

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554**

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

To: The Commission

**OPPOSITION OF
THE NATIONAL FOOTBALL LEAGUE**

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February 13, 2012

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Introduction and Summary

The National Football League (the “NFL” or the “League”) opposes the petition for rulemaking to repeal the sports blackout rule, because this rule — like the network nonduplication and syndicated exclusivity rules — supports contractual provisions that are fundamental to broadcast television and thereby enable universal distribution of high quality content, including NFL football, to all Americans and to our fans — all at no cost to those fans. The NFL is unique among professional sports leagues in its commitment to free, over-the-air broadcasting. The NFL is the *only* sports league that provides local fans with access to *all* games, both regular season and playoffs, on free local television.¹ The NFL embraces a range of other platforms and technologies for the distribution of games and other content to fans, including through cable and satellite networks, websites, and mobile applications, but broadcast television distribution of NFL games remains at the core of the NFL’s media policies. The FCC’s sports blackout rule serves the public interest because it enables fans to enjoy programming made available by the NFL and its broadcast partners on free, over-the television

¹ In rare exceptions, just 16 games last year out of 256 regular season games, local games are blacked out under the League’s blackout policy and as supported by the FCC’s sports blackout rule, which is discussed in greater detail herein.

while also promoting the excitement of a live game with full stadiums, a hallmark of the NFL and one that the League has worked vigorously to ensure for decades.

Much of the Petition's argument is directed not at the Commission's blackout rule, which Petitioners seek to repeal (though not for the benefit of our fans who depend on broadcast television), but on the NFL's blackout policy. As explained below, that policy is rooted in the same concerns that prompted Congress to adopt the Sports Broadcasting Act and remains vital today.² The Commission's blackout rule also remains vital, because it reinforces contractual obligations that cannot be achieved in the market and that serve the public interest.³ The sports blackout rule has served the public interest for nearly four decades and has been affirmed repeatedly by Congress and by the Commission, as recently as 2005, because in the long run it benefits our fans. There is no argument nor evidence in the Petition that would justify the Commission reversing course and taking actions that go against Congressional intent and that would harm our broadcast partners and our fans, especially those who depend on free, over-the-air television. Accordingly, the Commission should not propose to repeal the rule.

I. THE FCC'S SPORTS BLACKOUT RULE BENEFITS VIEWERS AND SERVES THE PUBLIC INTEREST BY SUPPORTING BROADCAST TELEVISION.

The FCC's sports blackout rule provides a key tool for enforcing contractual rights on the distribution of games. In that regard, the rule sits alongside the network non-duplication rule and the syndicated exclusivity rule in protecting the broadcast television model by helping to enforce contractual relationships that cannot otherwise be protected in the market,

² Pub. L. No. 87-331, 15 U.S.C. §§1291-93.

³ 47 C.F.R. §§ 76.111, 76.120, 76.127-30.

primarily because of the compulsory copyright.⁴ By reinforcing the contractual rights negotiated by the NFL and its broadcast partners, the sports blackout rule enables the League to achieve its overall media strategy of enabling fans of all teams to enjoy football for free, if that is what they want, while also protecting the investment of our broadcast partners.

A. The FCC’s Sports Blackout Rule Benefits Viewers by Supporting Broad Distribution of Games on Broadcast Television.

The NFL negotiates with the CBS, FOX, and NBC broadcast television networks for carriage of its games. The League recently reconfirmed its commitment to broadcast television, and to those fans who want to enjoy NFL football for free, by entering into significant extensions of its agreements with the CBS, FOX, and NBC television networks that ensure that the NFL will remain on broadcast television through the 2022 season. The NFL seeks to manage the display of its games on broadcast television consistent with its long-term media policies. One of the most important policies, which goes back to the origins of the Sports Broadcasting Act, is to promote fan attendance and to maximize the in-stadium experience of supporting fans cheering on a team, and for that reason the NFL has a local blackout policy if the game is not sold out 72 hours in advance. (The blackout does not affect the broadcast of the game in the visiting team’s market or other markets.) Contrary to the suggestion in the Petition, such instances are relatively rare, with only 16 local blackouts last season out of a total of 256 regular season games, or just 6%.⁵ The overall trend shows a substantial reduction in blackouts from

⁴ The Sports Fan Coalition (SFC) has been clear about its goal. The SFC’s comments in the FCC’s retransmission consent proceeding made clear that it objected to the blackout rule because of its linkage to the retransmission consent rule. Comments of SFC, MB Docket No. 10-71, at 5-6 (May 27, 2011) (explicitly seeking to “strengthen the hand” of MVPDs during retransmission consent negotiations). The SFC apparently seeks to serve only sports fans who rely on cable television services.

