

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Amendment of the Commission's Rules) MB Docket No. 10-71
Related to Retransmission Consent)
)
)

COMMENTS OF SPORTS FANS COALITION, INC.

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May 27, 2011

SUMMARY

Sports fans have become a political football in retransmission consent disputes. In the recurring smack-down negotiations between big broadcasters and big pay-TV companies, games are pulled right before the action starts, leaving fans in the cold. Fans who are vital to the success of sports and who have contributed through multiple public and private expenditures are treated like fumbled pigskins.

Without sports fans, there would be no sports media economy. The fans buy the tickets, watch the games, pay for their sports tiers, purchase their sports packages, and wildly support their teams. That support is reflected in the public goods granted by government to keep the games going. Broadcasters, who receive their licenses from the public at no cost, acquire television rights from professional sports leagues, who negotiate those rights under a special federal antitrust exemption enacted just for that purpose. The televised games often are played in stadiums and arenas built with taxpayer dollars or regulatory waivers. In addition to the public goods spent on sports, the fans themselves pay for sports programming with the legitimate expectation that they will have the ability to watch the games for which they pay. In return, the fans are punished, thwarted from watching the teams they love.

The Commission can and should do something. The Commission raised the possibility of waiving the network non-duplication and syndicated exclusivity rules during programming take-downs so that there might be alternative ways to receive key programming. The Commission also should waive the sports blackout rule in such circumstances. In doing so, the Commission would allow sports fans to watch a local game they otherwise would be unable to view, while spurring the broadcast and pay-TV companies to reach a negotiated solution.

In addition, the Commission should deem that when a broadcaster takes down a collegiate or professional sporting event shortly before game time, it has committed a “per se” violation of the good faith standard. The Commission has a long history of treating sports programming differently for a number of reasons. It should do so again here. Sports should not be used as a weapon during retransmission consent disputes.

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COMMENTS OF SPORTS FANS COALITION, INC.

Sports Fans Coalition, Inc. (“SFC”) is a non-profit public interest advocacy organization devoted to giving fans a voice in public policy debates impacting collegiate and professional sports in the United States. SFC’s members live in major urban centers and rural areas throughout the U.S. The organization is governed entirely by a volunteer board of directors, which includes former senior White House staff members from President Bill Clinton’s and President George W. Bush’s Administrations; sports writers; public interest lawyers; a former C.E.O. of a publicly traded company; and a former managing partner of a major accounting firm. All advisory committee members and contributors are publicly disclosed on SFC’s website, as are the corporate articles and bylaws.¹ SFC believes that sports fans are harmed by programming take-downs involving collegiate and professional sports and herein proposes measures the Federal Communications Commission (“Commission” or “FCC”) should take to protect fans.

¹ See www.sportsfans.org. See also John Branch, *Fan Advocate Seeks Edge in the Washington Game*, THE NEW YORK TIMES, Oct. 22, 2010, available at http://www.nytimes.com/2010/10/23/sports/23lobby.html?_r=1&ref=sports.

I. Sports fans have become a political football in retransmission consent disputes.

The record in this proceeding reveals a battle between broadcast media conglomerates and the pay-TV companies that distribute their programming. The Commission needs to protect a group of people who pay their bills and contribute to ratings but have become collateral damage in this corporate smack-down: sports fans.

Sports fans have become pawns in retransmission consent disputes. When a broadcaster wants to gain leverage in a retransmission consent negotiation, it threatens to take away games from sports fans. At the beginning of 2010, sports fans across the country narrowly missed losing the Sugar Bowl, the Fiesta Bowl, the Orange Bowl, and the NFL playoffs before FOX finally agreed to come to terms with Time Warner Cable and Bright House Networks.² In 2004, fans were caught in the middle of a major clash between EchoStar and Viacom/CBS in which fans' access to the Super Bowl and March Madness was at risk.³

