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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY


April 11, 1994

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Comments of the Office of the Commissioner of Baseball
Inquiry into Sports Programming Migration
PP Docket No. 93-21

Dear Mr. Caton:

Please find attached on behalf of the Office of the Commissioner of Baseball an original and 11 copies of the Comments of the Office of the Commissioner of Baseball filed in the above-referenced proceeding.

Any questions regarding the submission should be referred to the undersigned.

Sincerely,

Bruce A. Henoch (ab.)

Bruce A. Henoch

Attachment

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

TO: The Commission

**COMMENTS OF**
**THE OFFICE OF THE**
**COMMISSIONER OF BASEBALL**

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April 11, 1994

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Exhibit 1: Baseball Flagships - 1994

Exhibit 2: Baseball Regional Television Networks - 1994

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## SUMMARY

Major league baseball clubs are now providing the American public with more "free" broadcasts on local television than at any time in the past. In 1994 they will present a total of 1,707 telecasts on local flagship stations -- an average of 66 of the regular season games played by each club. That represents a 23 percent increase over the number of flagship telecasts presented in 1980 (the base year selected by the Commission). During the same period, baseball clubs increased by approximately 61 percent (from 134 to 216) the number of television stations that broadcast their games.

In addition, a recently-created joint venture among the baseball clubs, ABC and NBC ("The Baseball Network") will produce free telecasts of approximately 160 regular season games in 1994. All of baseball's "crown jewels" (the All-Star Game, the League Championship Series and the World Series) will continue to be broadcast on free television -- as will the new Divisional Series.

As the Commission has recognized, the ratings for baseball's national network broadcasts (regular season and post-season) have declined appreciably in recent years. To rekindle fan interest in these broadcasts, baseball has taken a number of steps that demonstrate its commitment to free national television. Baseball's

new national telecasting arrangements will ensure that the regular season and post-season baseball telecasts of greatest interest to fans are available at a time when they are most likely to be viewed.

Cable programming services have provided fans across the country with additional viewing options, which offer a valued supplement to -- and not a substitute for -- the telecasting of baseball by conventional broadcasters. In 1994 regional sports networks will televise 1,211 games; and ESPN will provide more than 60 million households nationwide with between 70 and 80 baseball telecasts. The increased options presented by cable services are a pro-consumer development that should not be restricted by government regulation.

The number of free telecasts that any one club presents may change from season to season, in response to a variety of factors that are often wholly unrelated to the number of telecasts presented by cable services. Baseball clubs must remain able to respond to changing circumstances -- in the same manner that other programmers with which sports interests compete are able to do so. The critical fact here is that every one of the major league baseball clubs is continuing to present a significant number of free over-the-air telecasts; no club has abandoned its commitment to free television.

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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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

TO: The Commission

**COMMENTS OF**
**THE OFFICE OF THE**
**COMMISSIONER OF BASEBALL**

The Office of the Commissioner of Baseball ("Baseball") submits the following comments in response to the Commission's Further Notice of Inquiry, FCC 94-65 (released March 11, 1994) ("Further Notice").

**BACKGROUND**

Section 26(a) of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") requires the Commission to study the carriage of sports programming. The purpose of the study is to investigate and to analyze "trends in the migration" of sports programming from broadcast to nonbroadcast

services. Section 26(b) of the 1992 Cable Act requires the Commission to submit to Congress by July 1, 1994 a final report on the results of the sports migration study. That report must include "such legislative or regulatory recommendations as the Commission considers appropriate."

The Commission released its initial Notice of Inquiry in this proceeding on February 9, 1993. See 8 F.C.C.R. 1492 (1993) ("First Notice"). Baseball filed Comments on March 29, 1993 and Reply Comments on April 12, 1993; it also provided additional data and information in response to specific requests from Commission staff. On July 1, 1993 the Commission submitted its Interim Report to Congress. See 8 F.C.C.R. 4875 (1993) ("Interim Report").

