

Testimony of
Mr. Jeffrey Pash

Executive Vice President
General Counsel of the National Football League
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TESTIMONY OF JEFFREY PASH, EXECUTIVE VICE PRESIDENT,
NATIONAL FOOTBALL LEAGUE
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Mr. Chairman, and members of the Committee, thank you for affording us the opportunity to appear today to discuss the NFL's television's policies. We understand that there are a number of issues on which the Committee has solicited our views and we are pleased to have the opportunity to address your questions and concerns.

NFL television policies and practices have been addressed for more than five decades by the Congress, the Federal Courts, and the Federal Communications Commission. These inquiries have led to the consistent recognition that NFL television policies serve the public interest, are responsive to consumer demand, and provide NFL fans with exceptional access to a wide and growing range of NFL product at little or no cost.

In the course of my testimony today, I will address these matters:

1. An overview of the NFL's current television policy and, specifically, the League's continued commitment to free, over-the-air broadcast television as the primary means of televising the vast majority of the NFL's live television product.
2. The League's development of supplemental television products, including NFL Sunday Ticket and the NFL Network; how these alternatives relate to the League's broadcast packages; and the consumer response to those supplemental offerings.
3. The application of anti-trust principles and the 1961 Sports Broadcasting Act to current NFL television policies.

The Nature of NFL Operations

A professional sports league like the NFL is a unique business entity because it creates and markets a single, jointly-produced entertainment product. The NFL produces athletic competition among its 32 member clubs, none of which can produce and present that product on its own. The NFL sports entertainment product in turn competes in a broad entertainment marketplace, which includes the jointly-produced entertainment products of other sports leagues, as well as other

entertainment products of all kinds. It is well accepted that outside a League structure no individual team could produce a product - whether that be a game, a telecast, or something else - that would have significant value or gain much in the way of consumer acceptance.

The entertainment marketplace within which the NFL competes is growing and increasingly competitive. In recent times, each of the four major professional sports leagues has added additional teams, new leagues have been formed, and other sports television products, such as "extreme sports" and NASCAR, have developed as well. Within individual communities, the number of professional sports offerings has grown considerably. College football and basketball have substantially expanded their presence on television. The increasing number of television channels on cable, satellite and now via telephone companies; the introduction of satellite radio; and the growth of the Internet have all brought vast new entertainment options to consumers. This Committee has examined closely the growth in entertainment options in recent decades and what that has meant for communications and competition policies. Sports leagues have been affected by the same changes in the marketplace that have affected the music business, the movie business, television networks, and virtually every other entertainment producer.

The typical household today has access to between 60 and 400 channels of television programming. In that environment, the size of the audience for many kinds of programming, including sports, can be so marginal and fragmented, that it is of little value to advertisers. The key factor that distinguishes the NFL from other types of programming is its ability consistently to deliver a mass audience.

The NFL's Television's Policies

The centerpiece of the NFL's television policy is free, over-the-air broadcasting of NFL games. Every NFL regular season game and every post-season game is televised on free over-the-air television. Some games, like the Sunday night broadcasts that began this year on NBC, are televised nationally. Other games, like the Sunday afternoon games at 1:00 and 4:00 p.m., are carried on a regional basis or, in the case of games with particular fan appeal, to broader portions of the country. Every fan continues to have available all of the local team's away games on broadcast television. When home games are sold out at least 72 hours in advance, the home game is televised as well. This season, every NFL game has been sold out and broadcast live in the home city. There have been no local blackouts this year.

Even games that are televised on ESPN as part of our national cable arrangement - an arrangement now in its 20th season - are televised on free over-the-air television in the home cities of the competing teams. Thus, the game last night between Tampa Bay and Carolina was available on over-the-air television in those two communities for any fan who did not have access to cable television. This is a unique requirement that is not imposed by any other league or in the context of any other sports telecast.

This same policy will apply to the games that will be shown, beginning later this month, on the NFL Network. While those games will be available throughout the country via cable and satellite carriers that offer the NFL Network, they will similarly be available on free, over-the-air television in the home cities of the competing teams, on the same basis as if they were televised on a broadcast network or on ESPN.