More recently, a retransmission consent dispute between FOX and Cablevision prevented millions in the New York area from watching two World Series games and “a number of NFL

² See Brian Stelter, *Time Warner and Fox Reach a Cable Deal*, N.Y. TIMES, Jan. 2, 2010, at B1 (reporting that an eleventh-hour retransmission consent deal “covering Fox stations in New York, Los Angeles, Orlando and other markets, avert[ed] a blackout of the weekend’s college bowl games in millions of homes.”); Marva Hinton, *Will Fox Reach Deal with Bright House in Time for Sugar Bowl?*, WDBO.com, Jan. 1, 2010, available at <http://wdbo.com/localnews/2010/01/will-fox-reach-deal-with-brigh.html> (reporting, after a brief extension during talks between Bright House and Fox on the eve of the Sugar Bowl, that “[f]ootball fans are hoping that extension continues”). See also *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, ¶ 16 n.49 (rel. Mar. 3, 2011) (“*Notice of Proposed Rulemaking*”).

³ See Robert Manor, *Viacom, EchoStar Settle Things*, CHICAGO TRIBUNE, Mar. 12, 2004, available at http://articles.chicagotribune.com/2004-03-12/business/0403120344_1_echostar-communications-corp-dish-network-chief-executive-charlie-ergen (reporting that “Viacom early in the talks threatened to withhold the Super Bowl” from EchoStar’s subscribers); R. Thomas Umstead, *Kicking Dish in the Pants*, MULTICHANNEL NEWS, Mar. 14, 2004, available at http://www.multichannel.com/article/59130-Kicking_Dish_In_The_Pants.php (reporting that several members of Congress wrote letters to the parties expressing concern that their constituents would “lose access to CBS coverage of the National Collegiate Athletic Association men’s basketball tournament,” and that “March Madness is going to turn into March Anger” if Viacom pulled its CBS signals).

regular season games.”⁴ Sports fans did not care which “side” won in a retransmission negotiation dispute – they just wanted to see their games. As one local mayor put it,

The question shouldn’t just be, who is right, Fox or Cablevision? At some point the question becomes, ‘Who owns the World Series? Corporate interests, or the American people?’ Corporate interests need to get games back on the air, or the World Series needs to be taken away from those who can’t stop fighting and given back to the people.⁵

When it comes to retransmission consent disputes, the fans who are vital to the success of the game and who have contributed to its success through multiple public and private expenditures are treated like fumbled pigskins.⁶

Without sports fans, there would be no sports media economy. The fans buy the tickets, watch the games, pay for their sports tiers, purchase their sports packages, and wildly support their teams. That support is reflected in the public goods granted by government to keep the games going. Broadcasters, who receive their FCC licenses from the public at no cost, acquire television rights from professional sports leagues, who negotiate those rights under a special federal antitrust exemption enacted just for that purpose.⁷ The televised games often are played in stadiums and arenas built with taxpayer dollars or regulatory waivers.⁸ In addition to the

⁴ See Notice of Proposed Rulemaking ¶ 15.

⁵ See Mayors and Little League Baseball Leaders: Cablevision/Fox World Series blackout un-American, THE TRENTONIAN, (Oct. 29, 2010) (quoting Robbinsville, New Jersey Mayor Dave Fried as he spoke out on behalf of his community, part of the 3 million people denied the chance to see the first two games of the World Series because of the Fox-Cablevision retransmission consent dispute) available at <http://www.trentonian.com/articles/2010/10/29/news/doc4ccb2b584c484858889259.txt?viewmode=fullstory>).

⁶ When the subject is a loss of sports programming because of a retransmission dispute, our members sometimes resort to the online version of yelling (WRITING IN ALL CAPS AND USING LOTS OF EXCLAMATION MARKS!!!) when posting to our Sports Fans.org Facebook page or writing comments on articles posted at www.sportsfans.org. See e.g. <http://www.facebook.com/home.php#!/pages/Sports-Fans-Coalition/178810756924>. Sports fans “yell” on our sites because they feel no one is listening and they have no control over their access to games in retransmission consent disputes.

