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Before the
Federal Communications Commission
Washington, D.C. 20554

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FCC 93-77

In the Matter of)
)
Implementation of Section 26 of the) PP Docket No. 93-21 ✓
Cable Television Consumer Protection)
and Competition Act of 1992)
)
Inquiry into Sports Programming)
Migration)

NOTICE OF INQUIRY

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I. Introduction

1. By this Notice of Inquiry ("Notice"), the Commission seeks the data and information needed to conduct the sports programming study mandated by Congress in the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or "1992 Act").¹

2. The study will examine, on a sport-by-sport basis, trends in the migration of sports programming from broadcast television to cable programming networks and pay-per-view services. For purposes of this inquiry, based on our review of the legislative history, sports programming migration will be considered to be the movement of sports programming from broadcast television to a subscription medium (i.e., one for which viewers pay a fee).²

3. The study will encompass local, regional, and national sports programming and will investigate "the economic causes and economic and social consequences" of migration trends. Moreover, the Commission is directed to "analyze the extent to which preclusive contracts between college athletic conferences and video programming vendors have artificially and unfairly restricted the supply of the sporting events of local colleges for broadcast on local television stations."³ Finally, the legislative history of the Act suggests that we should, to the extent possible, "project future sports

¹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). The Cable Act of 1992 was enacted on October 5, 1992, and the sports programming study instructions are in Sec. 26.

² An increase in the number of games exhibited via subscription media of an individual team or league would not, by itself, constitute sports programming migration. To identify migration, it would be necessary to examine the number and type of games (e.g., regular season and playoffs) that were available via broadcast television.

³ 1992 Cable Act, supra note 1, Sec. 26(a).

carriage trends".⁴ Congress instructed the Commission to submit an interim sports migration report on or before July 1, 1993, and a final report on or before July 1, 1994. These reports are to include "such legislative or regulatory recommendations as the Commission considers appropriate."

4. Issues regarding the broadcasting of sports events, the "siphoning" or "migration" of sports telecasts from broadcast television to subscription or cable television,⁵ the "blacking-out" of local broadcasts,⁶ exclusivity in the distribution of televised sports events,⁷ and concerns relating to the proper application of the antitrust laws and competition policies relating to sports leagues⁸ have been matters of public policy concern for a number of

⁴ See Committee on Energy and Commerce, U.S. House of Representatives, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. ("House Report"), at 126.

⁵ See e.g., Weaver v. Jordan, 411 P. 2d 289 (1966) (State prohibitions on wire pay TV operations found to violate the First Amendment); Fourth Report and Order in Docket 11279, 15 FCC 2d 466 (1968) (FCC restrictions adopted on the broadcasting of sports events on over-the-air subscription television); Home Box Office V. FCC, 567 F.2d 9 (D.C.Cir. 1977) (restrictions on distribution of sports and other programming on a subscription cable television basis violate the First Amendment).

⁶ Report and Order in Docket 19417, 54 FCC 2d 265 (1975) (FCC rules adopted requiring the certain sports events carried by cable systems on distant signals be blacked out in home market). Third Annual Report of the Federal Communication Commission on the Effect of Public Law 93-107, The Sports Antiblackout Law, on the Broadcasting of Sold-Out Homes Games of Professional Football, Baseball, Basketball and Hockey. U.S. Government Printing Office, June 1976 (FCC report on the effects of Public Law 93-107).

⁷ See e.g., Major League Baseball, 6 FCC Rcd 5573 (1991) (Application for special relief to accord additional exclusivity protection under the Commission rules to live broadcasts of sports events denied).

⁸ See e.g., The Sports Broadcasting Act of 1961, Publ. L. 87-331. 15 U.S.C. §§ 1291-5 (Granting owners of professional football, baseball, basketball and hockey teams a limited exemption from the sanctions of the antitrust laws, authorizing joint agreement to pool and sell package rights to telecasts of professional sporting events); Chicago Professional Sports v. N.B.A., 754 F. Supp. 1336 (N.D. Ill. 1991) (Applicability of antitrust laws to National Basketball Association limits on the number of games that may be sold to broadcast "superstations"); Association of Independent Television Stations v. College Football Association, 637 F. Supp. 1289 (W.D. Okl. 1986) (Applicability of antitrust laws to agreement between College Football Association and ABC Sports and ESPN authorizing the televising of certain college football games).

years. This study will seek first to develop an updated factual record regarding the telecasting of sports events as mandated by the 1992 Cable Act. Second, it will seek to develop an analytical framework on which legislative recommendations regarding such telecasting may be based.