In short, no fan needs to pay to see a wide variety of NFL games, including all games of the home team. In general, NFL fans will have available 90 or more games on free television during the regular and post-season.

The NFL's television policy, and particularly its overwhelming emphasis on broadcast television, is intended to serve three main goals. First, because NFL teams normally play once each week, we try to make each game a special event and obtain the broadest possible audience for those games. The best way to do so has been, and continues to be, through broadcast television.

Second, we want to encourage strong fan support in each local market. More than five decades ago, it was recognized that one way of accomplishing this was by televising away games into the home market to ensure that fans could see their team play on television even when it was impossible to buy a ticket. Consistent with the 1973 Blackout Legislation, sold out home games are also televised live in the home city. Further, our television agreements provide for live telecasts of all games of all teams. This is a unique requirement in sports, and is fully consistent with our desire to maintain the NFL's status as mass-appeal sport.

Third, the broadcast television agreements generate substantial revenues that are equally shared by the 32 NFL Clubs; thus, clubs like Cincinnati, Green Bay or Kansas City receive the same amount as teams in New York and Chicago. The equal sharing of television revenues is a principal reason why the NFL includes strong franchises in small and mid-size markets like Buffalo, Green Bay and Pittsburgh. Those revenues are used principally to support growing player benefits and salaries under our collective bargaining agreement, which itself is predicated on this equal sharing of media and other League revenues. Television revenue is also used to support stadium construction throughout the League.

Each of these three goals remains as important to the NFL today as forty years ago. Our policies over the decades have continued to focus on providing NFL games to the broadest possible television audience, on ensuring that all teams have their games televised, and on generating equally shared television revenues to maintain franchise stability, preserve competitive balance on the playing field, and support our Collective Bargaining Agreement.

Television Policy and the 1961 Statute

The 1961 Act was passed because Congress recognized that without it, many sports teams and their fans would be unable to make effective use of television. For example, in the absence of a single-network package with equally-shared revenues, several NFL teams may well have ceased operations due to their inability to obtain sufficient exposure and revenue from television. Under the Sports Broadcasting Act, the NFL has created the most pro-consumer television plan in sports today. The NFL has maintained its commitment to broadcast television even while the league has grown from 12 teams in 1960 to 32 teams today, and even though network television has experienced dramatic changes and prime time entertainment programming has seen its ratings erode as a result of competition from cable, satellite and other options. Although the 1961 Act applies equally to all sports leagues, no other league today has a remotely similar commitment to broadcast television.

In the 1990's, Congress directed the FCC to study, among other matters, the NFL's operations under the 1961 statute. The FCC's final report in 1994 found that the NFL's television policies were consistent with the public interest and recommended no amendments to limit the application of the 1961 Act.

Far from moving away from broadcast television, the NFL's current agreements have served to strengthen our relationship with broadcast television. We have for example instituted a new policy of "flexible scheduling," under which teams will be able to "play their way" onto our national broadcast on Sunday night on NBC. This upcoming Sunday will mark the first time that flexible scheduling will be used to substitute a more attractive match-up. The game between the Denver Broncos and San Diego Chargers for first place in the AFC West will be moved from a Sunday afternoon telecast window to Sunday night, where it will be broadcast free to the entire country, rather than simply to certain regions.

The goals of flexible scheduling - which involves only our prime-time broadcast partner and not ESPN or the NFL Network - are threefold: to ensure that high-quality match-ups are made available to the widest possible audience; to showcase "surprise" teams who otherwise would not receive national exposure, which builds interest in those teams before they appear in playoff games televised by our broadcast partners; and to ensure that our prime-time broadcast partner does not suffer from a late season match-up between clubs whose performance has fallen below what was expected when the schedule was developed the previous spring. Flexible scheduling thus benefits both fans and our broadcast partners, and we fully expect it to strengthen the relationship between the NFL and broadcast television in the coming years.

