A. The Economic Framework for Assessing Comcast's Exclusionary Conduct

122. Antitrust economics considers exclusionary conduct to be anticompetitive if it impairs a rival's efficiency or its ability to impose price discipline. Such conduct can occur by raising a rival's costs, by degrading a rival's quality of service,[256] or by depriving rivals of economies of scale.[257] Anticompetitive effects may be realized regardless of whether the rival is driven out of the market entirely;[258] they require that the rival faces increasing marginal costs or large upfront costs or both. If the conduct forces the rival to operate on a higher portion of its marginal cost curve, then such conduct would achieve partial foreclosure, and the rival would not be able to constrain prices as effectively. In the extreme case, when the conduct prevents the rival from covering its average variable costs, the conduct would induce exit and thereby achieve complete foreclosure.

123. Exclusionary strategies can take several forms, and such strategies can be used to extend monopoly power from one market into another, or to maintain monopoly power in a given market. When the markets in question are vertically aligned, exclusionary conduct is referred to as "vertical restraints," and the effect of such conduct is called "vertical foreclosure."[259] Because regional sports programming, national sports programming, local broadcast affiliates, and online programming are inputs in the production process of video

256. *See* Steven C. Salop & David T. Scheffman, *Cost-Raising Strategies*, 36 J. IND. ECON. 19 (1987).

257. *See, e.g.*, Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. CHI. L. REV. 229, 239 (2005) ("Economies of scale are a market rather than a firm attribute. To the extent that the loyalty rebates raised LePage's average costs by shrinking its output and thus preventing it from achieving the available economies of scale, this was not a consequence of 3M being a more efficient company in a sense relevant to antitrust policy.").

258. *See, e.g.*, Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253 (2003); Dennis W. Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. ECON. 194 (2002); Michael D. Whinston, *Tying, Foreclosure and Exclusion*, 80 AM. ECON. REV. 837 (1990); Thomas G. Krattenmaker & Stephen C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 234-45 (1986); Stephen C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983) (Special Issue) [hereinafter *Raising Rivals Costs*].

259. *See* Patrick Rey & Jean Tirole, *A Primer on Foreclosure* (reprinted in III HANDBOOK OF INDUSTRIAL ORGANIZATION, Mark Armstrong & Rob Porter, eds., 2145-2220, 2007), at *8 ("Vertical foreclosure may arise when a firm controls an input that is essential for a potentially competitive industry. The bottleneck owner can then alter competition by denying or limiting access to the input.") [hereinafter *Foreclosure Primer*].

distribution, it is appropriate to analyze Comcast's conduct through the lens of vertical foreclosure. The FCC has found that significant incentives exist for vertically integrated MVPDs—and Comcast in particular—to use vertical foreclosure strategies to raise rivals' (competitors') costs and thereby achieve partial or total foreclosure.[260]

124. Anticompetitive strategies that are designed to increase a rival's costs are known as "raising-rival-cost" strategies.[261] A basic tenet of economics is that it is always better to compete against a rival with higher costs.[262] A firm can raise a rival's costs in many ways, including by interfering with its rival's production or selling methods, interfering through government regulation[263] (see discussion of Comcast's influence over LFA's approval process above), using tie-ins with other products, raising switching costs, or raising an input price (see discussion of Comcast's refusal to supply its affiliated RSNs to DBS rivals below).[264] An equivalent strategy that can be used to disadvantage a rival—and artificially inflate prices—is to degrade a rival's quality of service.[265] For example, by denying DBS rivals' access to CSN-

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260. *See* In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses, MB Dkt. No. 05-192, Memorandum Opinion and Order, released July 21, 2006, FCC 06-105 [hereinafter *FCC Adelphia Order*] at ¶ 118 ("One way by which vertically integrated firms can raise their rivals' costs is to charge higher programming prices to competing MVPDs than to their affiliated MVPDs."). *See also id.* at ¶ 123 ("We find that the transactions [the Adelphia purchase and related cluster-driven swaps] would enable Comcast and Time Warner to raise the price of access to RSNs by imposing uniform price increases applicable to all MVPDs, including their own systems, by engaging in so-called 'stealth discrimination,' or by permanently or temporarily withholding programming. As commenters contend, such strategies are likely to result in increased retail rates and fewer choices for consumers seeking competitive alternatives to Comcast and Time Warner.").

261. *See* Salop & Scheffman, *supra*, at 19 ("In this paper, we show that strategies designed to raise rivals' costs have a number of advantages over predatory pricing. First, cost-raising strategies do not have an inherent problem of credibility. Such strategies may be profitable whether or not the rivals exit, since higher cost rivals have an incentive to cut back output and raise prices immediately, which may make it possible for the predator to reap gains even in the short run.").

262. *See, e.g.*, DENNIS CARLTON & JEFFREY PERLOFF, MODERN INDUSTRIAL ORGANIZATION 371(Addison Wesley 4th ed. 2005) ("A firm clearly benefits if it can only raise its rivals' costs.").

263. *Id.* at 372 ("By supporting government regulation so that a new rival cannot adopt their production techniques, incumbent firms can preserve and protect their market position and make it more costly for entrants to compete.").

264. *Id.* at 371-73. A refusal to supply an input is tantamount to setting an infinite price for that input.

265. *See, e.g.*, Nicholas Economides, *The Incentive for Non-Price Discrimination by an Input Monopolist*, 16 INT'L J. IND. ORG. 271 (1998) ("This paper considers the incentive for non-price discrimination of a monopolist in an input market who sells in an oligopoly downstream market through a subsidiary. Such a monopolist can raise the

Philadelphia, Comcast effectively degraded their quality of service (for any given price of DBS service, the failure to offer the Phillies/Flyers/76ers to a Philadelphia resident is a less-compelling offer), which impaired DBS firms' ability to constrain Comcast's cable television prices. These strategies represent a particularly effective means of monopolizing a downstream market (in this case, the MVPD market) because they can engender anticompetitive harm without forcing rivals to exit the market completely and do not require any short-term profit sacrifice.

125. Over the course of the last few decades, defendants accused of using vertical restraints for anticompetitive purposes have invoked the Chicago School's "One-Monopoly-Profit Theorem," associated with economists who taught at the University of Chicago in the 1950s, as proof that such conduct could be motivated by efficiency reasons only. Consider a situation similar to the fact pattern here in which a firm has monopoly power over one product but faces competitors in the supply of some complementary good. The Chicago argument is essentially that because there is only one source of monopoly profit—the critical input—any additional monopoly profits a firm made by leveraging its power in the downstream market would come at the direct cost of the upstream market.[266] However, economic research has proven

costs of the rivals to its subsidiary through discriminatory quality degradation."); *see also* Nicholas Economides, *Raising Rivals' Costs in Complementary Goods Markets: LECs Entering into Long Distance and Microsoft Bundling Internet Explorer*, New York University Center for Law and Business Working Paper #CLB-98-004 at 1 ("Suppose that a firm monopolizes a market that provides a required input for a complementary market. Assume further that the monopolist also provides the complementary product through a subsidiary. Besides the monopolist's subsidiary, a number of other independent companies participate in the complementary good market. Under these conditions, we show that the monopolist has an incentive to (i) raise the costs of the rivals to its downstream subsidiary; and (ii) degrade the quality of the monopolized good offered to the downstream rivals of its subsidiary. These actions of the monopolist reduce competition and social welfare.").