II. Scope of the Inquiry

A. Sports Covered, Time Period Examined, and Geographical Considerations

5. Neither the 1992 Act nor its legislative history provides a list of the sports that we should include in our analysis.⁹ We thus have decided to focus our inquiry on sports that both have or have had significant broadcast exposure and significant non-broadcast exposure. Whether the measure is number of games/events or size of viewing audience, we tentatively conclude that the major relevant sports are Major League Baseball (MLB), the National Football League (NFL), the National Basketball Association (NBA), the National Hockey League (NHL), and college football and basketball. We urge commenters to address these sports. We also seek comment on video distribution of the Olympic Games. Commenters analyzing other sports should document carefully the magnitude of broadcast and subscription television coverage that they receive and have received.¹⁰ Because Congress also instructed us to forecast future trends in the movement of sports programming,¹¹ we also solicit comments regarding sports that are now exhibited primarily on broadcast television but might move in the future.

6. We also wish to focus the inquiry in time. Because we have defined migration as movement from broadcast television to subscription media, we tentatively conclude that there is no need to review practices that predominated before the subscription media were widely available. Home Box Office became the first satellite-delivered cable service in 1975, and ESPN, the most popular national cable sports network, went on the air in 1979.¹²

⁹ The only sport mentioned specifically is college football. See House Report, supra note 4, at 126.

¹⁰ We note that sports such as tennis and golf are carried on both broadcast and subscription media.

¹¹ See note 4, supra.

¹² Data in this paragraph on Home Box Office, ESPN and superstations are from Cablevision, June 1, 1981, pp. 54-56. Data on total cable subscribers and television households are from Paul Kagan Associates, Cable TV Investor, Nov. 21, 1990, p. 9.

Superstations are another popular and widely available nationally-distributed source of sports programming.¹³ The first superstation, WTBS, began satellite distribution in 1976, while WGN and WWOR became superstations in 1978 and 1979, respectively. In those early years, cable television was not widely available, and, of course, every cable subscriber did not have access to all of the sports-carrying services mentioned. By 1980, there were 19.2 million cable subscribers, representing 25.2 percent of the 76.3 million television households in the United States. ESPN had 3.7 million subscribers as of May 1980, representing 4.8 percent of television households. WTBS had 8.2 million subscribers and reached 10.7 percent of television households. Few regional cable networks were operating in 1980. For these reasons, we propose to begin our inquiry with the year 1980.¹⁴ We seek comment on this time frame.

7. We also seek data on how the availability of ESPN, other national cable networks offering significant sports programming (e.g., TNT and Black Entertainment Television), and the superstations have grown over time. We seek the same information with respect to regional sports networks (both broadcast and cable) and pay-per-view sports services. Because the statute directs us to consider local, regional, and national sports programming, we

¹³ The term "superstation" generally refers to an independent television broadcast station that is retransmitted by satellite. For copyright purposes, a superstation is defined as "a television station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier." 17 U.S.C. §119(d) (9). The 1992 Cable Act incorporates this definition into the Communications Act's retransmission consent section and exempts superstations from the retransmission consent requirement, provided that they were distributed via satellite on May 1, 1991. 47 U.S.C. §325(b) (2). Cable systems retransmit superstations pursuant to a compulsory license (17 U.S.C. § 111). The satellite carrier compulsory license (17 U.S.C. §119) expires on December 31, 1994. With respect to their out-of-market retransmission to home satellite dishes and via cable systems, superstations are subscription services.

