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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

NFL ENTERPRISES LLC,

Complainant,

MB Docket No.
08-214

v.

COMCAST CABLE

File No.
CSR-7876-P

COMMIUNICATIONS, LLC,

Defendant.

Volume 5

TRANSCRIPT

The Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
Hearing Room TW-A363

Tuesday, April 14, 2009

9:30 a.m.

BEFORE:

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Chief Administrative Law Judge

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| Counsel for Comcast Cable | | | |
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1 motions for additional documents. And I have
2 granted them to the extent of just producing
3 adequate representative documents on each of
4 the subject matters. And those will be
5 delivered forthwith, meaning as soon as you
6 can when we have breaks, or you can
7 communicate with your office.

8 And I'm leaving the order open for
9 any further needs which I can rule from the
10 bench if it comes up, but I'm hoping that at
11 least that will get it well beyond where it
12 was yesterday.

13 And at the break the document is
14 in the typewriter right now, and I will have
15 copies after the break whenever that is. I
16 hope we have time for a break.

17 Okay, the first witness according
18 to what I have is Mr. Hawkins for Enterprise;
19 is that correct?

20 MR. LEVY: Yes, Your Honor. But
21 if Your Honor would, yesterday at the document
22 admissions hearing you said that opening

1 statements were not required.

2 JUDGE SIPPEL: That's correct.

3 MR. LEVY: If Your Honor would
4 allow I'd like to spend five or 10 minutes on
5 a statement that would just sort of set the
6 tone and set the framework for analysis.

7 If Your Honor doesn't want to hear
8 a statement we will proceed directly to Mr.
9 Hawkins.

10 JUDGE SIPPEL: I always want to
11 hear from the lawyers. I will hear from you,
12 and I will hear from Carroll.

13 MR. LEVY: And I intend to be
14 brief, and I also intend not to get into any
15 highly confidential information, so there is
16 no need at this point at least to ask members
17 of the press and others to leave.

18 But I ought to give Your Honor
19 notice that there may be such an issue when
20 Mr. Hawkins takes the stand. And it may be
21 necessary to ask those to leave who are not
22 entitled under the protective order to hear

1 confidential or highly confidential
2 information.

3 JUDGE SIPPEL: Well, that's a
4 good point, and I'm glad you raised it now.
5 Because I've been thinking about this for the
6 last 24 hours, and I think as much as it is
7 possible to do, we have the written testimony,
8 we have the written testimony unredacted. To
9 the extent that you are able to direct the
10 witness to unredacted material and have him
11 testify or affirm it or somehow or other say,
12 well, yes that supports what I'm trying to
13 say, instead of having to actually state the
14 information on the record, particularly if we
15 are talking about numbers and things like
16 that.

17 Now I don't know if that works or
18 not, but maybe that is something we ought to
19 talk about.

20 MR. LEVY: I'm not confident it
21 will work.

22 JUDGE SIPPEL: All right.

1 MR. CARROLL: This may be one of
2 the few times we agree all day. I -

3 JUDGE SIPPEL: I must be doing
4 something wrong.

5 MR. CARROLL: Given the exhibits
6 that I anticipate using with this witness,
7 most of which I think are probably stamped
8 highly confidential, I just don't know any way
9 to have an effective examination without being
10 able to go through those materials.

11 It may be possible for you on
12 direct to do it in a way that doesn't get
13 specific. But I would have thought they'd
14 want to be specific because they are
15 anticipating what I'm going to do.

16 But we have exhibits that have
17 been produced, they're documents, but they are
18 labeled highly confidential. And out of
19 respect for how they designated them I have no
20 choice.

21 MR. LEVY: And we'll have the
22 reciprocal, Your Honor. It may be that during

1 Mr. Carroll's examination of our witnesses
2 that our witnesses who are - the other
3 witnesses are permitted to stay, because I
4 assume you are not going to be using Comcast
5 highly confidential information, and the
6 reciprocal may be true as well.

7 But I think it would be very
8 difficult for all of us if we were cabined by
9 the need to try to avoid mention of numbers or
10 avoid use of documents that may disclose
11 proprietary information.

12 JUDGE SIPPEL: All right, just
13 keep it in mind. Like I say, it's difficult
14 for me to do anything but just think of it in
15 the abstract.

16 And the other question I have is
17 with respect to other witnesses. When we
18 have, for example, Mr. Hawkins today, and we
19 also have Dr. Singer. Should - is there any
20 objection to Dr. Singer staying here for this
21 testimony? I don't see why not.

