Testimony of

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TESTIMONY OF
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BEFORE THE
U.S. SENATE
COMMITTEE ON THE JUDICIARY
HEARING ON
"VERTICALLY INTEGRATED SPORTS PROGRAMMING:
ARE CABLE COMPANIES EXCLUDING COMPETITION?"
DECEMBER 7,2006

Mr. Chairman and Members of the Committee:

Thank you for inviting me to testify today. I welcome the opportunity to continue a dialogue with you about the intensely competitive marketplace for communications and video services. In particular, I appreciate the privilege of sharing with you Comcast's experience and insight into issues related to vertical integration in the creation, aggregation, and distribution of video programming, including sports programming.

Consistent with my testimony at the hearing you held six months ago, I want to emphasize again today that video businesses are intensely and increasingly rivalries and that American consumers enjoy access to a greater abundance and diversity of
programming, delivered in more different ways, than at any point in history. But, focusing specifically on the subject of this hearing, I want to make three main points about vertical integration and how it impacts the video marketplace.

First, as a matter of policy, vertical integration is generally good for competition and consumers. This is true in many different sectors of the economy, and it is true in video
businesses as well. Many of the cable programming networks that American consumers take for granted today came into existence only because cable operators were willing to invest in the creation of new programming.

Second, as a matter of fact, vertical integration in the cable industry has declined enormously over the past decade. It wasn't all that long ago that over 50% of the networks that cable operators carried were owned or controlled by cable operators, and the percentage of affiliated networks was steadily rising. But, in this new century, vertical integration has steadily declined year after year and we believe it is now
approximately 12%. At Comcast, we have an ownership interest in less than 7% of the networks that we carry in a typical cable system.

Of course, many of the networks that we carry are vertically integrated with other companies -- especially the four major broadcast television networks. News Corp., for example, is the most

vertically and horizontally integrated media company in the world.
Third, in light of the intense competition that now pervades the video marketplace, and the benefits that can flow from vertical integration, it is my opinion that the solution to ally problems caused by vertical integration lies in the antitrust laws. In particular, I will explain why I believe that the antitrust laws are far superior to sector-specific regulation in addressing concerns about the potential for anticompetitive behavior. I will also touch on ways in which antitrust exemptions can create competitive distortions and injure consumers.

I. THE VIDEO MARKETPLACE IS INTENSELY COMPETITIVE AND TODAY CONSUMERS CAN RECEIVE MORE PROGRAMMING FROM MORE SOURCES VIA MORE MEANS THAN EVER BEFORE.

Any analysis of existing laws or of proposals to change the laws should begin with an analysis of the relevant marketplace. In the video marketplace, two segments of the marketplace are particularly relevant to this hearing: programming supply and programming distribution. Because market power is a prerequisite to any antitrust concern, let me first clear up any misconception about competition in these segments.
Two years ago, the Federal Communications Commission ("FCC") concluded that:
"The vast majority of Americans enjoy more choice, more programming and more services than any time in history "' Yet the competition that exists today is far greater than existed then. This competition has driven our company, and the entire cable industry, to improve. More importantly, it has given the American consumer the richest cornucopia of video programming in the world, with extraordinary diversity of voices and content, meeting almost every conceivable need and interest.
In the past, when Congress and the FCC assessed competition in video distribution, the analysis was often confined to a subset of the video marketplace, that is, to what they call the "multichannel video programming distributors," or "MVPDs." Today, even if one adheres to this artificially narrow focus, which ignores a profusion of new video distribution mechanisms, the marketplace is intensely and increasingly competitive.
MVPDs include not just traditional cable television operators but also "broadband service providers" like RCN, WOW, and Knology; direct broadcast satellite ("DBS") providers like DIRECTV and Echostar's Dish Network; local exchange carriers like Verizon and AT&T; providers of Multichannel Multipoint Distribution Service; electric utilities; and satellite master antenna TV systems.
Taken as a whole, the growth of these competitors has been extraordinary since Congress passed the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").' At that time, Congress foresaw the possibility of significant potential competition from these providers of multichannel video services, and it took measures to promote that competition. Today, that competition is real, robust, and thriving, as the most recent data from the FCC arid other sources affirm.
Given the seismic changes that are occurring in the video marketplace to focus exclusively or even primarily on MVPDs is myopic and misleading. Today, American consumers enjoy an unprecedented array of other means for how, where, and when they can obtain video programming. Increasingly, they consume what they want, when they want it. The source may be an over-the-air broadcast, a digital video recorder ("DVR"), an Internet download, or a video-on-demand ("VOD") server. The content may be a full length movie or a 30-second video clip. The viewing device may be a 60-inch high definition television ("HDTV"),

a mobile device with a three-inch screen, or a PC with a
20-inch screen. Consumers, not programmers or distribution companies, are now sovereign.

A. Video Distribution Is Highly Competitive.

Viewed over the period of time since Congress enacted the 1992 Cable Act, the growth of DBS has been remarkable, DIRECTV and EchoStar each offer their services to almost every household in the United States, and between them they have captured over 28.5 million customers -- more than any single cable company. Each year for the past five years, the DBS companies have added two to three million new customers, while the cable industry in the aggregate has added approximately zero. The two major DBS companies now serve 30% of all MVPD subscribers, and they are the second and fourth largest MVPDs in America.

Local exchange carriers like Verizon and AT&T (both Bell Operating Companies that continue to provide telephone service to over 90% of all the households in their service areas and have resources far beyond those of any traditional cable company) are also making a large-scale entry into the multichannel video marketplace and are poised to become formidable competitors. For example, in the last year alone, Verizon has deployed its cable services to consumers in California, Florida, Maryland, Massachusetts, Pennsylvania, New York, Texas, and Virginia. As of September 30,2006, it offered cable service to over 1.2 million households. Verizon expects that number to rise to 18 million households by the cod of 2010.~ Just this past Monday, Verizon announced that its cable service "is available now to 80,000 households in parts of 35 communities" in the greater Philadelphia area.4

AT&T is moving a little more slowly, but it plans to offer its cable service to about 90% of what it regards as "high value" customers and 70% of "medium-value" customers in the areas where it currently provides telephone service (while bypassing all but a few "low-value" customers).5

Meanwhile, both Verizon and AT&T, as well as BellSouth and Qwest, are successfully partnering with the DBS providers to provide video options to consumers today in areas where they have not yet deployed their own cable services.

MVPDs, however, are not now, nor have they ever been, the only source of video programming. Anywhere from 15-20 million households prefer to rely on over-the-air television. Tens of millions of Americans also supplement their viewing with DVD and videotape rentals and purchases, and Netflix has become a national phenomenon.

Additional video options, which are becoming more popular every day, include iPods, mobile phones, and broadband Internet.