Through the first nine weeks of the current season, we have seen very strong fan support for our telecasts on all of our television partners. Consider the following:

? Ratings on CBS are up 4 percent over 2005 and 7 percent over 2004; total audience is up 6 percent and 9 percent, respectively.

? FOX is averaging its highest ratings since 2000, and is up 8 percent over 2005.

? The night game on NBC on November 5 was the most watched program in the country that week. Through nine weeks, the NFL is averaging a rating that is 5 percent higher than the comparable prime time program in 2005.

? Audiences for ESPN's Monday night telecasts are up 40 percent over the audience for its comparable Sunday night NFL games in 2005.

These strong performances and growth in ratings and total audience are rare in today's fragmented television environment. They demonstrate the continuing strength and attractiveness of NFL games on television. They also reinforce two key beliefs that underlie our television policy: the NFL's commitment to broadcast television as the best available means of attracting large national audiences for our games; and its belief that careful supplementation of live game telecasts - for example, through NFL Sunday Ticket and through related programming principally televised on ESPN, NFL Network, and other cable channels - can reinforce game telecast ratings and drive fan interest in football.

NFL Sunday Ticket

NFL Sunday Ticket is a satellite television package that permits fans to view "out-of-market" games. A fan living in Washington, for example, would ordinarily see games of the Washington Redskins as well as one or two other games on Sunday afternoon. That same fan, by purchasing NFL Sunday Ticket, has the opportunity to see any NFL game being played that day.

NFL Sunday Ticket was first introduced in 1994, and approximately 1.8 million homes and commercial establishments currently subscribe to NFL Sunday Ticket. The package is designed to be a service for a limited number of more serious fans who want to watch games not shown by the broadcast networks where they live.

Because NFL Sunday Ticket is available exclusively on satellite via DirecTV, it serves to advance the interests of both the NFL and the federal antitrust laws. NFL Sunday Ticket supplements existing broadcast television. No fan needs to purchase NFL Sunday Ticket in order to see the local teams' games, a national prime time contest each week, a wide range of attractive match ups featuring other teams, and all playoff games. Consequently, NFL Sunday Ticket does not displace the primary role of broadcasters, nor does it displace local affiliates as the means of watching telecasts of the home team's games. NFL Sunday Ticket is accepted by the League's broadcast partners as complementary to their own telecasts. The FCC reached the same conclusion in its report on sports migration: "As a threshold matter, we do not see the NFL package as a sports migration issue. It appears to be a net addition to output and to the choices lawfully available to dish owners and commercial establishments."

NFL Sunday Ticket also furthers the goals of antitrust laws in at least two important respects. Because it involves the creation of a new product that responds to consumer demand, NFL Sunday Ticket enhances consumer choice by giving the option to view NFL games that are not otherwise televised where they live - an option that did not previously exist. This is precisely the kind of activity that firms are encouraged to engage in by the antitrust laws. By responding to consumer demand and enhancing consumer choice, NFL Sunday Ticket promotes consumer welfare, which is the primary focus of the antitrust laws.

Moreover, as DirecTV's testimony makes clear, NFL Sunday Ticket has helped promote competition in the broader television marketplace. Because NFL Sunday Ticket is uniquely attractive programming available only on DirecTV, it had the clear effect of enhancing satellite as a competitor to cable. Consumers who previously only had access to a single cable option now have a robust alternative in satellite, with unique and attractive programming such as NFL Sunday Ticket. In its Third Annual Report on Competition in the Video Marketplace, the FCC commented on the role of such programming in promoting satellite as a competitor to cable. "DBS providers, which generally are unable to carry local broadcast programming at present, are emphasizing both the technical superiority of their digital service and their unique program offerings (e.g., their comprehensive sports packages) to differentiate their services from those of cable." In its Fifth Annual Report, the Commission found that, "[a]ccording to surveys of DBS subscribers, the primary advantages of DBS are superior channel capacity . . . digital quality picture, CD quality sound, and specialized programming such as exclusive sports packages."

The Commission also addressed the claim that the exclusive contract between the NFL and DirecTV was somehow unfair. In its 1997 Report, the Commission concluded: "We have also consistently recognized, however, that exclusive arrangements can often produce efficiency benefits for the parties involved, and may increase competition, which can produce lower prices and increased choice for consumers in programming and distribution markets."