22 MR. CARROLL: No, he's an expert

1 for the other side. We have our expert in the
2 room as well, and I think the expert should be
3 able to hear the testimony.

4 JUDGE SIPPEL: And are there any
5 other fact witnesses that you would want to be
6 - to remove from the courtroom?

7 MR. CARROLL: Well I think it's
8 understood the fact witnesses are not to be
9 present for other fact witnesses' testimony.

10 JUDGE SIPPEL: That's what I'm
11 saying.

12 MR. CARROLL: And I agree with
13 that.

14 JUDGE SIPPEL: So are we clear on
15 that?

16 MR. LEVY: We're agreeing to
17 everything. We're off to a good start.

18 JUDGE SIPPEL: What did I do
19 wrong yesterday?

20 All right, I appreciate this very
21 much. And you may commence - just give me one
22 second.

1 (Pause)

2 Mr. Levy, you may present your
3 opening statement.

4 OPENING STATEMENT BY COUNSEL FOR NFL
5 ENTERPRISES

6 MR. LEVY: Your Honor, the core
7 issue in this case is whether Comcast has
8 abused its status as a vertically integrated
9 carrier.

10 A vertically integrated carrier is
11 one that owns not only a cable distribution
12 network but also individual program channels.
13 Comcast does both. It owns Comcast Cable, the
14 largest cable company, the largest cable
15 distributor in the nation; and it also owns
16 individual channels including Versus and The
17 Golf Channel.

18 When subscribers sign up with a
19 cable system they buy a package of channels,
20 a package the carrier has agreed to carry.
21 Subscribers usually have several packages from
22 which to choose. As the number of channels

1 increase, the subscriber pays more.

2 The programmers, the entities that
3 own the channels, want their channels in a
4 package to which a large number of viewers
5 subscribe. The channel owners are usually
6 paid by the cable carrier on a per subscriber
7 basis. The broader the penetration, the more
8 eyeballs the channel reaches, the more the
9 channel can command from advertisers as well.

10 As I mentioned Comcast owns
11 channels that it carries on the cable systems
12 that it also owns. Those channels include
13 Versus, a national sports channel, that has a
14 variety of sports programming including
15 hockey, professional bull riding, bicycling
16 and cage fighting.

17 Comcast gives Versus broad
18 penetration on its cable systems. Comcast
19 also owns the Golf Channel, a national sports
20 channel that shows only golf programming.
21 Comcast gives the Golf Channel broad
22 penetration on its cable systems.

1 Comcast also has interest in
2 regional sports networks, and a partial in the
3 MLB channel. It gives all of them broad
4 penetration on its cable systems.

5 The discrimination question is
6 whether Comcast treats those channels, which
7 it owns, differently, better, than it treats
8 the NFL Network, which it doesn't and whether
9 it does so on the basis of affiliation.

10 Now the NFL Network is a national
11 sports channel just like Versus and the Golf
12 Channel. It's devoted to football
13 programming. It is very popular. Over 200
14 distributors now carry the NFL Network. It
15 has achieved very high ratings in a very short
16 amount of time.

17 Now beginning in 2004 Comcast gave
18 the NFL Network broad penetration on its cable
19 systems. In 2006, however, Comcast stopped
20 giving the NFL Network broad penetration. It
21 moved the NFL Network to a sports tier, a
22 premium tier viewed by only a small fraction

1 of Comcast subscribers.

2 Subscribers have to pay an
3 additional fee to get that sports tier. This
4 action had real consequences for the NFL
5 Network which no one really disputes.
6 Comcast's own witnesses acknowledges that it
7 hurts a channel to be put on a premium sports
8 tier.

9 Comcast claims that it was
10 entitled to move the NFL Network to a sports
11 tier under its carriage contract with NFL
12 Network. That is the issue in the New York
13 litigation.

14 But whether or not it had a
15 contractual right to move the network, and we
16 argue in the New York litigation that it did
17 not, Comcast was barred by statute from
18 treating the NFL Network, an independent
19 network, differently from the manner which it
20 treated its own networks.

21 That is a statutory mandate: a
22 vertically integrated carrier, as I noted at

1 the outset, may not discriminate based on
2 affiliation between the channels that it owns,
3 on the one hand, and an independent channel on
4 the other.