⁷ See 15 U.S.C. § 1291.

⁸ See Tom Ferrey, *South Bronx Neighborhood Taking Hit from New Stadium*, ESPN THE MAGAZINE, Sep. 19, 2008, available at <http://sports.espn.go.com/mlb/news/story?id=3598021> (reporting that “with the state chipping in for garages and the federal government allowing the aggressive use of tax-free construction

public goods spent on sports, the fans themselves pay for sports programming with the legitimate expectation that they will have the ability to watch the games for which they pay.

Despite fans' public and private contributions to sports, however, they are rewarded with threats and gamesmanship during retransmission consent disputes. The recurring threat of blackouts during these disputes causes significant uncertainty, frustration, anxiety, and confusion for sports fans. Fans must scramble to make alternate plans when disputes threaten to disrupt or block access to major sporting events. For example, as the FOX disputes went down to the wire in late 2010, fans did not know whether they would be able to watch College Bowl or NFL playoff games on their existing pay-TV service unless they switched providers in time for the games.

Compounding the threat to fans is the practice by media conglomerates of tying broadcast carriage rights with non-broadcast channels. This means that, for example, not only are games carried on one of the "Big 4" broadcast networks at risk, but so are games on cable/satellite sports channels. And in the event a blackout actually occurs, unprepared fans (or fans in areas without access to over-the-air signals) may end up missing the sporting event entirely. The game, once played, cannot be replayed; the excitement for fans of a live sports broadcast is lost forever. Sports fans do not care who "wins" in these disputes or how they get resolved. Fans simply want to avoid being held hostage as broadcasters battle over fees with pay-TV providers.

In its *Notice of Proposed Rulemaking*, the FCC states that "subscribers are the innocent bystanders adversely affected when broadcasters and MVPDs [Multichannel Video

bonds, the total public subsidy has grown to \$656 million" for the new Yankees Stadium); Patrick McGreevy, *Environmental Exemptions OKd for Football Stadium in City of Industry*, L.A. TIMES, Oct. 15, 2009, available at <http://articles.latimes.com/2009/oct/15/local/me-stadium15> (reporting that "the California Senate approved a measure . . . that exempts the [L.A. football stadium development] project from state environmental laws").

Programming Distributors] fail to reach an agreement to extend or renew their retransmission consent contracts.”⁹ Sports fans are among those innocent bystanders.

II. The Commission should waive the sports blackout rule during takedowns, in addition to waiving network non-duplication and syndication rules.

From the fans’ perspective, the best solution would be prohibiting the take-downs of professional or collegiate sporting events in the first place.¹⁰ Short of such a prohibition, however, the FCC has expressed its willingness to consider eliminating the network non-duplication and syndicated exclusivity rules during retransmission consent impasses.¹¹ The intent of waiving network non-duplication and syndicated exclusivity rules apparently is to give consumers an alternative means of receiving programming carried by the broadcaster whose signal was removed and to place competitive pressure on the broadcaster to make a deal, rather than simply play the competing pay-TV providers against one another. Under the proposed regulatory waiver system, when a broadcaster pulls its signal during a retransmission consent dispute, an MVPD would be permitted to bring in neighboring network and syndicated programming.

SFC believes that, if the Commission adopts this approach, it also should waive its sports blackout rule¹² during the take-down. If the Commission only waives the network non-duplication and syndicated exclusivity rules, then the MVPD that brings in a neighboring network affiliate still would have to comply with the sports blackout rule. Thus, if the local

⁹ *Notice of Proposed Rulemaking* ¶ 17.