⁵ Only four clubs experienced blackouts: Cincinnati, Tampa Bay, Buffalo, and San Diego. The impact of the sports blackout rule is further reduced in markets where distant signals are not (continued...)

historical levels. In 1974, which marks the season fresh in mind when the FCC first adopted rules on sports blackouts, 59% of games were blacked out. That figure dropped through the 40% range in the 1980s, and into the 30% range for much of the 1990s, which was when Congress was directing the FCC to extend the blackout rule to satellite. During this past decade, the figure fell to the 10% range in the early part of this decade. Since 2005, on average fewer than 6% of games have been blacked out each year.

These numbers show that the League's decades-long commitment to promoting each week of the NFL as an event that attracts wide fan support is working, both for fans in the stadium and fans watching on television. Attendance is up and ratings are up, and the NFL believes that those trends are directly related. We work closely with our broadcast partners to give our fans a high quality product that is available for free, and we think the current system is working and should not be altered.

B. It Would Be Impractical to Achieve This Goal Via Private Contract.

The Petition asserts that the FCC's sports blackout rule is unnecessary because the same goal could be accomplished through private contract.⁶ That claim is wrong and misapprehends the interplay of the current contractual framework and copyright law. The Commission found in 2000 that "[t]he network non-duplication, syndicated exclusivity, and sports blackout rules ... generally protect exclusive contractual rights that have been negotiated between program providers and broadcasters or other rights holders. These exclusive contractual rights are potentially threatened by cable systems that are capable of importing duplicative

available in the first place. For example, neither DirecTV, DISH Network, nor the dominant cable operator in the Cincinnati and Dayton markets (Time Warner) and the Lexington market (Insight) offers distant CBS, FOX, or NBC signals.

⁶ Petition at 8.

programming from distant sources *beyond the control of the contracting parties.*⁷ The Commission's rules thus support the broadcast television model and remain necessary because these protections cannot be achieved reliably or efficiently, let alone exclusively, in the marketplace. The Commission's conclusion in 2000 remains true today and helps to keep sports programming on broadcast television, available to all viewers.

The compulsory copyright licenses granted by Sections 111 and 119 of the Copyright Act permit cable and satellite operators to retransmit the signals of distant broadcast stations without obtaining the consent of the sports leagues whose games are carried on those stations. Thus, where a distant station has given its consent to be retransmitted into a local market, the rights-holder's ability to manage how its games appear in the local market would be frustrated by the compulsory copyright regime, in the absence of the sports blackout rule. The law giving MVPDs a compulsory copyright takes rights away from programming owners, who in a completely market-based system would control when and where their programming is shown. The network non-duplication, syndicated exclusivity, and sports blackout rules protect rights-holders' valid interests in managing the televising of their programs. Those opposed to the FCC's sports blackout rule are trying to pick and choose: they want to keep the compulsory copyright but at the same time they contend that rules that restore rights that otherwise would belong to program owners should be repealed.

Because of the compulsory copyright, obtaining the ability to effectuate a blackout through private contracts would entail substantial cost and effort, the rewriting of

⁷ See *Implementation of the Satellite Home Viewer Improvement Act of 1999*, Report and Order, 15 FCC Rcd 21688, ¶ 3 (2000) (emphasis added); see also *id.* ¶ 22 (“Congress directed the Commission to make the [satellite] rules ‘as similar as possible’ to the cable rules and to protect the contractual exclusivity rights purchased by broadcasters and sold by program rights holders.”).