¹⁴ We note that the House Report, supra note 2, at 126, asks whether there have been significant changes in the marketplace since the Commission's former sports siphoning rules were invalidated by the court in Home Box Office, Inc. v. FCC. 567 F.2d 9 (D.C. Cir. 1977). The foregoing discussion makes clear that the market today is vastly different from that of 1977. Our discussion is intended to provide a brief historical background on these changes. We note in particular that the former sports siphoning rules were struck down in 1977, prior to the start of ESPN, and that there was only one superstation (WTBS) in 1977. We seek more detailed comment for purposes of this inquiry.

seek separate data on each geographic division.¹⁵ We are particularly interested in comment as to the appropriate classification of superstations because, while they are local broadcast stations, some of them are available nationally.

B. Measuring Sports Programming Migration

8. We have defined migration as the movement of sports programming from broadcast television to a subscription medium.¹⁶ All of the major categories of sports that we are examining have both regular season games and post-season events. Despite the growth of subscription sports services, the character of major post-season events has, in our view, remained relatively constant from year to year. Hence, it is easy to measure migration of such events as the World Series, Stanley Cup, Super Bowl, NBA Championships, college football bowl games, or NCAA Final Four. With regard to regular season games, schedule changes from year to year and variations in the relative strengths of teams, in our view, make it more difficult to attempt to track the medium on which particular regular season games are exhibited. Hence, we propose to measure migration by comparing the total quantities of regular season games exhibited on broadcast and non-broadcast media from year to year and by making a separate post-season comparison. We seek comment on this approach and also on the appropriate units for measuring quantity. On first impression, we believe that the number of games in each category is the appropriate unit. However, we seek comment on whether it is useful and meaningful to measure migration by audience ratings or by some other method.

C. Evaluating Changes in Video Distribution of Sports Programming

9. In order to fulfill the mandate of the 1992 Act, we need an analytical framework to evaluate changes in the exhibition of sports programming. We tentatively adopt the following assumptions, but seek comment on each of them. First, we assume that the relevant sports leagues, teams, universities, and conferences desire to maximize their overall net revenues. These entities make the decisions about exhibition rights and they do so as part of overall revenue maximization plans. These plans include strategies for determining ticket prices, stadium concessions, and sales of licensed merchandise (jerseys, hats, etc.). Second, we assume that

¹⁵ With regard to local and regional programming, we also seek information on any regional broadcast networks that might distribute sports programming. For example, St. Louis Cardinals baseball games are carried on a regional network with a "flagship" station in St. Louis.

¹⁶ See para. 2 *supra*. We seek comment on whether the criteria in the Commission sports siphoning rules that were struck down in 1977 (see note 14 above), former 47 C.F.R. §76.225, should be incorporated in whole or in part into our definition. Pending receipt and analysis of data on exhibition of sports programming, we have not yet formed an opinion on the magnitude of sports programming migration.

the relevant public policy goal is consumer welfare. In other words, the objective is to maximize the value to viewers of the menu of sports events telecast, subject to relevant constraints. It is difficult to quantify the value to viewers of sports programming, even on subscription media, for which they pay a direct fee. The absence of a direct charge for broadcast programming makes the task even more difficult in that case. We note, however, the statement in the House Report that "[A] significant reduction in the quality or quantity of sports programming available on free television, whether professional or collegiate, would be of great concern to this Committee."¹⁷ Thus, we will focus on the availability of broadcast sports and the price and availability of subscription sports programming to the viewing audience.¹⁸

III. Video Distribution of Sports Programming

10. In order to document the degree of past sports programming migration and to make the best possible prediction of future trends, we would like to document any examples of migration that have already taken place. Along with general information on sports programming availability by medium, we seek descriptions of incidents of sports migration that carefully describe the availability of programming before and after the migration.¹⁹ While we focus our attention on the six categories of professional and college sports enumerated in paragraph 5, commenters may also present data on other sports as appropriate.

¹⁷ See House Report, supra note 4, at 125.

¹⁸ In practice, it is likely that changes in availability of sports programming will be measured by tracking over time the number and composition of events in relevant categories available via various media, broadcast and subscription. However, we note that a simple comparison of number of games, without additional analysis, may not be sufficient to evaluate viewer satisfaction.

