Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
Petition for Rulemaking to Eliminate the Sports Blackout Rule	)	**MB Docket No. 12-3**

COMMENTS OF THE OFFICE OF THE COMMISSIONER OF BASEBALL

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The Office of the Commissioner of Baseball ("Baseball") submits the following response to the Commission's January 12, 2012 request for comment on the November 11, 2011 "Petition for Rulemaking" filed by the Sports Fans Coalition, Inc. and others ("Petition"). The Petition asks the Commission to eliminate rules that require cable operators and satellite carriers to "black out" certain sports programming on out-of-market (distant) broadcast signals ("Sports Rule"). *See* 47 C.F.R. §§ 76.111, 120, 127-130 & 1506(m) (2011). For the reasons stated below, the Commission should deny the Petition.

INTRODUCTION AND SUMMARY

1. The Petition reflects a fundamental misunderstanding of the Sports Rule in general and the applicability of that rule to Major League Baseball ("MLB") in particular. The Sports Rule militates against the deleterious effects of the government-imposed "compulsory licenses" that allow cable systems and satellite carriers to retransmit broadcast programming without the consent of program owners (17 U.S.C. §§ 111 & 119) -- compulsory licenses that the Commission has determined disserve the public interest and should be abolished. *See* Report in Gen. Docket No. 87-25, 4 FCC Rcd. 6711, 6712 (¶ 8) (1989) ("Compulsory Licensing Report"); *cf.* Pub. L. No. 111-175, 124 Stat. 1218, § 301

(directing the Copyright Office to report on mechanisms for phasing out the cable and satellite compulsory licenses). The Sports Rule does not provide a "public subsidy" to sports leagues, as Petitioners wrongly claim. *See* Petition at 2, 3 & 4. Rather, it prevents cable systems and satellite carriers from exploiting their government subsidies (the compulsory licenses) to interfere with market-based business decisions about the telecasting of games that sports clubs and leagues create at great effort, expense and risk. Not surprisingly, there is no mention of compulsory licensing in the Petition, which advances arguments as if the Section 111 and 119 compulsory licenses did not exist.

2. In order to secure the benefits of the Sports Rule, Baseball must incur significant administrative burdens and costs. Nevertheless, during each of the past thirty-six years, Baseball (on behalf of each of its U.S. clubs) has consistently exercised its rights under that rule -- just as the owners of other TV programming content exercise their comparable rights under the network non-duplication and syndicated exclusivity rules, which the Commission has adopted to counterbalance the marketplace distortions of compulsory licensing. In structuring their telecasting arrangements, MLB clubs seek to maximize their television audiences and their gate receipts; both are critical components of a club's and a league's success. League economics, and the need to present the club's product in the most exciting and attractive way possible to its fans, require a carefully-struck balance between these twin objectives. The Sports Rule helps achieve the necessary balance in light of the "artificial advantage" (Compulsory Licensing Report at 6734 (¶ 187)) that compulsory licenses afford cable systems and satellite carriers.

3. The Sports Rule should remain in effect as long as the cable and satellite compulsory licenses remain in effect. Indeed, the Sports Rule should be strengthened to

better comport with the marketplace that the compulsory licenses undermine. The Commission, however, should not consider any changes in the Sports Rule without a full understanding of the nature and effect of those changes on the Section 111 and 119 compulsory licenses. It would be particularly inappropriate to undertake the rulemaking sought by Petitioners during the pendency of litigation involving the scope of the Section 111 compulsory license and its applicability to online video distributors ("OVDs") -- litigation that has the potential either to reaffirm or to change dramatically the fundamental premises underlying the Commission's cable rules, including the Sports Rule.[1]

BACKGROUND

4. The Commission adopted the Sports Rule for cable systems in its *Report and Order in Docket No. 19417,* 54 FCC 2d 265 (1975) ("1975 Report"). In the Satellite Home

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[1] *See WPIX, Inc. v. ivi, Inc.*, 765 F.Supp.2d 594, 602-616 (S.D.N.Y. 2011) ("*WPIX*"); *CBS Broadcasting, Inc. v. FilmOn.com, Inc.*, Case No. 1:10-cv-7532-NRB (filed October 1, 2010 S.D.N.Y.) ("*FilmOn*").