Probably the most significant developments of the past year have taken place in video available through either Internet streaming or downloads. As Comcast recently pointed out in the FCC's annual inquiry on the status of competition in the video marketplace, in July 2006 alone, 107 million Americans, or three out of every five Internet users, viewed video online.' According to The Wall Street ‚Journal, "video Web sites now draw users in numbers that rival those of cable and satellite companies. It is unlikely that anyone would have imagined that, when YouTube launched last December, it would be acquired by Google less than a year later for $1.65 billion. Nor was it foreseeable, just a year or two ago, that every major broadcast network would be offering a selection of its most popular shows over the Internet.

And consumers are increasingly freed from the boundaries of time and space. DVRs, VOD, Internet streaming and downloads, and new mobile devices make it possible to watch video at a time and place of the user's choosing, rather than being constrained to view it only when it appears on a linear network and only if one is home and available at the appointed hour.

In this unbelievably dynamic marketplace, neither Comcast nor anyone else can rest for even a moment. Each and every day, we compete to attract new customers and to keep our existing customers happy. This is why Comcast alone has spent over $45 billion since 1996 to add the channel capacity that allows us to deliver 200 or more video channels to almost every home we pass.. . and added dozens of international and foreign language channels.. . and added a dozen or more HDTV channels in every market.. . and become the industry leader in providing VOD, offering our digital homes over 8000 different programming choices any time, day or night, in every conceivable niche, including more local programming and -- now -- high-definition VOD as well. We have to work extremely hard to remain our customers' first choice. The way that we do that is by constantly investing in more capacity so that we can add new programming, new channels, and new features.

Comcast offers consumers the highest quality programming and, we think, the highest quality video services available in the marketplace. 'This is a direct result of the investments we made in response to intense competition. The claim that competition is not robust because cable prices have not decreased is false. In fact, according to some economists, DBS competition has constrained cable prices substantially and "without DBS entry[,] cable prices would be about 15 percent higher and cable quality would fa11." Moreover, modern economic theory recognizes that lower prices are not the only manifestation of vibrant competition: improved quality and service also are natural competitive responses to increased competition.' It is not unusual for prices not to drop in intensely competitive markets, especially where significant costs are created at different layers in the distribution chain. In the video marketplace, competition has manifested itself in substantial service and quality enhancements.

In short, the video distribution marketplace is more competitive and diverse than ever.

As Congress looks to the future, it is wrong to view television as it was viewed in 1992, or 1996, or even 2000. It is an entirely different marketplace, and is fundamentally and irreversibly competitive.

B. Video Content Choices Are Abundant.

'The explosion of distribution capacity and outlets has launched a corresponding explosion in content. When the 1992 Cable Act was passed, there were approximately 68 national programming networks (and only a dozen or so regional networks) in operation in the United States. The majority of them were owned by cable companies (largely because independent programmers, the broadcast networks, and the Hollywood studios were not willing to invest in cable programming at the time). In fact, 57% of cable networks had "some ownership affiliation with the operating side of the cable industry."'~

The average household did not have cable at all, and those that did normally had access to 36 or fewer channels of programming (all analog).

Fast forward to 2006. Incredibly, today, of the 53 1 national networks, the FCC reports that cable operators have an interest in approximately 20 percent of them, although our data shows that the number is closer to 12%.12 On a typical Comcast system, we have a financial interest in less than 7% of the networks that we carry. Meanwhile, the number of national programming

networks affiliated with broadcast networks or broadcast
stations has increased dramatically -- as of the FCC's latest report, 26.6% of the 531 total networks were owned by a media entity, such as a broadcast network or station, but not by a cable operator.13 For example, News Corp. has a financial interest in over 54 programming networks worldwide, of which more than 19 are national programming networks distributed in the United states.14 Approximately 85% of all American TV
households take service from an MVPD, and a typical MVPD household enjoys access to over 200 video channels. In addition, many producers -- both majors and independents -- are creating programming for VOD, and some have used VOD exposure as a springboard for the creation of new full-time channels.

Meanwhile, the Internet has made it easy for anyone with a video camera and an Internet connection to become a programmer. Anyone can instantly make one's content available to hundreds of millions of broadband-empowered viewers around the world. Millions of videos have been posted to the Internet, where they can be accessed by anyone with a broadband connection. "YouTube, the country's No. 1 online-video site, had more than
34 million unique visitors in August, according to Nielsen.Net Ratings."'~

Four important developments contributed to this proliferation of programming choices:

First, the cable industry invested over $100 billion to expand the capacity of our distribution networks and tens of billions more to improve the quality and diversity of our programming offerings.

Second, DBS and other distribution media have emerged to provide additional outlets for programming.

Third, cable operators and other distributors enjoy the freedom to package and price this programming as required by the marketplace, not regulation, and to create tiers and packages that respond to consumer demand, make economic sense
for our industry, and respond to competition from other providers 16

Fourth, cable's infrastructure investment created a market for residential broadband, which stimulated competitors to invest in DSL, wireless broadband, satellite broadband, and broadband over powerlines -- and companies and individuals have used these new media to make their content available to tens of
millions of consumers.

Much of this progress resulted from a conscious congressional decision to get the government out of the marketplace and to promote competition instead of regulation

For example, before 1996, all of cable operators' programming tiers were subject to rate regulation, which created a disincentive for anyone to invest in new programming networks. After Congress deregulated cable operators' programming tiers (except for the basic tier), investment in cable systems and programming increased drastically and the number of national programming networks exploded. National programming networks
totaled 129 in 1995, of which approximately 5 1% were affiliated with a cable operator;
with the investment explosion fueled by the 1996 Act, that number grew to 53 1 by 2006, of which (according to the FCC) only 21.8% are affiliated with a cable operator." This represents a 300% growth in the number of networks in the last decade, while at the same time vertical integration declined 60%.

In light of this significant competition in the programming supply and distribution segments of the video marketplace, Congress should be working to eliminate unnecessary regulations. Too many remnants of an antiquated statutory regime crafted for the marketplace of 1992 remain in place. In a robustly competitive and rapidly evolving marketplace, such regulations simply do not make sense.

11. VERTICAL INTEGRATION, EXCLUSIVE ARRANGEMENTS, AND ANTITRUST.

One of the characteristics of the antitrust laws is that, with few exceptions, they are laws of general applicability and apply across the economy. Although the competitive characteristics of industries may vary a great deal from one sector to the next, the essential laws and analytical tools remain the same. And thus the core precepts of the Sherman Act and the Clayton Act remain equally applicable whether the industry is barbed wire or fiber optics, chalkboards or laser printers, baby buggies or supersonic transports. Between them, the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission apply these laws to industries as diverse as trash hauling, semiconductor fabrication, and credit card services.

Yet, in parts of the communications industry, there are provisions of the Communications Act that address vertical integration and exclusive arrangements in ways that constrain business dealings well beyond what the antitrust laws require. This is an anachronism that is no longer necessary.

A. What Does Antitrust Law Tell Us About Vertical Integration and Exclusive Agreements?

One of the issues I think it is important to address today is vertical integration in the video marketplace. Another, sometimes related and often controversial, issue is the use of exclusive arrangements between programming networks and MVPDs. Although vertical integration and exclusive arrangements can go hand-in-hand, the latter being facilitated by the former, neither is a prerequisite for the other and each can exist on its own. More importantly, for the purposes of this hearing, both vertical integration and exclusive arrangements are useful economic tools that can benefit competition and consumers.

