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

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

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

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

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

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

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

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

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

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

[4] *Id.*

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

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

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

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

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

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

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

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

A. Comcast

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

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

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

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

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

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

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

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

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

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

B. Time Warner

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[12] *Id.*

[13] *Id.*

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

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

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

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

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

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

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

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

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

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

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