¹⁰ The Sports Fans Coalition believes the FCC was incorrect when it expressed its belief that it did not have authority to extend the sweeps rule to sports during retransmission consent disputes. *See Notice of Proposed Rulemaking* ¶¶ 38-41. The “sweeps” rule is designed to protect ratings harm to broadcasters during a negotiation. 47 C.F.R. § 76.1601; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 ¶¶ 108-09 (1993) (implementing the “sweeps” rule). Why not protect fans, too? The Sports Fans Coalition believes that 47 U.S.C. § 154(i) grants the FCC this authority.

¹¹ *Notice of Proposed Rulemaking* ¶ 44.

¹² 47 C.F.R. §§ 76.111, 76.127.

NFL, NHL, or NBA game did not sell out and the league requires the local broadcaster to black out that game, then even though the local broadcaster has pulled its signal from an MVPD, the MVPD importing a neighboring network affiliate carrying the game must black out that game from the neighboring broadcaster's signal.

SFC ultimately would like to see the sports blackout rule eliminated entirely. Failing that, if the Commission's goal is to protect consumers and infuse competition into a system where one party, the local broadcaster, holds too much leverage, then the Commission should take the waiver concept to its logical conclusion: give the sports fans who could not watch the game under normal circumstances a chance to see that game, despite the broadcaster's take-down.

This approach would strengthen the hand of the impacted MVPD by giving it a product others can't sell, not even the local broadcaster that pulled the signal in the first place. The threat of a sports blackout rule waiver also will serve to level the proverbial "playing field" between the broadcaster and the MVPD during retransmission disputes.

In practice, the actual number of times when this could occur is relatively small. Like the potential waiver of the network non-duplication and syndicated exclusivity rules, however, the mere threat of the Commission waiving the sports blackout rule during retransmission consent disputes would give the parties extra incentive to reach a deal and not take games away from fans.

The proposed rule would work as follows:

- Assume that there is a retransmission consent dispute between a cable operator and a local CBS affiliate in Detroit, Michigan. It easily could be Jacksonville, Florida, Tampa Bay, Florida or any of the other markets around the country that have been experiencing unusually high rates of sports blackouts recently, but for this illustration, it is the Motor City.

- The local Detroit CBS affiliate refuses to renew its retransmission consent agreement or provide a temporary extension during negotiations and its signal therefore comes down from the local cable operator.
- The Commission, under its new rule, allows the local cable operator to carry a neighboring broadcaster's signal, including that broadcaster's CBS network and syndicated programming because the usual network non-duplication and syndicated exclusivity rules do not apply during the take-down.
- Shortly before a local Detroit Lions game, the NFL informs the local CBS affiliate that it must black out the game because the stadium did not sell out and, under its agreement with the NFL, the local broadcaster complies with the blackout.
- All other MVPDs that carry the local CBS affiliate's signal, including DIRECTV, DISH Network, and any other carrier, also must black out the game, pursuant to the Commission's sports blackout rule.
- The cable operator that lost the local CBS affiliate due to its retransmission consent dispute, however, need not black out the game. It can carry the game from the neighboring broadcaster's feed, assuming the neighboring broadcaster carries it, or from anywhere else, for that matter.
- The cable operator who lost the local broadcast signal due to a retransmission consent dispute just became the *only* television provider in Detroit, Michigan to carry the local Lions game.

This scenario probably strikes fear into the heart of every major broadcast and sports executive, not to mention some discomfort among the MVPDs who still would be subject to the sports blackout rule. On the other hand, if this scenario became reality, there probably would be a loud cheer from every sports bar in Detroit, because now the consumer—sports fans—would for the first time would get, rather than lose something of value during a retransmission consent dispute and the parties to the negotiation would have a new-found interest in coming to agreement. SFC stands with the fans.

III. The Commission has ample authority to waive the Sports Blackout Rule during programming take-downs.

The Commission has total discretion to amend, waive, or repeal the sports blackout rule. Congress never directed the Commission, by statute, to implement the rule. For almost thirty years, the sports blackout rule has vexed, annoyed, and infuriated American sports fans, who – through their elected representatives in Congress—never asked for the rule in the first place.