At the outset, two key points are worth emphasizing: (1) vertical integration and exclusive arrangements are common throughout the economy and generally benefit consumers and competition; and (2) vertical integration and exclusive arrangements raise competition or policy concerns only in the very rare circumstances when they have the effect of seriously impairing a rival's ability to compete, which may thereby reduce consumer choice.

1. Vertical Integration and Exclusive Arrangements Generally Promote Competition and Consumer Welfare.

Vertical integration is something that the antitrust laws know and understand. Vertical integration is not something to be feared; in fact, it often promotes competition and consumer welfare. Where it creates a problem, antitrust creates a remedy.

The classic definition of vertical integration is straightforward: "Vertical integration occurs when a firm provides for itself some input that it might otherwise have purchased on the market. As a result, the input is said to be produced within the firm rather than purchased from another
Vertical integration is common and ubiquitous. It occurs in every industry and region and is "practically infinite in its variety."19

As a general matter, vertical integration is widely understood to be pro-competitive or competitively neutral, and courts and expert analysts agree that there should be no presumption against vertical integration. There is a long-standing and bipartisan consensus among antitrust enforcers and practitioners that vertical integration is usually beneficial.

Firms typically integrate vertically because they find it cheaper and more efficient to produce an input rather than to purchase it from the marketplace. As a general matter, this type of cost savings is beneficial to the economy and should be encouraged.22

Vertical integration can also lower costs to consumers by eliminating "double mark ups" -- the ability of a11 upstream firm to charge a downstream firm a mark-up for an input, which is then passed on to consumers. Economists refer to this as the elimination of "double marginalization."23

Vertical integration may also bring together complementary resources or expertise, thereby facilitating investment, innovation, and product development. This helps explain why cable companies have played a leading (but far from unique) role over the years in developing and launching new programming networks.

Similar competitive benefits are associated with exclusive contracts. Allowing the producer of a product or service to limit the channels through which it will be distributed or allowing a distributor to distribute or refuse to distribute a given product or service can foster investment and innovation and increased competition based on product differentiation -- so-called "interbrand" competition. Exclusive arrangements often promote non-price competition and improved quality, as well as climate free-riding of one distributor on the marketing efforts of another distributor. A distributor with an exclusive arrangement has more incentive to market the supplier's product for which it has exclusive distribution rights.

We see this when Yahoo! cuts exclusive deals with newspapers so that it can better compete against Google. We see this when XM Radio builds exclusive shows around Bob Dylan, Oprah, and Major League Baseball, and Sirius counters with Howard Stern, Martha Stewart, and the National Football League We see this when Verizon Wireless announces new Hispanic services for its V-CAST music service, and Cingular responds by saying it has already been providing Spanish-language video services but will announce new services soon. 27 We see this when Microsoft announces a new music player that offers features that are not available on the iPod, while neither device can play music purchased from the other's affiliated music store. None of these examples is an antitrust violation; in fact, all are pro-competitive.

The evidence that vertical integration between video programming producers and distributors has benefited consumers is prevalent throughout the video marketplace. In the cable industry, vertical integration stimulated the flow of capital into the programming marketplace, which resulted in an explosion of programming networks.

Absent cable operators' investments in programming networks, consumers would never have been able to watch HBO, Discovery, TV One, C-SPAN, TNT, or CNN. In Comcast's case, we have been an industry leader in developing high quality regional sports networks, and in the past few years our investments and expertise have helped launch Comcast SportsNet West, Comcast SportsNet Chicago, and SportsNet New York.

In addition, Comcast has invested in creating innovative networks that are tailored to niche audiences, for example, PBS KIDS Sprout, G4? TV One, and AZN. Without these investments, it is likely that many programming networks would never have progressed beyond the idea phase.

2. Vertical Integration and Exclusive Arrangements Implicate Antitrust Laws Only When a Competitor with Market Power Engages in Unfair Competition.

Of course, in some cases vertical integration and exclusive arrangements can cause competitive harm. For example, in some instances, vertical integration or exclusive arrangements can create entry barriers and can foreclose access to important upstream inputs or downstream markets. Such anticompetitive effects are unlikely, however, if a firm (even a monopolist) vertically integrates into a competitive market.30 Even if the subject market is not competitive, there is no basis for a flat presumption against vertical integration. 31

For these reasons, antitrust enforcement agencies and the federal courts analyze the costs and benefits of vertical integration on a case-by-case basis, based upon the particular real-world facts and circumstances of the affected markets.32 This is the correct approach. It ensures that the economy is able to benefit from the many instances of procompetitive vertical integration, while ensuring that potentially harmful instances of vertical integration are identified and remedied.33 Only in limited cases where vertical integration and exclusive arrangements are accompanied by anticompetitive conduct exerted by a competitor with market power does such conduct implicate the antitrust laws. 34

"Absolute" or "per se" prohibitions on vertical integration and exclusive arrangements are undesirable. As noted, there are numerous benefits to vertical integration -- even by monopolists -- and the competitive harms associated with vertical integration are rare.

The antitrust laws have addressed such harms for over a hundred years. and have proven well-suited to enforcing the pro-consumer and pro-competition goals of Congress. In virtually every industry, arrangements perceived by someone as anticompetitive can be subjected to antitrust scrutiny,-and absent some showing of market and likely consumer injury, antitrust will shrug the complaint off and leave the marketplace to work its magic. Thus, Congress should be skeptical of efforts to supplement or supplant antitrust enforcement with inflexible and absolutist approaches. The danger of such approaches is that they will undermine economic efficiencies and increase prices to consumers.

This is probably the case with the cable industry. With content of all kinds being increasingly consumed by consumers whenever and however they want it, the time is long since past when one subset of players in the multiplatform content distribution business is subject to uniquely restrictive rules. The antitrust laws provide adequate protection against anticompetitive conduct, but without skewing incentives, stifling investment, or unfairly burdening one competitor as against another.

R. Antitrust Laws Are Better Suited To Protect Consumers and Competition Than Is Cable-Specific Video Regulation.

Independent of the antitrust laws, Congress has enacted legislation applicable to particular industry sectors. But sometimes this sector-specific legislation addresses what are perceived to be deficiencies in competition, and this can lead to duplication, inefficiency, and even conflicts with antitrust laws.