266. *See* Rey & Tirole, *supra*, at 11 ("It [the Chicago School theorists] argued that there is a single source of monopoly profit, and that a bottleneck monopolist can already earn the entire monopoly profit without extending its market power to related segments, and so in the absence of efficiency gains, vertical integration cannot increase the profitability of the merging firms.").

that anticompetitive foreclosure can be profitable and effective even when the assumptions of the one-monopoly profit theorem hold.[267]

126. With respect to exclusive dealing, Chicago-school economists argued that buyers would demand to be fully compensated by the seller before entering into an arrangement subjecting them to future monopoly power.[268] But economists now recognize that when buyers are unable to coordinate their responses, no single buyer can stop the exclusion by itself.[269] Moreover, if those buyers are distributors, the upstream supplier can secure their acquiescence by sharing with them some of its expected monopoly profits.[270] As the former chief economist of the Antitrust Division of the DOJ Dennis Carlton has explained, exclusive dealing may be particularly anticompetitive when it deprives rivals of the scale necessary to achieve efficiencies.[271] When considered in this light, exclusive dealing may allow a monopolist to maintain its power by impairing the ability of rivals to grow into effective competitors.

127. One could analyze Comcast's refusal to supply inputs to downstream rivals through the lens of a tie-in. In this case, the tying product is input or programming (for example, a local NBC affiliate or NBCU online content) and the tied product is Comcast's cable television service. Comcast forces consumers in the Philadelphia DMA to purchase Comcast cable television service as a condition of getting CSN-Philadelphia—that is, Comcast ties the purchase of CSN-Philadelphia to a customer's purchase of Comcast cable television service. Similarly,

267. *See* Salop & Scheffman, *supra*, at 32 ("Proposition 9 shows that a fixed coefficient technology is not a sufficient condition for the absence of anticompetitive impact of a vertical merger (cf. Bork [1978])."); *see also* Rey & Tirole, *supra*, at 12 ("The reconciliation of the foreclosure doctrine and the Chicago School critique is based on the observation that an upstream monopolist in general cannot fully exert its monopoly power without engaging in exclusionary practices.").

268. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX 304–09 (1978).

269. *See, e.g.*, Ilya R. Segal & Michael D. Whinston, *Naked Exclusion: Comment*, 90 AM. ECON. REV. 296, 307 (2000).

270. *See, e.g.*, A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375, 404 (2006).

271. Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen *and* Kodak *Are Misguided*, 68 ANTITRUST L.J. 659, 663 (2001).

Comcast ties the purchase of its online content portfolio (via Fancast) to a customer's purchase of Comcast cable television service (and its cable modem service). According to the economic literature, a monopolist may have an incentive to use a tie to monopolize a second market to (1) deprive rivals of sales sufficient to achieve scale efficiency in the tied-product market;[272] or (2) deter entry into the tied-product market;[273] or (3) earn monopoly profits in the tied-good market that are not currently available but will be in the future.[274] Applied here, Comcast is motivated by a desire to weaken extant MVPD rivals (DirecTV, Dish Network, and Verizon FiOS) and to deter entry of nascent rivals (OTT video providers).

128. Finally, one could analyze Comcast's refusal to supply inputs to downstream rivals through the lens of exclusive dealing. Exclusive dealing often requires a buyer to deal exclusively with a seller, a seller to deal exclusively with a buyer, or a seller to enact policies requiring customers to deal exclusively with it. Exclusive dealing can be anticompetitive whenever it allows one manufacturer to monopolize the most efficient distribution channel and thereby prevent its rivals from competing effectively, or when it thwarts entry or inhibits the growth of existing rivals. Justice Breyer, among others, has recognized that exclusive dealing can be used to foreclose "enough outlets, or sources of supply, in the hands of a single firm (or small group of firms) to make it difficult for new, potentially competing firms to penetrate the market."[275] An important inquiry is whether the exclusive arrangement forecloses competition in a substantial share of the line of commerce affected.[276]

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272. *Id.* at 667–68.

273. *See, e.g.*, Barry Nalebuff, *Bundling as an Entry Barrier*, 119 Q. J. ECON. 159, 183 (2004).

274. Dennis W. Carlton & Michael Waldman, *Tying, Upgrades, and Switching Costs in Durable-Goods Markets*, NBER Working Paper No. 11407, at 3 (2005), *available at* http://www.nber.org/papers/w11407.

275. Interface Group, Inc. v. Mass. Port Auth., 816 F.2d 9, 11 (1st Cir. 1987) (Breyer, J.) (emphasis in original) (citations omitted).

276. In his antitrust treatise, Professor Hovenkamp explains that exclusive dealing requires "a plaintiff to show that the defendant has significant market power, that the exclusivity agreement serves to deny market access to

129. It bears emphasis that the economic literature does not distinguish between the exact form of the vertical restraint (exclusive dealing versus a tie-in). A showing of scale economies in the tied product is important for assessing both tie-ins and exclusive deals from an economic perspective. In my opinion, Comcast has abused its downstream market power by requiring that key inputs were exclusive to Comcast as a condition of doing business.

B. Types of Exclusionary Conduct

130. Comcast's exclusionary strategies can be grouped according to three major types: (a) refusal to supply affiliated programming to rival MVPDs, (b) discrimination vis-à-vis independent programming networks, and (c) tying affiliated online content with the purchase of cable television and cable modem service.

1. Refusing to Supply Affiliated Programming to Rival Distributors on Reasonable Terms

131. Comcast's exclusionary conduct vis-à-vis MVPD rivals have taken several forms, ranging from outright denial of access to unreasonable terms of access. Those strategies are briefly reviewed here.

a. Outright Denial

132. By exploiting the "terrestrial loophole" in the program access protections of the Cable Act, Comcast has denied its DBS rivals in Philadelphia and in Portland access to Comcast's affiliated RSN, leading the Commission to conclude in the case of Philadelphia that such exclusionary conduct "has had a material adverse impact on competition in the video distribution market."[277]

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one or more significant rivals, and that market output to consumers is lower (or prices higher) as a result." HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 206 (2005).