On September 13, 2010, ivi.tv began streaming via the Internet to paying subscribers, without authorization, all the broadcast TV programming on approximately thirty distant signals from New York and Seattle, including numerous MLB telecasts. ivi soon added two dozen broadcast signals from Los Angeles and Chicago and announced its intention to offer even more signals from other markets. ivi claimed that it is a "cable system" entitled to the Section 111 compulsory license. Baseball and several other content owners filed a copyright infringement action against ivi. Shortly thereafter, FilmOn.com commenced a similar service, and various content owners filed a similar lawsuit. In *WPIX,* the district court entered a preliminary injunction against ivi, concluding that ivi is not a cable system. Likewise, the court in *FilmOn* enjoined FilmOn pending final judgment. The *WPIX* decision is on appeal to the U.S. Court of Appeals for the Second Circuit. Pending before the Commission is the related issue of whether OVDs are "multichannel video programming distributors" ("MVPD"), which must obtain retransmission consent to carry broadcast signals under Section 325 of the Communications Act. *See* In the Matter of Sky Angel U.S., LLC, 25 F.C.C. Rcd. 3879, 3882 (April 21, 2010).

Currently, each cable system imports, on average, only two distant signals. *See* Copyright Office Notice of Inquiry, 72 Fed. Reg. 19039, 19043 (April 16, 2007). The situation could radically change if the courts held that OVDs are "cable systems" eligible for the Section 111 compulsory license. OVDs have the technical ability to offer throughout the entire country, without significant expense on their part, literally hundreds of distant signals and therefore all or virtually all broadcasts of any sports league. The importation of such massive amounts of sports programming would support the need for significantly enhanced sports blackout protections as well as other changes in Commission rules related to compulsory licensing.

Viewer Improvement Act of 1999 ("SHVIA"), 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); *see also* 47 U.S.C. § 573(b)(1)(D) (directing the Commission to extend the Sports Rule to open video systems); In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, 11 FCC Rcd. 14639 (March 11, 1996) (implementing that statutory directive); 47 U.S.C. § 325(b)(2)(B)(iii) (exempting satellite carriers from the need to obtain retransmission consent of superstations provided that the carriers comply with the Sports Rule). In 2005, the Commission advised Congress that no changes in the Sports Rule are appropriate or necessary. *See* Retransmission Consent and Exclusivity Rules: FCC Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, 31 (September 8, 2005) ("Section 208 Report"), *available at* http://transition.fcc.gov/mb/policy/shvera.html (last visited February 13, 2012).

5. Pursuant to the Sports Rule, a sports club may require cable systems and satellite carriers to black out, within a limited geographic area, the telecast of that club's home game by a distant broadcast station – provided that a local broadcast station is not televising the same game. For example, the Sports Rule requires cable operators and satellite carriers to black out, solely within thirty-five miles of the FCC-determined "reference point" in Washington, D.C., superstation WGN-TV's (Chicago, IL) broadcast of a game between the Washington Nationals and the Chicago Cubs played in Washington, D.C. – as long as that game does not appear live on a broadcast television station licensed to the Washington, D.C. market. Once a club authorizes a local broadcast TV station to televise a particular home game, Sports Rule protection is lost; cable systems and satellite carriers may import pursuant to

compulsory licensing the visiting club's telecast of the same game, notwithstanding that the local broadcaster may have "exclusive" rights to televise the game.

6. Sports Rule blackouts are not automatic. To obtain the protection afforded by the Sports Rule, Baseball must (and does) incur the significant cost of identifying all of the potentially affected cable systems and games for each U.S. club and sending notices in the form and within the time frame required by the Sports Rule. Baseball also must (and does) devote significant resources to monitoring compliance with the Sports Rule and addressing any violations of that rule.

