ATTACHMENT B

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

In the Matter of	)
	)
Inquiry Regarding The Impact Of Certain	) MB Doc. No. 05-28
Rules On Competition In The Multichannel	)
Video Programming Distribution Marketplace	)

COMMENTS OF THE
PROFESSIONAL SPORTS LEAGUES

The Office of the Commissioner of Baseball ("Baseball"), the National Football League ("NFL"), the National Basketball Association ("NBA"), the National Hockey League ("NHL"), and the Women's National Basketball Association ("WNBA") (hereinafter collectively "Professional Sports Leagues" or "Leagues") submit the following comments in response to the Commission's Notice of Inquiry published at 70 Fed. Reg. 6593 (Jan. 25, 2005) ("Notice").

INTRODUCTION AND SUMMARY

1. Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809 (2004) ("SHVERA"), directs the Commission to conduct an inquiry regarding the "impact on competition" in the multichannel video programming distribution ("MVPD") market of several Commission rules. Those rules include the "Sports Rule," which requires cable operators and satellite carriers to "black out" certain sports programming on out-of-market (distant) broadcast signals when requested by the League or the affected team. *See* 47 C.F.R. §§ 76.111, 120 and 127-130 (2004). The Notice seeks comment on how the Sports Rule "affects competition in the MVPD market," including the impact (if any) that the Sports Rule may

have "on the ability of rural cable operators to compete with DBS in the provision of digital broadcast television signals to consumers." Notice, 70 Fed. Reg. at 6594. The Notice also seeks "recommendations for statutory changes" regarding the Sports Rule and its effect upon "competition in the MVPD market." *Id.*

2. As discussed below, the Sports Rule is vitally important to the Leagues. It allows the Leagues and/or their member clubs to prevent cable operators and satellite carriers from frustrating a decision (a) not to televise a particular home game over any medium or (b) to afford a local cable network exclusive rights to originate a telecast of a home game. There are significant administrative burdens and expenses associated with exercising the rights afforded by the Sports Rule. Nevertheless, the Leagues and/or their member clubs have exercised those rights consistently over the past thirty years because control over the telecasting of their games is critical to their effective operation. In structuring their television arrangements, the Leagues seek to maximize both their television audience and their local attendance. League economics, and the need to present the Leagues' products in the most exciting way possible, require a carefully-struck balance between these objectives. The Sports Rule helps achieve the necessary balance.

3. The Sports Rule does not impose any significant burden on cable or satellite operators. Indeed, the protection afforded by the Sports Rule is far more limited than that which the Leagues routinely negotiate in the marketplace regarding games <u>not</u> covered by the Sports Rule. If anything, the Sports Rule is too limited. The Rule's artificially narrow scope itself creates a significant competitive imbalance in the MVPD market – when Regional Sports Networks, for example, must compete against the

importation of distant signals. However, the Sports Rule does not affect the ability of rural cable operators to compete with DBS in the provision of digital broadcast television signals to consumers.

DISCUSSION

I. The Sports Rule Provides An Important Right Upon Which the Professional Sports Leagues Have Relied For The Past Thirty Years

4. The Commission adopted the Sports Rule for cable in its *Report and Order in Docket No. 19417,* 54 FCC 2d 265 (1975) ("1975 Report"). The Commission properly concluded that the Sports Rule is necessary to ensure the overall supply of televised sports programming and to help effectuate the policies underlying the Sports Broadcasting Act, 15 U.S.C. §§ 1291 *et seq.* *See* 1975 Report, 54 F.C.C. 2d at ¶¶ 2-3 and 43-58. In the Satellite Home Viewer Improvement Act of 1999, Congress directed the Commission to extend the Sports Rule to satellite carriers. *See* 47 U.S.C. § 339(b). The Commission did so in its Report and Order in Docket No. 00-2, 15 FCC Rcd 21688 (2000).

5. Pursuant to the Sports Rule, a sports club may require cable systems and satellite carriers to black out, within a 35-mile "specified zone," the telecast of that club's home game by a distant (out-of-market) broadcast station – provided that the home game is not televised by a local broadcast station. For example, the Sports Rule would allow Major League Baseball and the Philadelphia Phillies or the National Basketball Association and Philadelphia 76ers to require cable operators and satellite carriers to black out, within 35-miles of the FCC-determined "reference point" in Philadelphia, WGN-TV's broadcast of a game between the Phillies and the Chicago Cubs or between the 76ers and Chicago Bulls played in Philadelphia – as long as that game does not

appear live on a broadcast television station licensed to the Philadelphia market. Likewise, it would allow the National Football League, for example, to demand that a cable system or satellite carrier not import into the 35-mile specified zone around the home team the signal of a blacked out NFL telecast. To avail itself of Sports Rule protection, the League or club must send a notice to the cable operator or satellite carrier in the form and within the time frame prescribed by the Rule.