As the Committee is aware, a consumer class action was commenced in 1997, challenging the legality of NFL Sunday Ticket. The principal claim brought by the plaintiffs was that the sale of all NFL games was a form of "bundling" that was prohibited by the antitrust laws. We believed there were significant legal and factual barriers to class certification, to establishing liability, or to proving damages. At a minimum, plaintiffs would have had to demonstrate how creating a new product that expanded output and consumer choice would be inconsistent with the antitrust laws. It would have also required plaintiffs to demonstrate how creating a new product that avoided frequent copyright violations, particularly by sports bars and restaurants, could offend national competition policy. We also knew, both from our own market research and the experience of other leagues, that what consumers wanted was the ability to choose to watch any of the dozen or more games played on a Sunday afternoon, and that such a package could be offered much more efficiently than more fragmented offerings.

After several years of litigation, we determined to settle the case, and the settlement was concluded approximately five years ago. The settlement was approved by the supervising federal judge and no antitrust challenge to NFL Sunday Ticket has been brought or threatened since. Under the settlement, the NFL agreed to offer NFL Sunday Ticket on both a season-long and week-by-week basis, and to limit the price of the weekly package to a designated percentage (17.8 percent) of the full season price. DirecTV has continued to offer a weekly-purchase option on these terms under the two follow-on NFL Sunday Ticket agreements signed since the settlement of this litigation. We also made a cash payment to class members and paid the costs of settlement administration and plaintiffs' legal fees.

The federal judge in Philadelphia, as he was required to do, reviewed the settlement to ensure that it was fair and reasonable. The court initially disapproved the settlement, in large part because it provided too much in the way of legal fees for plaintiffs' attorneys. The court specifically commented on "the weakness of plaintiffs' claim" and held that rejection of the settlement would serve the public interest by acting "as an incentive to class action counsel to exercise a high degree of care and diligence before initiating class action litigation." The court held that rejection of the settlement would also protect "defendants from payment of unmeritorious claims simply because the claims are joined and aggregated together with other equally unmeritorious claims."

At the hearing on the settlement approval, "plaintiffs' counsel conceded that the claim faces an uphill climb in establishing liability as well as damages." And plaintiffs admitted "that defendants have a strong argument that their alleged illegal activities are permitted under a rule of reason analysis." There was also a "serious question" of whether class members could recover any damages, or were instead barred as indirect purchasers under the decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). As the judge commented during the hearing on settlement approval, "this is a very weak case."

Following the court's initial rejection of the settlement, the terms were renegotiated and the administrative costs and attorneys' fees were significantly reduced. Although recognizing that "the recovery is modest," the court nonetheless approved the revised settlement because the modest recovery "is a function of the lack of strength of plaintiffs' claim and not a result of unfairness."

NFL Network

Three years ago, the League established the NFL Network, a year-round channel devoted to football. The creation of the NFL Network was clearly a pro-competitive act under the antitrust laws.

We created NFL Network as another means to better serve our current fans, and help develop the next generation of football fans by offering a wide range of innovative football-oriented programming year-round. The NFL Network's programming lineup includes news and interview programs, documentaries and features, in-depth coverage of the annual NFL Scouting Combine and the College Draft, preseason NFL games, college and youth football games, and rebroadcasts of previously televised NFL games. The overall programming of the NFL Network is of the highest quality, and represents the next stage in the evolution of NFL "shoulder programming" - from syndicated weekly NFL Films shows in the 1970s, to a wide range of programming on third party cable channels (such as ESPN) and local broadcasters throughout the 1980s and 1990s, to a network dedicated to in-depth 24-hour coverage of our sport.

NFL Network is presently available in approximately 40 million homes, on cable as well as both DirecTV and EchoStar (or "Dish Network"). Both DirecTV and EchoStar have included NFL Network on their basic tier, at no additional cost to consumers. This is similarly true of those telephone companies with which we have carriage agreements.