7. 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 281. Indeed, the scope of blackout protection afforded by the Sports Rule is much narrower than the protection that Baseball (and the other leagues) routinely negotiate in arms-length marketplace transactions unencumbered by the compulsory licenses. *See generally* http://support.directv.com/app/answers/list/kw/blackouts (last visited February 13, 2012) (describing sports blackout provisions with which satellite carrier DirecTV must comply). Among other things, market-negotiated blackouts typically extend to a team's entire home territory, rather than only the limited 35-mile zone in which the Sports Rule applies. Market-negotiated blackouts permit Baseball and other sports leagues to provide both broadcasters and regional sports networks ("RSNs") with the exclusivity that is essential to their success. To the extent that the Sports Rule falls well short of replicating marketplace-based blackout protection, the Sports Rule falls equally short of mitigating the injurious effects of the compulsory licenses discussed in the Commission's Compulsory Licensing Report and elsewhere.

DISCUSSION

8. Petitioners base their request for elimination of the Sports Rule on a series of hyperbolic assertions that are wholly unsupportable and inapt when applied to Major League Baseball. None of these assertions provide a proper basis for eradicating a rule that has well-served the public interest for many years, that Congress has directed the Commission to extend to new technologies on two separate occasions, that Congress embodied in the Communications Act retransmission consent provisions and that the Commission itself found no basis for changing as recently as six years ago. *See supra* paragraph 4.

9. There have been no "rampant television sports blackouts nationwide" (Petition at 6) of MLB games. To the contrary, the number and geographic reach of Sports Rule blackouts of MLB telecasts is relatively small. The Sports Rule, as it applies to Baseball, affects only cable and satellite subscribers within thirty-five miles of twenty-five cities with MLB teams. In 2011, these subscribers had access, on average, to telecasts of 151 of 162 regular season games of their MLB home team via local over-the-air flagship stations and RSNs. At most, therefore, the Sports Rule would affect the ability of a limited subset of cable and satellite subscribers to view distant signal telecasts of 11 of 162 regular season MLB games involving their home team. And that number is high because some or all of the remaining eleven games may have been away games (not subject to the Sports Rule) or they were available to these subscribers from sources other than flagship stations and RSNs (such as Baseball's national rightsholders FOX, ESPN, ESPN2, TBS and MLB Network).

10. The notion that the Sports Rule has "perpetuate[d] the practice of restricting the availability" of MLB telecasts "on various video platforms" (Petition at 2) is equally baseless. When the Sports Rule was adopted in 1975, MLB clubs televised fewer than 1,600 games; in 2011 the comparable number was more than 4,500 -- an increase of over 180%. There is simply

no shortage of MLB telecasts that the American public can view and no compelling need to repeal the Sports Rule to make MLB "more available." *Id.* at 3. There is no rational government policy for compelling an MLB club to offer cable and satellite subscribers access to more than 151 of the club's 162 games. And Petitioners' claim that the "leagues . . . resist fans' access to sports in new media" (*id.* at 12) wholly ignores the substantial and successful efforts that Baseball, through MLB Advanced Media, has made to provide its fans with access to MLB games over a variety of interactive media. *See* "MLB.TV Ready To Play Ball for 10th Season," *available at*, http://mlb.mlb.com/news/article.jsp?ymd=20120209&content_id=26632720&vkey=news_mlb&c_id=mlb (last visited February 13, 2012) (discussing the availability of MLB games on mobile devices (iPad or Android phones), computers, and game consoles such as Xbox, through programs such as MLB.TV and MLB.com At Bat).

11. It is also wrong to suggest that Baseball's "[t]icket sales now are dwarfed by television revenues" (Petition at 3) and that we are in "an era when television distribution revenues far outstrip ticket and concession revenues." *Id.* at 13. In any given year, ticket sales and television revenues account for roughly the same portion of Baseball's revenues and both are critically important to an MLB club's economic health; the inability to generate either sufficient gate receipts or local TV revenues can materially affect the stability of an MLB franchise, as history has demonstrated with both MLB and other sports franchises. Petitioners' claims about "exorbitant" increases in ticket prices, and the "negative impact on attendance" during the "recent recession" (*id.* at 2, 5 & 6), likewise misstate the facts. The average MLB ticket price for a regular season game in 2011 was $26.91, about 5.8% higher than it was three years earlier in 2008 ($25.43); that $1.48 increase was less than the rate of inflation, as measured by the change in the CPI between January 2008 and October 2011. MLB clubs also offered many tickets at prices as

low as $5, with little or no increase from prior years, in order to make attendance at MLB games as affordable as possible.

