Testimony of

Mr. Daniel Fawcett

Executive Vice President
DIRECTV
November 14, 2006

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

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

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

Because of the program access statute, DIRECTV was able to provide the first competitive choice to the incumbent cable operators. The statute gave DIRECTV access to must-have programming that cable would otherwise have withheld, but also permitted DIRECTV to differentiate itself through arms-length negotiated exclusive deals, such as The NFL Sunday Ticket. The end result: precisely what Congress envisioned - a vibrant competitive marketplace and more choice and better service for consumers. Rather than raising antitrust concerns, the NFL Sunday Ticket has helped promote competition in a market that, for years, had none at all.

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

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

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

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

Congress helped make this possible by enacting the program access provisions of the 1992 Cable Act. The point of these provisions was to ensure that new entrants challenging the cable monopoly had access to the programming they needed to do so. More specifically, Congress sought to:
increas[e] competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.

Indeed, "the conferees expect[ed] the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies." Congress hoped that, with a level competitive field, new entrants such as DIRECTV could compete on the merits of their offerings, and consumers would benefit from their efforts to win customers from each other.

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

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

In carefully tailoring its program access rules, Congress recognized that exclusive contracts could be a valuable tool to enhance the competitive viability of new entrants. As Representative Tauzin noted during debate on the House floor, "exclusive programming that is not designed to kill the competition is still permitted . . ." Thus, where a new entrant seeks to obtain exclusive programming to increase competition, the program access rules permit it to do so. And even a cable operator is free to bargain for exclusivity to differentiate its service - so long as it does so on a level playing field with an non-cable-affiliated programmer.

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

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

Perhaps the best example of an exclusive arrangement helping - not harming - competition is The NFL Sunday Ticket. DIRECTV, as a new entrant, was able to get a foot in the door of this highly concentrated industry in part by offering unique content, such as The Sunday Ticket. These unique offerings helped DIRECTV to differentiate itself and thereby break the stranglehold of the cable monopolies. The cable industry, in turn, found itself forced to innovate and become more responsive to customer's concerns - today offering a competitive, attractive package that includes its own differentiated video-on-demand and bundled internet offerings. This is exactly what Congress had in mind when it enacted the program access provisions. DIRECTV thus believes that the NFL Sunday Ticket raises no meaningful antitrust concerns. To the contrary, it has served the purpose of the antitrust laws by contributing to a competitive video services marketplace.

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

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

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

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

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

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

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

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

The program access rules do not prohibit this kind of behavior so long as the cable operator pays the same high price. But that restriction is of no concern to the cable operator because even inflated payments are simply a transfer of money from one division of the company to another.

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

* * *

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

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