In our negotiations with cable companies, we have allowed the NFL Network to be launched on widely-distributed "digital cable" tiers of service - digital cable being cable companies' next-generation video product, currently purchased by 40 to 50 percent of cable subscribers. We have been willing to do so because we believe NFL Network will help drive consumer adoption of this new technology, directly benefiting both cable companies and consumers in the long run. At the same time, we have been unwilling to allow NFL Network to be placed on a separate "sports tier" for which the cable company would charge a substantial separate fee for a very limited number of sports channels. We do not believe that cable companies' pricing of the NFL Network on such "sports tiers" is in our fans' best interests, nor do we believe that their narrow penetration is consistent with our objective of cultivating mass interest in the sport of football, or with the very high ratings cable telecasts of our games receive. Finally, although we are willing to help drive digital penetration in the short run, we do insist that cable companies ultimately assure us that the NFL Network will be delivered on broadly available tiers of service purchased by a substantial majority of their customers (similar to the carriage already provided by satellite and telephone company video services).

Later this month, the NFL Network will begin televising a package of eight regular season games on a live basis. These games will be shown nationally Thursday or Saturday nights. Each of the eight games to be played this year will also be simultaneously shown on broadcast television in

the home cities of the participating teams (subject to the blackout policy) - just as we have done with our ESPN telecasts for the past 20 years. In short, as is true with the ESPN telecasts, no fan will have to pay to see a telecast of the local team's games.

Neither the formation of the NFL Network, nor the decision to place a limited number of games there that are simultaneously carried on an over-the-air basis, raises issues under the antitrust laws generally or the 1961 Act. NFL Network offers new, specialized football programming year-round. It offers an additional outlet for televising high school and college games and has already competed successfully to obtain the rights to several college bowl games. It gives consumers another entertainment option and offers producers another means of televising their product. More important to us, it offers us a high quality television network dedicated solely to building our sport, which will enable the NFL better to compete in the entertainment marketplace of the future. All of those outcomes are pro-competitive, expand output and choice, and are consistent with broad antitrust policy.

Nor does this eight-game package suggest a broad shift away from broadcast television. As Commissioner Tagliabue said two years ago, "Before we proceed with any new package, we must assure ourselves that is based on sound television premises and that it is structured to complement rather than cannibalize our Sunday and Monday night audiences and move us down the road to commodination." Our telecasts of eight games on the NFL Network (several of which were previously shown on cable television), are a limited supplement to our current broadcast and basic cable offerings, and should be viewed in that light.

NFL Network has also helped promote competition in the broader television marketplace. For example, since adding NFL Network to its basic lineup, EchoStar added approximately 300,000 new subscribers, most of whom switched away from cable television. A significant number - perhaps as many as one third of these new subscribers - switched to EchoStar to obtain the NFL Network. And EchoStar did not increase the price of its basic package when it added NFL Network to its offerings.

Although we are in difficult and at times contentious negotiations with certain cable companies, we continue to work aggressively to secure distribution agreements so that NFL Network can be available to the widest possible number of viewers throughout the country. Further, while cable companies may argue to the contrary, there is no reason why a cable system's decision to carry NFL Network needs to result in higher rates for consumers; the experience of both EchoStar and DirecTV confirm this.

These are tough commercial negotiations, but that is hardly unprecedented in either sports or television. There have been numerous similar disputes in the past, where cable companies, including Time-Warner, have declined to offer both sports and general entertainment programming because of disputes with the rights-holder. These disputes are generally resolved because one or both parties reassess and modify their positions. They do not raise antitrust issues and do not require intervention of the Congress.

Conclusion

NFL television policies have evolved to reflect changes in technology, the growth of the League, and our increasingly mobile society, among other factors. But throughout the past five decades, we have not lost sight of our principal responsibility - to bring fans across the country a wide range of outstanding NFL television each week, and to keep our game a healthy and robust entertainment product for generations to come. Our current practice of televising all games on free, over-the-air television, combined with supplemental offerings through NFL Sunday Ticket, the NFL Network, and other outlets, certainly meets that responsibility.