the same thing" to the others. But they can't offer the same thing because they don't get an ownership.

Mr. DUPUY. We believe that the equity was for additional consideration, sir. We believe that the equity was as a result of DIRECTV coming in, being the early mover, making the market. DIRECTV agreed that they would provide 15 million homes. Mr. Carey signed a blank piece of paper, and agreed to step up and guarantee 15 million homes.

Now, someone else wants to come in and say, "Oh, now that you have it established, and we know we're going to have 15 million homes, we want a piece of that equity, as well." It is very common in the broadcast industry for the early movers to get a piece of equity. Much like iN DEMAND or Comcast owns Versus and owns the Golf Channel, which are carried on satellite, very common to give early movers a piece of equity.

Senator KERRY. Sure, I understand that. And, obviously in the investing world you need to be able to cut that kind of deal, and

I certainly respect the need to attract capital and go forward with some kind of business plan, I understand that.

What I'm trying to get at here, though, is representing the public interest, and the fan base, it seems to me there ought to be some way to skin this cat, where your equity is respected, where your deal goes forward, but you still provide a fair access here for a broader base to be able to share in this product. And, it would seem to me, in the end, you all benefit. That everybody benefits. It's a win-win-win—you win because you're going to have revenue increased, you're going to have increased base to appeal to, you folks win because you continue to carry, and the fans win—most importantly—because they get a multiple choice of how to access this. Why is that unreasonable?

Mr. DUPUY. I come back to the first point I made, Mr. Chairman, and that is we hope they do opt-in. But certainly, you wouldn't suggest that we would hand the games over to them at whatever price they wish to pay—

Senator KERRY. I'm not suggesting that. But they have not, it seems to me, tried to negotiate a "whatever" price. They have, in fact, met your demand of a parity—equal price, same price—but different level of subscribers.

Mr. DUPUY. That's correct.

Senator KERRY. And it's reasonable to understand why there would be a different level of subscribers, because you can't get to 80 percent of 65 million, and consider that the same thing as 15 million. Am I wrong? Am I missing something, Professor Ross? Do you want to weigh in?

Mr. ROSS. I'm not sure if you're missing something, because I'm not an expert in this area, in the details of the commercial area. I would add an analogy that the members of this committee may be familiar with, because it's something the FCC has done in many cases. Recognizing the market imperfections, in cases where you have vertical integration, they have recognized that there's a real need to get a deal to be done so people can watch programming. And, if parties can't agree to a deal, they have to agree to binding commercial arbitration.

Now, you're a persuasive guy, Senator Kerry, so I have to say in listening here, what you seem to say is making sense to me. I know I have a great respect for Mr. DuPuy's commercial acumen, so I have some skepticism that maybe I'm missing something in your—superficially what you have to say. But, one way to solve this would be for the parties to all agree to binding commercial arbitration so they get a deal that is fair to them in some way, whatever that is. And then the bottom line is Senator Lautenberg's concerns are met, and fans aren't deprived of games.

What is really going on here, is that in order to ensure maximum access to the Baseball Channel in 2009, Major League Baseball is trying to leverage that at the expense of fans now. It may be 10 years from now, fans will be better off, by that process—maybe not, we don't know. But that's the dynamic here.

Senator KERRY. Well, it's a fair question, but I think—I'm not trying to reach too far here. I'm trying to get into a sort of, you know, reasonable place. But it does seem to me, Mr. DuPuy, that what's driving this, to a large measure, at least from an outsider's

perspective looking in, is MLB's commitment and passion for this channel.

Mr. DUPUY. That's correct, Senator.

Senator KERRY. That's really what's driving it.

Mr. DUPUY. We concede that. That our business judgment is that the establishment of the channel and getting enough homes to launch the channel is what is driving this negotiation, that's correct.

Senator KERRY. And, if that is true, why is that not ultimately an exercise of your market power? To the negation to this larger public interest?

Mr. DUPUY. Because we're increasing output, sir. We broadcast all of our games. And again, I don't think this is a matter of every game should be available—

Senator KERRY. When you say "increasing output,"—well, but somebody drew an analogy in their testimony, I forget who it was, it might have been Mr. Carey, about HBO and Sopranos, *et cetera*—this is a different kind of content we're talking about. It's a different kind of product, a different kind of base. So, I don't think that analogy works.

And, in the same way, when you say we're trying to drive this content, it seems to me, again, there ought to be a way for reasonable people to work out, without violating this investment interest, which I respect, and the capital, the business approach to this—the long-term time, energy, investment, idea and so forth, but still allow folks to get in on a reasonable economic basis, so you have a broader consumer base. Which, ultimately, if you're looking down the road, my hope would be that the channel is a raging success, that in fact, you do have a better product, that DIRECTV's creativity and intervention here, and how they define the product spurs the others to do the same, so that in the end, Major League Baseball has a much larger fan base, with a much more diverse portal.

Mr. DUPUY. We share your hope, across the board. And we believe the terms that were offered and have not been accepted, were reasonable. We heard the Senator, we heard the fans, and we made this package available to all bidders.

Senator KERRY. Well, I want to come back to explore that. Senator Specter is here, and I want to respect his time, and others'. But I do want to go back to get both Mr. Vogel and Mr. Jacobson in on this discussion, about what might, in fact, work, and hope everybody doesn't get into this kind of fixed, hard-based descriptive style, using adjectives that sort of push people away, rather than bring people together.

Senator Specter?

**STATEMENT OF HON. ARLEN SPECTER,
U.S. SENATOR FROM PENNSYLVANIA**

Senator SPECTER. Thank you, Mr. Chairman. And thank you for convening this hearing on this very important subject. The Judiciary Committee has had a look at it, and maybe with the merger of the Commerce Committee, and the Judiciary Committee we can do some good here.

I have grave concerns about what is happening on paid television, generally. The MLB activity, and the issue of EXTRA INNINGS mirrors what the NFL has been doing with the Sunday Ticket, and more recently with a Thursday/Saturday program. I believe that this is a movement along the line of very, very substantial charges for sports fans in America.

There is no doubt that America is addicted to NFL Football, and Major League Baseball. It's a love affair—I became involved in it many years ago myself, when there was very little to do on the plains of Kansas except look at the box scores. And now, every Sunday when the Phillies and I are in town together, I go, and I am a regular at the NFL, and I know my views are shared by millions of Americans.

We have a difficult situation, when we try to do anything about what Major League Baseball is doing because of the antitrust exemption, which has been judicially created. Congress has flirted with the idea from time to time of conditioning it, or changing it, but we have not been able to do that.

But I think, Senator Kerry is on the right line, what he has written to the FCC, you have a proposed sale of DIRECTV to Liberty, there is a potential involvement by the Department of Justice on the antitrust implications, so we're not entirely powerless, but what we would like to see happen is that the parties on their own would work out reasonable arrangements to make EXTRA INNINGS available to more fans.

And, I know that there has been the suggestion that the offer has been made to other potential carriers, and it's been rejected, and they have a few more days to take up the offer. But, the issue turns—as I understand it—on the requirement that it be subscribed to, in Comcast's case for example, and I have an extra special interest in Comcast, which is Pennsylvania-based. For obvious reasons, we would have to put a charge on too many of Comcast's subscribers.

I note in the press, Senator Kerry, you have made a comment about not having seen the contract, and raised a question as to whether we have a right to, but I think perhaps we might be a little bit more assertive there, and examine it. And see what the details are on the refusal of Comcast and Warner and others, and the others in the combine was to undertake.