The sports blackout rule was the result of lobbying by the broadcast industry when federal courts found that professional football was violating anti-trust laws and Congress subsequently granted leagues a narrow anti-trust exemption for negotiating broadcast distribution deals. A federal court found in 1953 that professional football violated anti-trust laws by requiring all teams to grant their broadcast rights to the league, which in turn would bargain directly with broadcasters.¹³

After losing in the federal courts, however, the NFL successfully lobbied Congress for special interest legislation, the Sports Broadcasting Act of 1961 (“SBA”), which granted the NFL and other major professional sports leagues a limited exemption from antitrust laws, allowing exclusive TV contracts with broadcasters than include blackout provisions.¹⁴ The SBA is widely referred to as “special interest legislation” by legal scholars, judges, and commentators.¹⁵

The SBA only applies to free, over-the-air broadcasting, as the plain meaning of the statute and its legislative history make clear. The statute refers to “sponsored telecasting,”¹⁶ a term of art referring exclusively to broadcast television.¹⁷ The SBA’s legislative history reflects

¹³ *U.S. v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953); *U.S. v. NFL*, 196 F. Supp. 445 (E.D. Pa. 1961).

¹⁴ See 15 U.S.C. § 1291 *et seq.*

¹⁵ See, e.g., *Professional Sports Ltd. P’ship v. NBA*, 95 F.3d 593, 595-96 (7th Cir. 1996) (calling the Sports Broadcasting Act “a special-interest exception to the antitrust laws”); *Shaw v. Dallas Cowboys Football Club*, 1998 U.S. Dist. LEXIS 9896, No. 97-5184, at *12-13 (E.D. Pa. 1998) (“The Sports Broadcasting Act did not pronounce a broad, sweeping policy, but rather engrafted a narrow, discrete, special-interest exemption upon the normal prohibition on monopolistic behavior.”).

¹⁶ 15 U.S.C. § 1291.

¹⁷ *Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177, 1183 (S.D. Cal. 2002) (“‘Sponsored telecasting’ under the SBA pertains only to network broadcast television and does not apply to non-exempt channels of distribution such as cable television, pay-per-view, and satellite television networks.”); Ross C. Paolino, *Upon Further Review: How the NFL Network is Violating the Sherman Act*, 16 SPORTS LAWYERS JOURNAL 1, 9 (Spring 2009) (“The SBA only exempts pooled broadcasting arrangements in “sponsored telecasting” 55 - “a term of art which ... means [only] free network television.”

that "[t]he bill does not apply to closed circuit or subscription television."¹⁸ In fact, the NFL admitted to Congress in 1961 that the SBA covers only the free telecasting of professional sports contests and does not cover pay-TV.¹⁹

After enactment of the SBA, broadcasters and sports leagues petitioned the Commission to impose a sports blackout rule, such that when leagues demanded that a broadcaster black out a game, the cable operator must follow suit. They argued that Congress, in granting the anti-trust exemption, allowed leagues to demand local blackouts of games when a stadium did not sell out. Therefore, petitioners reasoned, if broadcasters must black out games under federally sanctioned league procedures, cable TV providers carrying the broadcast signal must do likewise or the broadcaster's exclusivity arrangement would be undermined.²⁰

The Commission initially resisted acting on the broadcasters' and leagues' request in 1971, instead asking Congress for guidance.²¹ In 1972, in the context of implementing a new regulatory regime for cable, the FCC issued a Notice of Proposed Rulemaking regarding cable sports programming and suggested that, in the absence of Congressional action, the Commission would promulgate rules.²²

¹⁸ *Shaw*, 1998 U.S. Dist. LEXIS 9896, at *10-11 (citing *Telecasting of Professional Sports Contests: Hearing before the Antitrust Committee of the House Committee on the Judiciary on H.R. 8757*, 87th Cong. 4 (Sept. 13, 1961)).