In its Interim Report at ¶ 8, the Commission defined "migration" as "the movement of sports programming from broadcast television to a subscription medium (i.e., one for which viewers pay a fee)." The Commission stated that in measuring the extent of migration, it would take account of numbers of games shown on broadcast and cable, ratings and other "relevant factors suggested by commenters." Interim Report at ¶ 11.

Concerning baseball, the Commission concluded that the reduction in national telecasts was

attributable to declining ratings and not migration; while there was no evidence of "wholesale migration" at the local level, there were "instances" of migration. Interim Report at ¶ 44 (referring to the Yankees as an "example"). The Commission did not propose any rules or legislative action in its Interim Report. However, it noted that it would explore the issues further in its final report and advised:

> If we believe that the availability of sporting events to the public is in jeopardy, we will not hesitate to suggest corrective legislation or to take appropriate regulatory action.

Interim Report at ¶ 85.

In its Further Notice the Commission has requested Baseball and other interested parties to update the record developed in connection with the First Notice. The Commission also has sought additional information relevant to the issues that may be addressed in its final report to Congress -- including information on the recent changes in baseball's national broadcast and cable network contracts and the Commission's preliminary findings with regard to baseball's telecasting practices. See Further Notice at ¶¶ 22-24.

## DISCUSSION

More than fifteen years ago the Commission adopted "anti-siphoning" rules which would have limited the ability of sports clubs and movie interests to provide programming to cable services. Those rules were struck down by the court of appeals as violative of the First Amendment and the Administrative Procedures Act. See Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

Baseball believes that anti-siphoning rules, which restrict the ability of sports clubs to place programming on different media, raise serious constitutional problems -- particularly where such restrictions are not imposed upon other programmers with which sports clubs must compete for access to broadcast and subscription services. More importantly, however, there is no legitimate need for anti-siphoning rules. As discussed below and in Baseball's initial comments, the supply of free baseball telecasts is not in jeopardy. The American public receives even more such telecasts now than at the time of the HBO decision.

### A. Local Over-The-Air Flagships

1. Telecasting Patterns. Suppliers of non-sports programs may have multiple opportunities to exploit their product in a pay medium (e.g., theatrical

releases, video cassettes, pay cable) before placing that product on free television. However, baseball clubs have only a single opportunity to derive revenue from each game in which they participate; and, in a substantial number of the cases, the clubs do so by placing that game on free television alone.

Each of the 26 U.S. baseball clubs presents telecasts of its games on one, or in some cases two, broadcast stations licensed to the community in which that club plays home games ("flagship stations"). In 1994 the 28 baseball flagship stations are scheduled to present a total of 1,707 regular season telecasts (in addition to the telecasts of a number of spring training games). See Exhibit 1. Thus, an average of 66 regular season games to be played by each club will be televised free on over-the-air flagship stations.

The 1,707 telecasts scheduled for 1994 also represent a significant increase over the number of flagship telecasts presented in 1980 (the base year selected by the Commission); the clubs presented a total of 1,392 flagship telecasts in that year (an average of 58 per club). The 1994 schedule represents an even greater increase over the number of flagship telecasts in 1975 (the year in which the Commission adopted the anti-siphoning rules struck down in the HBO case); the clubs presented a total of approximately 1,200 flagship

telecasts in 1975 (or an average of 52 telecasts per club).

Table 1
Baseball Flagship Station
Regular Season Broadcasts
(1975-94)

| | |
|---|---|
| 1975 | 1200 |
| 1980 | 1392 |
| 1994* | 1582 |
| 1994** | 1707 |

* Does not include two 1993 expansion clubs
** Does include 1993 expansion clubs

In its Interim Report at ¶ 44, the Commission originally indicated that there had been no change in the number of local baseball telecasts between 1980 and 1992. In an Erratum released July 12, 1993 the Commission observed that the number of baseball games shown on local television had increased by four percent between 1981 and 1992. As Table 1 illustrates, between the Commission's base year of 1980 and the most recent year of 1994 the total number of flagship station broadcasts of baseball games will have increased by approximately 23 percent (or 14 percent if one disregards the telecasts of the two 1993 expansion clubs). Between 1975 and 1994, the increase has been approximately 42 percent (32 percent without the 1993 expansion clubs).