But, this is something I would hope that Major League Baseball would work out on its own, and would find a way to satisfy other carriers so that more baseball fans can see it. Once the season starts, there are going to be a lot of people who understand what they're not saying. Right now, they don't really know it, because there are not too many people who are concerned about what goes on in Russell 253. But when they see things happening in Major League Baseball parks around the country, and can't watch it on television, there's going to be a tremendous reaction. And when the fans react, Congress may react. And if Congress reacts, you may be well-advised to act before we do. Thank you, Mr. Chairman.

Senator KERRY. Thank you, Senator Specter, very much. I know you've been involved in this, I remember when Senator Bill Bradley was here, and we had a round on the issue of the antitrust issues,

and I certainly respect your involvement in this for a long period of time. So, I appreciate you being here, and your leadership on it.

I have some more questions, but I think I've sort of done my first round, so let me come back, Senator Klobuchar.

**STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Thank you, Senator Kerry, and thank you, all of you, and I just want to explain a little my background and interest in this—besides adjusting Senator Lautenberg's microphone—my interest in this is that I grew up in a sports family, my dad covered the Vikings and the Twins for the *Minneapolis Star Tribune* for many, many years, has written a number of sports books, and I grew up in the days of Calvin Griffin, and the Mets Stadium, when the Twins were training in a park owned by the Animal Rescue League.

And, I've seen the evolution of professional sports, and actually wrote a book on the building of the Metrodome, and the involvement of professional sports in that. It was my college essay at Yale, and they tried selling it at the Dome next to the Twins caps and the purple inflatable swords at the Vikings games—it didn't do that well—but, it's still actually used at colleges. And, part of my interest in writing that book was to look at just the public interest value of sports, and how it's a shared interest of the citizens. And, so when I look at this issue, that's where I come from on this.

And, as Professor Ross has pointed out, there are a lot of Twins fans all over the country—last year we had the MVP, the Cy Young Award Winner, and the American League batting champion. And so, I'm assuming that millions of Americans only want to tune in to watch the Twins. So, that's why I'm interested in this issue.

So, my first question is, of you, Mr. Carey, and that is, how many Americans cannot get access to DIRECTV, either because of the location of their home, or the building they're in, or a building that doesn't allow it?

Mr. CAREY. From a line of sight, essentially, it would be slightly less than 2 percent. We run 1½ plus percent of customers, so I guess if you took the number of cable subscribers—it's obviously not relevant to those EchoStar subscribers who have the same issue in terms of line of sight, it would be the 200,000 or so cable customers that may have a line of sight issue. It would be a number slightly less than 5,000 homes that subscribed to EXTRA INNINGS last year that could have a line of sight issue that would prevent us providing the service.

We do provide the broadband access, so that every customer, obviously, can get it through broadband. But that would be the number of, again, fewer customers—around 5,000 cable customers out of the ones that had it last year, that may have a line of sight issue, or some landlord issue, although legally, landlords aren't allowed to block satellite access.

Senator KLOBUCHAR. Does anyone want to add to that? Your perspective, Mr. Jacobson?

Mr. JACOBSON. I appreciate your interest in sports, Senator, I am an EXTRA INNINGS customer—I was—I live in Manhattan, I live in an apartment building. I'm not going to be able to see these

games now, unless I want to huddle around my 4-inch computer screen, and I really don't think that's much of a substitute for me, or for our customers.

I'm not sure where Mr. Carey's statistics come from, I don't know what the number is, quite frankly, what the exact number is. We have gotten thousands of letters from concerned fans, asking us, "How am going to be able to see these games?" Either because they don't have sufficient line of sight, or they live in apartment buildings, or they're just not predisposed to change.

I mean, there are a huge number of these customers who are getting other services today from cable—whether they're getting broadband service from cable or whether they're getting telephone service from cable—so, it may not be a question of whether or not they can switch. It may be a question of whether or not, legitimately, they want to switch. And if they don't—because they don't want to give up those services—should they have to sort of double-down on costs? Should they now have to get DIRECTV and cable, and only increase their costs? I don't think that's fair, I don't think that's very consumer-friendly, and we literally have gotten thousands of requests from customers about this, who are very concerned, and they're very angry.

Senator KLOBUCHAR. OK.

Mr. CAREY. Can I just clarify, the number—from years of experience, we track every sale, we know how many line of sight issues we have, so it is 1½ to 2 percent of our customers that order DIRECTV that have a line of sight issue. So, it's pretty mathematical to say, it's about 5,000 customers out of the 200,000 EXTRA INNINGS—

Senator KLOBUCHAR. Mr. Ross?

Mr. ROSS. I want to just chime in to say, I have no reason to doubt Mr. Carey's factual assertions, but there are a couple of other facts that I think you need to take into account.

One is the number of apartment buildings, especially for seniors, that will negotiate really attractive deals with one company or another. And if they happen to have negotiated a really good deal where you get free cable as part of your rent, it's economically impractical, because you're already paying the rent, to expect people to get DISH or DIRECTV, even if it's technologically possible to do so.

Second, and I note your timing was good with Senator Nelson coming into the room, because I know from personal experience from relatives that are his constituents that there are—as he well knows—a lot of weather-related activities in Florida during the summertime, and people who demand instant access, like for sports, you have a serious problem with satellites, and you know, there's just nothing human nature can do about a massive thunderstorm coming in to interfere with the satellite channel. And so there are a variety of reasons why the number of people who, for practical purposes, can't switch, is larger than the number who, for technological reasons, can't switch, which was the initial part of your question.

Mr. CAREY. I would say, of the 5,000—

Senator KLOBUCHAR. If I could just go to another, one question, that I'm just trying to clarify here, and that's when I heard about

the details on this, did iN DEMAND actually negotiate for exclusive rights, or not? Because I seem to hear different things from different people, about what happened here.

Mr. JACOBSON. Well, I can answer that, Senator. We never did, we've never negotiated for exclusive rights, we were asked to make Major League Baseball whole in the event that DIRECTV decided it no longer wanted to be at the negotiating table, which we agreed to, but we were never interested in negotiating for exclusive rights.

Senator KLOBUCHAR. OK. Mr. DuPuy?

Mr. DUPUY. That's a matter of semantics, Senator. What they did was submit an offer that said, "We will pay you 'X,' if you have no other distributors of the product." And had certain terms and conditions attached to that.

Senator KLOBUCHAR. OK, my last question here is, just as we look at how to resolve this, I'd just like to hear, briefly, 30 seconds from each of you, if you think that we should resolve this issue in the context of a broader effort to address competition, the area which is what we've heard from DIRECTV, or do you think we should specifically focus on this.

Mr. Jacobson?

Mr. JACOBSON. You know, I'd just like to come up with a solution, Senator. I think we posed a reasonable solution. To the extent that this committee can help us bridge the gap, I think that that would be terrific, but I think what we proposed, in light of the fact that the baseball channel is not going to be launching for 2 years, let's give the fans something today, let's not penalize them today for something that may or may not happen 2 years from today, and I think that's a fair compromise.

Senator KLOBUCHAR. Mr. Carey?

Mr. CAREY. They have the opportunity to offer this programming. They don't like the financial terms of it. There are an array of programming agreements we have which I don't like the financial terms of. We pay re-transmission rights to many broadcast stations, cable doesn't. We have onerous contracts that are much more expensive than cable's—I don't run down to Washington every time, you know, we have a contract issue or a programming issue or a cost issue and ask for it to be arbitrated or legislated. You know, we deal with it, that's the marketplace. And at times, we stepped up to an agreement, you know, we entered into the agreement in good faith, went through an honest process, we have taken the risks, we're the only ones today with a signed contract, we're on the hook for significant risks without knowing where that contract ends up.

We're taking the further risk of the uncertainty about exclusivity and non-exclusivity, and the other parties simply don't like the business terms. Quite frequently, I don't like the business terms, but I deal with it in the marketplace. And I think, there has to be a consistency with how these issues are dealt with.