¹⁹ *See id.* at *11.

²⁰ *See Cable Television Service - Sports Programs*, Report and Order, 34 Rad. Reg. 2d 68340 ¶ 28 (P&F) (1975) ("*Sports Blackout Order*") (recounting the arguments of sports and broadcast interests, including the claim that "the public interest in viewing sports events over conventional television is also jeopardized by unrestricted cable television importation of sports events broadcast by distant television stations").

²¹ *In Re Commission Proposals for Regulation of Cable Television*, Opinion, 31 F.C.C.2d 115 (1971) ("Letter").

²² *See Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programs on Cable Television Systems*, Notice of Proposed Rulemaking, 36 F.C.C.2d 641 ¶ 2 (1972) (stating that "if Congress chooses not to legislate in this area, we believe that we should institute this proceeding").

In 1975, its requests for Congressional guidance unheeded, the Commission chose to move forward under its general authority.²³ Rather than using express statutory authority to justify the sports blackout rule, the Commission alluded to the SBA, an anti-trust statute.²⁴

Ironically, the only Communications Act amendment enacted during this period was an *anti*-blackout law that restricted sports leagues' ability to black out games at will.²⁵ The anti-blackout statute enacted in 1973 and cited by the Commission in implementing the sports blackout rule was far from a mandate to impose sports blackouts. To the contrary, it grew out of then-President Nixon's direct appeal to the NFL to end its blackouts of sold-out local games.²⁶

Even the Satellite Home Viewer Improvement Act of 1999, which led to the satellite sports blackout rule, only required that the cable rule also be imposed on satellite television when "technically feasible."²⁷ It was not a Congressional directive to impose the rule in the first place but rather a requirement to maintain regulatory parity between cable and satellite providers.

Thus, Congress never enacted a statute requiring the Commission to impose the sports blackout rule. The Commission is under no direct statutory obligation to impose the sports blackout rule and retains utter discretion as to whether, when, and how the rule shall apply. In this case, the Commission can and should add the sports blackout rule to the list of broadcaster exclusivity protections that would be waived during a retransmission consent-related programming take-down.

²³ See *Sports Blackout Order*, 34 Rad. Reg. 2d 68340.

²⁴ See *id.* ¶ 4. The Commission also reasoned that "cable systems should not be permitted to circumvent the purpose of the [SBA] by importing the signal of a station carrying the home game of a professional team if that team has elected to blackout the game in its home territory." *Id.* ¶ 11.

²⁵ See *id.* ¶¶ 25-27 (discussing P.L. 93-107).

²⁶ Dean Rosen, *Back to the Future Again: An Oblique Look at the Sports Broadcasting Act of 1961*, 13 ENT. L. RPTR., Vol. 13, No. 5 (Oct. 1991) at 14 (viewed online at: <http://elr.carolon.net/BI/V13N05.PDF>) (discussing P.L. 93-107, the anti-blackout statute, one of the two statutes cited by the Commission in its sports blackout rule implementing order).

²⁷ 47 U.S.C. § 339(b)(1)(B).

IV. The sports blackout rule works in conjunction with the network non-duplication and syndicated exclusivity rules and therefore all three rules should be waived simultaneously.

The Commission in 2005, under direction from Congress, reviewed the network non-duplication, syndicated exclusivity, and sports blackout rules. The Commission found that the sports blackout rule serves a function similar to the network non-duplication and syndicated exclusivity rules.²⁸ Furthermore, the sports blackout rule functions in the same manner as the network non-duplication and syndicated exclusivity rules.²⁹

The Commission concluded that no commenter pressed a case for repeal or modification of the sports blackout rules.³⁰ Likewise, the Commission noted that the Sports Leagues expressed their interest in maintaining the blackout rule, but they did not press for any changes.³¹

Because of the interrelated nature of the network non-duplication, syndicated exclusivity, and sports blackout rules, the FCC needs to carefully examine whether the sports blackout rule should be waived during retransmission consent disputes in addition to the related network non-duplication and syndicated exclusivity rules.³² To ensure the key FCC goal of preserving consumer access to programming, it makes sense to waive the sports blackout rule in situations where the network non-duplication and syndicated exclusivity rules are being waived.