As these data make clear, the American public will receive in 1994 significantly more free baseball telecasts on local flagships than in 1980. Consumers also will receive more such telecasts than at the time that the court in HBO held there was no basis for anti-siphoning rules.

2. Factors Affecting Flagship Telecasts. In its Interim Report at ¶ 44, the Commission concluded that an "overview" of baseball's telecasting practices does not show any evidence of "wholesale migration." The Commission, however, went on to say that there are "some instances" of migration by individual clubs. See also Further Notice at ¶ 22 ("At the local level, the record is slightly more ambiguous, with some teams experiencing a decrease in the number of games broadcast over local television").[1]

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[1] The only baseball club that the Commission identified was the New York Yankees. It should be noted that a new contract was recently signed between WPIX and the Madison Square Garden Network, which owns the rights to telecast Yankees games. This contract ensures that 50 Yankees games will be broadcast on free local television through the 1996 season; that is the same number that had been broadcast during the past three years but less than the 100 games broadcast in 1980. The new contract is responsive to concerns that all Yankees games would be transferred to cable, and ensures that a significant portion of Yankees games will remain on free television during the upcoming seasons.

It also should be noted that at the time the Commission adopted its original anti-siphoning rules, the Yankees were broadcasting approximately 68 games per year

[Footnote continued on next page]

In 1994 the vast majority of the U.S. baseball clubs will broadcast on free television more or essentially the same number of games that they broadcast in 1980. Even more important is the fact that every one of the clubs will present a significant number of free telecasts over their flagships -- ranging upwards from 35 regular season telecasts (plus the 12 regular season telecasts produced by The Baseball Network, see pages 21-23 below). There is no evidence that any club has abandoned, or intends to abandon, baseball's historic commitment to presenting a substantial number of games on over-the-air television.[2] Under these circumstances, anti-siphoning restrictions are as unnecessary and unjustifiable as they were in the HBO case.

The Commission should consider not only the sizeable amount of free telecasts involving each club, but also the several factors that may limit the number

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[Footnote continued from previous page]
-- down from the 130 games that they had broadcast prior to entering into a contract with Home Box Office for the telecast of several games on a subscription basis. The existence of isolated examples of "migration" did not support anti-siphoning rules in the HBO case and would not support such rules today.

[2] Over-the-air telecasts have been and will continue to be used by baseball as an important means of stimulating fan interest in the game of baseball and in the hometown team. Baseball has relied upon the type of widespread exposure which broadcast television affords in order to maintain the necessary fan support. That support is a critical element in promoting attendance at baseball games and generating other sources of revenue for the clubs.

of such telecasts -- factors that are often wholly unrelated to the number of games presented over cable services. The decision to broadcast a specific number of games is the product of various considerations. Consequently, decreases in free telecasts of baseball, even when accompanied by increases in subscription telecasts, cannot be presumed to constitute "migration."

First, a baseball club's opportunities to place telecasts on over-the-air television are necessarily limited. Stations affiliated with one of the national broadcast networks generally have less interest in televising baseball because of their commitments to televise network programming. For example, in 1994 only seven of the U.S. clubs' 28 flagships are network affiliates. As this suggests, the majority of clubs are able to place free telecasts on only the relatively small number of independent stations in their markets.

Where a club is able to negotiate with a network affiliate, the affiliate is typically interested in televising fewer games than an independent. On average, each of the network affiliated flagships will televise 47 games in 1994; the comparable number for independent flagships is 66 games. See Exhibit 1.

The club with the fewest number of flagship telecasts (35) is the Pittsburgh Pirates. The Pirates' flagship, KDKA, is a CBS affiliate. KDKA recently

reduced its Pirates' telecasts from 55 (the number broadcast in 1993) to 35, citing its commitment to carry certain CBS programming that previously had been preempted (KDKA's ratings for Pirates telecasts also had declined from a 16 in 1991 to a 10 in 1993). Plainly, the reduction in Pirates' free telecasts does not constitute "migration" -- particularly since the number of games on the Pirates' cable service will increase by only one game in 1994.