Additionally, we note that the House Report, supra note 4, at 126, states that we should address "[w]hether further losses of sporting events from free over-the-air television negatively affect broadcast television stations' ability to compete with cable and other multichannel providers." We request comment on whether this reflects a Congressional concern with broadcast television stations' profitability independent of the issue of availability of sports programming to viewers.

¹⁹ We also seek comment on examples of "reverse migration" and on how to evaluate them. For example, in recent years the early rounds of the NCAA basketball tournament have moved from ESPN to CBS.

A. Professional Sports

11. General Considerations. In this subsection, we request specific data on the four major professional sports identified above--the National Football League, Major League Baseball, the National Basketball Association, and the National Hockey League--beginning in 1980. As a preliminary matter, we request a description of the schedule of games for each sport: number of teams, number of regular season games, home and away, and structure of post-season play. In each case, we seek data on the number of games exhibited locally, regionally, and nationally on broadcast television, as well as on cable networks and pay-per-view services and on the number of games not exhibited at all.²⁰ In each category, commenters are requested to distinguish between home and away games. With respect to local television, commenters should list the station or stations²¹ broadcasting the games and describe cable carriage, including noting if a superstation is involved. With regard to regional cable networks, we seek information on whether they are offered as basic cable services, pay cable services, or a combination of both.

12. Additionally, to the extent it is available, we request information on audience ratings, which may allow us to examine shifts over time in the demand for sports programming and to assess the impact of non-broadcast media on broadcast sports programming. We are particularly interested in data that allow comparison of program offerings and ratings before and after a change in the menu of programming available (e.g., before and after ESPN began carrying National Football League or Major League Baseball games).

13. We further request information on contract terms, including duration of contract, number of games for which rights have been sold (which may be more than actually exhibited), exclusivity provisions, and rights fees. In order to describe fully the exclusivity provisions, we request that commenters will delineate for each team the geographic "home territories" within which the team can sell broadcast and cable exhibition rights.

14. With regard to predicting future patterns of sports programming exhibition, we are interested in when the major current contracts expire, and whether, in the remaining years of current contracts, the number of games to be exhibited will change significantly. Comment also is sought on sports other than the four identified above that might be candidates for sports

²⁰ For games not exhibited at all, we request information on how many were available for exhibition (i.e., the rights had been sold to a broadcaster, cablecaster, or other video distributor) and how many were not available for distribution.

²¹ We understand that, in some cases, a "flagship" station acquires the rights to produce telecasts and distribute them over an ad hoc network of television stations in an area.

programming migration in the future. As noted above, we also specifically request documentation of any examples of sports programming migration that has already taken place.

15. Specific Issues. In this subsection, we raise some specific questions about the four major professional sports. This list is not, of course, meant to be exhaustive. With regard to the NFL, we are particularly interested in the transition to Sunday night cable exposure and its impact on total viewing of NFL games.²² We understand that some of the weekend afternoon NFL telecasts are regionally differentiated and we seek comment on how regional games are distributed. In view of the fact that regional games are, in principle, available for "out-of-region" exposure, we ask for comment on any future expansion of NFL telecasts, including pay-per-view. Finally, we note that the NFL sells exclusive telecasting rights for all of its teams, unlike MLB, the NBA, or the NHL. We seek comment on whether the NFL's unique arrangement with its teams could accelerate or dampen migration of sports programming.

16. With respect to MLB, we seek comment on plans for national cable carriage in light of ESPN's recent decision not to exercise its option to extend its MLB contract beyond the coming year.²³ Additionally, we seek comment on two potential examples of sports programming migration--the decline over the last several years in the number of MLB games on national broadcast networks and the shift of games of individual teams (e.g., the New York Yankees) from a local television station to a regional cable network.

17. The NBA and NHL, and the individual teams in both leagues, offer examples of potential sports programming migration. NBA and NHL teams appear to have pioneered different mixes of broadcast, cable, and pay-per-view exhibition in response to market conditions. We request comment on the transfer of individual NBA and NHL teams' games from local television to cable networks. In particular, we seek information on the pay-per-view packages sold by the Philadelphia 76'ers, Minnesota North Stars, Chicago Blackhawks, and Pittsburgh Penguins, and ask whether any of those arrangements constitute migration of sports programming. At the national level, we note that, with the exception of its All-Star game, there is no national broadcast network coverage of the NHL. What factors explain this absence? With respect to the NBA, we specifically request data on changes over time in the exhibition of playoff games.