277. In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, Sunset of Exclusive Contract Prohibition, Review of the Commission's Program Access

i. Comcast SportsNet Northwest

133. For years, Portland Trail Blazer games were available to cable and satellite subscribers via the BlazerVision Pay Per View package.[278] In 2001, Paul Allen, owner of the Trail Blazers, abolished the pay-per-view system when he founded the Action Sports Cable Network (ASCN) to broadcast Trail Blazer games and other valuable local sports programming, including Seattle Seahawks and Portland Fire games.[279] ASCN planned to team with ESPN Network and KGW-TV to maximize fan access to local teams. The Blazers increased broadcast production by 30 percent to meet the demand for increased coverage.[280] For sixteen months, ASCN struggled to secure a distribution deal with Portland's "primary cable television provider," AT&T Broadband, which was purchased by Comcast in the midst of the negotiations over ASCN carriage in 2002.[281] A "shift in management" at AT&T Broadband in late 2001 caused the cable company to renege on its "verbal agreement" to carry ASCN in Oregon and southwest Washington.[282] ASCN was forced to fold after failing to secure a distribution deal with the cable company, leaving the Blazers to scramble to find a home in time for the 2002-2003 NBA season.[283]

134. After conducting discussions with cable providers, satellite companies, Fox Sports Northwest, and local stations, Allen sold the rights to broadcast Trail Blazer games to Fox

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Rules and Examination of Program Tying Arrangements, MB Dkt. Nos. 07-29, 07-198, Report and Order and Notice of Proposed Rulemaking ¶ 39 (rel. Oct. 1, 2007)

278. R. Thomas Umstead, *DirecTV Fishes for Subs with Trail Blazers*, MULTICHANNEL NEWS (Nov. 4, 1996) [hereinafter *DirecTV Fishes for Subs*].

279. Kristina Brenneman, *Paul Allen's Sporting Plans*, PORTLAND BUS. J. (Feb. 2, 2001) [hereinafter *Paul Allen's Sporting Plans*].

280. *Paul Allen's Sporting Plans, supra.*

281. Andy Giegerich, *Fox Hunts for Local Space to Increase Sports Coverage*, PORTLAND BUS. J. (Mar. 26, 2004) [hereinafter *Fox Hunts for Local Space*]. For a discussion of the AT&T Broadband-Comcast acquisition, *see* Bob Liu, *Comcast Offers to Acquire AT&T Broadband*, INTERNETNEWS.COM (Jul. 8, 2001); David Lieberman, *Comcast to Buy AT&T Broadband*, USA TODAY (Dec. 20, 2001).

282. *Action Sports Cable Network Blames AT&T for Failed Negotiations*, PORTLAND BUS. J. (Oct. 31, 2001).

283. *Fox Hunts for Local Space, supra.*

Sports Northwest in November 2002.[284] The network signed a five-year deal and carried 30 Blazers games during the first year of its contract.[285] Fox Sports Northwest reached more than 3.4 million homes in the Northwest in 2006,[286] giving the team broad distribution; however, the network was known to have a Seattle focus.[287] The contract with Fox Sports Northwest expired at the close of the 2006-2007 season and the parties failed to come to a renewal agreement.[288]

135. Comcast began negotiations for broadcasting rights with the Portland Trail Blazers in the spring of 2007, soon after renewal talks with Fox Sports Net collapsed.[289] Comcast won the rights to the games after agreeing to a 10-year, $120 million contract.[290] In May 2007, Comcast and the Trail Blazers announced the creation of a new regional sports network, Comcast SportsNet Northwest (CSNW), the core programming of which would be live coverage of the Portland Trail Blazers.[291] Trail Blazers Executive Vice President of Business Operations, Mike Golub, proclaimed that the partnership would "serve sports fans in ways never before possible and deliver an unprecedented amount of Trail Blazer games, programming and access."[292] CSNW launched shortly before the 2007-2008 NBA season and in its first year carried at least 55 of the 81 regular season games broadcast on television and made more of

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284. *Notebook: Agent Alleges Kings Reneged on Secret Deal*, SEATTLE TIMES (Nov. 14, 2002) [hereinafter *Notebook 2002*], *available at* http://community.seattletimes.nwsource.com/archive/?date=20021114&slug=nbanotes14.

285. *Notebook 2002, supra*; Jason Vondersmith, *Local teams, local TV*, PORTLAND TRIBUNE (Jul. 15, 2008) [hereinafter *Local teams, local TV*].

286. *Select FSN Trail Blazers Games To Be Televised in HD*, NBA.COM, *available at* http://www.nba.com/blazers/news/FSN_Trail_Blazers_Games_In_HD-201079-1218.html.

287 *Local teams, local TV, supra.*

288 Mike Rogoway, *Comcast, Blazers to announce cable deal (updated)*, THE OREGONIAN (May 21, 2007) [hereinafter *Comcast, Blazers to announce cable deal*], *available at* http://blog.oregonlive.com/business/2007/05/comcast_blazers_to_announce_ca.html.

289. *Comcast, Blazers to announce cable deal, supra.*

290. John Canzano, *Trail Blazers start another season with many fans held hostage by Comcast SportsNet*, THE OREGONIAN (Oct. 10, 2009), *available at* http://www.oregonlive.com/sports/oregonian/john_canzano/index.ssf/2009/10/canzano_trail_blazers_start_an.html.

291. *Comcast, Blazers to announce cable deal, supra.*

292. Comcast Sports Net, Portland Trail Blazers Announce a New Regional Sports Network, NBA.COM, *available at* http://www.nba.com/blazers/news/Comcast_Sports_Net_Portland_T-225869-1218.html.

those games available in HDTV than ever before. Those who did not subscribe to Comcast, however, were able to access fewer than 30 regular season games during the 2007-2008 season, compared with 61 during the 2006-2007 season.[293] As of September 2007, CSNW reached just 590,000 subscribers in Oregon and southwest Washington.[294] Although a number of small cable carriers and Verizon FiOS carried the sports network, many local fans who subscribed to DirecTV and Dish Network were still unable to receive Trail Blazer programming.[295] CSNW began offering its Trail Blazers coverage live over the Internet for a fee to local subscribers during the 2009-2010 season, but refused to offer the package to Blazers fans (and fans of other NBA franchises carried on Comcast-owned regional sports networks) who could not watch the games through their cable providers.[296] Tim Fitzpatrick, vice president of communications for CSN Philadelphia, acknowledged that Comcast was only interested in serving its "existing audience" with the convenience of Internet streaming.[297] In January 2010, three years into the ten-year contract, and frustrated by Comcast's failed negotiations with the two major satellite TV carriers and some local cable operators, the Blazers announced that they would "pursue all of [their] rights under [the] contract."[298] As of April 2010, DISH Network and DirecTV were still without access to CSNW.

293. *Comcast, Blazers to announce cable deal, supra.*

294. Brent Hunsberger, *Comcast-Trail Blazers Deal Still Leaving Some Viewers in the Dark,* THE OREGONIAN (Sept. 26, 2007), *available at* http://blog.oregonlive.com/playbooksandprofits/2007/09/comcasttrail_blazers_deal_stil.html.

295. John Canzano, *Trail Blazers Start Another Season with Many Fans Held Hostage by Comcast SportsNet,* THE OREGONIAN (Oct. 10, 2009); Jon Hemingway, Portland *FiOS TV Subscribers Get Comcast SportsNet Northwest,* BROADCASTING & CABLE (Jan. 17, 2008).

296. Mike Rogoway, *Disappointed Blazers "Pursuing All of Our Rights" in Comcast Deal,* THE OREGONIAN (Jan. 7, 2010) [hereinafter *Disappointed Blazers*], *available at* http://www.oregonlive.com/business/index.ssf/2010/01/blazers_say_they_are_pursuing.html; Tom Lowry, *Comcast Targets ESPN by Streaming Pro Sports Games,* BUSINESS WEEK (Dec. 16, 2009), *available at* http://www.businessweek.com/technology/content/dec2009/tc20091216_396786.htm.