As you know, in 1992, Congress felt it necessary to address a variety of perceived competitive deficiencies in the video marketplace as it then existed by enacting a uniquely detailed and regulatory regime to govern cable operators.35 Rules were established to require cable operators to carry broadcast channels to allow local franchising authorities to require the carriage of public, educational, and governmental channels, to allow the FCC to establish requirements for commercial leasing of channels to allow the FCC to review certain commercial carriage decisions of cable operators;39

to prescribe rules governing the sale of certain cable-affiliated programming networks to competing MVPDS;~' and -- of particular relevance here -- to prohibit (for ten years) any exclusive arrangements between cable operators and their affiliated programming networks.41

Whatever the merits behind the enactment of all these sector-specific statutory provisions at that point in time, it is clear that -- today -- they have long since outlived their usefulness. Of the 531 national programming networks identified in the FCC's latest report,4 2 Comcast has a financial interest in only ten.43 And of the 100 or so regional networks, Comcast has a financial interest in only twelve.44 Focusing more specifically on sports programming, Comcast has a financial interest in only three national programming networks and eight regional programming networks that could be considered sports network 45 And in every case except one, which I will discuss below, Comcast has made its programming available to every other competitor. Comcast has not used its affiliation with sports programming networks in any manner that could be viewed as anticompetitive. Quite the opposite is true, and our investments have produced better programming for consumers and fostered fierce competition with other MVPDs.

As I explained above, the intense competition that now pervades every aspect of the video marketplace makes these cable-specific market-conduct rules an anachronism.

These rules address problems that no longer exist. And, to the extent that there remain any bases for concern about anticompetitive conduct, the current cable-specific rules represent artificial and clumsy solutions to problems that can better be addressed through the mechanism of antitrust.

Remember, cable operators and other communications companies are fully subject to the antitrust and the antitrust laws already address vertical relationships. They already provide the tools to evaluate whether a contract that enables a single MVPD to carry a given network is procompetitive or anticompetitive. They already provide a mechanism for judging the reasonableness of a given distributor's decision not to carry a particular network. The real question is whether those types of arrangements need to he subject to two different sets of federal laws. I submit that the answer is an emphatic no.

In my judgment, the antitrust laws are superior to sector-specific regulation in a number of respects. One important difference is that antitrust is driven by facts and analytical rigor, not by speculation. Antitrust is informed by evolution in the science of economics, not preconceived theories that have long since been disproved by real-world experience in the marketplace. Antitrust generally leaves market participants free to create, innovate, and alter business arrangements without pre-ordained and highly artificial boundaries, and it intrudes only to the extent needed to remedy market failures.

In contrast, laws and regulations applied specifically to cable companies under the Communications Act impose arbitrary restrictions on certain competitors' abilities to innovate and structure their businesses in the ways that make the most economic sense.

In fact, those laws and regulations discriminate between competitors and create an uneven playing field. While cable operators are subject to an expansive regulatory regime that includes regulation of their vertically integrated programming networks and prohibitions on entering into exclusive contracts, no such regulation and restrictions are imposed on cable operators' competitors. How can News Corp.s' vertical integration and exclusive arrangements be beneficial for consumers but Comcast's and Time Warner's not be? As I explain below, it is past time for Congress and the FCC to transition communications regulation from sector-specific regulation to the antitrust laws.

111. VERTICAL INTEGRATION, EXCLUSIVE ARRANGEMENTS, AN11 THE COMMUNICATIONS LAWS.

Policymakers have generally understood that market forces are superior to government regulation in enhancing consumer welfare; that is no less true in the area of video content. But, despite dramatically increased competition, cable operators remain subject to unnecessary regulations that address concerns which, in this day and age, are fully addressed by antitrust laws.

Back in 1992, when DBS had yet to launch its first satellite or sign up its first customer, the cable industry faced little direct multichannel competition. In response to consumer complaints, and in the absence of meaningful alternative sources of programming, Congress passed strict regulations governing the cable industry. Even then, Congress expressed a strong preference for competition over regulation, and its intention to reduce regulation as competition took hold.47 Congress even went so far as to acknowledge that, at some point in the future, it expected competition to displace regulation.

In the years since, video competition has taken deep root. Many of the regulations that currently govern the cable industry were intended to address less competitive market conditions that have long since changed. The regulations, however, have not.

Two of those regulations that are relevant to this hearing are the so-called "program access" provisions of the 1992 Cable and the "program carriage" provisions of that

A. Program Access Regulation Is a Remnant of a Bygone Marketplace.

Congress adopted the program access provisions to ensure that national satellite-delivered cable programming services in which cable operators had an attributable financial interest would be made available to the industry's competitors on rates, terms, and conditions comparable to those available to cable companies. Moreover, the program access provisions, implemented into rules by the FCC," prohibited exclusive arrangements between cable operators and cable-affiliated programming networks in order to ensure that fledgling satellite providers and other competitors would have access to programming perceived as critical to their success.

These provisions represented a major departure from normal competition policy, which would encourage investment and innovation in exclusive programming.52 In appropriate situations, exclusive programming arrangements may permit competitors to distinguish themselves from one another and thereby intensify competition and benefit consumers.

In adopting program access requirements, Congress clearly did not intend to commoditize all video programming. The statute does not apply to any programming in which a cable operator does not have an attributable financial interest, nor does it apply to terrestrially distributed cable networks (of which there were more than a dozen in operation when the 1992 Cable Act was passed). Nor docs the statute require that all programming be sold to everyone or sold at the same price to all distributors. Thus, in adopting this striking exception to freedom of commerce, Congress specifically limited its marketplace intrusion.

Congress also intended that the exclusivity prohibition be temporary. It was scheduled to sunset in ten yearss3 Unfortunately, the FCC saw fit to exercise its authority to extend it for another five years,54 and the matter will be debated anew in 2007.

Although it could be said that (given the successful growth of DBS, in particular) the program access rules are working, it would probably be more accurate to say that the marketplace is working. In the 14 years since Congress enacted these provisions, there have been far fewer program access complaints filed with the FCC than either the FCC or Congress envisioned (approximately 45 in total), and only six of these complaints have resulted in rulings adverse to the programmer -- in fact, most have been settled.

Importantly, as competition has grown, the number of program access complaints has dwindled, not increased. What is clear in today's marketplace is that national programming networks, whether or not affiliated with a cable operator, desire broad
distribution of their services and have every incentive to ensure that as many consumers as possible can see their programming, including the 28.5 million DRS subscribers, the customers of other MVPD competitors, the millions of broadband Internet enthusiasts, and the growing hordes of mobile phone and portable media device users.

Perhaps the best known complaint pertaining to program access concerns Comcast SportsNet Philadelphia. The FCC (twice) and the courts (once) have thoroughly considered and rejected complaints by DIRECTV and EchoStar that Comcast's creation and distribution of this high-quality regional sports network violated the program access rules. All have concluded that Comcast was within its rights to make the economically sound decision to distribute this network terrestrially using a pre-existing distribution
system and to license it to some, but not all, of Comcast's direct competitors.s5

DIRECTV and EchoStar both claim that Philadelphia professional sports programming is "must-have" programming and that they cannot compete in that region without it. The facts, however, do not support that claim.

Since the mid-Nineties, nearly a hundred local Philadelphia professional sports events have been available on local broadcast stations, but when the DBS companies were
authorized to carry these signals (which were available to them free of charge), they did not do so until they were required to by federal law. It is difficult to understand why, if the games of Philadelphia sports teams are "must-have" programming, they would not bother to carry them for free. Moreover, based on data from Media Business Corp. (as of September 30, 2005), it is clear that DBS penetration in Philadelphia is higher than or
comparable to that in many other urban markekS6 And between 2000 and 2005, the DBS companies tripled their market share in Philadelphia. Clearly consumers are considering a wide variety of factors -- prices, programming choices, technology options,
customer service, etc. -- when choosing among MVPDs, and not just the presence or absence of one particular network.