²² Monday Night Football began well before the 1980 starting point of our analysis.

²³ See Wayne Walley, "ESPN Says No to Baseball Extension," Electronic Media, Nov. 2, 1992, pp. 10, 44.

B. College Sports

18. The Cable Act of 1992 requires an assessment of the trends of sports migration in collegiate sports programming. Collegiate sports programming has evolved into a highly competitive and increasingly complex environment at virtually all levels of carriage. In this subsection, we request specific data on college football and college basketball beginning in 1980.²⁴

19. We seek data describing the schedule of games for the two sports. Such information should include, but not necessarily be limited to, the number of teams involved, the length of the regular season, the number of regular season games, the number of home games versus away games and the structure of postseason play. In each instance, we seek data on the number of games exhibited locally, regionally and nationally on broadcast television, as well as on cable networks and as pay-per-view events.²⁵ This information should clearly distinguish between home and away games. We also seek data on which games were exhibited live and which were shown on a tape delay basis. Information is also requested on the number of games available for exhibition (*i.e.*, for which rights had been sold) but not actually exhibited and on the number of games for which no video exhibition rights were sold.

20. In order to examine shifts over time in the demand for collegiate sports programming and to assess the impact of non-broadcast media on broadcast collegiate sports programming, we also request information concerning audience ratings. In particular, we are interested in data that will allow comparison of program offerings and ratings before and after a change in the menu of programming available (*e.g.*, before and after ESPN began carrying college football).

21. Additionally, we request information on contract terms, including but not necessarily limited to, duration of contract, the number of games for which rights have been sold (which could be more than actually exhibited), exclusivity provisions, and rights fees. In order to describe fully the contract provisions, we request that commenters will delineate for each team the geographic "home territories" within which the college can sell broadcast and cable exhibition rights.

22. We also seek comment on the objectives of colleges, college athletic conferences, and other organizations of colleges that market

²⁴ We assume that college conferences and associations, individual colleges, broadcast stations and networks, sports syndicators, and national and regional cable networks are the best sources of information on college sports telecasting.

²⁵ We seek comment on how to classify telecasts according to these three geographic categories and specifically on how to treat superstations.

exhibition rights to college sports. Our tentative assumption is that these organizations wish to maximize net revenues from athletics, subject to a variety of constraints related to their primary mission as educational institutions, and to enhance the general reputation of the institutions. While some degree of local television exposure is beneficial in terms of generating fan interest, television coverage can in some instances reduce paid attendance. This could prompt colleges to limit broadcast coverage to away games. In order better to understand colleges' incentives, we seek comment on the percentage of athletic department revenue generated by sale of broadcast or other media distribution rights and by gate receipts for football and basketball respectively.

IV. Causes and Consequences of Sports Programming Migration

A. Causes

23. We seek comment on the economic causes of past and potential future sports programming migration. Has there been a change in demand for broadcast sports programming, particularly at the national level? The expansion in both broadcast and non-broadcast media outlets since 1980 has resulted in fragmentation of the viewing audience.²⁶ Has this, in turn, reduced the expected audience for sports programming and enhanced the relative profitability of other types of programming that may cost less to produce or acquire? Has there been a lag in the market's adjustment to any such new realities?

24. We also seek comment on the impact of new technologies on sports programming migration. Has the simple increase in availability of subscription media since 1980, plus the profit maximizing goals of sports rights holders, led to migration? Subscription media are able to charge subscribers more closely according to the intensity of their preferences than broadcast media can. Is it, then, more profitable to target a smaller audience that can be charged directly than a mass audience that yields only advertising revenues? We note that the 1992 Cable Act permits television broadcast stations, with certain exceptions, to assert retransmission consent rights vis-a-vis multichannel video program distributors.²⁷ Thus, in the future, broadcasters may earn additional revenues in the form of retransmission consent fees. Commenters who address the importance of the "second revenue stream" available to cable and other subscription media should also assess the potential impact of retransmission consent on broadcasters' ability profitably to exhibit sports programming.