²⁸ See Federal Communications Commission, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, ¶ 58 (Sept. 8, 2005) (“Like the network non-duplication and syndicated exclusivity rules, the sports blackout rule is intended to ensure that MVPDs do not undermine contractual arrangements between broadcasters and sports programming rights holders by importing sports programming that is subject to blackout in the local market.”).

²⁹ See *id.* ¶ 17 (“As with the network non-duplication and syndicated exclusivity rules, the sports blackout rule applies only to the extent the rights holder has contractual rights to limit viewing of sports events.”).

³⁰ See *id.* ¶ 58.

³¹ See *id.* ¶ 60.

³² Cf. *id.* ¶ 33 (“It is essential to bear in mind that the four rules considered in this Report [retransmission consent, network non-duplication, syndicated exclusivity, and the sports blackout rule] do not operate in a vacuum. . . . Because of the interplay among these various laws and rules, when any piece of the legal landscape governing carriage of television broadcast signals is changed, other aspects of that landscape also require careful examination.”).

V. The Commission should protect fans from media conglomerates' brass-knuckled tactics and deem sports take-downs during retransmission consent disputes to be "bad faith."

The Commission asks in this proceeding whether additional items should be added to the list of "per se" violations of the retransmission consent "good faith" standard.³³ Sports Fans Coalition believes that purposefully taking down sports programming in order to gain negotiating leverage should be a per-se violation of the good faith standard.

The timing of take-downs of important sports events has been allegedly used to create leverage in retransmission consent negotiations. Regarding the World Series take-down, Cablevision claimed that News Corp. "deliberately timed the deadline to black out WNYW and WWOR to ensure that Cablevision customers would be denied access to "must see" sporting events including Major League Baseball playoffs and the World Series to force Cablevision to accept its 'take it or leave it' demands."³⁴

The Commission has long treated sports programming as distinguishable from other types of programming, whether in the context of special rules, such as the sports blackout rule,³⁵ or merger conditions designed to prevent the anti-competitive hoarding of regional sports networks.³⁶ In this proceeding, the Commission similarly can draw the line at using sports programming as a negotiating tool. In addition to the competitive importance of sports programming, the massive public subsidies for stadium construction, along with sweeping

³³ *Notice of Proposed Rulemaking* ¶ 21.

³⁴ Letter from James L. Dolan, President and CEO, Cablevision, to William T. Lake, Chief, Media Bureau, Federal Communications Commission, at 2 (Oct. 25, 2010) available at http://www.fcc.gov/cablevision-letter_2010-25-10.pdf. See also *id.* at Attachment A (providing a chronology of Cablevision's dispute with News Corp. that explained how News Corp. failed to accept an extension of a prior agreement until November 15, 2010, which would have allowed the negotiations to take place after the World Series and noting that "News Corp. insisted that the agreement expire on October 15, just before the National League playoffs and the World Series").

³⁵ See *Sports Blackout Order*, 34 Rad. Reg. 2d 68340 ¶ 11 ("Sports events stand on a separate footing from other programming presented on commercial television.") (internal citations omitted).

³⁶ See, e.g., *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp., Ltd., Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, App. F, § III (2004).

exemptions from federal law enjoyed by professional and collegiate leagues make sports a different type of programming worthy of heightened consumer protection.

VI. Conclusion

Take-downs of sports programming during retransmission consent disputes needlessly punish sports fans. The Commission can and should do something. It has ample authority to take a number of actions. American sports fans would cheer for a referee that puts them back in the game.

Respectfully submitted,

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