ATTACHMENT C

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	)

REPLY 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 reply to comments filed in response to the Commission's Notice of Inquiry published at 70 Fed. Reg. 6593 (Jan. 25, 2005) ("Notice").

I. The Record Does Not Provide Any Basis For Diminishing The Already Limited Scope of The Sports Rule

1. In their initial comments, the Professional Sports Leagues explained that the Sports Rule is vitally important to the effective operation of the Leagues and their member clubs; that the Rule does not impose any significant burden upon cable operators or satellite carriers; and that the Rule does not affect the ability of rural or any other cable operators to compete with DBS in the provision of digital broadcast television signals to consumers. With the exception of the National Cable and Telecommunications Association ("NCTA"), no commenting party even mentioned the Sports Rule.

2. NCTA urged the Commission to initiate a rulemaking to "exempt" cable operators in "smaller and more rural markets" from having to comply with various rules,

including the Sports Rule. *See* NCTA Comments at 12. But the NCTA did not provide any basis that would support exempting such cable operators from the Sports Rule. NCTA did not offer (nor could it offer) any evidence that DBS subscribers are able to receive out-of-market sports telecasts that are blacked out under the Sports Rule for co-located cable subscribers. And it failed to produce any evidence that the Sports Rule has had any adverse impact on rural or small market cable operators or has impaired their ability to compete with DBS in any way.

3. NCTA did no more than assert that cable operators in smaller or more rural markets should be able to "fully serve customers with distant stations." *Id.* That solitary (and unfounded) assertion, which fails to distinguish rural or small market cable operators from any other multichannel video programming distributors, hardly supports initiation of a rulemaking to exempt such cable operators from the Sports Rule. *See MTS and WATS Market Structure*, 50 Fed. Reg. 43,707, 43711 (Oct. 29, 1985) (refusing to reverse rulemaking based on the unsupported assertions of a party).

4. In its comments at pp. 5-6, NCTA claimed that "DBS' carriage of broadcast signals is subject to a very different regulatory regime" than the one applicable to cable and that DBS can offer "multiple sporting events" in "white areas" that cable operators in those areas must black out pursuant to the Sports Rule. But that claim is simply wrong. The Sports Rule imposes the same fundamental blackout obligations on cable and DBS. *See Report and Order in CS Docket No. 00-2*, 15 F.C.C. Rcd. 21,688 ¶¶ 7 & 74 (Nov. 2, 2000). If a cable operator in a particular community is required to black out a distant signal telecast under the Sports Rule, the DBS operator serving subscribers in that community will likewise be obligated to black out that telecast. The Sports Rule

does not give DBS any regulatory advantage over cable operators in white areas or elsewhere.[1]

II. NCTA Has Misconstrued The Nature and Purpose Of The DBS Compulsory License

5. NCTA argued that DBS enjoys other regulatory advantages over cable television that Congress should rectify, based on DBS carriage of distant signals. NCTA implied that, under the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"), DBS carriers will be able to provide their subscribers with a distant network signal even where a subscriber is able to receive his or her local network station over-the-air. The proposed changes suggested by NCTA would lead to more out-of-market broadcast signals being distributed than is the case today. These changes need not be adopted because NCTA's claim that cable is at a disadvantage compared to DBS is based on a misinterpretation of the very limited compulsory copyright system for DBS carriage of distant signals in 17 U.S.C. § 119 (2005).

6. The distant-signal compulsory license was intended to allow the very few DBS households who were unable to receive a good quality, over-the-air signal from their local affiliate to still be able to receive network programming. In other words, it was meant to provide them with a single, lifeline network service unless and until they could receive their local network station, rather than access to multiple programming streams in *addition* to their local network affiliate. The need for this type of distribution

[1] NCTA's request for a Sports Rule exemption covering "rural" and "small" market cable operators is not only groundless but is also puzzling. As noted by the Leagues in their initial comments, virtually all of the Leagues' games are held in large cities, and the Sports Rule provides protection only within the 35-mile zone surrounding the reference point in those large cities. Thus, the Sports Rule is rarely applicable to cable operators in what might reasonably be considered "rural" or "small" markets.

is decreasing rather than increasing because virtually all the U.S. broadcast markets will be served by satellite carriers with local broadcast stations under the local-into-local license (17 U.S.C. § 122) within a matter of months. Once local-into-local is offered in an area, new subscribers will no longer be permitted to receive signals of multiple stations (distant and local) affiliated with the same network. As a practical matter, then, any differences between the cable and satellite distribution of broadcast signals will be diminished naturally as DBS providers offer local-into-local service in more and more areas – eliminating the need (competitive or otherwise) for the carriage of out-of-market network signals available to viewers via cable.