literally hundreds of contracts, extensive monitoring and after-the-fact enforcement efforts, and yet still would not be completely effective. The NFL contracts with the CBS, FOX and NBC networks for broadcast distribution and thus lacks privity with the local network affiliates that carry the games and with the MVPDs that retransmit the broadcast signal. In order to assure that a MVPD does not import a game carried by a distant station when the game is blacked out on the local broadcast station, the League would need to ensure that all of the other parties involved in the distribution of its games are contractually bound to honor the League’s sports blackout policy. The contractual relationships that would need to be modified include those between:

1. *The NFL and the television networks* (which recently were extended through the 2022 season);
2. *The CBS, FOX, and NBC television networks and their network affiliates* (of which there are hundreds, many of which may not be due for renegotiation and renewal for several years); and
3. *The network affiliates and the MVPDs* (which also will have varying expiration dates, and for which the renegotiation process would be complicated by the fact that MVPDs likely would resist inclusion of any contractual alternative to the sports blackout rule).

Because MVPDs can take advantage of the compulsory copyright regime to circumvent a sports league’s decision not to televise a game locally, and because of the complexities, costs, and uncertainties associated with contractual alternatives to the sports blackout rule, it is simply not accurate to say that a sports league can achieve its objective with private negotiations. The Commission correctly reached this conclusion in 2005 when it advised Congress that the sports blackout rule—like the network nonduplication and syndicated exclusivity rules—ensures 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.”⁸ Accordingly, the Commission told Congress that the rule should be preserved.⁹ The Petition brings forth no new argument or fact to alter the Commission’s 2005 conclusion.

II. THE NFL’S BLACKOUT POLICY IS ROOTED IN THE FINDING BY CONGRESS IN THE SPORTS BROADCASTING ACT THAT PROMOTING GAME ATTENDANCE HELPS THE SPORT AND THE FANS.

For over half a century, Congress and the Commission have recognized that sports blackout policies such as the NFL’s serve legitimate purposes and are in the public interest. As noted above, Congress and the FCC reached this conclusion even when the League’s percentage of blacked-out games was much higher than the 6% it was last season. Sports blackout policies, supported by the FCC’s sports blackout rule, promote live attendance and thus improve the stadium experience. The FCC’s sports blackout rule enables teams to promote fan attendance without having local broadcast blackouts circumvented by MVPDs, and for that reason the Commission found, and we agree, that the rule “assure[s] the continued availability of sports telecasts to the public.”¹⁰ The Commission concluded that “the ultimate effect of frustrating local blackouts might be to reduce overall sports telecasts. . . . Thus, the games would be available to fewer television viewers, contrary to our communications policy and the sports broadcasting policy of Congress.”¹¹

⁸ *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 WL 2206070, ¶ 58 (2005).

⁹ *Id.*

¹⁰ *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*, Report and Order, 54 FCC 2d 265, ¶ 54 (1975) [hereinafter “1975 Sports Blackout Order”].

¹¹ *Id.* ¶ 57; *id.* ¶ 63 (stating that the rule serves the public interest and “follows the sports telecasting policy which has been established by Congress”).

The Commission's concern in 1975 about a reduction in overall sports telecasts presaged a debate about sport migration that the Commission examined after the 1992 Cable Act.¹² Since then, the migration of sports to cable television networks has been pronounced, with every other major sport moving a majority of its regular season games (and indeed, many playoff games) to cable television networks. The NFL stands in sharp contrast to this trend -- with the recent renewal of television contracts, the NFL has ensured that our fans can see their local games and playoff games for free on broadcast television until at least 2023. The migration to cable television networks that has characterized so many other sports leagues has not changed the NFL's fundamental strategy because our media policy, embraced by our broadcast partners and reinforced by the FCC's rules, can be accomplished with broadcast television.

Fan engagement cannot be taken for granted in professional sports. The goal of fan engagement reflects the NFL's view of its relationship with the viewing public. The NFL tries to make each game, of which there are relatively few in comparison to other professional sports, a special event with a broad audience. The League's blackout policy is designed to promote broad attendance and to make each game a special event. Anyone who has been at a basketball or football game in a half-filled arena versus one packed with tens of thousands of cheering fans will attest to the qualitative difference in the experience, regardless of the quality of play of the teams. In fact, the excitement that one feels in a packed arena or stadium translates onto television, and thus improves the television viewer's experience. So for both the fans in the stadium *and* the fans watching on television, a packed house matters. The NFL's blackout

¹² See Sports Programming and Migration Study and Reports, Section 26 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (directing the Commission to study sports migration); *Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992*, Final Report, 9 FCC Rcd 3440 (June 30, 1994).

policy is designed to achieve the goal of maximizing attendance and the stadium experience, and the League believes that the policy has worked very well over the past five decades.