²⁶ See generally, Florence Setzer and Jonathan Levy, Broadcast Television in a Multichannel Marketplace, Working Paper 26, Office of Plans and Policy, Federal Communications Commission (June 1991).

²⁷ See 1992 Cable Act, supra note 1, Sec. 6.

25. In this context, we also seek comment on league and team strategies in order to understand the factors that influence decisions regarding the sale of broadcast exhibition rights. For example, how important is broadcast media exposure in promoting interest in a team? Are gate receipts and attendance a function of the availability of local broadcasts of a team's games, or is the key factor whether the team is winning? What is the relationship between broadcast exposure and gate receipts and other sources of revenue? What are the shares of profits accounted for by gate receipts, television revenues, and other sources?

26. We also seek comment on the role of superstations and their impact on the availability of games both within and outside of their local markets. Superstations provide national distribution of a substantial number of Major League Baseball and National Basketball Association games. While superstations have been in existence since 1976, their availability to viewers has increased significantly since then, concomitantly with the increasing availability of cable television and other distribution media. We seek comment on what effect, if any, out-of-market games have on local broadcasts, on local or regional cable network telecasts, and on pay-per-view offerings. Additionally, we wish to examine the impact of superstation status on sports programming availability in the home markets of superstations. For example, does the out-of-market exposure and attendant increased advertising revenue in effect subsidize local broadcast of games on superstations? We also seek comment on the impact of superstation sports programming on national broadcast exhibition.

27. The House Report indicates that we should study "[t]he effect of the current professional sports antitrust exemption on the distribution of professional sports carriage rights."²⁸ We seek comment on how to analyze this issue. We approach it with some caution, because it is possible that distribution contracts would not be radically different even in the absence of the exemption. We seek comment on the extent to which this may be true. In addition, we suggest that, to the extent that a public policy problem exists that arises out of the antitrust exemption and that relates to exhibition of sports programming, it may be preferable to seek a remedy that directly addresses the rights holders, *i.e.*, the sports teams, leagues, etc. that actually sell the exhibition rights and are protected by the exemption. We seek comment on this suggestion too and on its implication--that any

²⁸ House Report, *supra* note 4, at 126. The Sports Broadcasting Act of 1961, *supra* note 8, exempts from the antitrust laws joint agreements among professional sports teams in the NFL, NBA, NHL, and MLB to allow their respective leagues to sell "rights of such league's member clubs in the sponsored telecasting" of their games. The Sports Broadcasting Act also prohibits broadcast television blackouts except "within the home territory of a member club of the league on a day when such club is playing a game at home." MLB also benefits from a more general antitrust exemption. *See Federal Baseball Club v. National League*, 259 U.S. 200 (1922) (Professional baseball is not interstate commerce, so federal antitrust law does not apply.)

legislative or regulatory activity in this area be directed at the rights holders rather than the mass communications media to whom they sell.

B. Consequences

28. To assess the economic and social consequences of sports programming migration, we focus on two issues: availability of programming and price of programming. Today, roughly 95 percent of television households have access to cable television.²⁹ This figure is likely to increase gradually in the coming years. Hence, cable programming is almost universally available. Those households without cable access may have access to other delivery systems. For example, in many rural areas, home satellite dish systems provide access to programming where cable is not available. In some urban and suburban areas, technologies such as MMDS provide an alternative to cable. We seek comment on the availability of cable and these other technologies, and on the prospects for sports programming delivery via DBS. We also seek comment on the availability of cable sports programming networks to rival delivery systems. Are there any "cable-exclusive" sports programming networks? Are such networks available via other media in uncabled areas? How will the new program access provisions of the 1992 Act affect the availability of sports programming? We also seek comment on the availability of pay-per-view capability on cable systems, particularly in areas that actually have pay-per-view sports programming. In sum, we wish to find out how migration has or might affect consumer access to sports programming.

29. Even if programming that has migrated to cable remains available to viewers, that availability comes at a price. Some viewers who did not previously subscribe to cable may find it necessary to do so to retain access to desired sports programming.³⁰ We seek comment on how to evaluate this phenomenon, including analysis of any social consequences of it.