297. *Disappointed Blazers, supra.*

298. *Disappointed Blazers, supra.*

ii. Comcast SportsNet Philadelphia

136. In Philadelphia, Comcast denies access to CSN-Philadelphia to DBS providers through the so-called "terrestrial delivery" loophole, which allows programmers to deny terrestrially-delivered programming to any MVPD.[299] Comcast is the majority owner of CSN-Philadelphia, with approximately an 80 percent equity share in the RSN.[300] Ever since Comcast acquired the rights from SportsChannel Philadelphia and PRISM in August 1997, Comcast has refused even to negotiate with DBS providers regarding carriage of CSN-Philadelphia.[301] Comcast also controls future access to the 76ers' and Flyers' carriage rights. Specifically, in 1996 Comcast acquired a controlling interest in Spectacor (now "Comcast Spectacor"), a holding company that owns the 76ers, the Flyers, and the Wachovia Center stadium that hosts the teams.[302]

137. By August 1997, Comcast acquired all the local telecasting rights of Philadelphia Flyers hockey games, Philadelphia 76ers basketball games, and Philadelphia Phillies baseball games previously held by Rainbow Sports, the owner of SportsChannel.[303] Thereafter, SportsChannel announced that it would cease to operate as of September 30, 1997.[304] On October 1, 1997, CSN-Philadelphia debuted as a new channel on Comcast's basic service tier in the Philadelphia area, and it was distributed only through terrestrial microwave and fiber

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299. *See, e.g.,* In the Matter of Applications of Adelphia Communications Corporation, Comcast Corporation, and Time Warner Cable Inc., for Authority to Assign and/or Transfer Control of Various Licenses, MB Docket No. 05-192, Comments of DirecTV, Inc., July 21, 2005, at 16-17 [hereinafter *DirecTV Comments*].

300. *See Eleventh Annual MVPD Report, supra,* at 141.

301. In the Matter of DIRECTV, Inc. v. Comcast Corporation, Comcast-Spectacor, L.P., Comcast SportsNet, Memorandum Opinion and Order, 13 F.C.C. Rcd. 21,822, 21,826-27 (released Oct. 27, 1998) [hereinafter *SportsNet MO&O*].

302. *See* Mark Robichaux, *Comcast to Buy Stake in Pro Teams in Philadelphia,* WALL STREET JOURNAL, Mar. 20, 1996, at B7 ("Cable giant Comcast Corp. jumped into the game of pro sports, saying it agreed to buy a majority stake in a venture that will own the Philadelphia 76ers basketball team, the Flyers hockey team, as well as two sports arenas.").

303. *SportsNet MO&O, supra,* at 21,834.

304. *Id.*

technology.[305] Before introducing CSN-Philadelphia as a new channel, Comcast indicated that CSN-Philadelphia's programming would not be available to any national DBS provider.[306] As I demonstrate in detail below, Comcast's discriminatory and continuing refusal to provide CSN-Philadelphia to its primary downstream competitors caused DBS providers to experience significantly lower-than-expected penetration rates in the Philadelphia DMA.

138. In January 2010, the Commission voted to close the "terrestrial loophole," and it permitted a DBS provider to file a program access complaint with the Commission to show it has been harmed by Comcast's withholding of CSN-Philadelphia. After a successful review, the FCC could force Comcast to reach a carriage deal for Comcast SportsNet. One day after that decision, Comcast announced that it would challenge the FCC action in an administrative process at the federal agency.[307] Despite the growing market share of DBS providers in Philadelphia, Craig Moffett of Sanford C. Bernstein & Co. estimated that Comcast's refusal to license CSN-Philadelphia has yielded an additional 450,000 subscribers for Comcast.[308] Accordingly, DBS market share in Philadelphia would have increased even faster but for Comcast's exclusionary practice.

b. Excessive Fees and Tying Carriage of RSNs to Less Popular Networks

139. Comcast launched Comcast SportsNet Chicago (CSN-Chicago)—which features the Chicago Bulls (NBA), Blackhawks (NHL), Cubs (MLB), and White Sox (MLB) in 2003.[309] These teams previously were carried on FSN Chicago, an unaffiliated RSN. Once Comcast's RSN acquired the rights to these teams, Comcast demanded that DirecTV pay a rate for CSN-

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305. *Id.*
306. *Id.*
307. Bob Fernandez, *Comcast to fight FCC ruling on sports telecasts*, PHILADELPHIA INQUIRER, Jan. 22, 2010, *available at* http://www.philly.com/philly/business/82341347.html#axzz0orclBgQ9.
308. Bob Fernandez, *FCC: Comcast must share Phila. sports coverage*, PHILADELPHIA INQUIRER, Jan. 20, 2010, *available at* http://www.philly.com/philly/business/82230427.html#axzz0orqf07iX.
309. COMCAST CORP. SEC FORM 10-K (filed February 23, 2005), at 50.

Chicago that was roughly 100 percent more than what DirecTV had been paying FSN Chicago for the same content.[310] Even if Comcast charged all MVPDs in Chicago this higher rate, the increased rates asymmetrically affect Comcast's MVPD rivals in Chicago because Comcast sees much of the rate increase as an intra-company transfer due to its 30 percent stake in CSN-Chicago.[311] Comcast's pricing of CSN-Chicago has also prompted a program access complaint by Dish Network.

c. Manipulating Zones or "Stealth Discrimination"

140. Similarly, Comcast discriminates against DirecTV in Sacramento by effectively raising the price DirecTV pays for Sacramento Kings (NBA) games carried on Comcast SportsNet West (CSN-West). CSN-West's marquee programming—Sacramento Kings basketball games—must be blacked out in large parts of its service area, including the San Francisco DMA. As a condition of permitting DirecTV to access CSN-West, Comcast forced DirecTV to carry the network in three "zones"—an inner zone consisting of areas in and around Sacramento, an outer zone consisting of areas within 150 miles of Sacramento, and an "outer-outer" zone consisting of the San Francisco DMA. Comcast charges the highest rates per subscriber for the inner zone, and charges lower rates for zones further out. Although Comcast charges the lowest per-subscriber rate for the outer-outer zone, the cost to DirecTV to carry CSN-West in the outer-outer zone is especially burdensome because that zone has twice as many subscribers as the inner and outer zones combined. As a result, the effective per-subscriber rate for subscribers who can view Kings games (those in Sacramento but not San Francisco) is much higher than the rates DirecTV is required to pay for comparable marquee RSN programming it obtains from Comcast. DirecTV has stated, for example, that the per-subscriber rates it is

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310. *DirecTV Comments*, *supra*, at 20-21.
311. Timothy Dwyer, *Nats Caught in a TV Rundown*, WASHINGTON POST, June 28, 2005, at A1.

required to pay for CSN-West are higher than the rates it pays for FSN Bay Area—an RSN that carries live games for four men's professional sports teams.[312]

2. Denying Independent Programming Networks' Access to Comcast's Subscribers

141. Comcast gives preferential treatment to its affiliated, national sports networks, Versus and the Golf Channel, relative to unaffiliated sports networks. As of the third quarter of 2009, Comcast had approximately 23.8 million total subscribers,[313] nearly all of whom have access to Comcast's affiliated sports networks on Comcast's "Standard Service." Comcast carries its affiliated national sports networks, the Golf Channel and Versus, on a tier that reaches nearly 100 percent of its subscribers. In contrast, Comcast's Sports Tier reaches only 11.3 percent of its subscribers (equal to 2.7 million divided by 23.8 million). It is there that Comcast places unaffiliated sports networks.