12. Attendance at MLB games has not been "flagging." Petition at 5. In 2011, that attendance stood at over 73 million compared to under 29 million in 1975 when the Commission adopted the Sports Rule. The 2011 attendance figure was higher than in 2010 and the fifth highest in MLB history. *See* "MLB Finishes 2011 With Fifth Highest Attendance Ever," *available at*, http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20110929&content_id=25386600&vkey=pr_mlb&fext=.jsp&c_id=mlb (last visited February 13, 2012). Overall, the last eight years make up the eight best-attended seasons in the history of Major League Baseball, including four record-breaking years. *Id.* Petitioners' notion that the Commission must eliminate the Sports Rule because of "flagging" attendance has no basis in fact, as reflected in Baseball's experience.

13. Petitioners also complain that "[t]he leagues *often* require a game to be blacked out from broadcast television if tickets to the game have not been sold out." Petition at 2 (emphasis added). That too is incorrect for Baseball. The vast majority of MLB games are not sold out. While there are specific instances in which MLB clubs do take account of gate attendance in making decisions about telecasting patterns (and invoking the Sports Rule), MLB clubs do not routinely black out games that are not sold out. MLB clubs could not possibly televise, on average, 151 of 162 games (as they did in 2011) if they refused to televise every game that is not sold out.

14. Petitioners state that the "public interest is served by the widespread televising of sports events" and that, in recognition of this fact, the Commission has adopted a policy of encouraging the growth of RSNs and their ability to provide unique sports programming. Petition

at 1 & n.2. But Petitioners request to eliminate the Sports Rule, if granted, would undermine this policy. Eliminating the Sports Rule would reduce the ability of RSNs to offer MLB games in their core geographic areas on an exclusive basis, a key consideration to the success of those RSNs. Rather than finding ways to undercut the exclusivity that MLB negotiates with RSNs, the Commission should be considering ways to prevent the use of compulsory licensing as a means to destroy that market-negotiated exclusivity and impair the viability of RSNs.

15. Petitioners further claim that elimination of the Sports Rule would not "add any regulatory compliance costs to the private sector." Petition at 3. That too is wrong. Cable systems are entitled to the Section 111 compulsory license only if they comply with FCC rules, including the Sports Rule. *See* 17 U.S.C. § 111(c)(1) ("[S]econdary transmissions...shall be subject to statutory licensing...where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission."). The Copyright Act makes clear that any change in the Sports Rule will trigger a proceeding before the Copyright Royalty Board to adjust the compulsory licensing rates that cable systems pay. *See* 17 U.S.C. §801(b)(2)(C) ("In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations . . . ."). As the Commission itself has recognized, the Section 111 royalty rates are below marketplace levels for many distant signals. *See* Compulsory Licensing Report at 6720 (¶ 69) ("In most cases, and on balance, logic and evidence suggest that the compulsory license rates paid by cable systems...are below market prices."). One can only presume that cable operators and satellite carriers would pass on to subscribers these rate increases

occasioned by any Commission change in its Sports Rule, regardless of whether they needed to do so in order to continue making a profit.

16. Petitioners contend that the Sports Rule "operates to extend the leagues' policy [on blackouts] beyond their private contracts" and that the leagues should "include in their contract negotiations the demand that their blackout policies be followed." Petition at 7-8; *see also id.* at 13 (Commission should not "prop up" sports leagues that are "free to negotiate with non-broadcast distributors to make sure that cable, satellite, and any other distributor obey the blackout policy"). That contention, however, fails to take account of the Section 111 and 119 compulsory licenses, which the Petition simply ignores. Baseball cannot negotiate the type of blackout protection provided by the Sports Rule (or any other blackout protection involving distant signals) because the compulsory licenses effectively trump any such negotiations; cable operators and satellite carriers need not black out any programming carried pursuant to compulsory licensing unless FCC rules require such blackouts.