Senator KLOBUCHAR. Mr. Vogel? Last one.

Senator KERRY. No, I was just going to say, we need that last question. Go ahead, answer the—

Mr. VOGEL. OK. Well, I think that, that is a much broader issue. I think access to sports content is the fundamental issue, and

Major League Baseball happens to be the example in front of us today.

I think that—as I said in my testimony—it limits competition. We came into the Major League Baseball EXTRA INNINGS package late. We added 50,000 customers, in three short years. Those customers had the choice of cable, they had the choice of DIRECTV, yet they made a choice to opt-in with EchoStar. Now, that's being taken away from them. So, I think the broader issue should be addressed by Congress.

Given that we're only four short days away from opening day, I tend to agree with Mr. Jacobson, that this channel doesn't launch until 2009, and there should be a way that we can share in the rights fees that DIRECTV has negotiated, and make Major League Baseball whole on a per-subscriber basis, based on its carriage, and move on and address the broader issue of access to sports rights, and how that impacts competition.

Senator KLOBUCHAR. Thank you very much.

Senator KERRY. Thank you, Senator Klobuchar.

Let me just remind colleagues, we're going to go around with a 7-minute round, and then we'll come back.

Senator Lautenberg?

Senator LAUTENBERG. Thanks, Mr. Chairman.

Do any of you have any idea about how much of TV-watching is dedicated to sports?

Mr. CAREY. I don't have a figure off the top of my head.

Senator LAUTENBERG. Well, obviously the volume of interest in sports is fantastic. I can think of nothing that crosses all kinds of lines to attract people to watch things more than sports—from golf to NASCAR.

Mr. DuPuy, do you worry about the loss of a body of interest in baseball as we go through this exclusive arrangement? One of the things that I can tell you in my office, that we get constant complaints about is the increasing cost of TV viewing. However that it is purchased. So, I just wonder whether we're in some ways going to kill this golden goose.

In New Jersey, for instance, we had this very serious question about what happened with the Rutgers Football game. That there were going to be 1.6 million people, roughly, unable to get the game. That had our phones ringing a lot.

But, through cooperation of the cable companies and the National Football League, we were able to sound out an agreement. And there's not a more energetic population about sports than those folks in New Jersey, our crowded little State. And why there is so much indignation at the fact that New York wants to recover the teams that we took from them, it's outlandish.

[Laughter.]

Senator LAUTENBERG. If you look at the Nets and the Giants and the Jets, some nerve.

[Laughter.]

Senator LAUTENBERG. I'm sure that you with your sports interest, must have been watching when the YES Channel was being discussed. And there was a question about whether or not, it could be offered, and people wanted it very much, except when a very small fee was going to accompany that watching. And there was a

total lack of interest, I mean, down in the single digits, of those who wanted to watch it and would pay for it.

And so, I think you have to be very careful, as I think Senator Specter said it very directly, that eventually if it comes across this desk enough, things will happen that you don't like.

And, I'm not issuing a threat here, but I simply ask, Mr. DuPuy, is there no fear that people will be deprived of seeing the games if this exclusive arrangement continues as it is?

Mr. DUPUY. No, Senator, there are two answers to that. Number one, I share your concern, you know, about future generations of fans. In an ever-increasing environment of multiple entertainment options, appealing to the next generation of fans is one of our critical objectives. And that's why we want to appeal to the broadest array of fans with the broadest amount of programming we can, which is why the launch of the Baseball Channel, in our business judgment, is so critical.

And, while we don't want to inconvenience any fan who has had a product, and wants to retain a product, to make the Baseball Channel available to 15 million fans on its launch, and to ensure that it will have a platform to appeal to 15 million fans, is trying to address those very concerns.

Second, there are alternatives. This is not that fans can't watch the games. They can switch to DIRECTV, or they can watch the games online. It may not be their desired alternative, that may not be their desired platform, but they can still watch them.

Third, we hope that IN DEMAND and DISH do, in fact, step up and continue the arrangement. So, yes, we share your concern about not alienating any fan.

Senator LAUTENBERG. Well, you say they can view it online, but is that an adequate substitute?

Mr. DUPUY. We televise all of our games through broadband, and in fact, more homes have access to broadband today, than have access to digital TV. So, it's available to more, and the quality of the monitors, the quality of the broadcast, we've increased the 700 mbs this year, the quality of it is actually quite good. It's not, in most homes, a 4-inch screen, it's a much bigger monitor than that.

Senator LAUTENBERG. Mr. Carey?

Mr. CAREY. Yes, I just wanted to add, I guess, two things.

One is, we have respected that, again, the majority of sports remains broadly available—Sunday afternoon football, Sunday night football, hundreds of baseball games, post-season, local sports—throughout sports. Really, the cornerstone of what really makes up, the programming that sports fans are interested in, we have made broadly available, we think it should be broadly available. What we've talked about here, and what DIRECTV has pursued, is really the premium packages to a narrow group of customers that pay a premium price for an expanded level of coverage. We invest to enhance that coverage, but there is a great deal of sort of the core sports that remains available.

Early on you talked about the situation in South New Jersey, and I guess what I do want to clarify there is, we've given the cable operators in that area the opportunity, to carry EXTRA INNINGS, as well as the Philadelphia games. We've never had the option, we don't today have the option, it's not in economic terms, we've never

been given the right to offer the Philly games or the local Philadelphia sports to the local Philadelphia fans. It's not a right we have. And I would argue, when you talk about sports interest, that is a much more core issue in terms of what appeals to the broadest public interest. Access to those local teams really are at the heart of what most people follow day in, day out in their lives. And when you talk about the passion of sports, it is generally, for their local teams, for those people who live in those local markets.

Senator LAUTENBERG. I urge you all to try and do your best to solve this problem. Because having it solved here is not a particularly good idea.

Thank you very much, Mr. Chairman.

Senator KERRY. Thank you, Senator Lautenberg.

Senator McCaskill?

**STATEMENT OF HON. CLAIRE McCASKILL,
U.S. SENATOR FROM MISSOURI**

Senator MCCASKILL. Mr. Ross, I'm curious about the antitrust part of this. Clearly, the legislative history of the 1961 Act that, basically through Congress, kind of blew out the antitrust laws, clearly the legislative history said sponsored telecasting does not include subscription television. And, I know there was a lawsuit, the *Shaw* case, that was settled. Now, I'm trying to figure out if the purpose of that lawsuit was to make sure that someone could buy one team, and not have to buy the whole darn thing—I'm trying to figure out how that settlement helped them? Because it doesn't appear to me that that settlement helped them.

Mr. ROSS. When I once served on a university committee, the general counsel reminded me before every meeting that he was the lawyer, and I was the professor. You would have to ask the lawyers why that case was settled on those terms.

If this was a hearing on the Justice Department settlement of that case—it was a private suit—I would have had a lot to say. It did not accomplish the public interest orientation of most fans. There were some fans who, for whatever reason, happened to prefer 1 week of NFL season, and not another week, and they benefited by that settlement, and the attorneys were rewarded in the settlement, but that was not an effective settlement of the underlying issues in that case.

Major League Baseball has a lot more games, and there are a lot more out-of-market games that are not available for broadcast on the networks than would be the case of many fans who are out-of-market fans elsewhere, and so the needs are, and the antitrust problems are even greater here.