As I noted earlier, most programmers -- including cable companies that own programming -- want maximum distribution for most of their products. But that should not mean that cable companies, DBS companies, and others should not have the freedom
to create and invest in some original and exclusive programming as well, in order to distinguish themselves from one another in the marketplace. Thanks in part to Comcast's freedom to use Comcast SportsNet Philadelphia as a point of competitive differentiation against its satellite competitors, Comcast has invested over $456 million in making this an exceptionally high-quality network. As a result, the network has been nominated for
over 150 Emmys and has won 56 times; provides over five hours of live sports news programming seven days a week; broadcasts over 300 games per year including 72 Sixers games and 61 Flyers games this season; and produces all home games in HD in its own

HD Studio, live postgame shows after every Flyers, Sixers, and Phillies game on Comcast SportsNet Philadelphia and after every Eagles game, and over 40 prime time specials involving all of our teams in the city from college to high school.

Given these facts, Congress and the FCC should consider that the program access rules (and the corresponding restrictions that now apply to DIRECTV as a consequence of its merger with News Corp.) may now be having the perverse effect of reducing investment in original programming. After all, why should competitors invest and create if they are guaranteed access to someone else's work on the cheap? Reliance on antitrust laws to police any potential harms caused by exclusive arrangements would reverse this course.

B. Program Carriage Decisions Should Be Left to the Marketplace.

The program carriage provisions of the 1992 Cable Act were intended to ensure that, 14 years ago when cable companies were perceived to be the sole providers of multichannel services, those companies could not play a "gatekeeper" role through actions that unfairly barred or handicapped independent programming networks from gaining distribution.

These rules have almost never been invoked, again largely because the marketplace works. Anyone who has an attractive programming idea, a sensible business plan, and a willingness to negotiate carriage terms that make sense for both the programmer and the distributor, has had the opportunity to build a business.

56 As of September 30, 2005, DBS penetration in Philadelphia was 12.04%, which was higher than Hartford, Springfield-Holyoke, Laredo, Providence, or San Diego; and was comparable to Boston, Las Vegas, El Paso, and Palm Springs. Other major cities such as New York, Tampa, Baltimore, and Milwaukee were only slightly higher.

57 DBS penetration in Philadelphia rose from 4% in September 2000 to 12.04% in September 2005.

But, what if a company feels that it has unreasonably been refused carriage? Should such a matter be addressed by the FCC, under its program carriage rules, or are such matters better left to antitrust enforcement? Just as with "program access," I believe antitrust is the better way to go.

This was borne out by our recent experience with the Mid-Atlantic Sports Network("MASN"). We believe that the network came into being as a result of a breach of the contractual rights of Comcast SportsNet Mid-Atlantic, and Comcast declined to carry it.

While this dispute was pending in the Maryland courts, and while the FCC was considering Comcast's and Time Warner's requests for approval of their acquisition of the Adelphia cable systems out of bankruptcy, MASN used print and online ads to generate political pressure on the FCC. The agency, in turn, decided to impose a condition on Comcast under which owners of regional sports channels, uniquely among all programming categories, may now demand that cable companies submit to binding arbitration if the channel owner and the cable operator cannot agree on terms and conditions of carriage. They did this even though Comcast already carries a great deal of unaffiliated regional sports networks -- even where we also carry affiliated regional sports networks-- because this is what is required by competitive market forces.s8

Shortly after this condition was adopted, Comcast and MASN reached a carriage agreement and settled their pending litigation. One immediate (and inevitable) result was that customer prices rose by $2 per month. One should rightfully question whether the FCC truly achieved any consumer benefit by effectively mandating a significant price increase for 1.5 million customers, only a fraction of whom will even watch MASN.

Although it is not the beneficiary of that merger condition, The America Channel ("TAC") is trying to achieve a similar result. Since April 2004, it has filed more than 66 pleadings (over 22 in the past 12 months) seeking FCC pressure to force carriage deals with Comcast and other cable operators. Although TAC has not demonstrated that it has produced a single hour of video programming, TAC claims that: (I) independent programming networks cannot succeed without a carriage agreement from Comcast and Time Warner; and (2) those companies will not work with independent programming networks.

In response to TAC's first claim, I would refer you to the article by C. Michael Cooley of The Sportsman Channel, entitled "How I Started a Network Without Comcast."^^

Moreover, there are many networks that have become viable before they obtained cable carriage," reinforcing the point that there are a sufficient number of U.S. MVPD households served by competitors to support such programming.

In response to the second claim, marketplace acts refute TAC's assertion. Comcast carries dozens and dozens of independent networks. In fact, we have no choice but to carry a significant number of independent programmers. Not only do our customers demand independent programming, but there aren't anywhere nearly enough affiliated programming networks to fill out our channel lineups.

In fact, 13 out of every 14 channels carried by Comcast are owned by companies that are completely independent. This should not come as a surprise -- it is our goal, and a competitive necessity, to provide the best programming and the best value for our customers, regardless of who owns or produces the programming.

Nonetheless, TAC has threatened to file a program carriage complaint with the FCC, and it has already filed a private antitrust lawsuit. Fortunately the antitrust forum is one that will ultimately require TAC to prove its case with facts, not unsupported allegations, and to demonstrate both the existence and abuse of market power. This is a far superior process to having the FCC simply make up the rules as it goes along, interfering in the cable business in ways that it never could with those who compete with us using other platforms.

I respectfully submit to you that the cable-specific rules have outlived their usefulness.

To the extent that there remains any potential for anticompetitive abuse, antitrust - with its focus on facts and its analytical rigor -- is the only remedy needed. (And for anyone who is concerned that today's Antitrust Division may not be sufficiently zealous in bringing antitrust cases, I would remind you that dozens of state attorneys general and hundreds of private plaintiffs' attorneys are all capable of pursuing antitrust remedies.)

IV. ANTITRUST AND SPORTS

With all that as background, I also want to make a few additional comments about antitrust and sports. Just as I think the time has come to eliminate sector-specific statutes that overlap and interfere with antitrust laws, so do I think this Committee should consider revoking sports-related exemptions from antitrust laws.