III. NCTA's Complaints About Copyright Royalty Calculations Are Meritless And Are Not, In Any Event, A Proper Subject Of This Proceeding

7. NCTA complains that "DBS enjoys a significant discount over cable for purposes of copyright royalty fee payments" under Section 111 of the Copyright Act, 17 U.S.C. § 111. *See* NCTA Comments at 10. According to NCTA, cable is disadvantaged because the definition of a "network" station in Section 119(d) of the Copyright Act, 17 U.S.C. § 119(d), is different than the definition of a "network" station in Section 111(f) of the Copyright Act. *See* NCTA Comments at 10-11. For several reasons, NCTA's complaint is off-base.

8. *First*, this is not the proper forum in which to evaluate NCTA's allegations concerning copyright royalty payments. Ironically, throughout Congress' consideration of the SHVERA, which authorizes the Commission to initiate the present proceeding, the satellite carriers claimed that *they* (not cable) were the ones disadvantaged by the differences between Sections 119 and 111 of the Copyright Act. In response to these claims, Congress directed the Copyright Office to provide a report that determines

whether the differences between Sections 111 and 119 in fact place either cable or satellite at any competitive disadvantage. *See* P.L. 108-447, Title IX, § 109. In contrast, Congress directed the Commission in this proceeding to conduct an inquiry that considers the competitive impact of only "retransmission consent, network nonduplication, syndicated exclusivity and sports blackout rules" – not copyright rules. *See* P.L. 108-447, Title IX, § 208(a).

9. *Second*, the statutory system for calculating cable royalties is completely different than the statutory system for calculating satellite royalties. *See, e.g.*, Reauthorization of the Satellite Home Viewer Improvement Act, 108th Cong. 44-45 (2004) (testimony of Fritz Attaway of the Motion Picture Association of America, Inc.) (describing the different payments made by cable systems and satellite carriers under their respective compulsory licenses). The only characteristic that they share in common is that both satellite carriers and cable operators pay a royalty that is well below fair market value. Because there are many significant differences in these systems and because virtually every cable operator pays a different per subscriber fee to carry broadcast signals, it is exceedingly difficult to make general comparisons about royalty obligations. Certainly, NCTA's selective focus on only one aspect of the different systems of royalty calculation (the definitions of "network stations), while ignoring all of the other aspects of these systems, is misleading.

10. *Finally*, although NCTA suggests that the differing definitions of "network station" afford DBS a competitive advantage, the actual structure of the two compulsory licenses belies that suggestion. Cable systems currently enjoy a much greater discount in their royalty rates when they carry network stations than do satellite

carriers. The royalty fee for cable carriage of a network station is only 25% of the fee for cable carriage of independent stations. In contrast, a satellite carrier currently pays a fee for the carriage of a network station that is roughly 80% of the fee that it pays for the carriage of non-network stations. *Compare* 17 U.S.C. § 111(d) (establishing network value of .25 of independent station value for cable systems) *with* 37 C.F.R. § 201.11 (establishing a $0.1485 network station royalty rate and $0.189 "superstation" royalty rate for satellite carriers). Furthermore, beginning in 2007, satellite carriers will pay a network station rate that is identical to the rate paid for other stations. *See* http://www.copyright.gov/carp/sat_rate_agreement.pdf. There is thus no reason that cable operators should have the competitive advantage of paying less for network signals than they pay for non-network signals.

IV. EchoStar's Request To Eliminate The Sunset On The Section 119 Compulsory License Is Misdirected.

11. EchoStar Satellite LLC ("EchoStar") noted in passing that the satellite compulsory license will expire on December 31, 2009 while there is no sunset on cable's compulsory license; it then urged the Commission to recommend that Congress make the Section 119 compulsory license permanent. *See* EchoStar Comments at 13. If anything, Congress should consider imposing a sunset on the cable compulsory license rather than removing the sunset on the Section 119 compulsory license; periodic reexamination of the compulsory license has the salutary effect of allowing Congress and all affected parties to evaluate the statutory provisions in light of technological, regulatory and policy developments. In any event, as explained above, the SHVERA directs the Copyright Office, and not the Commission, to consider whether differences in the compulsory licensing provisions (including sunset provisions) have any competitive impact. Thus,

EchoStar's complaint about the Section 119 sunset is not properly before the Commission in this proceeding.

Respectfully submitted,

Robert Alan Garrett
Christopher Winters
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

Counsel to the Office of the Commissioner of Baseball

Philip R. Hochberg
LAW OFFICES OF PHILIP R. HOCHBERG
11921 Rockville Pike, Suite 300
Rockville, MD 20852

Counsel to the National Football League, National Basketball Association, Women's National Basketball Association and National Hockey League

Of Counsel:

Thomas J. Ostertag
OFFICE OF THE COMMISSIONER OF BASEBALL
245 Park Avenue
New York, NY 10167
(212) 931-7800

March 31, 2005