Now, with regard to the antitrust issue, you of course, have the question of the baseball exemption, is it still valid? And, if it is valid, does it apply to this issue? Given that *Flood v. Kuhn* makes absolutely clear that baseball is interstate commerce, this committee clearly has the authority to pass non-antitrust legislation that simply regulates this industry, on an industry-specific basis. It obviously has the authority to regulate some of the questions that both sides have been complaining about here, about exclusivity—whether its the right of cable companies to exclude DIRECTV from its programming, or *vice versa*. So, there's ample

opportunity to legislate here, but there are a variety of issues that could tie up private antitrust litigation for years, before consumers will get a chance to benefit. Thus, although there might not be some interesting litigation issues worth pursuing, this is clearly not something—unlike other areas—where you and Senator Kerry can just say, “Go litigate this in court.” That really isn’t going to resolve the issue for sports fans in the next half decade.

Senator MCCASKILL. And there have been no signals, I assume, from Justice that they’re interested in looking at exclusivity, as it relates to sports marketing on subscription television?

Mr. ROSS. Not that I am aware of, and, no.

Senator MCCASKILL. I would ask both Mr. Vogel and Mr. Carey. The problem I’ve got with the exclusivity as it relates to your particular product is that, it’s very difficult for a consumer to go back and forth. I don’t even want to begin to tell you the saga of the decisionmaking of DIRECTV versus DISH in my house. You talk about ugly, divorces are made of this stuff.

[Laughter.]

Senator MCCASKILL. You know, the NFL is a big deal to my husband and so is baseball, and I’ve got to tell you the computer monitor will never make it in my household. Most of the people I know who have the passion for sports that want to watch the number of games that are now possible to watch because of our technology and because of the use of our airwaves, whether they’re public or whether they’re satellite. You know, online isn’t going to get it unless we get to the point that is much less confusing than it is now for the average consumer.

What I’m worried about is that I’m going to be sitting in this committee hearing a couple of years from now and there’s going to be a merger proposed. The rationale for the merger is going to be, “Well, if we just combined, if we just bought the other one, well, then the whole problem of who gets exclusivity is going to go away,” and then we don’t have any competition. I just would like both of you to comment as to whether or not you envision, either one of your companies coming before this committee with the rationale for merger, that “Gosh, if we could just get together we would solve that old baseball, that pesky NFL versus MLB problem.”

Mr. CAREY. Can I, let me first address the——

Mr. VOGEL. Since Chase has all the rights, he should comment first.

[Laughter.]

Mr. VOGEL. I’ll comment later.

Mr. CAREY. First——

Senator MCCASKILL. By the way, I went with you and that’s why I’m in so much trouble.

[Laughter.]

Mr. CAREY. I’m trying to solve that problem.

Senator MCCASKILL. I made the choice and boy have I regretted it. Every Sunday I have to hear it.

Mr. VOGEL. And that’s why I’m here. I’m trying to solve that problem for you.

Senator MCCASKILL. And by the way, he wanted me to switch and I explained to him how expensive it would be.

Mr. VOGEL. Thank you. I would agree, 33 percent increase.

Mr. CAREY. Everyone's going to say, I hope you're a DIRECTV customer. And we will try to take care of that.

Mr. VOGEL. A valued customer, Chase.

Mr. CAREY. You know, I, in all honesty, we do make changing a very seamless process. There aren't charges up front. And, actually in many ways, to our chagrin, an awful lot of people, about 20 percent of our customers every year, and 20 percent of EchoStar's, and probably more of cable's are changing services.

Senator MCCASKILL. If you think it's seamless, I need to talk to you.

Mr. CAREY. Well, we do—

[Laughter.]

Mr. CAREY.—we spend a lot of time on it, but you have an enormous number of homes. You probably have something in the neighborhood of 20 million homes today that every year are changing their service provider. In many ways we wish people, once they were put in place, wouldn't change and 20 percent of your customers are changing every year. And, it's a different 20 percent. There are a lot of customers moving around. There are a lot of offers out there, in many ways, to entice people to change. So, there is, certainly, a great deal of change and we spend a lot of time to make it as friendly as possible to make those changes happen. But, the fact of the matter is, an enormous number of people are changing very frequently.

Senator MCCASKILL. You don't envision using this as an excuse to merger?

Mr. CAREY. We're certainly not having any conversations today about a merger.

Mr. VOGEL. They're selling Liberty. News Corp.'s interest is going over to Liberty.

But, I'm glad to hear you're a consumer and you're making exactly the point I tried to make in my testimony, we've enjoyed access to this EXTRA INNINGS content for 3 years. We have expanded the market. This transaction now forces the consumer, through no fault of their own, to make a change. And, there is a difference in our price-point versus DIRECTV's price-point. We didn't take a \$5 rate increase on our core package this year, we took a zero rate increase on our package this year.

And, this is about migrating customers from one platform to the DIRECTV platform. Is it easy? You know, it's a matter of degree. It wouldn't be easy in my house. It's not easy in anybody's house, best I can tell. But, the fact of the matter is, consumers had the choice to purchase DISH, DIRECTV, or a cable operator. They had the choice to get EXTRA INNINGS as part of that purchase decision. That choice is now being taken away, through no fault of their own, and we don't see that as particularly fair.

And, that's why I said earlier, we think that all sports content ought to be subject to a broader review in this particular forum, and we'd be happy to participate in that. But, we don't think forced change by a content provider is in the best interest of consumers, by any means.

Senator MCCASKILL. Thank you, Mr. Chairman.

Senator KERRY. Thank you very much, Senator McCaskill, we appreciate it.

Senator Nelson?

**STATEMENT OF HON. BILL NELSON,
U.S. SENATOR FROM FLORIDA**

Senator NELSON. Mr. Carey, DIRECTV apparently has exclusive rights to both Pro Football and Major League Baseball. Are exclusive sports programmings deals the answer to the triple-play threat from cable and other video providers?

Mr. CAREY. First, let me just clarify, right now that baseball actually still is in a place where it could be non-exclusive or exclusive, so it's not decided. But, to answer the question, we have clearly pursued content, generally, as an area to differentiate ourselves. In many ways, as we said, as the cable players do with the bundle, with broadband, to use that as a way to differentiate themselves and create offers for customers that make it punitive to choose cable broadband without video. We have looked at content, we look at other areas—service, content, technology—as areas to differentiate, but content is an area we are trying to differentiate. We invest significantly in original content, in interactive content, and we've gotten things like the NFL.

We've not just taken the rights, we've taken those rights and invested in creating new features and new enhancements. NASCAR we just took this year. A level of NASCAR, the races themselves remain on broadcast, on various broadly distributed providers. But, we've taken the NASCAR rights that cable used to have. And, when cable had it last year, it generated about 30,000 customers. We took those rights, invested significantly, and I think there have only been four or five races this year. We already have over 100,000 customers to our NASCAR package, because we created an array of new exciting features to energize that.

So, we have looked at sports as a place that we can bring new features, new enhancements, new energy, and new excitement that really does differentiate us against our competitors who use other tools. And you're right, cable would look at broadband, the broadband bundle, as their primary vehicle today, certainly their lead vehicle in the market for differentiating themselves.

Senator NELSON. Well, how do these agreements comport with antitrust law, and other FCC regulations?

Mr. CAREY. I'm not an antitrust expert, so I'm not sure I can provide commentary on the antitrust aspects of it. We negotiated with baseball, we negotiated with others. I mean, it was an open process in baseball. All parties had an opportunity, we certainly had no edge, we just had an interest. We had an interest, and a belief we could do unique things with this package. And, we continued to enter into an agreement that exists today that provides a non-exclusive or exclusive arrangement. So, we pursued it. We pursued it in an open market, in a competitive marketplace. We did succeed in reaching an agreement, and that agreement still provides for an exclusive or non-exclusive option on the other players' part.