My earlier comment that the antitrust laws apply across the entire economy was something of an oversimplification. As you know, Major League Baseball is exempt from the antitrust laws under an exception created by the Supreme Court." In addition, Congress has enacted legislation that exempts certain narrowly defined conduct by all four of the major professional sports leagues and their respective teams. Specifically, and of particular relevance to this hearing, in 1961, Congress enacted the Sports Broadcasting Act, which permits teams of the four major sports leagues to pool their individual

GolfTV, DIY, Boomerang, The Independent Film Channel, and NFL Network are just sonic

"examples of networks that obtained most of their initial carriage on DBS').
61 See Federal Baseball Club v. National League, 259 U.S. 200 (1922); see also I5 U.S.C. 5 26b (removing the league's employment negotiations with players from the scope of the antitrust exemption,
while clarifying that the exemption continues to apply to other antitrust issues).
television rights to allow the league to sell "all or ally part of the rights of such league's member clubs in the sponsored telecasting of the games."62
Many in Congress decry increases in the prices for cable and satellite programming. Yet the biggest cost incurred by MVPDs is for access to programming, and as the Government Accountability Office found a few years ago (when it was still called the General Accounting Office), programming costs are rising faster than cable prices.63 By far the biggest programming cost increases are those for sports programming. Part of the problem may be attributable to the antitrust exemptions that professional sports leagues enjoy.
Consider the NFL and its ability to extract exorbitant rate increases year after year for its content. The NFL is expected to receive more than $3.7 billion per year from CBS, ESPN, Fox, NBC, and DIRECTV through its television rights deals that extend from the 2006 to 2013 seasons.65 This represents a 53% increase in annual revenue over the deals that expired at the close of the 2005 season. And this was just the tip of the iceberg -- now the NFL Network is reportedly seeking to raise its license fee for large cable operators to between $.70 and $.90 per subscriber from its previous price of between $.20 and $.25 per subscriber." This rate hike would make the NPL Network the third most expensive national ad-supported cable channel after ESPN (at about $3) and TNT (a little less than $1).
In my view, it is certainly valid to ask whether that antitrust immunity played any role in enabling the NFL to pull its games off of broadcast television and then try to force cable
62 Pub. L. No. 87-331,75 Stat. 732 (codified at 15 U.S.C. $9 1291-1295). As Chairman Specter noted at the last hearing, the exemption for pooling games in order for the league to sell the rights for "sponsored telecasting" has been interpreted by the U.S. Court of Appeals for the Third Circuit to be
limited to selling those rights to "broadcasts which are financed by business enterprises . . . in return for
advertising time and are therefore provided free to the general public"; in other words, a broadcast network.
Shaiv v. Dallas Cowboys Football Club, Ltd., 172 F.3d 299, 301 (1999).
63 U.S. Gen. Accounting Office, Telecommunications Issues Related to Competition and Subscriber
Rates in the Cable Television Indz4stry 22 (Oct. 2003) ("2003 GAO Report"), available at http://www.gao.gov/new.items/d048.pdf
64 See id. GAO found that between 1999 and 2002, the average license fee for sports networks (ESPN, ESPN Classic, ESPN2, Fox Sports Net, The Golf Channel, The Outdoor Channel, and Speed
Channel) increased by 59%. In that same period, by contrast, the average license fees for the 72 non-sports networks analyzed by GAO increased by only 26%. See id
65 Mike Reynolds, Football Kicks off with Shifts in TV Formation, Multichannel News, Aog. 14,
2006, at 28.

66 See id The fees currently being paid for rights to televise NFL games each year are approximately equivalent to the combined fees paid annually for rights to televise NASCAR races; Major
League Baseball, NBA, NHL, and NCAA basketball games; golf; and the Olympics. See Ben Grossman &
John M. Higgins, NFL Goes Long: Leagues New Network Ignites a Turf War with Cable Operators,
Broad. &Cable, Aug. 14, 2006, at 14.
67 See John Ourand Comcast to Pay Surcharge, Carry NFL Net Games, Sports Bus. J. 28 2006.; Reynolds, supra note 65, at 28.
See Ourand, surpra note 67.

and satellite companies to buy access to those games at vastly increased prices without antitrust immunity. If antitrust immunity is a factor in allowing the professional sports leagues to substantially increase prices that must be passed along to cable and satellite customers, I urge you to consider revoking that immunity. This doesn't mean that the leagues will be adjudged to have violated the antitrust laws, but I don't see why they should be immune from those laws.

I do recognize that sports programming has characteristics that makes it somewhat different from other types of programming. The passion that some fans bring to sports sometimes exceeds that of even the most intensely loyal viewers of primetime network series. And, as noted, sports programming can be exceptionally expensive. But these particular characteristics are not reasons for special treatment under the communications or antitrust laws. To the contrary, the arguments given above for eliminating program access and program carriage laws -- but leaving the antitrust laws fully in force - would seem to apply fully.

As our Chairman, Brian Roberts, said to an audience here in Washington a couple of months ago, Comcast is open to a serious public dialogue about the issues that are arising due to the proliferation and escalating costs of sports networks, and I applaud this Committee for holding today's hearing and the one held Last month. There are legitimate issues about how the growing number of pricey sports channels should be offered and who should bear the cost. But as this dialogue begins I think it is fair to ask that policymakers exercise regulatory restraint. In particular, I would think we should try to avoid anomalies like requiring Time Warner to carry the NFL Network, apparently under the theory that it is essential that Time Warner have access to that network's grand total of eight out-of-market games, while DIRECTV is permitted to have exclusive access to literally scores of the NFL's other out-of-market games.

V. CONCLUSION.

Mr. Chairman and Members of the committee, the video marketplace is the most competitive it has ever been; virtually every consumer in the United States can choose to receive video programming from at least three different multichannel video providers, in addition to broadcast stations, the Internet, and an ever increasing number of sources, including telephone companies. Enormous successes have resulted from deregulation and competition in the video marketplace, including massive investments, robust competition, and abundant choice

The time has come to take the next step, eliminating sector-specific regulations that saddle cable with a layer of regulation that is in addition to antitrust and, perhaps, eliminating sector-specific immunities from the antitrust laws as well.

We appreciate your attention to these issues -- in the context of video programming in general and sports programming in particular. I hope my testimony has helped to show
that today's problem is not that sports programming might be withheld from competitors. Quite the opposite -- today's problem is that sports teams and leagues can force their way
onto cable systems and charge whatever they can convince the FCC or an arbitrator is "fair." This has the effect of driving up what all consumers are paying, even though many have no particular interest in sports, and even the sports fans are being asked to pay more to see the same number of games. We will welcome the opportunity to work with you in forging effective solutions to this problem.
Thank you for the opportunity to testify today.

1 In re Annual Assessment o f the Status of Competition Market for the Delivery of Video Programming 10th Annual Report, 19 FCC Rcd. I606 1/ 4 (2004).
2 Pub. L. No. 102-385, 106 Stat. I460 ("1992 Cable Act") (codified at 47 U.S.C. $5 521-555a)
3 See Press Release, Verizon Communications Inc., Veriioi? Provides New Financial and Opemtior~aDl elai1.r on its Fiber Net>vor,k as Deployr?~mGt ains Morizenturiz (Sept. 27, 2006), availahle at
Ii11~~://invcstosvcrizo1i.~o1ii111cws/vicas?Ncs1se~e~ a~ls7o7 T3i;l de Herrera, Verizon Expaizds FiOS
TVService, Bradenton Herald, Oct. 4,2006, at I .
4 Press Release, Verizon Communications Inc., TV as You've Never Seen It Before: Verizon Launches FiOS TV iri Greater Philadelphia Area (Dec. 4,2006), available at
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5 See Projecl Lighfspeed, SBC Communications Conference Call I4 (Nov. 1 1,2004).