142. Table 4 shows the tier on which sports programming appears in Comcast's channel lineup in the Washington, D.C. area in January 2010, which is generally representative of its carriage decisions in other parts of the country.

TABLE 4: SPORTS PROGRAMMING ON COMCAST BY TIER AS OF JANUARY 2010 (WASHINGTON, D.C.)

"Standard Service"	Affiliation	"Digital Classic"	Affiliation	"Sports Entertainment"	Affiliation
ESPN	No	ESPN Classic	No	Fox Soccer Channel	No
ESPN2	No	ESPN U	No	Fox College Sports	No
Golf Channel	Yes	MLB Network	Yes*	Tennis Channel	No
Versus	Yes	NBA TV	Yes**	CBS College Sports	No
SportsNet MA	Yes	NHL Channel	Yes***	GolTV	No
MASN	No^			Speed Channel	No
				Big Ten Network	No
				Horseracing Television	No
				TV Games	No
				NFL Red Zone	No^^

Sources: Comcast Channel Lineup, *available at* http://www.comcast.com/Customers/Clu/ChannelLineup.ashx (accessed on Jan. 4, 2010); affiliation is from 13th Annual Report, Appendix C, Table C-1; Comcast 8-K, filed 12/04/09 for the Period Ending 12/03/09, at 6.

Notes: * Comcast owns 8.3 percent of MLB Network. ** Comcast holds equity in NBA TV through its ownership in the National Basketball Association. *** Comcast owns 15.6 percent of the NHL Channel, and the League provides anchor programming for Versus. ^ MASN is carried subsequent to a settlement of a carriage complaint, as is the NFL Network, which is carried on

312. *See DirecTV Comments, supra* at 23-25.

313. Comcast Reports Third Quarter 2009 Results, Nov. 4, 2009, at 3.

Comcast's "Digital Starter" tier, which is Comcast's most broadly distributed level of digital service. ^^ Comcast also sells the HD version of the NFL Red Zone as part of its extra-charge HD package.

As Table 4 shows, *none* of the sports networks carried on Comcast's "Sports Entertainment" tier is affiliated with (or owned by) Comcast. In contrast, with the exception of ESPN channels—which have sufficient countervailing market power vis-à-vis Comcast by virtue of their significant sports holdings to obtain broad access for their networks—all of the sports networks that are carried on Comcast's "Standard Service" tier are either affiliated with (and owned by) Comcast (Versus, the Golf Channel, SportsNet Mid-Atlantic), or are carried by Comcast subsequent to the settlement of an FCC program-carriage complaint (MASN). For completeness, Table 4 also shows sports networks carried on Comcast's "Digital Classic" tier in Washington, D.C., which achieves greater distribution than its Sports Entertainment tier but less distribution that its Standard Service tier. On its Digital Classic tier, Comcast owns a minority equity stake in the MLB Network (8.3 percent), the NHL Network (15.6 percent), and NBA TV (through its equity stake in the National Basketball Association).[314] Moreover, the National Hockey League provides Versus its anchor programming (live professional hockey games). With the exception of the two ESPN networks on the Digital Classic tier, which again have countervailing market power, it appears that a sports network can avoid being relegated to Comcast's Sports Entertainment tier so long as Comcast is at least modestly involved in its success; significant involvement leading to outright ownership yields access to Comcast's Standard Service tier and all the associated benefits, including exposure to a much larger audience and a more desirable channel number.

143. As a consequence of Comcast's discriminatory tiering policy, an unaffiliated sports network is restrained in its ability to compete effectively for viewers, advertisers, and

314. Comcast Spectacor owns the Philadelphia 76ers, which jointly owns the National Basketball Association along with the other teams, and thereby owns part of the equity in NBA TV. See Comcast Corp. SEC Form 10-K for fiscal year ended Dec. 31, 2007, at 1.

programmers. Comcast is the largest MVPD in the United States, with roughly 24 million MVPD subscribers. Competition scholars have concluded that 20 percent of a market constitutes a significant foreclosure share.[315] The reason why 20 percent is considered critical is that, in the presence of economies of scale, missing out on such a large portion of the market can inflate a rival's average costs. Because Comcast's market share of roughly 25 percent of U.S. MVPD subscribers exceeds that 20 percent standard, economists typically would consider Comcast's exclusionary conduct here to be presumptively anticompetitive. Moreover, the actual foreclosure share may exceed Comcast's market share to the extent Comcast is acting in coordination with other vertically integrated MSOs as part of a reciprocal compensation strategy, or other MSOs are following Comcast's tiering strategy, or both.[316]

144. Economists have derived market conditions under which exclusionary conduct can harm competition. In particular, when markets exhibit economies of scale or when markets display network effects, exclusionary conduct can impose barriers to entry and expansion that make rivals smaller, causing them to be less efficient and therefore less capable of restraining the incumbent's prices.[317] This market condition appears to be satisfied here. By refusing or conditioning a programmer's access to its highly penetrated tiers, Comcast deprives rival sports

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315. *See* PHILLIP AREEDA, IX ANTITRUST LAW 375, 377, 387 (Aspen 1991) (indicating that 20 percent foreclosure is presumptively anticompetitive); *See also* HERBERT HOVENKAMP, XI ANTITRUST LAW 152, 160 (indicating that 20 percent foreclosure and an HHI of 1800 is presumptively anticompetitive).

316. *See* Jun-Seok Kang, Reciprocal Carriage of Vertically Integrated Cable Networks: An Empirical Study, Indiana University Working Paper, August 30, 2005, at 1 ("These [empirical] results make credible an underlying premise of a 30 percent national market share limit that the Federal Communication Commission established in 1993: namely, *that MSOs may tacitly collude in their carriage decisions*, having the effect of restricting market access to startup cable networks in which those MSOs have no ownership interest."). Moreover, Comcast appeared to act in concert with other cable operators in its dealings with the NFL Network. *See* Transcript of Record, NFL Enterprises LLC v. Comcast Cable Communications LLC, File No. CSR-7876-P, Apr. 16, 2009, 1277: 10-1279:10 (Paul Tagliabue testimony describing Comcast CEO Brian Roberts' suggestion that the NFL's relationship with the "cable industry" would not be "positive" on a going-forward basis.)

