

**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

**REPLY COMMENTS OF  
THE NATIONAL FOOTBALL LEAGUE**

The FCC’s sports blackout rule serves the public interest and should not be repealed, as the National Association of Broadcasters (“NAB”) and the Office of the Commissioner of Baseball (“Baseball”) confirm in their comments.<sup>1</sup> The FCC’s sports blackout rule ensures wide availability of sports games on free, over-the-air television; more broadly, the rule, coupled with the network non-duplication and syndicated exclusivity rules, supports the public interest in maintaining free, broadcast television as a viable means of receiving popular sports programming such as NFL football.

The comments filed in support of repeal do not warrant extensive reply. Petitioners’ comments are copied almost verbatim from their initial Petition; we addressed all of their arguments in the NFL’s opening comments. The only other submission offering substantive comments supporting repeal -- from a group of academic economists -- is fundamentally flawed, principally because it overlooks the effect of the compulsory copyright and the impact of repeal of the blackout rule on the broadcast television model.<sup>2</sup>

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<sup>1</sup> Comments of NAB, MB Docket No. 12-3 (Feb. 13, 2012); Comments of Office of the Commissioner of Baseball (“Baseball Comments”), MB Docket No. 12-3 (Feb. 13, 2012).

<sup>2</sup> Certain Senators filed comments support the Petition and also discussing retransmission consent, which is beyond the scope of this proceeding.

Elimination of the sports blackout rule “would hurt local broadcasters and their viewers and could accelerate the migration of popular sports programs from free to pay TV,”<sup>3</sup> a fact ignored by the Petitioners and completely glossed over by the economists. As NAB states, repeal of the FCC’s sports blackout rule would harm broadcasters and their viewers by undermining the broadcast television model, which depends on high quality programming to attract revenues that in turn are invested in local news and other valuable programming.<sup>4</sup> In addition, NAB asserts that repeal of the rule could prompt some sports leagues to migrate games away from over-the-air television, where games can be viewed for free by any viewer, to pay television platforms.<sup>5</sup> Because the FCC’s sports blackout rule supports the accessibility of games on free, local television and also supports broadcasters’ investments in local news and other programming, the rule helps sports fans and other viewers.

In their zeal to “get rid of unnecessary regulation,” the economists simply dismiss these consequences, arguing that the NFL could achieve through private contracts the same result now achieved by the sports blackout rule.<sup>6</sup> But like the Petitioners, the economists view the FCC’s sports blackout rule in a vacuum. They ignore that the blackout rule is intertwined with the copyright regime -- in particular, the compulsory copyright for cable and satellite operators’ retransmission of distant signals.<sup>7</sup> The compulsory copyright would undermine attempts at a private contractual alternative to the sports blackout rule, even if such a contractual solution

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<sup>3</sup> NAB Comments at 2.

<sup>4</sup> *Id.* at 6-7 (asserting that the Commission’s exclusivity rules “support local broadcasters’ investment in high quality, diverse information and entertainment programming,” including the substantial investments needed to provide local news and other services to local communities).

<sup>5</sup> *Id.* at 7.

<sup>6</sup> Sports Economists Comments (Roger Noll, *et al.*) at 19, MB Docket No. 12-3 (Feb. 13, 2012).

<sup>7</sup> NAB Comments at 8; Baseball Comments at 2-3, 10-11.

could be implemented despite its many costs and complexities.<sup>8</sup> As we explained in detail in our initial comments, it is not realistic in this context to conclude that a rights-holder can control the importation of distant signals by contract.<sup>9</sup> The FCC’s sports blackout rule guards crucial rights that must be protected in light of the non-market-based compulsory copyright.<sup>10</sup>

Moreover, as the NAB has recognized and the economists ignore, because the compulsory copyright strips rights-holders of the ability to control distribution of their games, “sports leagues wishing to retain control over distribution of their content would have an incentive to move to pay platforms where the compulsory license would not undermine their private agreements.”<sup>11</sup> Thus, the Petitioners are simply wrong in claiming that repeal of the sports blackout rule would increase the availability of games;<sup>12</sup> NAB asserts that the more likely consequence would be a shift of games to less accessible, more expensive platforms, with adverse consequences both for sports fans who cannot afford the expense of subscribing to a pay-TV service and for local stations and viewers generally.<sup>13</sup>

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<sup>8</sup> Baseball Comments at 9-10.