Senator NELSON. Constituent "X" has their, they have the triple-play. They have their Internet, they have their telephone, and they have their television all coming in on one wire. Now, what am I

to tell Constituent "X", who lives in Fort Lauderdale, Florida and they happen to move there from Boston. And, they want to watch the Red Sox. What should I tell Constituent "X"?

Mr. CAREY. Well, I might suggest one solution to that would be, if the cable companies offered broadband and telephony services in a way that they could take another video provider, such as DIRECTV, without being financially penalized. That would be a much better market solution and a much more pro-competitive market solution than in being able to say you have to bundle those three things together and you get financially penalized if you want to buy different video service with those other providers.

Senator NELSON. That person who has it, could they see the Boston Red Sox by watching it on their computer?

Mr. CAREY. Yes, they could.

Senator NELSON. And, how much would that cost?

Mr. CAREY. I think the cost is a little under \$100.

Senator NELSON. OK. And, now Mr. Jacobson?

Mr. JACOBSON. Yes, Senator.

Senator NELSON. What's wrong with that?

Mr. JACOBSON. Well, I don't think most people would consider that a satisfactory solution, Senator. I don't think you were here for the earlier part of when I was speaking about my own situation. I live in Manhattan, I come home, and I want to watch the games on my television. I have a big plasma screen, and I want to watch them on the television. I don't really care to watch it on my laptop. And I don't—

Senator NELSON. Can you hook up your laptop to your television screen?

Mr. JACOBSON. You know, Senator, I barely can turn the TV on. I mean, I—

[Laughter.]

Mr. JACOBSON.—you know, figuring out how to wire that together would be impossible for me, and I don't think that the broadband solution is in anyway a satisfactory substitute. Now, maybe if I was on the road and I was in a hotel room and I needed to pick up a game, that might work, but, certainly not as an every night proposition.

Senator NELSON. Well, let me ask you this. Now, some of your cable companies, in your consortium, certainly have some exclusive sports deals, as well. For example, Comcast has the exclusive right to the Philadelphia Phillies, and Cox has the rights to some San Diego Padres games. Many cable operators also have local news channels that they do not make available to satellite providers, such as DIRECTV and EchoStar. So, notwithstanding the FCC's terrestrial exception that apparently allows you to not share this programming, how is that fair to consumers?

Mr. JACOBSON. Well, you know, Senator, I run a programming company. I don't work at a cable system and as far as the terrestrial exception, I think, you referred to, I'm not at all familiar with it. It's not the business that I'm in. And, I don't mean to try and duck your question. Really, it's just not something I have any expertise in.

Senator NELSON. Mr. Chairman, I don't think Constituent "X" in Fort Lauderdale, Florida is satisfied yet.

Senator KERRY. Senator, iN DEMAND is sort of the middle person here marketing these things for a number of cables, so I accept what Mr. Jacobson is saying on that, but I agree with you. I don't think they are necessarily satisfied.

Were you finished?

Senator NELSON. No. Mr. Chairman, I'm not, because I want to pick that up. If you are a Phillies fan or a San Diego Padres fan, you have an exclusive deal to show them. Can people in Philadelphia watch the Phillies if they're not tuned in to that particular channel?

Talk to me about that Mr. Ross, you're shaking your head, no.

Mr. ROSS. These are, Mr. Jacobson's employers, but this is not within his duties, hence, the difficulty your question is posing for him. They have these exclusive agreements, and you can only get them on cable, and you can only get them if you buy a \$35, \$40 basic premium package. I must confess that hearing some of the testimony here reminds me of Claude Raines in Casablanca, who is shocked, shocked that there is bundling going on here.

Mr. Carey is outraged that the cable companies would bundle a telephony programming and the Internet. And, yet, this whole problem would be mitigated, although not eliminated, if you had the option to subscribe to only sports programming. So, then for example, if Senator McCaskill's staff is still here, Senator McCaskill could have solved her problem by putting up a second dish—maybe she wouldn't have liked that aesthetically, and then kept her DISH Network for whatever purpose she wanted and then just gotten Sunday Ticket from DIRECTV and paid them whatever price her husband was willing to pay for that—which was probably a lot.

The problem is you can't do that today. You can't get the sports programming, unless you also subscribe to some basic premium package, which runs \$25 to \$45 a month. And, which means, that if you want to get these competing packages, like the Philadelphia person you were talking about, Senator Nelson, they would have to get Comcast, \$40 a month, ESPN, TBS, all those channels, plus the Phillies, and then they would have to get DIRECTV for their out-of-market games, and \$40 a month, *et cetera*. And so, that's one of the—

Senator NELSON. Is that—

Mr. VOGEL. That's not accurate in our case. We provide those packages—

Senator NELSON. Hang on 1 second.

Mr. VOGEL.—free of charge and a la carte.

Senator NELSON. Mr. Ross, in your opinion is that in the best interest of the consumer?

Mr. ROSS. I haven't studied the issue of general bundling to know. Among the many solutions to this problem, one of them would be getting rid of bundling. Whether that's the better solution as opposed to abolishing exclusivity, as opposed to getting rid of the antitrust exemption, as opposed to Senator Kerry just inviting all these people over to his house and locking them in a room until they come out with a solution, I don't really know which one is the best solution.

Mr. VOGEL. Can I just say—

Senator NELSON. Mr. Vogel, you had a comment. Please.

Mr. VOGEL. I'm sorry. Yes, sir. In DISH Network's case, we don't force a buy-through of a basic package to get access to incremental content that's available a la carte. So, the model that Professor Ross described is not our model at all. And, we can do that, and I believe DIRECTV can as well, just by virtue of our technology being digital and being able to address each individual receiver, and each individual home, with whatever content that they wish to purchase. We don't force a buy-through through the analog tier to get access to additional content.

Mr. CAREY. Can I just say on the bundle, because it's not a shock, I mean, I recognize fully the bundle exists. I guess, my question is, if this is about the consumer which is a bigger issue? Having 20 plus million cable-bundled customers that really aren't able to make a video choice because they're financially penalized if they don't buy all three together or 20 million plus broadband customers on the bundle or 200,000 customers that you're talking about the EXTRA INNINGS. I think that is the question if there's an issue here about customer choice.

Senator NELSON. Mr. DuPuy, did you and Bud Selig know that you were going to really stir up a hornet's nest when you negotiated this like this?

Mr. DUPUY. Senator, what we had hoped is that everyone would participate so it would not have happened, but we were very concerned, as I've mentioned before, about providing the maximum amount of programming to the maximum amount of our fans, I guess would be my best answer.

Senator NELSON. And, in your opinion, as a representative of MLB, is that done with regard to your present arrangement?

Mr. DUPUY. We would prefer to have everyone opt in, you know, as I again mentioned before, we don't want to inconvenience any fan, but the launch of the channel with 15 million homes, we think does service the great majority of fans, particularly when viewed against the number of subscribers to the EXTRA INNINGS package, yes sir.

Senator NELSON. Since you've got the Baseball Channel coming on in 2009, what do you think ought to be done in the meantime?

Mr. DUPUY. What I think ought to be done in the meantime is that everyone ought to participate and that we ought to continue, and everyone ought to agree to carry the channel and we ought to participate, and go forward arm in arm.

Senator NELSON. Let the record show that Professor Ross was vigorously shaking his head yes.

[Laughter.]

Senator KERRY. Thank you, Senator. The record will show that, thanks to your observation.

Let me pick up here, if I may, and I thank everybody for engaging in this dialogue.

The Communications Act, as we have amended it—and I've sat here through the years and done that, I guess a couple times—gives the general powers of the Commission, “the Commission from time to time as public convenience, interest, or necessity requires shall have exclusive jurisdiction to regulate the provision of direct to home satellite services.” So, obviously all of you are sitting here with a very real public interest component as to what might define

that necessity or interest. I want to get back to the basics here, and then also get specific a little bit and then we can wrap it up.