317. *See, e.g.*, Einer Elhauge, *Defining Better Monopolization Standards*, 56 STANFORD L. REV. 253 (2003).

networks of critical economies of scale.[318] Because many costs of the cable network (including program acquisition costs) are invariant to the number of subscribers, increasing a network's number of subscribers (and therefore increasing advertising and license revenues) reduces the cost of providing service on a per-subscriber basis. A review of the economic literature suggests that the scale economies associated with national television advertising are significant. Advertisers can receive better returns by advertising with larger audiences, and as a result, advertising rates generally increase with audience size.[319] Accordingly, the ads that smaller networks sell are sold at a significant discount disproportionate to the rates charged by their larger and more widely distributed competitors. National sports networks are highly dependent on advertising revenue. According to SNL Kagan, nearly half of total revenue for a national network is derived from advertising revenue; in contrast, advertising revenues comprise only 15 to 20 percent of total revenues for regional sports networks.[320]

145. A second potential motivation for Comcast's discriminatory conduct is that Comcast seeks to expand its footprint from golf, hockey, and bull riding—the sports content carried on its affiliated national sports networks—into complementary sports programming. That motivation is particularly salient here because Comcast's objective according to its 2008 Annual Report is to expand its reach into sports programming: "We have invested and expect to continue to invest in *new and live-event programming* that will cause our programming expenses to

318. *See, e.g.*, Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak Are Misguided*, 68 ANTITRUST L. J. 659 (2001)

319. *See, e.g.*, Johan Arndt & Julian L. Simon, *Advertising and Economics of Scale: Critical Comments on the Evidence*, 32 J. IND. ECON. 229, 231-2 (1983); Dong Chen & David Waterman, Vertical Foreclosure in the U.S. Cable Television Market: An Empirical Study of Program Network Carriage and Positioning, Oct. 2005, at 7. Advertisers may also consider factors such as the season and time of day. But these factors are not affected by Comcast's tiering decision.

320. Derek Baine, *Comcast sports networks: Opening the kimono on $2 billion in hidden value,* SNL Kagan, Oct. 8, 2009.

increase in the future."[321] Comcast's "Programming segment," which "consists primarily of [its] consolidated national programming networks, including E!, Golf Channel, VERSUS, G4 and Style," earned revenues of $1.4 billion in 2008.[322] The (upstream) programming division's operating cash flow grew at 28.3 percent in the second quarter of 2009, whereas its (downstream) cable division grew by only 4.1 percent.[323] With those rights on an exclusive basis, Comcast could seek higher carriage fees from its downstream rivals (DirecTV, Dish, and Verizon) as a means of raising rivals' costs. Alternatively, as the Commission has concluded in other contexts,[324] Comcast could deny that exclusive programming to its downstream rivals as a means of degrading their quality of service.

a. Failed Attempts to Extract Equity in Exchange for Carriage

146. Comcast has a long history of denying carriage for discriminatory reasons to unaffiliated sports networks such as MASN and the NFL Network. In both cases, Comcast sought to acquire the underlying programming of the unaffiliated sports networks on an exclusive basis. With respect to MASN, Comcast sought the rights to the Washington Nationals games from Major League Baseball. With respect to the NFL Network, Comcast sought the rights to eight live (Thursday- and Saturday-night) games from the NFL. When it failed to obtain

321. Comcast SEC Form 10-K, for the fiscal year ended Dec. 31, 2008, at 29 (emphasis added).

322. *Id.*

323. Comcast 2nd Quarter 2009 Results, Aug. 6, 2009, at 4.

324. *See* In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses, MB Dkt. No. 05-192, Memorandum Opinion and Order, released July 21, 2006, FCC 06-105, ¶ 118 ("One way by which vertically integrated firms can raise their rivals' costs is to charge higher programming prices to competing MVPDs than to their affiliated MVPDs."). *See also id.* ¶ 123 ("We find that the transactions [the Adelphia purchase and related cluster-driven swaps] would enable Comcast and Time Warner to raise the price of access to RSNs by imposing uniform price increases applicable to all MVPDs, including their own systems, by engaging in so-called 'stealth discrimination,' or by permanently or temporarily withholding programming. As commenters contend, such strategies are likely to result in increased retail rates and fewer choices for consumers seeking competitive alternatives to Comcast and Time Warner."); Federal Communications Commission, Sunset of Exclusive Contract Provisions, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, CS Dkt. Nos. 07-29, 07-198, Report and Order, rel. Oct. 1, 2007, ¶ 53 ("We also find that three additional developments since 2002 provide cable-affiliated programmers with an even greater economic incentive to withhold programming from competitive MVPDs: (i) the increase in horizontal consolidation in the cable industry; (ii) the increase in clustering of cable systems; and (iii) the recent emergence of new entrants in the video market place, such as telephone companies.").

what it sought, Comcast retaliated by refusing to carry MASN and the NFL Network on Comcast's digital tier. As noted in Table 4, Comcast ultimately settled these carriage disputes.

i. MASN

147. In 1981, the Baltimore Orioles were granted the television rights to the Washington area by Major League Baseball (MLB). When the Nationals (formerly the Expos) moved to Washington from Montreal for the 2005 baseball season, the Orioles agreed to share the territory and dropped their opposition to the franchise's relocation in return for control of local television broadcasts of the National's games. Comcast Executive Vice President David L. Cohen described the arrangement between the Orioles and MLB as "original sin."[325] The Orioles launched a new RSN called Mid-Atlantic Sports Network (MASN) to carry both the Orioles games (formerly carried on Comcast SportsNet Mid-Atlantic) and the Nationals games. Comcast refused to carry MASN in the Washington area. In addition, Comcast filed a complaint against MASN and the Orioles in Maryland Circuit Court to maintain the rights to Orioles games on Comcast SportsNet Mid-Atlantic. (Comcast's complaint was dismissed twice.) Asserting that Comcast's refusal to carry MASN was based on discrimination in favor of its own RSN, in June 2005, MASN filed a program-carriage complaint with the Commission.

148. When approving the acquisition of Adelphia by Comcast and Time Warner in 2006, the Commission confirmed that dominant MVPDs still had the ability to jeopardize competition in upstream programming markets, especially with regard to the foreclosure of unaffiliated RSNs. In particular, the Commission found that the (shared) acquisition of Adelphia would increase Comcast's incentive and ability to discriminate against unaffiliated RSNs.[326] To protect against this type of discrimination, the Commission imposed non-discrimination

325. Arshad Mohammed & Thomas Heath, *Comcast Will Air Nats Games, Ending Dispute*, WASHINGTON POST, Aug. 5, 2006, at A1.

326. *Adelphia Order* ¶¶ 114, 116, 189.

remedies in the form of commercial arbitration on Comcast (and Time Warner) that prevented Comcast from discriminating against independent RSNs.[327]

149. Later that month, the FCC found that MASN had made a "prima facie showing" that Comcast had discriminated against the network, and that Comcast had "indirectly and improperly demanded a financial interest" in the network in exchange for carrying it.[328] The FCC gave MASN the right to send the dispute to an arbitrator or an administrative judge.[329] Recognizing that it stood little chance to prevail in that setting, in August 2006, Comcast withdrew its case in the Maryland Circuit Court, and it agreed to carry the Nationals broadcasts for some 1.6 million Comcast customers in the Washington area.[330] As part of the agreement, MASN withdrew its carriage complaint at the FCC. One week later, Comcast announced that it would raise cable television rates by $2 a month for its 1.6 million Washington-Baltimore area customers because of the cost of carrying MASN.[331] MASN added the Orioles games to its network for the 2007 season. In 2009, MASN brought another carriage complaint to the FCC, alleging that Comcast discriminated against it by not carrying MASN in the Harrisburg and Tri-Cities DMAs. The dispute was also settled.