Second, the emergence of the Fox network over the past several years has served to decrease interest in the bidding for baseball telecasts. In 1994, only one of the clubs' flagships, KTVU, is a Fox affiliate; KTVU is scheduled to televise 49 of the San Francisco Giants' regular season games in 1994. Fox affiliates in at least four cities (Chicago, Los Angeles, Philadelphia and Milwaukee) no longer serve as flagships for baseball clubs.

For example, in 1990 Station WFLD in Chicago became affiliated with the Fox network and chose to drop the White Sox. WFLD had, in fact, earlier initiated a lawsuit against the White Sox seeking to be released from its contractual obligation to broadcast White Sox games. The only station in Chicago with any significant interest in televising White Sox games was WGN (the White Sox' ratings had declined to their lowest point in

at least a decade during the period 1987-89). WGN, however, was limited in the amount of time that it could devote to White Sox games given its commitment to carry more than 130 games of the Chicago Cubs.

Thus, the White Sox free telecasts declined by approximately 20 games between 1989 and 1990. While the same number of games were picked up by a cable service in 1990, that service did not "siphon" any games that would otherwise have been broadcast on free television. Cable subscribers simply gained access to games that broadcasters were unwilling to televise.

Third, the creation of any additional networks, as proposed by Time Warner and Paramount, may further decrease the amount of time that broadcasters are willing to devote to baseball in the future. For example, the Cardinals recently renegotiated their contract with KPLR -- the only local broadcast station that bid for the Cardinals' games. KPLR, however, was not willing to make a long-term commitment to broadcasting as many games as the Cardinals were willing to place on broadcast television -- in part because of the possibility that KPLR would become an affiliate of the proposed Time Warner network. The Cardinals had no choice but to supplement its flagship broadcasts by entering into a local cable deal to ensure that fans

would continue in the long-term to have access to a large number of games.

Other stations which currently broadcast baseball may also become affiliated with the planned networks, such as Paramount's WDCA in Washington (which broadcasts Orioles' games) and KTXH in Houston (the Astros' flagship). Any study of changes in sports telecasting patterns must account for both the historic and the future impact of additional networks on sports clubs.

Fourth, increased commitments to televise syndicated programs, particularly on a bartered basis, have reduced the number of opportunities for the broadcasting of baseball games. The bartering of syndicated programming has, in fact, grown from a $134 million business in 1980 to more than $1.45 billion in 1994. See Paul Kagan, TV Program Investor, June 30, 1992, at 3; Advertiser-Supported Television Association, Programming the 500-Channel Society: A Guide to Advertiser-Supported Syndication, at A-11. The increased telecasting of other sports programs (such as the expanded NBA play-off schedule) also limits baseball's opportunities to place games on free television. In 1990, for example, WTBS reduced its Braves broadcasts slightly in order to televise the Goodwill Games; WTBS will do the same in 1994 (while the number of Braves cablecasts will be increased by one).

Fifth, a broadcaster may look to a number of additional factors in deciding whether to televise baseball and, if so, how many games -- such as the on-field success of a team and its relative popularity (considerations that relate to the cachet of the club's telecasts); the ratings that the club's broadcasts have received and will likely receive; the nature of the exclusivity that the club is able to afford; and the financial health of the broadcaster. All of these factors may, of course, change from negotiation to negotiation, resulting in increases or decreases in free telecasts.

Sixth, baseball clubs must take account of the impact upon their gate receipts of any telecasting arrangement.[3] Many clubs believe that telecasting home

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[3] Congress itself recognized the impact of televising home games that are not sold out. Pub.L.No. 93-107, codified as 47 U.S.C. § 331 (expired). See Evaluation of the Necessity for Television Blackouts of Professional Sporting Events, Report by the Special Subcommittee on Investigations of the Committee on Commerce, 93d Cong., 1st Sess. (1973); TV Blackout--Professional Sports, S. Rep. No. 347, 93d Cong., 1st Sess. (1973). See also 15 U.S.C. § 1292 (permitting blackouts of pooled telecasts in the home territory of a club on a day when that club is playing at home).