30. From the viewpoint of consumer welfare, it is important to assess whether the availability of subscription media for sports programming has increased or decreased total output, in addition to evaluating its effect on the output of broadcast sports programming. We seek comment on the extent to which subscription media have made available programming that otherwise would

²⁹ See Paul Kagan Associates, Marketing New Media, June 15, 1992, p. 5. This source shows 95 percent of television households passed by cable in 1991 and projects 96 percent for 1992.

³⁰ We note that NFL games carried on national cable networks are also made available via broadcast television in the home markets of the two teams playing.

not have been transmitted via video at all.³¹ In sum, is the public better served by the current mix of broadcast and subscription exhibition than it was before?

V. Preclusive Contracts

31. The 1992 Cable Act directs the Commission to determine whether "preclusive contracts between college athletic conferences and video programming vendors" artificially restrict the availability of local college sporting events for broadcast by local television stations. For the purposes of this inquiry, the 1992 Act defines as preclusive any contract that prohibits

(A) the live broadcast by a local television station of a sporting event of a local college team that is not carried, on a live basis, by any cable system within the local community served by such local television station; or

(B) the delayed broadcast by a local television station of a sporting event of a local college team that is not carried, on a live or delayed basis, by any cable system within the local community served by such local television station.³²

The reference to cable carriage in the definition suggests that the term "video programming vendors," which is not defined in this subsection, refers to cable networks, but we seek comment on this tentative assumption.³³

32. In recent years, there has been an increase in contracts between collegiate athletic conferences and various cable sports channels. In some instances, these contracts may effectively preclude local television stations from obtaining rights to broadcast local college football or basketball games. Historically, cable sports channels have televised one game during the normally scheduled times for such games (e.g., Saturday afternoon for college football), while their league contracts preclude local television stations from contracting directly with individual schools to broadcast any games, whether or not they are being telecast by the cable sports channel.

³¹ Our focus is on the four professional and two college sports discussed above, but commenters may address other sports as appropriate.

³² 1992 Cable Act, Section 26(c) (2).

³³ We note that Section 12 of the 1992 Cable Act, which covers regulation of carriage agreements, defines "video programming vendor," for purposes of that section, as "a person engaged in the production, creation, or wholesale distribution of video programming for sale."

Prior to such contracts, local television stations sometimes obtained the rights to broadcast local college games.

33. We seek information on which conferences have television contracts and with whom--regional cable networks, national cable networks, and, depending on the definition of "video programming vendors" considered appropriate, broadcast television stations or networks. How long have such contracts been in existence, which contracts have preclusive provisions, and what, if anything, is precluded under such provisions? In particular, if such contracts permit delayed broadcasts, what is the interval required between the live event and the delayed broadcast? From a business perspective, what is the relationship between the attractiveness (and hence the profitability) of a delayed broadcast and the interval between the live event and the broadcast? We also seek data concerning the number of collegiate football or basketball games that could have been available for broadcast and would have been broadcast by local television stations but for preclusive contracts between collegiate athletic conferences and cable sports channels (inclusive of pay-per-view).

34. In addition, we seek comment on whether college football and basketball games previously broadcast by local television stations but now carried on cable should be treated differently from games never previously broadcast but now carried on cable. In other words, we ask whether there is a significant connection between migration and preclusion. If these two types of games should be treated differently, how should they be treated? Additionally, we request comment on the economic and social consequences, if any, of preclusive contracts.

35. Pursuant to our statutory instructions, the Commission has consulted with the U.S. Department of Justice "to determine whether and to what extent such preclusive contracts are prohibited by existing statutes."³⁴ The Department's letter of opinion is attached as Appendix A. The letter indicates that the legality of preclusive contracts under the antitrust laws, in particular the Sherman Act, "would be judged under the 'rule of reason,' which requires a balancing of the potential anticompetitive effects of a practice against the potential competitive effects." In this case, the purpose of a rule of reason analysis would be to determine if the contracts limit or increase the quantity of sporting events telecast. The Department points out that such an analysis requires attention to "definition of the relevant product and geographic markets; evaluation of the degree of market power possessed by the college leagues, on the one hand, and the programmers, on the other; and whether preclusive contracts permit the achievement of

³⁴ 1992 Cable Act, Section 26(c) (1).

efficiencies that could not readily be achieved in another manner."³⁵ Comments on the legality of preclusive contracts should address these factors.