5 As long as Comcast continued to
6 give Versus and the Golf Channel broad
7 distribution it was obligated to do the same
8 with the NFL Network.

9 Now Comcast disputes this
10 obligation by arguing that the NFL Network is
11 too expensive; but that position can't be
12 reconciled with a number of facts that will be
13 undisputed.

14 First, the fact that the NFL
15 Network was carried by Comcast on a broadly
16 penetrated tier for two years before it moved
17 the network.

18 Second, that Comcast paid the NFL
19 Network the rate prescribed by its agreement
20 during that period.

21 Third the fact, that NFL Network
22 popularity grew substantially during that

1 period.

2 And fourth that Comcast - that
3 virtually all of Comcast's competitors,
4 looking over this from a broad perspective,
5 are paying on average - well, let me put it
6 differently, because I want to be careful not
7 to disclose any confidential information; let
8 me put it differently.

9 All of Comcast's competitors are
10 carrying the NFL Network on broadly
11 distributed - by broadly distributed means.
12 And we will have evidence on that point later
13 today.

14 Finally Comcast's position can't
15 be reconciled with the fact that it offered to
16 pay a very substantial sum, for the eight-game
17 package that it now claims makes the NFL
18 Network too expensive. Comcast offered to pay
19 a large sum for that package because it wanted
20 to put those games on the NFL Network. But
21 when it didn't get the games on the NFL
22 Network - excuse me, because it wanted to put

1 the games on Versus, forgive me - but when it
2 didn't get those games for Versus, and the
3 games ended up on the NFL Network, it claimed
4 that the cost it had to pay was too high.

5 Now the statute, the 1992
6 legislation, has another statutory mandate
7 beyond prohibiting discrimination. It also
8 prevents vertically integrated cable carriers
9 from demanding a financial interest in an
10 independent channel as a condition of
11 carriage.

12 And we will offer evidence to show
13 that that is exactly what Comcast did here.
14 It demanded that the NFL Network - it demanded
15 that the NFL give to Comcast NFL Network's
16 most valuable program, the package of eight
17 live regular season games, as a condition of
18 carriage.

19 And Comcast threatened the NFL, it
20 told the NFL - excuse me, it told the NFL that
21 if it did not get the eight-game package, it
22 would tier the NFL Network, it would make life

1 difficult for the NFL Network going forward.

2 The NFL decided not to give the
3 eight-game package to Versus, to Comcast,
4 because in part it had questions about the
5 quality of Versus' programming. One of
6 Comcast's witnesses himself admitted that a
7 premier sports league might not want to take
8 its premier programming and put it on a
9 network right after a show that deals with
10 martial arts or deer killing.

11 Now in June of 2006, the NFL
12 Network said to Comcast, we are going to carry
13 those games on our network. You can pay us an
14 incremental amount as we had agreed if you
15 want the network to carry those games on your
16 system; or you can forego the games. And we
17 will offer you substitute programming.

18 Comcast made a choice. It elected
19 to have those games carried on the NFL
20 Network. It elected to pay a surcharge. And
21 then it decided to tier the NFL Network and to
22 take its revenge, to impose its consequences.

1 The evidence will show
2 conclusively, as I noted, that Comcast treats
3 its affiliated sports networks better than it
4 treats the NFL Network. Comcast says the
5 issue is about price, but the record belies
6 this.

7 And with that we are prepared to
8 offer Mr. Hawkins as our first witness. Mr.
9 Carroll is welcome to offer a responsive
10 statement. But that is basically a summary of
11 our case, Your Honor.

12 JUDGE SIPPEL: All right, can I
13 just ask you one question. I don't mean - I
14 think you have already answered it by your
15 last statement. But I was kind of led to
16 believe yesterday, you know I just pick these
17 things up as I go along, that really it's a
18 question of price. If you all can agree on a
19 price that program is going to go where you
20 want it.

21 Perhaps the price from your
22 standpoint is outrageous, but that's a

1 negotiable item.

2 MR. LEVY: That's not what the
3 statute says, Your Honor. The statute says
4 that a vertically integrated carrier cannot
5 discriminate between its own affiliated
6 channels and other channels on the basis of
7 affiliation.

8 Comcast's position is that the
9 network's price, the NFL Network's price, is
10 too high, and that that is a basis, that is a
11 justification for their discrimination.