Likewise, the Commission has recognized the need and legitimacy of rules that protect the gate against certain competing telecasts. See 47 C.F.R. §76.67 (the "Sports Rule"), adopted in Report and Order in Docket 19417, 54 F.C.C.2d 265, on reconsideration 56 F.C.C.2d 561 (1975). The Sports Rule requires cable systems, in certain circumstances, to delete the distant signal

[Footnote continued on next page]

games on broadcast television reduces gate receipts. Two clubs (the Cubs and Braves, which are commonly-owned with their flagship superstations) do televise a number of home games over those stations. However, the remaining 24 U.S. clubs, on average, will broadcast only 14 of their 81 home games in 1994. See Exhibit 1. That number has remained relatively constant since 1980. Because of the importance of gate receipts, most clubs (particularly those in smaller markets without superstation affiliations) will likely continue their practice of broadcasting only a small portion of their home games.[4]

Finally, the Commission's own policies under the cable compulsory license have contributed to a lack of interest on the part of some broadcasters in televising baseball. In 1991 Baseball requested the Commission to rule that the network nonduplication provisions (47

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[Footnote continued from previous page]
telecast of a home club's game. If a club places a game on its flagship, it loses Sports Rule protection. Baseball believes that such protection should be available regardless of whether the flagship televises the game; expanding the protection in this fashion would increase incentives for placing home games on flagship stations.

[4] The total number of home telecasts over flagship stations increased from 432 in 1993 to 469 in 1994. The increase is almost entirely attributable to two teams (the Baltimore Orioles and Los Angeles Dodgers), which typically sell out home games. With the exception of the Orioles, all flagships which televise more than 19 of their 81 home games are superstations.

C.F.R §§ 76.92 et seq.) prohibit cable systems from importing games licensed exclusively to over-the-air broadcast stations. Baseball was concerned about situations such as that in St. Louis, where the Cardinals licensed its flagship (KPLR) the exclusive right to broadcast games with the Chicago Cubs -- only to find that St. Louis cable systems were able to carry via the compulsory license the WGN superstation telecasts of the very same games. See Baseball Petition for Declaratory Ruling in CSR-3441 at 2-3 (filed Aug. 8, 1990). The Commission, however, denied Baseball's petition. See Memorandum Opinion and Order in Docket CSR-3441, 6 F.C.C.R. 5573 (1991).

In that proceeding several broadcasters explained to the Commission that the lack of exclusivity protection from superstation baseball telecasts significantly decreased their interest in broadcasting baseball. This view was expressed by CBS and the trade association representing stations affiliated with all of the major networks. It also was expressed by several flagships which have since discontinued, or (like KPLR) have reduced, their free telecasts of major league baseball.[5] Baseball does not contend that the

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[5] This view was expressed in comments to the FCC by the following stations: WTXF (formerly the flagship station for the Phillies; replaced in 1993 by WPHL); WDAF

[Footnote continued on next page]

Commission's action in CSR-3441 was the sole reason for these stations' decreased interest in baseball; however, the Commission's refusal to protect the broadcasters' exclusivity was (as the stations themselves warned) an important factor that the Commission must consider in assessing "migration."

* * * * *

Each of the above factors -- individually and in combination -- may affect the number of games that any one club places on free television. Particular clubs and broadcasters reach varying conclusions on the appropriate number of baseball broadcasts in a given market; and those conclusions may vary from time to time as new contracts are negotiated between different broadcasters and different club owners. It is, of course, essential to any club's long-term economic stability that it remain free to change its telecasting patterns in order to respond to changing circumstances -- just as other program suppliers are free to do so.

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[Footnote continued from previous page]
(formerly the flagship station for the Royals; replaced in 1993 by KSMO); KTTV (formerly the flagship station of the Dodgers; replaced in 1993 by KTLA). This view also was expressed by KPLR, the Cardinals' flagship, and KTVU, the Giants' flagship. KPLR has since reduced its Cardinals' telecasts from 77 to 60. Only two other clubs present fewer flagship telecasts than the Giants. In mid-season 1993 Station KICU agreed to televise a dozen Giants' games; KICU, however, refused to do so in 1994, citing poor ratings. Baseball hereby incorporates by reference the material filed in Docket CSR-3441.