17. Indeed, MLB clubs routinely grant RSNs exclusive rights to televise their games throughout the clubs' home territories. Yet, cable systems can destroy that exclusivity by importing telecasts of the very same games into the territories beyond the Sports Rule's 35-mile blackout zone. Likewise, if a club wanted to grant a broadcaster in its home territory exclusive rights to a particular game, it could not do so if that game is broadcast by the other club's flagship station. Cable systems and satellite carriers would be allowed under the compulsory licenses to import the other station's telecast throughout that home territory. Neither the anemic Sports Rule nor any other Commission rule would prevent cable systems or satellite carriers from nullifying the club's grant of exclusive rights to the original station.

18. In its Section 208 Report to Congress, the Commission suggested that "[s]ports leagues control . . . MVPD retransmission of their programming" because they can prevent broadcast stations from granting retransmission consent to MVPDs. *See* Section 208 Report at 31. Individual MLB clubs, and not the league, negotiate with individual broadcast flagship stations. Moreover, MVPDs need not obtain retransmission consent from any "superstation." *See* 47 U.S.C. § 325(b)(2)(B) & (D). And superstation WGN-TV alone, available to more than eighty percent of U.S. television households, will televise over 90 MLB games in 2012. In any event, the Commission concluded in its Section 208 Report that there should be no changes in the Sports Rule notwithstanding the potential for sports leagues to control blackouts indirectly through retransmission consent. *See* Section 208 Report at 31. There is no basis for reaching a different conclusion here -- particularly while questions remain as to the applicability of retransmission consent to online video distributors. *See supra* note 1.

19. Petitioners also ground their request for elimination of the Sports Rule on the refrain that the Commission should not permit sports blackouts "[a]t a time of persistently high unemployment, sluggish, economic growth and consumer uncertainty." Petition at 2 & 4; *see id.* at 2 (referring to "difficult economic times"); *id.* at 5 & 6 (referring to the "recent recession"); *id.* at 6 (referring again to "persistently high unemployment"). Sound communications policy, however, should not vary with changes in unemployment rates and economic forecasts. To the extent that the state of the nation's economy is relevant (as Petitioners mistakenly maintain), it is not materially different today than when the Commission adopted the Sports Rule in 1975. Indeed, the national unemployment rate reached nine percent in 1975, higher than the current rate of 8.3%. *See* http://data.bls.gov/timeseries/LNS14000000 (output options set from 1975 to 2012) (last visited February 13, 2012). And, as the Commission itself recognized, the country in the

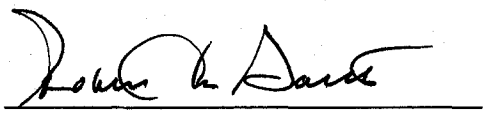
mid-1970s was in the midst of the "deepest recession since World War II coupled with continued high inflation and increase in interest rates." *See* 57 F.C.C. 2d 960, 962 (1976).

20. Baseball of course is not "oblivious to the economic plight of millions of Americans," as Petitioners suggest. *See* Petition at 9. As noted above, Baseball has sought to be responsive to its fans by establishing reasonable ticket pricing policies. *See supra* paragraph 11. But the relevant point is that changes in the country's economic climate should not dictate changes in FCC rules that ameliorate, to a very minor degree, the problems resulting from the government-imposed system of compulsory licensing.

CONCLUSION

For the reasons discussed above, the Sports Rule should not be eliminated. The Commission should not make any changes in the Sports Rule while the courts, in pending litigation, consider the scope of the Section 111 compulsory license and its applicability to online video distributors -- services that have the capability of importing a virtually unlimited number of sports telecasts on distant signals in contravention of numerous exclusive licensing arrangements negotiated in marketplace transactions. Alternatively, if the Commission initiates a rulemaking proceeding, Baseball respectfully requests that that proceeding consider whether to amend the Sports Rule so that it better comports with marketplace realities, unencumbered by the distortions of the government-mandated compulsory licenses.

Respectfully submitted,



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February 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2012, a copy of the foregoing Comments of the Office of the Commissioner of Baseball was sent by Federal Express overnight mail to the individuals listed below:

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