Senator Specter's Hearing Questions

1. **Do you think it would be possible for the NFL to engage in revenue sharing and, at the same time, allow individual teams to negotiate contracts for television rights?**

The collective sale of rights to telecast NFL games serves the interests of consumers by increasing output, enhancing consumer choice, and improving the quality and appeal of the NFL's entertainment product. It also reflects the reality (discussed in some detail in my answer to Question 5 below) that, at least for purposes of television rights sales, the NFL's 32 clubs are joint producers of a single television product – an integrated and inter-related annual series of League-scheduled and League-administered on-field football competitions leading to the crowning of a single champion. While League rules could, in theory, be changed to allow the clubs to negotiate individual television contracts and simultaneously engage in revenue sharing, such a fundamental change in the NFL's business model would sharply disadvantage consumers by both reducing their access to NFL television programming and increasing the cost of available programming. Such a change would also reduce, rather than enhance, competition in the broader television marketplace.

As a threshold matter, individual team negotiation of television contracts would effectively eliminate the current arrangements under which every NFL game is broadcast on free, over-the-air television. The most likely outcome, based on the experience of other sports, is that a significant number of NFL games would instead be telecast primarily or exclusively on another basis – cable, satellite or pay-per- view.

As a result, individual team negotiation of contracts would diminish consumer choice and would almost certainly result in most fans having to pay to watch NFL football while having access to fewer games; it would eliminate the opportunity for fans to see the most exciting national match-up or a preferred regional offering on Sunday afternoons; and it would make it difficult, if not impossible, for many displaced fans to see their favorite team. Individual team negotiation of contracts would sharply limit the League's ability to engage in innovations that improve the product, such as "flex scheduling," which was introduced this year in response to consumer demand in order to enhance our free broadcast offerings. Further, if a broad shift of regular season NFL television to regional outlets were to occur, it would inevitably result in less national exposure for individual clubs, reducing the national interest in, and appeal of, the NFL playoffs and Super Bowl. It is the broad, nationwide interest in those games that makes them such compelling and highly-viewed anchor programming for free over-the-air television.

2. **The Sports Broadcasting Act currently covers only the joint sale of television rights by NFL members to over-the-air broadcasters. Do you believe the Sports Broadcasting Act should be expanded to cover the joint sale of television rights to cable and satellite providers?**

We believe that the Sports Broadcasting Act already covers the joint sale of television rights to cable and satellite providers, whose offerings can and should be viewed as "sponsored telecasts" within the meaning of the statute; as we discussed at the hearing, this is precisely the position we took in the *Shaw* case. We recognize that the Third Circuit disagreed but are hopeful that, if presented with the issue, other Courts of Appeal would see it differently. We also note that in 1999, the Chairman sponsored legislation that, among other things, would have confirmed and made explicit that the Act applies to cable and satellite programming. We supported that aspect of the legislation at the time and continue to believe that its passage would be in the public interest.

3. **Why did the NFL member teams decide to provide the "Sunday Ticket" exclusively to one program distributor, DirecTV? Is there any reason why the NFL member teams could not have also entered into similar arrangements with other program distributors? [note margins]**

When NFL Sunday Ticket was first launched, only satellite providers were capable of delivering the games on a national basis; no cable company had the national footprint to deliver the games in every area of the country. As I explained in my testimony, we also wanted to maintain the health of a model based on televising every NFL regular season game via free, over-the-air broadcasts.

NFL Sunday Ticket is designed to *complement* our broadcast programming by making available to displaced fans or avid consumers the broadcast feeds of out-of-market games. A multi-provider distribution arrangement would undermine our broadcast programming by shifting viewers away from the broadcast networks and allowing them to watch, via other means of distribution, the broadcast feeds produced by our network partners.

Even if we were successful in negotiating an arrangement with our broadcast partners that would allow multiple carriers to piggyback on their productive efforts, the diversion of viewers and associated advertising revenues from the networks and their local affiliates would undermine our ability to ensure, over the long term, that all NFL games remain available via free, over-the-air broadcasts. (A key goal of NFL television policies has always been to maintain the viability of our broadcast television model and the important role that local affiliates play in televising and promoting NFL football.) Moreover, as a practical matter, such an arrangement would be highly prejudicial to the interests of fans and consumers. It would likely be impossible (and, if possible, substantially more costly) for a fan to secure access to all 32 clubs' games if they were parceled out among multiple cable, satellite and pay-per-view outlets. It is difficult to identify a consumer interest that would be served by such an arrangement.