In adopting the Sports Broadcasting Act (“SBA”), Congress recognized that promoting attendance is a legitimate policy, and the sports blackout rule helps achieve that goal.¹³ The SBA expressly permitted blackouts “within the home territory of a member club of the league on a day when such a club is playing a game at home.”¹⁴ As the Commission pointed out in adopting the sports blackout rule, teams have a legitimate interest “in protecting their home gate receipts from the potentially harmful financial effects of invading telecasts of their games from distant television stations.”¹⁵ Without the rule, cable systems could “circumvent the purpose of the law by importing the signal of a station carrying the home game of a professional

¹³ The Petition asserts that the SBA was “special interest legislation.” Petition at 14. The NFL has explained why that characterization is erroneous and how the SBA benefits the public. *See Amendment of the Commission’s Rules Related to Retransmission Consent*, Reply Comments of the National Football League at 5-9 (MB Dock. No. 10-71; June 27, 2011). The SBA applies to all professional sports leagues. Congress acted to allow the NFL to do what its then-rival, the AFL, as well as the NBA, NHL, and MLB, already did to some degree: pool the television rights of the member clubs and negotiate package broadcast contracts with the networks, sharing the resulting revenues among the member clubs and supporting the viability and competitiveness of small- and mid-size market teams. The NFL alone lacked this right due to an aberrational ruling by a single district judge.

¹⁴ 15 U.S.C. § 1292. *See also 1975 Sports Blackout Order* ¶ 45 (“In 1953 Judge Grim found that it was reasonable for the NFL to require home area blackouts when member teams were playing at home, and this practice was specifically approved in P.L. 87-331.”). In 1973, Congress prohibited agreements preventing the telecast of home games when the tickets actually had sold out 72 hours before the game. P.L. 93-107 (1973). Congress did not extend this provision after its statutory sunset following the 1975 season, and the NFL has continued to honor its commitment not to blackout such games.

¹⁵ *1975 Sports Blackout Order* ¶ 55; *see also id.* ¶ 57 (“The potential loss of gate receipts resulting from these importations could force sports clubs to extend their blacked out zone of protection to include all distant stations which may be carried by local cable television systems. Thus, the games would be available to fewer television viewers, contrary to our communications policy and the sports broadcasting policy of Congress.”).

team if that team has elected to blackout the game in its home territory.”¹⁶ Accordingly, the Commission determined that the sports blackout rule “is consistent with the policy established by Congress and helps to assure the continued availability of sports telecasts to the public.”¹⁷

The Congressionally-recognized goal of promoting fan attendance—which helps to improve the quality of the stadium experience for television viewers and fans in attendance alike—remains important today. Indeed, in 1999 Congress explicitly required that the FCC extend the cable sports blackout rule to satellite operators in order to reinforce these goals.¹⁸

In short, the League’s blackout policy, and the Commission’s sports blackout rule, not only protects contractual provisions, it also promotes the stadium experience of live, exciting games, and it ensures that every game is an event. This policy has worked well for the NFL, its broadcast partners, and its fans over the past three decades. The FCC should not alter its rules.

¹⁶ *Id.* ¶ 11.

¹⁷ *Id.* ¶ 54. *See also id.* ¶ 53 (“We believe that a rule restricting cable television sports importations in a manner consistent with these judicial and Congressional pronouncements would be in the public interest and would reflect Congressional policy as applied to today’s sports practices.”).