Currently, Mr. Carey, DIRECTV carries EXTRA INNINGS, correct?

Mr. CAREY. Correct.

Senator KERRY. Currently, Mr. Vogel, DISH carries EXTRA INNINGS, correct?

Mr. VOGEL. That is correct.

Senator KERRY. Currently, Mr. Jacobson, iN DEMAND offers through it's represented group—Cox, Time Warner *et cetera*—EXTRA INNINGS, correct?

Mr. JACOBSON. That is correct, Senator.

Senator KERRY. So, everyone sitting at this table is in the current state of EXTRA INNINGS availability, including, obviously, Major League Baseball because you're what's provided. If this deal goes through in 4 days as it's currently constructed, half that table gets wiped out. They no longer offer it, it comes down to you, and it's basically an exclusive deal. So, we go from your universe, how many people?

Mr. JACOBSON. Last season, we distributed EXTRA INNINGS to about 25 million digital cable customers.

Senator KERRY. Your universe, Mr. Vogel?

Mr. VOGEL. Thirteen million digital cable customers.

Senator KERRY. Thirteen and twenty-five.

Mr. VOGEL. I would say digital satellite customers, excuse me.

[Laughter.]

Senator KERRY. Let the record show that Mr. Carey is smiling. We have them coming together here folks.

[Laughter.]

Senator KERRY. Mr. Carey, your universe, 15 million?

Mr. CAREY. Sixteen million.

Senator KERRY. Sixteen million. So, we're taking 25 and 15, 13 and saying you've got to switch, if you want to continue, you've got to change if you want to get it, or you're out. Now, it's not that many people getting it, I understand. We're now in a universe that is a much smaller number of people who've chosen to do it.

I don't know, maybe that is because of this fee and people don't want to do it. Maybe it would be smarter to offer it for less, and have more people do it and then more people would go to the ballpark *et cetera*, and so forth and so on. I certainly run into an awful lot of people that are getting fed up, on some level, with professional sports in general because of costs, I mean, you hear this everywhere. And, they switch into college. It's happening, I'm not going to name, but certain sports, I think, are having greater problems with that than others. But, I'd be concerned about it, if I were an owner. And, particularly, I think, we should be aware of how people are treated as we go forward.

What concerns me is putting this public interest on the table. Obviously, you all understand making a deal and I understand and I think everybody at this table and outside understands that DIRECTV saw an opportunity and it took it. It made an offer, it's been creative, and it's got a concept, a vision of how it wants to offer this, and they're trying to go down that road. So, we're trying

to mix and match the public interest with a legitimate business interest here.

Now, what I don't understand is why, on a two-year basis, which is approximately what it would be—that's what it would be, I guess—it wouldn't be reasonable to continue the status quo if you can't come to an agreement in the next four days? That way you don't drive people into having to switch, and being angry, and maybe losing some of them altogether, with the proviso that at the end of that period of time, when the channel comes on, you have the full option, Mr. DuPuy, of taking them on or putting them off. If they meet the deal, fine. If they don't, they're not there.

What's the matter with that interim period to sort this out?

Mr. DUPUY. Well, as I tried to explain before, Senator, we have engaged in those discussions with all three of these parties for almost a year now. And, there has been no agreement to meet the price allocation either. The formula that was proposed by IN DEMAND was not the formula that we had—

Senator KERRY. I understand that.

Mr. DUPUY.—proposed.

Senator KERRY. Let's talk about that for a minute.

Mr. DUPUY. Yes, sir.

Senator KERRY. Currently, the EXTRA INNINGS deal is you're going to carry it for 7 years, \$100 million annually, correct?

Mr. DUPUY. It starts lower than that, but that's the average annual value, yes, sir.

Senator KERRY. They have to carry your channel?

Mr. DUPUY. Yes, sir.

Senator KERRY. Your channel has to reach 80 percent of subscribers, and it must be carried on the basic tier, correct?

Mr. DUPUY. Yes, sir.

Senator KERRY. And, DIRECTV gets a 20 percent equity in the deal?

Mr. DUPUY. Yes, sir.

Senator KERRY. In the channel?

Mr. DUPUY. In the channel.

Senator KERRY. Now, the terms that were made available to the others did not include the equity, and it had a per-subscriber license fee that matches DIRECTV, but they're required to carry a match to 80 percent of their subscribers—

Mr. DUPUY. Yes, sir.

Senator KERRY.—correct? Now—

Mr. DUPUY. The digital subscribers only.

Senator KERRY. Right. And they don't get an equity in the deal?

Mr. DUPUY. Which would be about 40 percent of their total, versus the 80 percent that Mr. Carey has agreed to carry.

Senator KERRY. OK. Now, as I understand it, cable objects to how that is going to be divided between the two, I mean, their objection is that it requires them to calculate their percentage of contributions based on the overall share of the digital universe. And, that presents them with two problems, doesn't it?

Problem number one is that they would have to use all of their digital cable subscribers in calculating that fee, which means ultimately, because of the way they grow, that they would wind up paying a disproportionate share of the fee, wouldn't they?

Mr. DUPUY. There are two different concepts here. How the fee for the EXTRA INNINGS package is allocated, and what percentage of homes, digital homes are committed to the Baseball Channel. And, your first description was about the latter and the allocation issue, I think, is about the former.

The allocation issue that we believe is appropriate, is based on the number of homes to which they have this product available. Otherwise, it's a disincentive for going out and obtaining customers. For example, iN DEMAND could sell one subscription to the EXTRA INNINGS package and DIRECTV could sell a million subscriptions or 999,000 subscriptions and iN DEMAND would only pay a fraction, a very tiny fraction, of the overall amount because they didn't market it as well and they defeat the exclusive.

What seems to us to be fair is, you have 25 million homes that you have available to sell it, they have 16 million homes that they have available to sell it to. If you each sell it and market it to the same number of people, you will each pay the proportionate amount. If you do a better job in marketing it, you'll get a better deal on it because you'll—

Senator KERRY. What's the matter with that, Mr. Jacobson?

Mr. JACOBSON. Well, the way effectively what Mr. DuPuy is describing is that we would be responsible—assuming EchoStar came in—for 51 percent of the costs for 39 percent of the subscribers. That is, we would effectively be paying 30 percent more.

Now, if Mr. Vogel doesn't do a deal with them then we're going to pay even more. We're going to pay about 62, 63 percent of the cost for about 40 plus percent of the subscribers for about a 50 percent hike in price. I don't know that I agree with what Mr. DuPuy said. I think the same rules would apply if DIRECTV subscriber base suddenly dropped and ours went up, then I guess we'd pay more also. But, the way cable operators pay and the way that cable networks have always paid is on a per-subscriber basis, and we think that that is fair.

Senator KERRY. So, that's really where the divide is right now?

Mr. JACOBSON. I think that's part of it, and I also think, what you pointed out about the equity or the value transfer is another part of it. Because I think that is something that is potentially worth hundreds of millions of dollars which has been made available to one distributor, but has not been made available to another.

Senator KERRY. So—is that the major sticking point for both cable and EchoStar? Is there a requirement to carry the baseball on the expanded basic tier?

Mr. VOGEL. We've—

Senator KERRY. If that provision were dropped, and I'm not sure it could be, but if that provision were dropped, would you take, would iN DEMAND take the deal?

Mr. JACOBSON. Well, I think we still have—

Senator KERRY. Even though you have to pay more proportionally for the EXTRA INNINGS?

Mr. JACOBSON. And, we rectified the equity, or the value in the channel? I think if that were the proposition then, you know, we'd certainly consider that. I still don't think it would be fair, Senator, because I think I'd be paying a disproportionate share of my costs, but I would certainly consider that.