6 See St~~dy1:0 7 Million People Viewed Online Video in Julji, USA Today, Sept. 28,2006 (noting that "1 07 lnilliot~p eople streamed or~downloadedn early 7.2 billion "idea clips -- an &rage of 67 apiece"),
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television shows are soaring in popularity among viewers, investors, and advertisers."), available at
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7 Ellen Sheng, As I17ternel TV Gains Popularity, Cable Fims Bulk Up Oferings, Wall St. J . , Sept.
27, 2006, at B4.
8 Austan Goolsbee & Amil Petrin, The Consumer Gains from Direct Broadcast Satellites and the Competition wiith Cable TV, 72 Econometrics 351, 35 1 (2004). Goolsbee & Petrin find that

For cable subscribers, our results suggest that cable prices are at least $4 per month lower than they would have been [without DBS entry]. I11 the aggregate, given 70 million cable subscribers,
the price effect yields a total welfare gain of about $3.3 billion for the consumers that stay with cable. The quality improvements to cable characteristics are worth approximately another $1 per

month of surplus, which adds another $800-900 million to the welfare change.
9 See, e.g., id at 370 ("In most empirical work [the incumbent firm's response to entry] is ignored,
even though it can substantially impact consumer welfare. In the cases where it is recognized . . . ,
incumbents are assumed to respond only by changing prices. Because of the rapid rise of DBS and the fact
that it [was] a higher quality alternative [in 20011 on many dimensions, we examine the response of both
cable prices and cable characteristics to entry.").
10 H.R. Rep. No. 102-628, at 41 (1992) (noting that there were "68 nationally delivered cable video
networks").
I I Id (noting that "39 [of the 681, or 57 percent, have some ownership affiliation with the operating
side of the cable industry").
" See In re Annual Assessment of the Status of Competition in the Market for the Delivery, of Video
Programming, Twelfth Annual Report, 21 FCC Rcd. 2503,11 I57 (2006) ("12"'Am?ual Report"). In the
12"'Annual Report, based on data as of June 30,2005, the FCC found that 21.8% of national programming
networks were vertically integrated with cable operators, but this finding was based on a computation that
counted a single network, IN DEMAND, as if it were 60 separate networks. See id. 7 157 & n. 568. The
FCC noted that, "[if we count IN DEMAND as one network, 57 satellite-delivered national programming
networks are vertically integrated with one or more . . . cable operator[],"id 7 159, which would mean 57
out of the total 472 (or approximately 12.1%) national programming networks are vertically integrated wit11
a cable operator.
13 See id W 160-161.
11 See generally News Corp., Form IO-K (Aug. 23, 2006), available at
http://ccbn.10kwizard.com/download.php?rep=tenk&ipage=4350417&format=PDF&cik=0001308161; 12'" Annual Report app. C-I ; News Corp. Web Site, at http://www.newscorp.com; Star Group Ltd., Star Brands, at http://www.startv.com/corporate/about/starbands.htm. Of the 54 worldwide programming
networks, DIRECTV, which is owned by News Corp. carriers over 30 networks -- 26 of those are sports networks, including 21 regional sports networks. The number of affiliated networks DIRECTV carries is
almost twice as many as Comcast carries.
I5 Sheng, supra note 7, at 84 ("MySpace was second with 17.9 million unique visitors. In comparison, Comcast, the country's largest cable company, has 24 million subscribers and DIRECTV, the

largest satellite-TV provider[], has 15.5 million U.S. subscribers.").
16 As I noted in my prior testimony before this Committee, program tiers lower transaction costs,
reduce marketing costs, lower distribution costs, increase the value of advertising, and reduce equipment
costs. The benefits oftiering in this fashion are widely understood and appreciated by both network programmers and would-be programmers. That is why so many of them have so vigorously opposed calls
to require distributors to sell programming a la carte.
17 Compare in re Annual Assessment of the Status of Competition the Market,for the Delivery of Video Programming,T hird Annual Report, 12 FCC Rcd. 4358 7 142 (l996), will? 12"'Annual Report 7 157
& 11.568. As noted above, the FCC's calculation overstates vertical integration greatly by counting one
network multiple times. See supra note 12.
18 3A Areeda & Ilovenkamp, Antitrust Law 1 755a (2005).
19 Id For example, a car manufacturer produces its own glass in its own plant rather than purchasing glass from a separate manufacturer; a newspaper company uses employees rather than contractors to distribute its newspapers to newsstands; a university operates its ow11 electrical generation facility rather than purchasing electricity from a local utility; a clothing store manufactures its own branded line of
clothes rather than reselling other brands.
20 See Nat'l Fuel Gas Supply Corp. v. FERC, 2006 U.S. App. LEXlS 28504 (D.C. Cir. Nov. 17, 2006) ("We began by emphasizing that vertical integration creates efficiencies for consumers."); DOJ,
Merger Gi~idelines4, 9 Fed. Reg. 26,823, 5 4.23 (noting efficiencies associated with vertical integration)
(1984); Areeda & Hovenkamp, supra note 18,Y 75% ("In the majority of cases no anticompetitive consequences can be attached to [vertical integration], and injury to competition should never be inferred
from the mere fact of vertical integration. Every firm -- from the largest monopolist to the tiniest competitor -- is vertically integrated to one degree or another.").
21 See Christine A. Varney, Comissioner, Federal Trade Commission, Vertical Merger Enforcement Challenges at the FTC (July 17, 1995) ("Vertical integration can lower transaction costs, lead
to synergistic improvements in design, production and distribution of the final output product and thus
enhance competition. Consequently, most vertical arrangements raise few competitive concerns."),
available at http://www.ftc.gov/speeches/varney/varta.htm
22 See Areeda & Hovenkamp, supra note 1 8 , 1 7 5 7(~" The extensive literature on vertical integration
suggests that be majority of instances of vertical integration produce resource savings.").
17 Id. 7 758a2 ("Consumers are better off for each instance of double marginalization eliminated By precisely the same token, the market price comes down each time a firm with market power is eliminated from the production and distribution chain.").