¹⁸ *See* § 339(b)(1)(A) of the Communications Act of 1934, as amended by § 1008 of the Satellite Home Viewer Improvement Act of 1999 (requiring Commission to extend sports blackout rule to satellite operators’ retransmission of the signals of nationally distributed superstations and of the signals of network stations, to the extent technically feasible and not economically prohibitive). *See also* H. Rep. No. 106-86 at 10 (“[T]he Committee *reasserts* the importance of protecting and fostering the system of television networks as they relate to the concept of localism To that end, the Committee has adopted ... sports blackout provisions to protect local broadcasters’ program exclusivity rights”) (emphasis added); *id.* at 9 (the bill “protects local broadcaster programming exclusivity rights through imposition of ... sports blackout [rules] modeled after the rules applicable to the cable industry”).

III. REPEAL OF THE SPORTS BLACKOUT RULE WOULD NOT END BLACKOUTS.

The Petition errs when it concludes that repeal of the blackout rule would curtail blackouts.¹⁹ That shows a profound misunderstanding of the rule. The sports blackout rule does not require a local television station to blackout games, nor would its repeal authorize a station to carry a game that has been blacked out by the rights-holder. Rather, the rule prevents cable and satellite providers from carrying a game locally when the over-the-air broadcast has been blacked out. In the absence of the rule, the local television station still would be required to black out the game if required to do so by the rights-holder, and viewers that rely on free, over-the-air broadcast television still would not be able to view the game.²⁰ Thus, local households that rely on over-the-air television would not benefit from repeal of the rule. Some of the signatories to the Petition are longtime supporters of broadcast television's free service to low-income Americans, and yet repeal of the rule would do nothing to benefit those Americans. The clear beneficiary, obviously, would be the MVPDs, such as those who back the Sports Fan Coalition.²¹ They would stand to gain because the contractual and compulsory copyright challenges described above would make broadcast television distribution more difficult, expensive, and uncertain and accordingly would make cable network distribution a more appealing prospect. The losers would be the sports teams and leagues, who would lose the

¹⁹ Petition at 3.

²⁰ MVPD subscribers in markets with no distant signals also would not be able to view the game.

²¹ See David Goetzl, "FCC Asks for Comment on Sports Blackout Rule," *MediaDailyNews* (Jan. 12, 2012) (citing Verizon and Time Warner support for the SFC), available online at <http://www.mediapost.com/publications/article/165727/fcc-asks-for-comment-on-sports-blackout-rule.html>.

ability to manage their games; the broadcasters; and in the long run, our fans, who would be saddled with higher costs and restrictions imposed by MVPDs.²²

* * *

The Petition provides no basis to reverse the Commission’s long-standing sports blackout rules. It cites no policy change from Congress with respect to the importance of local broadcast stations and the need to protect them from imported distant signals, nor does it highlight any factual difference with respect to the implementation of the sports blackout rules over the past thirty-five years. To the contrary, as noted above, the only relevant factual change in the past four decades is that local NFL game blackout have been dramatically reduced – a fact that undermines any need for a change. For all these reasons, the NFL urges the Commission not to change the regulatory framework that has respected the rights of copyright holders and the integrity of our local broadcast television system when it comes to valuable sports programming distributed through free, over-the-air television.

²² Programming disputes between an MVPD and a cable sports network have caused basketball and hockey fans in New York for the past several weeks to miss the games of their local teams. *See* Matt Flegenheimer, “Desperate in TV Fight, Some Knicks Fans Buy Tickets,” *New York Times* (Jan. 22, 2012) (“Since New Year’s Day, the MSG channels, which carry games for the Knicks, the Rangers, the Devils and the Islanders, have been unavailable to the 1.7 million Time Warner Cable customers in the metropolitan region and parts of upstate New York.”).

Respectfully submitted,

THE NATIONAL FOOTBALL LEAGUE

By:

A handwritten signature in black ink, appearing to read "Gerard J. Waldron", written over a horizontal line.

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February 13, 2012

CERTIFICATE OF SERVICE

I, Angela Patterson, a secretary at the law firm of Covington & Burling LLP, do hereby certify that on this 13th day of February, 2012, I caused a copy of the foregoing "Opposition of the National Football League" to be sent via first-class U.S. Mail, postage prepaid, to the following:

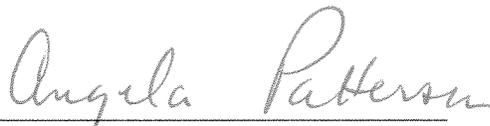
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