VI. Conclusions and Administrative Matters

36. In responding to this Notice, we urge commenters to be as concise and precise as possible, to provide data that permit straightforward evaluation of the trends in sports programming exhibition, and to document carefully any examples of sports programming migration. We encourage comments from the sports leagues and teams, from players' organizations, from universities and college athletic conferences, from broadcast, cable, and other delivery media, from sports programmers, from relevant government agencies, and from other interested parties. We believe that much of the information that we seek in this inquiry is already in the public domain, and our purpose is not to compel private parties to reveal confidential business data. Should any party wish to submit confidential information, the Commission has procedures for protecting it.³⁶

37. This Notice is issued pursuant to authority contained in the Cable Television Consumer Protection and Competition Act of 1992, Section 26, and Sections 4(i), and 403 of the Communications Act of 1934, as amended. 47 U.S.C. 154(i), and 403. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before March 29, 1993, and reply comments on or before April 12, 1993. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

³⁵ We note that the staff of the Federal Trade Commission's Bureau of Competition addressed some of these issues in a somewhat different context in a complaint against the College Football Association (a group of major colleges) and the ABC television network. See Complaint Counsel's Nonbinding Statement filed Oct. 26, 1990 in In the Matter of College Football Association, an unincorporated association and Capital Cities/ABC, Inc., a corporation, Federal Trade Commission Docket No. 9242. We further note that an Administrative Law Judge dismissed the case against the CFA on jurisdictional grounds.

³⁶ See 47 C.F.R. §§ 0.457(d), 459, and 461. But cf. 47 C.F.R. § 0.442.

38. For further information concerning this proceeding, contact Jonathan D. Levy, Office of Plans and Policy, (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, appearing to read "Donna R. Searcy".

Donna R. Searcy
Secretary



U.S. Department of Justice

Antitrust Division

Judiciary Center Building
555 Fourth Street, N.W.
Washington, D.C. 20001

December 21, 1992

Renee Licht, Esq.
Acting General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, D.C. 20554

Re: Sports Programming Migration Study

Dear Ms. Licht:

In accordance with Section 26(c)(1) of the Cable Television Consumer Protection Act of 1992, staff of the Antitrust Division has discussed with staff of the FCC the application of the antitrust laws to "preclusive contracts," as that term is defined in Section 26(c)(2) of the Act. At the request of your staff, I am writing to set forth the issues that should be considered by the Commission in conducting the analysis required by Section 26(c)(1).

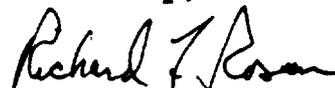
We understand that the contracts in question are generally between a college athletic conference or league and a video programming vendor. For agreed-upon consideration, the programmer is granted the exclusive right to televise all of the league's sporting events. Even if the programmer subsequently decides not to televise a particular league event, it retains exclusive television rights to that event. This means that some league events may not be televised at all.

The legality of such "preclusive contracts" under the antitrust laws would be judged under the "rule of reason," which requires a balancing of the potential anticompetitive effects of a practice against the potential procompetitive effects, in order to assess whether such agreements have the effect of limiting the televising of sporting events or whether they serve to increase the aggregate number of sporting events shown on television. Thus, the Commission's analysis should consider the definition of the relevant product and geographic markets; evaluation of the degree of market power possessed by the college leagues, on the one hand, and the programmers, on the

other; and whether preclusive contracts permit the achievement of efficiencies that could not readily be achieved in another manner.

These are the issues that should be addressed in any antitrust analysis of preclusive contracts. The Division has not to date conducted such an analysis, and any such analysis would necessarily depend on the specific facts presented. I cannot express any view at this time as to whether any such contracts do, in fact, violate the Sherman Act.

Sincerely,



Richard L. Rosen
Chief
Communications and Finance
Section