

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

In the Matter of)
)
NFL Enterprises LLC,) MB Docket No. 08-214
Complainant) File No. CSR-7876-P
v.)
Comcast Cable Communications, LLC,)
Defendant)

To: Marlene H. Dortch, Secretary
Federal Communications Commission

Attn: Richard L. Sippel
Chief Administrative Law Judge

**DEFENDANT’S REPLY IN FURTHER SUPPORT OF
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Defendant Comcast Cable Communications, LLC (“Comcast”) respectfully submits this Reply in further support of its Motion to Compel Production of Documents. In its Motion, Comcast showed that the NFL is withholding highly probative documents that undermine the NFL’s claims, including the NFL’s own internal analyses of the unattractiveness of the NFL Network (“NFLN”) to distributors and litigation documents relating to Charter’s refusal to carry the NFLN (Request No. 5); and documents relating to the NFL’s use of live game rights controlled by the National Football League to induce distributors to carry the NFLN on otherwise unwarranted terms (Request No. 10).

As to Request No. 5, the NFL argues that its internal admissions concerning the NFLN’s lack of appeal to distributors are “irrelevant.” As an initial matter, this argument is impossible to square with the NFL’s failure to object to the relevance of documents from distributors

themselves on the same topic.¹ Regardless, the relevance is perhaps best explained by the NFLN's Chief Operating Officer, Kim Williams, who in October 2006 informed NFL team owners that cable distributors were "attempting to ascertain whether the demands of their subscribers justify agreeing to our terms of carriage."² That most major cable distributors have not agreed to the NFL's terms of carriage indicates that those terms are not justified by the demands of cable subscribers. Comcast is entitled to admissions by the NFL and by Charter (which is controlled by NFL team owner Paul Allen) that broad carriage of the NFLN is not justified by market demand because those admissions undermine the NFL's claims against Comcast.³

As to Request No. 10, the NFL argues that the request is "based purely on Comcast's conjecture that Enterprises may use game rights as an incentive to obtain favorable distribution for the NFL Network."⁴ That argument is belied not only by Comcast's own experience,⁵ but also by documents showing that the NFL wielded "Sunday Ticket leverage" – namely, dangling the possibility of cable companies getting access to the Sunday Ticket package of out-of-market games that the NFL has granted exclusively to DIRECTV – as a tool for obtaining distribution of the NFLN. For example, in a March 2004 "Strategic Analysis" of "Broadcast/Cable Television Negotiations," the NFL concluded that "MSO demand for NFLST [i.e., NFL Sunday Ticket] will

¹ See Mot. Ex. B at 4; *see also* Mot. at 3.

² See Exhibit A.

³ *Id.*

⁴ NFL Opp. Mem. at 5.

⁵ Mot. at 8.

give NFL leverage to demand wide carriage for NFL Network.”⁶ The NFL admitted that rights to Sunday Ticket were an “[o]ppportunity to significantly grow NFL Network carriage” and a “[s]ource of leverage against powerful MSOs (e.g., Comcast).”⁷ Similarly, in another internal distribution strategy presentation, the NFL articulated as part of its NFLN “Distribution Strategy” the “use of Sunday Ticket Leverage opportunistically.”⁸

The NFL’s claim against Comcast is based on the allegation that Comcast has harmed the NFLN’s ability to compete for distribution.⁹ In alleging competitive harm, the NFL puts at issue *how* it competes. The significant market power the NFL possesses as the monopoly licensor of NFL game rights – which it has wielded to drive distribution of its NFLN – goes directly to the NFLN’s ability to compete, and thus puts the lie to the allegation in this proceeding that Comcast’s exercise of its contractual right to tier has harmed the NFLN’s ability to compete.

Moreover, by proffering expert testimony purporting to estimate a “fair market value” of the NFLN among certain distributors by using estimates of pricing from the NFLN’s carriage deals with those distributors,¹⁰ the NFL has put at issue the fact that the NFLN’s current distribution says little about the attractiveness of the network’s programming, and a great deal about the NFL’s market power as the monopoly seller of NFL game rights. It is thus unsurprising that the NFL resists so strenuously producing the evidence that would show (1) its

⁶ Exhibit B at NFLE0937896, p. 40.

⁷ *Id.* at NFLE0937897, p. 41.

⁸ Exhibit C at NFLE0413497, p. 1.

⁹ *See* Complaint at ¶ 43.

¹⁰ *See* NFL Enterprises LLC’s Expert Opinion Summary (Dec. 12, 2008) at 3; Report of Dr. Hal J. Singer (Mar. 6, 2009) ¶¶ 63-84.

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own analyses of the attractiveness of its programming to distributors, and (2) the extent to which it has used its game rights monopoly (and not the NFLN's pricing or programming) to drive NFLN's distribution. Comcast is entitled to discover the NFL's documents relating to its use of rights to NFL games not on the NFLN as leverage to obtain better distribution for the NFLN than the network warrants.

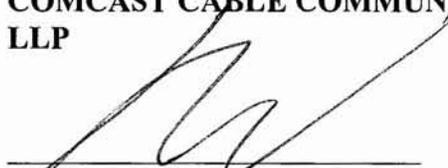
Finally, the NFL repeatedly mentions the number of documents that it has produced, but it is not the number of documents that matters, but the fact that the NFL is still withholding highly probative documents that undermine its claims.

CONCLUSION

For the foregoing reasons and the reasons set forth in Comcast's Motion to Compel Production of Documents, Comcast respectfully requests that the Presiding Judge grant its motion to compel.

Respectfully submitted,

**COMCAST CABLE COMMUNICATIONS,
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Dated: March 12, 2009

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CERTIFICATE OF SERVICE

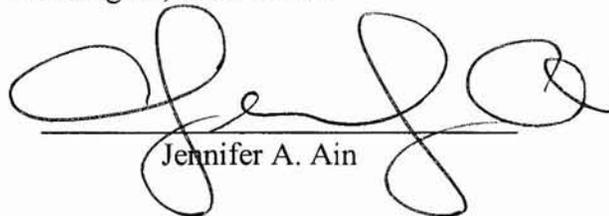
I, Jennifer A. Ain, hereby certify that, on March 12, 2009, copies of the attached Defendant's Reply in Further Support of Motion to Compel Production of Documents were served by e-mail on the following individuals:

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Exhibit A

Exhibit Redacted

Exhibit B

Exhibit Redacted

Exhibit C

Exhibit Redacted