<sup>9</sup> NFL Comments at 4-7, MB Docket No. 12-3 (Feb. 13, 2012) (detailing the hundreds of contracts that would need amendment to effectuate a blackout and why that effort still could be ineffective).

<sup>10</sup> *See, e.g.*, Baseball Comments at 1 (noting that the rule helps to mitigate the effects of the “government-imposed” compulsory copyright licenses); *id.* at 2 (“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”).

<sup>11</sup> NAB Comments at 8.

<sup>12</sup> Petition at 3.

<sup>13</sup> *See* NAB Comments at 8-9. In addition, the Baseball Comments note that repeal of the sports blackout rule would trigger a reassessment of the compulsory licensing royalty rates, with the costs of any increased rates passed on to pay-TV subscribers. *See* Baseball Comments at 9-10.

The economists acknowledge that most games sell out and that only a few games (six percent) were blacked out in the last season.<sup>14</sup> They also acknowledge that “the pricing policy of most NFL teams seems to be to set the price to guarantee that the games will be sold out,”<sup>15</sup> and that “teams set prices so that ticket demand equals or even exceeds seating capacity.”<sup>16</sup> This underscores the League’s decades-long fan-friendly policies that seek to maximize stadium attendance while also maximizing television distribution.<sup>17</sup> Moreover, on those rare occasions when games do not sell out, encouraging stadium attendance is a valid, important interest, as Congress and this Commission repeatedly have recognized over many years.

Thus, the economists miss the mark when they assert that “[i]f televising games substantially reduced attendance, one would not expect that teams would televise all or nearly all of their home games.”<sup>18</sup> Most teams televise all or nearly all of their games because such games are sold out. What is at issue here, however, is both the small number of games that do not sell out *and* the long-term interest of the League in maximizing the stadium experience for our fans in attendance and those watching on television.<sup>19</sup> Televising non-sold out games in the home

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<sup>14</sup> Sports Economists Comments at 5 (noting that almost all NFL games sell out and that only 16 games were blacked out in 2011); *id.* at 13 (“nearly all [NFL] teams sell out every game”).

<sup>15</sup> *Id.* at 13.

<sup>16</sup> *Id.* at 14.

<sup>17</sup> This conclusion by the economists that blackouts are relatively rare and that teams set ticket prices to encourage sell-outs, rebuts two of Petitioners’ erroneous claims -- that there have been “rampant television sports blackouts,” Comments of Petitioner at 7, and that fans are being priced out of games. *Id.* at 5-6.

<sup>18</sup> *Id.* at 16.

<sup>19</sup> The NFL uses many technologies to improve the fan experience, from mobile apps to putting the Super Bowl online -- the most watched online video event ever. The NFL’s leadership in this area is well recognized. *See* Thad Novak, “Super Bowl 2012 Live Stream,” Bleacher Report (Feb. 4, 2012) (concluding that putting the Super Bowl online “puts the league ahead of its major competitors when it comes to using the Internet to its advantage”), available at [http://bleacherreport.com/articles/1053642-super-bowl-2012-live-stream-online-strategy-puts-nfl-ahead-\(continued...\)](http://bleacherreport.com/articles/1053642-super-bowl-2012-live-stream-online-strategy-puts-nfl-ahead-(continued...))

team's market undermines the goal of encouraging a packed stadium full of cheering fans year after year. The FCC's sports blackout rule supports the sports leagues' legitimate interest, and the interest of our fans and our broadcast partners.

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For the reasons stated in our initial comments and above, as well in the comments of Baseball and the NAB, the Commission should preserve the sports blackout rule, which serves sports fans, the broader viewing public, and the broadcast television market generally.

Respectfully submitted,

**THE NATIONAL FOOTBALL LEAGUE**

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of-pro-sports-curve. It is thus absurd for Petitioners to claim that the NFL has “resist[ed] fans’ access to sports in new media.” Comments of Petitioners at 13.

## **CERTIFICATE OF SERVICE**

I, Kathryn Bowers, a secretary at the law firm of Covington & Burling LLP, do hereby certify that on this 28th day of February, 2012, I caused a copy of the foregoing "Reply Comments of the National Football League" to be sent via first-class U.S. Mail, postage prepaid, to the following:

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A handwritten signature in black ink, appearing to read 'K. Bowers', is written above a horizontal line.

Kathryn Bowers