12 We are going to show you in a
13 variety of different respects that that
14 argument has no merit whatsoever. Price is
15 competitive with what others in the market -
16 the price that NFL has sought from Comcast,
17 and with which Comcast agreed by the way - is
18 competitive with what others are paying for
19 the NFL Network, and what Comcast competitors
20 are paying for NFL Network.

21 The price is a reasonable price by
22 a variety of other standards, but if - there

1 is no question that if - well, let me put it
2 this way. Comcast and the NFL Network had
3 agreed on a price that would be paid for
4 carriage of the NFL Network, and all we had
5 asked for at the time this dispute first arose
6 was for Comcast to carry us at that price.

7 But the bottom line is, given the
8 similarities of the networks, given the extent
9 to which they compete with one another, that
10 they go after the same demographic, that they
11 compete for advertising, these are similarly
12 situated networks, and the issue of price is
13 not a justification for discrimination.

14 And we are going to show that
15 through a variety of means including through
16 Mr. Hawkins and through Dr. Singer, by
17 demonstrating that the price that is at issue
18 here, the price we are demanding for the NFL
19 Network is a reasonable price and a
20 competitive price.

21 If a vertically integrated carrier
22 could avoid its statutory obligations by

1 simply saying, we are not prepared to pay what
2 the channel or the network is asking, the
3 statute would have no teeth whatsoever. It
4 would be virtually meaningless, because the
5 vertically integrated carrier could always
6 take the position, we are not going to pay you
7 that much for your product.

8 And it would then have a license
9 in effect to discriminate between affiliated
10 and unaffiliated networks.

11 JUDGE SIPPEL: But isn't there
12 another side to that coin? If you are a
13 powerful - if you have as you say a one of a
14 kind programming, set of programs, and you go
15 to a carrier, as a hypothetical of course, and
16 you say, look, they want your program, they
17 want to put your network on. And you say to
18 them, yeah, you can put it on all right, but
19 you have to meet my price. And in effect you
20 could control the price with your product.

21 They want to put it on, but you
22 are going to say, well, we are not going to

1 negotiate our price; here is my price, you
2 meet it or else. And that wouldn't be
3 discrimination, though, would it?

4 MR. LEVY: Your Honor, let me
5 make two points. That could conceivably be
6 the case in the event that the price that was
7 being requested was a noncompetitive price; it
8 wasn't a market price. But here we have a
9 situation where the price is a market price.
10 And if it can be demonstrated that that is the
11 price that others are paying for it in the
12 market.

13 But this statute imposes no
14 obligation on an independent program. The
15 statute is a one-way ratchet in effect. It
16 focuses on the obligations of the vertically
17 integrated carrier, the carrier that owns both
18 the means of distribution and the programming;
19 and it is designed to prevent the vertically
20 integrated carrier from using its market power
21 as a bottleneck to deprive independent
22 programmers of access to the market.

1 And that's why the statute is
2 defined in very specific terms; and the
3 Commission's regulations are the same. They
4 are designed to protect the independent
5 programming, and they impose an obligation on
6 the vertically integrated carrier not to
7 discriminate.

8 And in this circumstance, because
9 the price is one that Comcast was paying for
10 some time before it moved the games, and that
11 it agreed to pay, and that its competitors
12 were paying, it is hard to imagine that there
13 could be any basis for Comcast to claim that
14 the discrimination in which it is engaged is
15 excused because of the fact that the NFL
16 Network has sought to enforce the price,
17 continue the price to which Comcast had
18 already agreed.

19 JUDGE SIPPEL: All right, it's
20 kind of a moving target here. They agreed in
21 2004, and in 2006 they felt under the contract
22 that they could change the terms in effect,

1 basically, they moved to require the higher
2 tier.

3 And now, all right, you set that
4 stage. But I'm asking this question, however
5 you want to define the discrimination, is
6 there any basis on which a carrier such as
7 Comcast can say to a programmer I don't - you
8 know, I might have the same thing that you
9 have, but I just don't want yours. I just
10 don't want it.

11 MR. LEVY: No, Your Honor, not
12 under the statute, no.

13 JUDGE SIPPEL: They can't do
14 that? Would there be a justification for
15 saying that?

16 MR. LEVY: There is no
17 justification on this record here.

18 JUDGE SIPPEL: No, no, I'm saying
19 hypothetically, in the abstract, could there
20 be a reason, could there be a good faith
21 carrier that says that, you know, for whatever
22 reason at all, but he has a reason - there is