327. *Id.* ("We find that this strategy would be made less likely by the arbitration and program access conditions that we adopt but recognize that Comcast and Time Warner nevertheless may be more likely to succeed in foreclosing an unaffiliated RSN as a result of the transactions. As a result, consumers could be unable to view the RSN's programming or could have to pay higher costs for the programming. Accordingly, to prevent such behavior, we adopt a further condition requiring Comcast and Time Warner to engage in commercial arbitration with any unaffiliated RSN that is unable to reach a carriage agreement with either firm, should the RSN elect to use the arbitration remedy.").

328. Arshad Mohammed, *FCC Finds Possible Bias Against MASN by Comcast*, WASHINGTON POST, Aug. 1, 2006, at D1.

329. Arshad Mohammed & Thomas Heath, *Comcast Will Air Nats Games, Ending Dispute*, WASHINGTON POST, Aug. 5, 2006, at A1.

330. *Late Innings; For Nats' fans, a breakthrough: baseball on TV!* , WASHINGTON POST, Aug. 9, 2006, at A16.

331. Arshad Mohammed, *Comcast To Raise Rates for Nationals; Subscribers to Pay $2 a Month More*, WASHINGTON POST, Aug. 12, 2006, at D1.

ii. NFL Network

150. In 2006, the NFL elected to televise eight live NFL games per year on its network, NFL Network. In doing so, it declined the opportunity to assign those games to a rival sports network, including Comcast-affiliated Versus. In an apparent reaction to its failure to secure exclusive distribution rights for those games, Comcast moved the NFL Network from a digital tier to its Sports Entertainment Package shortly thereafter. The NFL Network initiated a carriage complaint before the Commission; separate contract litigation was initiated in a New York state court. In August 2009, the NFL Network and Comcast reached a settlement. Subsequent to that agreement, Comcast carried the NFL Network on Comcast's more popular Digital Classic or Digital Starter tiers,[332] increasing the NFL Network's subscribers on Comcast from two to eleven million.[333] In sum, given Comcast's prior discriminatory conduct vis-à-vis The Big Ten Network, MASN, and the NFL Network, and given the pressures applied by cable operators to the MLB Network, NBA TV, and the NHL Network to exchange equity for broader carriage, it is reasonable to infer that Comcast's discrimination here is motivated by a desire to extend its sports programming footprint into football.

iii. Big Ten Network

151. Comcast's dealings with the Big Ten Network, another unaffiliated sports network, reveal the same exclusionary pattern. In June 2008, a spokesperson for the Big Ten Network, an unaffiliated regional sports network, told the *Philadelphia Inquirer* that "Comcast wouldn't sign a deal *because the Philadelphia company* [that is, Comcast] *didn't own at least*

332. Brian Mackey, *Comcast settles dispute with NFL Network*, News-Leader, May 20, 2009.
333. Joe Flint, *DirecTV, Comcast fight over Versus distribution*, LOS ANGELES TIMES, Sept. 2, 2009.

part of the new network, and it was treating the new network differently than Comcast's own sports networks, Versus and the Golf Channel, which have limited audiences and low ratings."[334]

b. Successful Attempts to Extract Equity in Exchange for Carriage

152. I briefly review the pressures placed on unaffiliated sports networks to assign equity to vertically integrated cable operators in exchange for broader carriage. My review is not meant to be exhaustive; for example, although Comcast disclosed its direct ownership interest[335] in the NHL Network around the time[336] that it moved the network from the Sports Tier to a more broadly penetrated digital tier, the NHL anecdote is not reviewed here.

i. NBA TV

153. Comcast changed its tiering decision vis-à-vis NBA TV following a deal between the NBA and Turner, which gave Turner, a division of Time Warner, a share of NBA TV's profits. Comcast has an incentive to carry Time Warner's affiliated programming broadly to the extent that Time Warner would reciprocate by carrying Comcast's affiliated programming broadly.[337] In 1999, the NBA launched NBA TV, the league's television network.[338] As of the 2006-07 basketball season, NBA TV had only 12 million subscribers, as most cable operators, including Comcast and Time Warner, carried the network on a sports tier.[339] In November 2006, *Reuters* reported that "Time Warner owns a 2 percent stake in NBA TV and [NBA

334. Bob Fernandez, *Comcast, Big Ten reach pay-TV deal*, PHILADELPHIA INQUIRER, June 20, 2008 (emphasis added).

335. Comcast SEC Form 8-K, filed 12/04/09 for the Period Ending 12/03/09, at 6 (showing ownership of 15.6 percent of NHL Network).

336. The disclosure of Comcast's direct ownership was made in December 2009. *Id.* The NHL Network was re-tiered in the Washington, D.C. area around July 30, 2009. See Important News for Comcast Customers, June 2009.

337. Vertically integrated cable operators have been recognized to enter into reciprocal carriage agreements. *See* Jun-Seok Kang, *Reciprocal Carriage of Vertically Integrated Cable Networks*, Indiana University Working Paper (Aug. 30, 2005) at *i* ("The research supports the reciprocal carriage hypothesis by finding that: (1) A vertically integrated MSO is more likely than a non-vertically integrated MSO to carry the start-up basic cable networks of other MSOs; and, (2) a vertically integrated MSO is no more likely than a non-vertically integrated MSO to carry independent start-up basic cable networks.").

338. Barry Jackson, *MLB Network Read to Launch*, MIAMI HERALD, July 18, 2008.

339. *NBA sees bigger TV deal with partners*, REUTERS, Nov. 28, 2006.

Commissioner David] Stern said the cable company and the league are discussing an increase in that stake."[340] In August 2007, *Variety* reported that NBA TV was "relegated to digital sports tiers ... If Time Warner, which owns cable systems reaching more than 14 million subscribers, agreed to shift NBA TV from sports tiers to digital basic, the network would add millions of new customers."[341] In January 2008, while in the midst of renewal discussions with existing distributors, the NBA made a deal with Turner Sports, an affiliate of Time Warner Cable, that passed operations of NBA Digital, including NBA TV and NBA.com, to Turner Sports in an effort to revamp the entities' marketing and programming.[342] The deal granted Turner an undisclosed share of the profits from the NBA TV and the NBA's other digital services.[343] The NBA, which handled distribution negotiations for NBA TV, also planned to offer equity in the network to other MVPDs to secure adequate carriage.[344] Following these transactions, the NBA announced that it had secured—at great cost—distribution on Time Warner's digital basic tier.[345] In June 2009, NBA TV secured distribution to Comcast's 11 million "Digital Classic" subscribers, up from the 2 million Comcast subscribers it reached before the NBA deal with Turner Sports.[346] In the span of one year, in which the NBA surrendered equity in its network to a vertically integrated cable operator (Time Warner), NBA TV's distribution skyrocketed from 12 million subscribers in the 2008-09 season to 45 million subscribers in the 2009-10 season.[347]

340. *Id.*

341. John Dempsey, *NBA TV may bounce to Time Warner Media conglom could take over hoops network*, VARIETY, Aug. 21, 2007.