Senator KERRY. Let me ask DIRECTV. Mr. Carey, is the only reason you're paying that \$100 million, is that price arrived at based on the exclusivity?

Mr. CAREY. The \$100 million is an exclusive price. And clearly if it was non-exclusive—

Senator KERRY. If I could just intervene for 1 second.

Mr. DuPuy, when you mentioned earlier that Mr. Jacobson had offered a deal in which they'd pay "X," if they were the only ones. Was there also an offer of "Y," if they weren't?

Mr. DUPUY. I don't know if it was in that. They have made a non-exclusive offer, yes.

Senator KERRY. OK, they have. What's the sticking point on the non-exclusive offer?

Mr. DUPUY. The sticking point was—

Senator KERRY. Is on the subscriber distribution?

Mr. DUPUY. We wanted carriage—

Senator KERRY. It's the subscriber distribution.

Yes, Mr. Ross?

Mr. ROSS. One interesting question that the Committee ought to think about here is why Mr. Carey, who will have the exclusive rights if the other offers aren't met, doesn't then turn around and resell the rights I don't know if he could do it legally, but I don't know why Major League Baseball would object to re-selling to Mr. Vogel and Mr. Jacobson for 50 cents less than DIRECTV would collect. So, basically, his rivals would not be making any money on the deal, he's making all the money on the deal. And, if he says, "I'm not interested in doing that," for the Committee to carefully examine why. He's obviously interested in getting some consumers over to him. But, there are obviously going to be some Major League Baseball fans who, for whatever reason, aren't going to switch to DIRECTV. Why would he forego the opportunity if he's going to sell Major League Baseball EXTRA INNINGS on DIRECTV for \$200, to not resell it to Mr. Vogel for \$199.50, and make all the money on the consumers who for—whatever other reason—don't want to switch to DIRECTV and that way, yes Mr. Vogel pays more, Mr. Carey gets more, but consumers get the whole product.

Mr. CAREY. I guess, quite simply today we don't have the rights. I mean, we're not a rights broker. We buy rights for us to use, I guess we could engage that way, but have not, we're not in the business of buying rights to resell to our competitors. I mean, again, it's certainly something good for business that we could contemplate, but we're not in the rights-brokering business, we acquire rights and usually rights holders are not that enthused in having a third-party represent their rights.

Senator KERRY. That brings us to the nub of this issue. That really brings us right into the core of it, which is, you buy rights so that your competitors don't have them. That's what you just said.

Mr. CAREY. Yes, we buy rights for ourselves.

Senator KERRY. Correct. You buy rights for yourself and you're not in the business of giving your competitors the rights you have.

Mr. CAREY. We don't sell rights as we don't buy rights from our competitors, or sell rights.

Senator KERRY. I understand that.

Mr. CAREY. The rights holders, typically, and in this case included, the rights holders have the—we've given the ability for the rights holder to offer those rights to third parties, but it's the rights holder that are offering the rights, not us offering the rights.

Senator KERRY. But, the way people are interpreting this back and forth, and the way this negotiation has gone—and, you know, I've been privy to some negotiations over the course of a lifetime, obviously yours here, these accusations that somebody's not negotiating in good faith, somebody's not really negotiating, you make an offer that's not a real offer, you go back and forth—and in the end, it's the bottom line that drives it. We all understand that.

But, here there's a different bottom line. I mean, that's why we're having a hearing here. That's why we're in this Commerce Committee room. It's a different bottom line, it's not just the economic issue. It's the public interest, it's the sports interest, it's baseball's interest, that's what it means. And it's hard to marry the deeply felt, and I think, earnest belief of the Commissioner, that this is a social institution with enormous historical and cultural ties to the country and a larger public interest with the economic interest that's represented here.

You're driving for the best business deal you can get. I understand that. That may not be the best deal for baseball, frankly, or for the fan. And, sometimes there are compromises. And, the question here is whether or not you can find one. I mean, frankly, you talk about a seamless transition. That's not a seamless transition for a consumer whose telephone and TV and Internet are all provided by one entity. It's not seamless.

And, it is not a realistic assessment. I mean, you have to think about how people use their computers. You have a laptop, you have a workstation in your home. You go to your workstation, you take your laptop, and you have anything from a 14-inch, 17-inch, who knows. Few people walk around—or lug around, because you can't travel with them—they're too heavy. So, you know, the practical reality is you have a small screen, you put it on your laptop or table in front of you and you do some work. That is not a destination baseball game watching event.

In a world where people are increasingly enticed to go out and get their big plasma screen and their big LCD and that's the way you want to watch it, with surround sound and maybe some friends sitting around, and whatever. So, it's not a realistic offer to say, "Gosh, it's going to be available on a dot com." The reality is that what's seamless is letting people have the opportunity to be able to share what they have today, that's seamless. But, also, to have a fair price paid by those who don't have the deal.

I respect your approach to this, *et cetera*, and I understand the drive of Major League Baseball to get the channel out there, which I think could be a great thing. I understand that. It would be a better thing if it was available to a whole bunch more people. That's how it's best. And, that's how the public interest is going to best be served here.

That's truly seamless, that's the easiest thing for the fan. If you've got EchoStar, "Wow, I can get Major League Baseball EXTRA INNINGS here. It's going to cost me a little more, here's

what I pay.” And the same thing, you know, on the other channel and you guys have the opportunity, because you’re developing the station to be more creative and do whatever you’re going to do and offer it in a different way. And, you can offer your extra package, I think NASCAR, you know, you can get NASCAR on Speed and you can go watch it, but you can also buy in and get your four car location and your pit crew and all that other stuff and it’s fun. So, people pay more for that.

So, there are all kinds of ways to skin this cat. What I’d like to see, if it’s possible, and I know there are only 4 days. But, it seems to me that maybe we can get some extra innings out of Major League Baseball here to say, “Let’s sort of hold the *status quo* for a period of time, with fair payment.” And, you’ve got to work this out—and I’d love to mediate it, but I’m not in the business of doing that. I’m confident you can get some arrangement that adequately reflects the subscriber base and the appropriate level of eyes watching it to pay. Which is what ought to be measured fundamentally. And, have easy access for everybody to be able to try and get at this.

Now, you know, I hope that you can do that. I think that in the end, I truly understand in the business point of view, it’s a good deal for DIRECTV. I understand why you’d want it all by yourself and I’m sure you’d make a terrific offering with it. I understand why it’s good for you folks in the long run, but I don’t think it’s as good as having it on every one of those channels.

And, I think, Mr. DuPuy, you said, I don’t remember where the words were. I think you said a little while ago, the broadest public interest, the broadest base is what you want. But, by definition, that’s multiples of millions of more people and I urge you to try to, you know, find a way to see if you can’t skin that cat a different way.

You want to comment on that?

Mr. DUPUY. Two brief comments, Senator. One, is—in your comment about bottom line, this was not about maximizing profit for us. Frankly, we believe that if we had just gone out and cut a non-exclusive deal, irrespective of the Baseball Channel, we probably could have done better, short-term, in a short-term deal, economically, than what we currently have.

What this was about was serving the maximum number of our fans with the maximum amount of programming, and that’s what drove these negotiations. So, I appreciate your concern, and we would—

Senator KERRY. But, by definition, how can that be the maximum number of fans?

Mr. DUPUY. Because—

Senator KERRY. If, on day one, if in 4 days, 250,000 people are going to wake up, and they can’t get it.

Mr. DUPUY. Because in 2 years, 15 million will have access to the Baseball Channel, which we are not assured without this deal.