B. Regional Broadcast Networks

1. Telecasting Patterns. In assessing the amount of baseball programming available on free television, the Commission also should consider the substantial amount of baseball presented by regional broadcast networks. These networks, which consist of stations that rebroadcast the flagships' game telecasts, bring free baseball telecasts to a number of the nation's smaller and medium-sized communities. The U.S. flagships and their regional affiliates will reach approximately 90 percent of the households in the 48 contiguous states in 1994.

The 1994 regional broadcast networks of the clubs are identified in Exhibit 2. As that exhibit illustrates, 20 of the 26 Baseball clubs will have regional networks in 1994 that range in size from two to 18 broadcast stations. Collectively, those 20 clubs will have 188 regional broadcast affiliates in 1994 (165 affiliates if one disregards the expansion clubs). While data on the 1980 regional networks are not available, in 1979 baseball clubs had a total of 110 regional broadcast affiliates. Thus, between 1979 and 1994 baseball's total number of regional network stations grew by approximately 71 percent (50 percent excluding the expansion clubs):

Table 2
Baseball Regional Broadcast
Network Stations (1979 and 1994)

| | |
|---|---|
| 1979 | 110 |
| 1994* | 165 |
| 1994** | 188 |

*Excludes two expansion clubs

**Includes two expansion clubs

This growth in the number of regional affiliates has significantly increased the availability of baseball games on broadcast television during the past two decades.

2. Factors Affecting Regional Telecasts. The development of regional broadcast networks is reflective of major league baseball's commitment to free television. Nevertheless, Baseball recognizes that more could be done in this area. Some clubs do not have any regional broadcast networks, while others have been unable to develop broadcast affiliates in particular communities. Furthermore, those stations that are affiliates frequently choose not to televise all of the games that are available to it.

Many of the factors discussed on pages 9-16 above affect the amount of baseball that is available on regional broadcast networks. However, as Baseball previously explained, a key factor is the substantial number of superstation baseball telecasts that cable

systems may import into a broadcaster's market. See Baseball Comments at 11-15.

That importation fractionalizes the audiences for baseball telecasts and negates the exclusivity that broadcasters seek, thereby reducing broadcaster interest in baseball -- particularly in those outlying communities where a club's following may not be as strong as it is in its core market. While superstation interests point to the relatively small ratings that they garner in major league cities, the mere presence of the superstations in various communities is itself a sufficient deterrent to maximizing the number of baseball games available on free television -- as various broadcasters explained in Docket CSR-3441. See pages 14-15 above.

Furthermore, the superstations themselves may have little incentive in developing regional broadcast networks. Of the seven clubs that will have no regional broadcast affiliates in 1994, six are superstation clubs -- the Angels, White Sox, Braves, Cubs, Dodgers and Mets.

Prior to WTBS' becoming a superstation, the games of the Atlanta Braves were televised by 30 broadcast stations serving millions of viewers throughout the Southeast United States; these stations were part of the Braves regional broadcast network. See Broadcasting,

March 3, 1975, at 39. WTBS, however, discontinued that network shortly after its signal went on satellite. Likewise, in 1992 the Cubs' network consisted of ten stations located throughout Illinois, Indiana and Iowa. See Baseball Comments at Exhibit D1. These stations, however, were not prepared to continue broadcasting Cubs' games unless WGN agreed to afford them exclusive telecast rights (such exclusivity would permit the stations to invoke the Commission's network nonduplication rules against cable importation of WGN Cubs' telecasts). Reportedly, WGN refused to do so. Therefore, it currently appears that the Cubs will have no regional broadcast network in 1994.

The cable compulsory license and superstations have provided cable subscribers with a substantial number of baseball games. At the same time, compulsory licensing and superstations have had, and will continue to have, an adverse impact upon the amount of baseball that broadcasters present on free television in various communities.

### C. National Broadcast Network

The number of baseball telecasts on national network television has declined since 1980. However, as the Commission has correctly found, that drop is the product of declining ratings -- and not migration to