6. Under the compulsory licensing provisions of Sections 111 and 119 of the Copyright Act, 17 U.S.C. §§ 111 and 119, cable operators and satellite carriers may retransmit sports and other programming on distant broadcast stations without obtaining the consent of the affected sports clubs. Those provisions, however, require cable operators and satellite carriers to comply with rules adopted by the FCC, including the Sports Rule. Absent the Sports Rule, cable operators and satellite carriers would be able to exploit compulsory licensing to override a decision not to televise a particular home game. They likewise could nullify a decision to afford a (non-broadcast) Regional Sports Network exclusive rights to televise that game within the club's core market. Absent the Sports Rule, neither the Leagues, the clubs nor their rightsholders would have the right or ability to require cable operators and satellite carriers to delete any distant signal sports telecasts that would affect gate receipts or exclusive licensing arrangements.

7. Recognizing the importance of Sports Rule protection, the Professional Sports Leagues (on behalf of all their U.S. clubs) have invoked that protection during each of the past thirty years. Since 1975, for example, the Leagues have routinely identified, and sent Sports Rule notices to, hundreds of cable operators across the country. Since 2000, when the FCC first extended the Sports Rule to satellite, the

Leagues have sent Sports Rule notices to satellite carriers as well. The Leagues have also devoted significant resources to monitoring compliance with the Sports Rule and addressing any violations of that Rule. The entire process has entailed considerable administrative burden and cost for the Leagues. However, given the substantial importance that the clubs attach to the Sports Rule, the Leagues have consistently taken the steps necessary to ensure that their clubs receive the protection afforded by the Sports Rule.

II. The Protection Afforded By The Sports Rule Is Exceedingly Narrow And Far More Restrictive Than That Which Sports Leagues Routinely Negotiate In The MVPD Marketplace

8. As the Commission recognized in its 1975 Report, the Sports Rule has "minimal impact on present and future cable television viewers." 1975 Report, 54 F.C.C. 2d at ¶ 56. The Sports Rule in fact affords sports clubs exceedingly narrow protection. As a practical matter, it requires cable operators and satellite carriers to black out only a handful of telecasts in approximately three dozen geographically-confined areas. The overly limited scope of the Sports Rule is particularly evident when compared to the blackout protection that is routinely negotiated by the Professional Sports Leagues in arm's-length marketplace transactions with the satellite and cable industries. *See generally* http://www.directv.com/DTVAPP/see/SportsBlackout.dsp (visited February 21, 2005) (describing sports blackout provisions with which DirecTV must comply); http://www.dishnetwork.com/content/programming/blackout/faq/index.shtml (visited February 21, 2005) (same, for EchoStar); http://.www.beatcabletv.com/blackouts.htm (visited February 21, 2005) (same, for EchoStar).

9. For example, satellite carriers and cable operators may offer their subscribers a package ("MLB Extra Innings") of up to 60 out-of-market telecasts of Major League Baseball ("MLB") games each week – in addition to the MLB telecasts available on Fox, ESPN, ESPN2, TBS, a local Regional Sports Network (such as FSN), or a local over-the-air broadcast station. Satellite carriers and cable operators, however, must black out certain of the otherwise available games on MLB Extra Innings *throughout* the home television territories of the teams participating in those games. Likewise, the NFL's Sunday Ticket, a satellite package of Sunday afternoon NFL game telecasts, does not allow a blacked out game to be received by satellite subscribers in the home territory of the blacked out team. Whereas the home territories of Professional Sports teams generally extend well beyond 35 miles and in some cases may encompass several neighboring states, the Sports Rule permits blackouts only in a limited 35-mile zone around an FCC-determined "reference point" for the home club. The Sports Rule also affords blackout protection only to the home teams while the Leagues often negotiate blackout protection for both the home and visiting teams.

10. Furthermore, the Sports Rule permits clubs to provide exclusivity for particular games only to non-broadcast licensees – such as Regional Sports Networks – and not to local over-the-air broadcast stations. If a local over-the-air broadcast station televises live a club's home game, the Sports Rule does not permit the club to request a blackout of the distant signal telecast of that game. In contrast, Professional Sports Leagues typically negotiate blackout provisions that protect exclusive licensing arrangements with both broadcast and non-broadcast rightsholders. Thus, for example, satellite carriers and cable systems may not offer in either of the participating clubs'