In this regard, it bears mention that as I explained in my December 13, 2006 letter (a copy of which is attached), in the most recent round of negotiations for Sunday Ticket, we held long discussions with a cable operator (Comcast) addressing the possibility that it would be one of the distributors of NFL Sunday Ticket. When the cable operator chose not to submit a bid for Sunday Ticket, we signed a new contract with DirecTV.

4. **Has an NFL team owner ever come to you or the Commissioner or anyone at the NFL and asked to independently negotiate with a program distributor such as DirecTV or Time Warner?**

We are not aware of any club's asking to negotiate independently rights for regular season game programming. However, as you may know, many clubs have relationships with local cable companies for other kinds of programming. This programming includes coaches shows, interview programs, news and highlights shows, and other specialty football-oriented programming.

5. **Isn't it true that NFL teams compete both on and off the field? If they also compete off the field, why should they, unlike any other business in this country be allowed to combine to set the price of the product they sell?**

It is true that NFL teams compete aggressively *on* the field. But as I stated in my testimony, off the field, NFL teams are partners in a business venture that competes aggressively with other entertainment providers. As the question suggests, they collectively produce a *single entertainment product* – an annual, inter-related series of professional football games that leads to the Super Bowl championship – that no individual club could possibly produce on its own. Federal courts have recognized this reality for more than 50 years; a recent decision of a federal appeals court deemed collaboration and cooperation among the member teams of a sports league to be "essential"; "a league with one team would be like one hand clapping." *Chicago Prof'l Sports Ltd. P'ship v. NBA,* 95 F. 3d 593, 598-99 (7th Cir. 1996). In this respect, the members of a professional sports league, which George Halas analogized to the spokes of a wheel, are fundamentally different from "any other business in this country."

In the *Bulls* case, cited above, the United States Court of Appeals for the Seventh Circuit suggested that a professional sports league may be "best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment." *Id.* at 600. That conclusion is certainly supported by the principles underlying Section 1 of the Sherman Act, which applies to a "contract, combination or conspiracy between *separate* entities to restrain trade." *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 768 (1984) (emphasis in original). In *Copperweld,* the Supreme Court emphasized that Section 1 of the Sherman Act is concerned with activity that "deprives the marketplace of independent centers of decisionmaking;" it potentially applies only when coordination among separately owned entities represents "a sudden joining of . . . independent sources of economic power." Given the mutual interdependence of the NFL clubs, none of which could possibly present NFL football on its own, these circumstances simply do not exist when the NFL sells its product to the networks.

6. **It is my understanding that, under rule of reason analysis, even a restraint of trade that is on balance pro-competitive must be no more restrictive than necessary in order to survive legal scrutiny. With respect to Sunday Ticket, is it necessary to prevent individual teams from negotiating independently to sell the television rights to their games?**

I respectfully disagree with your premise. Numerous courts have held explicitly under rule of reason analysis that "a reasonable restraint [*i.e.*, one in which the procompetitive benefits outweigh its anticompetitive effects] does not become unreasonable simply because the least restrictive means were not used." *E.g., International Health Care Management v. Hawaii Coalition for Health,* 332 F.3d 600, 608 (9th Cir. 2003).

That having been said, allowing individual teams to negotiate independently to sell NFL Sunday-Ticket related television rights would diminish consumer welfare for many of the same reasons set forth in response to Question 1, above. As the FCC has repeatedly recognized (and as noted in my testimony), NFL Sunday Ticket is pro-competitive because, among other reasons, it expands output by making more games available to consumers and presenting the games in a package that is consumer friendly. It is clear from our experience and the experience of other sports leagues that the vast majority of consumers prefer a package with all the games. It would be more costly and less efficient for consumers if, in order to secure a complete package of games, they had to secure subscriptions to multiple providers (perhaps multiple cable, satellite and/or pay-per-view companies). In many cases, this would be impossible in the current television marketplace. There is no demand for individual team packages in the NFL, and that is not surprising given that individual team packages in other sports have not succeeded.

7. **Did former Commissioner Tagliabue decline to entertain any cable company's bid for the Sunday Ticket? Has any NFL official or representative ever informed an interested party that bids for Sunday Ticket are unwelcome?**

In response to the Chairman's request at the hearing, I addressed this question in my December 13, 2006 letter, a copy of which is attached.