Senator KERRY. I’ll lay you odds, I bet you I could construct a deal where you can get an assurance of a Baseball Channel, and everybody’s carrying it.

Mr. DUPUY. Well, the NBA would love that, the NFL would love that, and we would love that, as well. And that was our objective

here, was to make the maximum amount available, to the maximum number of fans, that's why we did it.

We hear your concerns, and our doors remain open, and we will be happy to continue the dialogue with both iN DEMAND and EchoStar.

Senator KERRY. Anybody, yes, Mr. Jacobson?

Mr. JACOBSON. I just want to add, Senator, as I mentioned earlier, we offered to carry the Baseball Channel in front of 15 million customers, which is guaranteed carriage that Mr. DuPuy is talking about, prior to the announcement of the DIRECTV deal. After they announced the DIRECTV deal, and said we'd have a right to match, we matched DIRECTV customers, subscriber for subscriber—so those are two, guaranteed opportunities for carriage of the Baseball Channel, and the first time we never heard back, and the second time we were rejected within an hour.

Now, we think that our offer today to try and figure out a solution for the fans next week, and put off for some time for discussion of the Baseball Channel is fair, and it's consumer-friendly, and as you pointed out, it's a seamless solution.

Senator KERRY. Well, when you say "put off," let me in fairness, I mean, if you're laying out your business plan, and you're proceeding forward, and you have to invest and you have to hire creative talent, and do what you have to do, you have to know where you're going, right? So, from their point of view, they don't want to just leave it out, hang it out there and put it off forever, it would seem to me.

Mr. JACOBSON. I'm not suggesting that it would be forever, Senator, I'm happy to come up with a date and time, out in the future, that at least gives the fans access to the games, but let's face it—the season's starting next week. We were given 3 weeks to try and, not only negotiate, but execute a very complicated transaction. I have multiple partners, we have a lot of cable affiliates, it's not just my three owners, it's a fairly sophisticated transaction, that evidently took Major League Baseball and DIRECTV some 6 months to execute, and I was asked to do it in 3 weeks.

Senator KERRY. Well, Mr. DuPuy, what's the possibility, in your judgment, of trying to keep the status quo for a period of weeks here, and sit down in good faith and see if we can't get folks together and, you know, pull off an agreement that meets everybody's needs?

Mr. DUPUY. We've tried to do that for 9 months, Senator. We have 4 days before our season starts. Mr. Carey has to launch his product.

We'll continue the discussion. We will make our best efforts to continue the discussion, bring it to resolution as quickly as possible. Our goal is to, again, we'd like everybody to opt in. If we can figure out a way to do that—

Senator KERRY. He can launch his product without launching it exclusively, can't he?

Mr. DUPUY. Well, someone has to sell it, and decide who's going to pay what to whom.

Senator KERRY. I understand, but—if you did that, it seems to me that in the next few days—it shouldn't be impossible to figure out a fundamental fee basis, I mean, you know what's been in front

of you for months, you know how this thing is going to divide, essentially, over those 9 months you've been working that.

I'm sorry, Mr. Carey?

Mr. CAREY. Yes, I just, I do want to add, on our behalf, you know, we are not indifferent to time, here. I mean, we are the one party today under contract, on an exclusive or a non-exclusive—we provided the two options—we would market it differently, depending upon how it is arrived at.

Senator KERRY. I understand.

Mr. CAREY. We certainly do have concerns, this is a legitimate process to get to a legitimate end by everybody here, this is a process that has been, seems to have been, more focused on press releases than meetings to negotiate.

We, ultimately, entered into—I'll go back to what I said—an honest process to end up with these rights, went the extra mile of accommodating a non-exclusive and an exclusive arrangement. This is about economics, because that's—they don't like the economic terms. And, essentially, the noise has been about economics. Yes, we've taken a risk, we've stepped up, we have a binding contract that has left us at risk on what, on two different fronts, and we expect that risk we've taken to be respected, it would be respected in any other process any of us engaged in, in terms of succeeding to arrive at an agreement, you know, that we stepped up to achieve, we've provided certain rights in here, but we don't, really—this process—it is important to us this is not an open-ended process. You know, over the last few weeks, I've—

Senator KERRY. Well, that's fair. But, let me sort of conclude it by saying, I think the process has been driven—you talk about press releases and this and that, and you made a comment a little while ago about, it shouldn't be necessary to come to Washington in order to resolve a contract, and so forth—I respect that.

We're not here because any party at this table came to us to intervene in a contract. We're here because constituents—people we represent and the public interest—leaped up at us when we noticed this deal, and people got in touch with us.

Mr. CAREY. I understand.

Senator KERRY. And, we're here because it has, essentially, been driven by the economic piece to the exclusion of a sufficient balance of the public, broader public interest piece. And, I think, frankly, the public relations piece, in terms of a league's relationship with its fan base, the people it represents. And, I think, the interest here is, indeed, in having something truly seamless, and something that works for the broadest fan base.

I also believe very deeply, that that is ultimately in the best interest of Major League Baseball. And, I think it's possible to get the best of both worlds here. I really believe that, if there were a good faith effort to do that.

So, maybe in the next 4 days—is there a plan for anybody to be sitting down and talking? Is there any meeting that's scheduled? Or, is this clock just going to run, and that's where we are?

Mr. JACOBSON. I hope it doesn't. I'm, you know, we'd be happy to meet, and we'd be happy to try and come up with a solution. I thought we tried to address—

Senator KERRY. Well, has anybody sat down face to face, Mr. DuPuy? Has there been a—has this been just a paper transaction?

Mr. DUPUY. There were two face-to-face meetings on March 9th.

Senator KERRY. What's the possibility of having a face-to-face meeting in the next couple of days? Next 24 or 48 hours? To see if you could work out something on this, or not? Possible?

Mr. DUPUY. We're willing to meet, yes sir.

Mr. JACOBSON. We're certainly willing to meet, Senator. Absolutely. And we're willing to try—

Senator KERRY. Everybody's willing to meet, but when you've set the times in the next 4 days, will you actually arrive at a time? And—

Mr. JACOBSON. We will set a time to meet.

Senator KERRY. All right. I appreciate that. I think the fans would appreciate it if you all could work something out that makes sense here. And in the long run, we all understand—you've got to balance a number of different interests here, but I think it would be great to see if you can't do that in a thoughtful, publicly spirited way.

Thank you very much, we appreciate you coming today.

[Whereupon, at 12:13 p.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. DANIEL K. INOUE, U.S. SENATOR FROM HAWAII

Today, the Committee will be examining the impact of exclusive sports programming contracts on sports fans. With the baseball season set to open in just a few days, this is a very timely discussion.

The video programming industry is evolving quickly. The emergence of new distribution platforms has increased competition among cable, satellite and other video programming providers.

When it comes to sports programming, this evolution, in principle, translates into new ways that fans can watch and follow the progress of our favorite teams. However, as more choices become available, concerns have arisen about the impact of exclusive sports programming deals. We must watch this trend closely to ensure that the interests and expectations of consumers are protected.

This brings us to today's hearing. Many sports fans are intensely loyal to their "home teams" even when living a long distance away. In the case of my constituents in Hawaii, they have no major league home team to follow. Instead, Hawaiians are fans of many teams from all over the country. They want to cheer for their teams like all fans, and they deserve fair access to out-of-market games. After all, for them, their only choice is out-of-market games.

Sports programming deals that either overtly or effectively limit the availability of such programming on competing video programs raise difficult questions about whether all fans are getting fair access to their favorite major league sports events. It is important that this committee keep a close watch on this situation, and makes sure that the consumer does not lose out with exclusive sports programming agreements.

I would like to thank Senator Kerry for his leadership in this matter, and I look forward to hearing from the witnesses assembled here today.