342. NBA.com Press Release, Turner Broadcasting and NBA Broaden Partnership with Digital Rights Agreement (Jan. 17, 2008) [hereinafter *NBA Press Release*].

343. Daniel Frankel, *NBA TV makes novel partnership; Turner Sports in charge of day-to-day programming*. DAILY VARIETY, Oct. 24, 2008.

344. Jon Lafayette, *NBA Drives to Hole; New Programs, Marketing Set for Network*, TELEVISION WEEK, Oct. 6, 2008.

345. *NBA TV reaches 45 million U.S. homes with carriage deals*, REUTERS, Oct. 22, 2009.

346. Deborah Yao, *Comcast Reaches Deal to Add NBA TV to Popular Digital TV Tier*, ASSOCIATED PRESS, Jun. 3, 2009; Bob Fernandez, *Comcast to Put NBA TV on 'Digital Classic' Tier*, PHILADELPHIA INQUIRER, Jun. 3, 2009.

347. *NBA TV reaches 45 million U.S. homes with carriage deals*, REUTERS, Oct. 22, 2009.

ii. MLB Network

154. Major League Baseball's television network, MLB Network, debuted in January 2009 with 50 million subscribers. The network "got the distribution [it] needed," according to president and CEO Tony Petitti.[348] MLB "learned from mistakes made in launching other single-sport networks" and the resulting distribution difficulties those networks faced.[349] The network "avoided such distribution problems"[350] by partnering with DirecTV and three leading cable companies, Time Warner, Comcast, and Cox. According to one sports analyst, "the reason that the MLBN has been able to enjoy a compatible arrangement with cable broadcasters is that *it gave up a share of its equity in order to reach that goal*."[351] DirecTV, Time Warner, Comcast, and Cox together acquired a third of the MLB Network. Unsurprisingly, each offers the network as part of its digital basic package.[352]

3. Tying Affiliated Internet Content to the Purchase of Cable Television Service

155. In this section, I briefly review Comcast's exclusionary conduct regarding online properties. Although the conduct relating to the Vancouver Olympics (reviewed below) was ostensibly committed by NBCU, it provides a harbinger of exclusionary strategies available to Comcast.

a. Fancast

156. Comcast has made some of the video content it distributes available online, but only to paying customers of its cable television services through its TV Everywhere model,

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348. Bill Doyle, *Tardy MLB Finally Debuts; New Network Largest Launch*, WORCESTER TELEGRAM & GAZETTE, Jan. 9, 2009 [hereinafter *Tardy MLB Finally Debuts*].
349. *Tardy MLB Finally Debuts*, *supra*.
350. *Id.*
351. Dianne M. Grasse, *MLB Network Rolls Out with Bait and Switch*, SPORTS CENTER, Jan. 9, 2009, *available at* http://www.sports-central.org/sports/2009/01/09/mlb_network_rolls_out (emphasis added).
352. *Tardy MLB Finally Debuts*, *supra*.

which is branded in Comcast markets as "Fancast."[353] Fancast provides access to network television shows and movies integrated with television-related news and a viewing guide for its video service.[354] During 2009, Fancast has had between two and five million unique visitors per month, or approximately 10 percent of the size of Hulu's audience.[355] As of March 2010, Fancast offered nearly 20,000 television shows and movies from two dozen channels, including HBO, Discovery, AMC, FX, and NBC.[356] Subscribers can use the service on three personal computers, but not on their televisions.[357]

157. The proper lens to view this conduct is a tie-in, with Comcast's cable television service serving as the tying product and the online content serving as the tied product. By tying access to its online content portfolio to the purchase of Comcast cable *television* service, Comcast may impair the ability of in-region MVPD rivals, including OTT providers, to compete effectively; by tying access to its online content portfolio to the purchase of Comcast cable *modem* service, Comcast may impair the ability of in-region rival ISPs to compete effectively. In particular, Comcast and other members of TV Everywhere can induce substitution away from fiber/DSL connections offered by telephone companies.

158. *BusinessWeek* explained how Time Warner and Comcast coordinated in the development of the TV Everywhere model. As Time Warner CEO Jeffrey Bewkes "watched one entertainment company after another put their TV shows and movies online for free . . . [he] began to fear that the pay TV industry would eventually find itself in the same untenable position

353. Fancast provides access to network shows and movies integrated with television-related news and a viewing guide for their video service. Information about Comcast's Fancast is available at http://www.fancast.com.

354. http://www.fancast.com/

355. Site statistics for Fancast available at http://siteanalytics.compete.com/fancast.com/?metric=uv.

356. *TV Everywhere*, BUSINESSWEEK, Mar. 10, 2010, *available at* http://www.businessweek.com/magazine/content/10_12/b4171041598366.htm.

357. *Id.*

as newspapers."[358] To exert the maximum pressure on content providers, Time Warner needed an MVPD partner; Bewkes reportedly floated his proposal to Brian Roberts, CEO of Comcast, in early 2009.[359] Bewkes prevailed on Roberts to allow customers to "tap into any cable channel's Web site as long as it was part of the TV Everywhere ecosystem."[360]

159. Collectively, Comcast and Time Warner possess significant buying power vis-à-vis independent cable networks. *BusinessWeek* explained that the cable operators were "using the $32 billion they pay content providers each year as leverage" to ensure that cable networks do not grant OTT providers such as Boxee and Roku access to their content.[361] Not all content providers are willing to go along with Comcast's design; in April 2009, Disney CEO Bob Iger explained that "preventing people from watching any shows online unless they subscribe to some multichannel service could be viewed as both anti-consumer and anti-technology, and would be something we would find difficult to embrace."[362]

b. 2010 Olympics

160. NBCU held the rights to the 2010 Winter Olympics in Vancouver, and it owns the rights to the 2012 Summer Games in London.[363] According to the *New York Times*, NBC's online Olympic portal, NBCOlympics.com, streamed fewer sports in the Vancouver games in real-time than it did in the Beijing games, "marking a step backward in online access to marquee events."[364] NBC's online portal aired only hockey and curling in real-time; every other event on

358. Ronald Grover, Tom Lowry & Cliff Edwards, *Revenge of the Cable Guys*, BUSINESSWEEK, Mar. 11, 2010, *available at* http://www.businessweek.com/magazine/content/10_12/b4171038593210.htm?chan=magazine+channel_top+stories.

359. *Id.*

360. *Id.*

361. *Id.*

362. Chris Albrecht, *Get ready to prove you paid for that video*, BUSINESSWEEK, Apr. 24, 2009, *available at* http://www.businessweek.com/technology/content/apr2009/tc20090424_766570.htm.

363. Cecilia Kang, *Merger plans for Comcast, NBC ignite battle over television access*, WASHINGTON POST, Dec. 4, 2009, at A1.

364. Brian Stelter, *A trickle of life streams on the web*, NEW YORK TIMES, Feb. 18, 2010, at 15.