24 See generally Continental T.V, Inc. v. GTE Sylvania Inc, 433 U.S. 36, 54-55 (1977) ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies ill
the distribution of his products. These 'redeeming virtues' are implicit in every decision sustaining vertical
restrictions under the rule of reason. Econimists have identified a number of ways in which manufacturers
can use such restrictions to compete more effectively against other manufacturers.").
25 Press Release, Yahoo! Inc., Yahoo! Forms Strategic Partnership with Consortium of More Than 150 Newspapers Across the U S (Nov. 20 2006) available at
http://yahoo.client.shareholder.com/press/ReleaseDetail.cfm?ReleaseID-219204.
26 See Corey Deitz, Radio: A Step by Step Comparison of XM and SIRIUS Satellite Radio Features,
About.com, at http://radio.about.com/od/satelliteradio/ss/blsatstepbystep.htm (last visited Nov. 30, 2006).
27 See Ian Martinez, New Mobile Services Reflect Major Hispanic Marker Power, Communications
Daily, Nov. 16, 2006, at 5 (describing Verizon Wireless's new services for Hispanics and stating that
"Cingular, which has major announcements 'in the pipeline,' according to a spokeswoman, has engaged in
a nationwide 'bilingual concept' conversion of over 500 stores in heavily Hispanic areas").
2s See Ethan Smith, Can Anybody Catch iTunes?, Wall St. J., Nov. 27, 2006, at R1 ("Microsoft is
currently mounting the most ambitious assault on iTunes with Zune -- a software and hardware 'ecosystem'
that tries to mimic the successful synergy between iTunes software and iPod gadgets.").
29 See, e.g, Jefferson Parish Hosp. Dist. No. 2 1,. Hyde, 466 U.S. 2, 45 (1984) (O'Connor, J . , concurring) ("Exclusive-dealing arrangements may, in some circumstances, create or extend market power
of a supplier or the purchaser party to the exclusive-dealing arrangement, and may thus restrain horizontal
competition. Exclusive dealing can have adverse economic consequences by allowing one supplier of
goods or services unreasonably to deprive other suppliers of a market for their goods, or by allowing one
buyer of goods unreasonably to deprive other buyers of a needed source of supply.").
30 See Areeda & Hovenkamp, supra note 18 7 755c.
iI See id.
.52 See Jefferson Parish, 466 U.S. at 45 ("In determining whether an exclusive-dealing contract is
unreasonable, the proper focus is on the structure of the market for the products or services in question --
the number of sellers and buyers in the market, the volume of their business, and the ease with which
buyers and sellers can redirect their purchases or sales to others.").

ii See Vareny, supra note 21 ("As a part of the FTC's case-by-case analysis, antitrust enforcers must
take great care when considering the nature and extent of the remedy in vertical merger cases. Since many
vertical mergers result in procompetitive efficiencies, we must craft relief narrowly to permit
procompetitive efficiencies to come to fruition whenever possible.").
21 See Verizon v. Trinko, 540 U.S. 398,407 (2004) ("The mere possession of monopoly power, and
the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the
free-market system. The opportunity to charge monopoly prices -- at least for a short period -- is what
attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.
To safeguard the incentive to innovate, the possession of monopoly power will not be found
unlawful unless it is accompanied by an element of anticompetitive condz~ct").
35 See generally 1992 Cable Acr, Pub. L. No. 102-385, 106 Stat. 1460
38 47 U.S.C. g$ 534-535.
37 Seeid $531.
38 See id. 5 532.
39 See id $ 536
40 See id 5 548(c)(2)(A)-(C)
4 t See id $5 548(c)(2)(D), 548(c)(5). The FCC later interpreted this provision to prohibit any
exclusive arrangement between a cable operator and any programming network affiliated with that cable
operator or any other cable operator. See 47 C.F.R. 5 76.1002(c) (2005).
J2 See supra note 12 and accompanying text (noting that the FCC's 531 networks counts iN
DEMAND as 60 different networks).
13 The national programming networks arc: E!, G4, AZN, VERSUS, Stylc, Golf Channel, iN
DEMAND, TV One, PRS KIDS Sprout, and The mtn.
44 Comcast's regional programming networks are: CN8, Cable Sports Southeast, Comcast SportsNet
Philadelphia, Comcast SportsNet Mid-Atlantic, Comcast SportsNet Chicago, Comcast SportsNet West,
SportsNet New York, Fox Sports New England, New England Cable News, and Pittsburgh Cable News
Channel, Comcast Local (Detroit), and Comcast Entertainment TV (Denver).
45 These networks are: VERSUS, Golf Channel, The nitn., Cable Sports Southeast, Comcast
SportsNet Philadelphia, Comcast SportsNet Mid-Atlantic, Comcast SportsNet Chicago, Cotncast SportsNet
West, SportsNet New York, Fox Sports New England, and Comcast Local (Detroit).
46 See 1552 Cable Act $ 27 (codified at 47 U.S.C. 5 521 note) ("Nothing in this Act or the
amendments made by this Act shall be construed to alter or restrict in any manner the applicability of any
Federal or State antitrust law."); United Stares v. A7'&T, 552 F. Supp. 131, I57 (D.D.C. 1982) (explaining

that the court repeatedly rejected the pre-divestiture Bell System's claim that it was immune from the
antitrust laws because those laws had been preempted by "pervasive regulation" under the Communications
Act); United States v. AT&T, 524 F. Supp. 1336, 1345 (D.D.C. 1981); United States v. AT&T, 461 F. Supp.
13 14, 1320-30 (D.D.C. 1978).
47 See 47 U.S.C. $ 521(6).
48 See, e.g,, 47 U.S.C. $5 543(a)(2), 548(c)(5)
49 1992 Cable Aci 5 I2 (codified at 47 U.S.C. 5 548).
50 ld. 5 19 (codified at 47 U.S.C. 5 536).
51 See In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and
Competition Act of 1992: Development of Competition and Diveristy in Video Programming Distribution
and Carriage, First Report & Order, 8 FCC Rcd. 3359 (1993).
52 Congress even recognized the importance of exclusive arrangements in promoting investment by
permitting cable operators to petition the FCC for a waiver from the exclusivity prohibition. See 47 U.S.C.
5 548(c)(4). However, the regulatory process for and delays associated with obtaining such waivers has
made this a burdensome means by which to obtain exclusivity.
53 See 47 U.S.C. $ 548(c)(5)
I" See In re Implementation of the cable Television Consumer Protection & Competition Act of
1992 Development of Competition and Diversity in Video Programming Distribution: Section
628(c) (5) of the Communications Act Sunset of Exclusive Contract Prohibition, Report & Order, 17 FCC Rcd. 12124
(2002).
i s Both Verizon and RCN have carriage agreements for Comcast SportsNet Philadelphia. While the
DBS companies and others have cried wolf for nearly a decade, claiming that the FCC's decision would
encourage companies to move their most valuable programming off of satellite (and therefore beyond the
reach of the program access rules), the fact of the matter is that that has not happened. In fact, Comcast's
other regional sports networks -- including those launched since Comcast created the Philadelphia network
-- are all satellite-delivered, again for sound economic reasons, and all are made available to competing MVPDs.
58 This is the situation in Atlanta, Boston, Detroit, Miami/Orlando/Tampa Bay, New York, and San
Francisco/Sacramento.
59 C. Michael Cooley, How I Started a Network Without Comcast, Multichannel News (Oct. 3,
2005). I attached a copy of this article to my testimony before this Committee this past summer.

60 See Comcast Reply Comments, filed in MB Docket No. 05-255, at 34 n. 138 (Oct. 1 I, 2005) (noting that BBC America, CNBC World, Bloomberg Television, ESPNU, Classic Sports/ESPN Classic,