



July 27, 2012

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **MB** Docket No. 12-3

Dear Ms. Dortch:

I provided yesterday an electronic copy, via e-mail, of the attached ex parte filing to the following people: Sherrese Smith and Lyle Elder, office of Chairman Genachowski; Erin McGrath, office of Commissioner McDowell; Dave Grimaldi, office of Commissioner Clyburn; Holly Saurer, office of Commissioner Rosenworcel; Courtney Reinhard, office of Commissioner Pai; and Sarah Whitesell, Media Bureau. I also spoke by telephone today with Holly Saurer, summarizing the contents of the filing and the history of Sports Fans Coalition.

Sincerely,

_s_____

David R. Goodfriend



July 26, 2012

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MB Docket No. 12-3

Dear Ms. Dortch:

The National Football League (“NFL”) recently implemented a major change in its blackout policy that merits attention as the Commission considers in this docket eliminating the Sports Blackout Rule. We believe that this change is a step in the right direction, acknowledges the outdated nature of existing local sports blackout practices, and indicates greater blackout flexibility by sports leagues than they previously had indicated on this docket. Some NFL teams, however, have opted out of the revised policy, leaving in place the current problematic blackout practice in some of the hardest-hit markets. Meanwhile, the nearly 40-year-old Sports Blackout Rule continues to prop up the NFL’s local blackout practices. For these reasons, we propose that the Commission **amend the Sports Blackout Rule such that the rule sunsets automatically after two years**, unless the professional sports leagues and their allies in the media industry prove on the record that the rule still is necessary to serve the public interest, convenience, and necessity.

The NFL’s recent policy change was striking in that the league had not made major changes to its blackout policy since Congress intervened in the early 1970’s.¹ NFL rules previously

¹ The NFL originally blacked out local games even when there were sell-out crowds, until Congress enacted a short-term statute allowing blackouts only when a stadium did not sell out. The NFL maintained that practice after the statute sunsetted. See Comments of Sports Fans Coalition, Inc.; National Consumers League; Public Knowledge; League of Fans; Media Access Project, MB Doc. No. 12-3, at 12 (citing press reports of the NFL’s change); see also

required 100% of non-premium tickets to be sold at least 72 hours in advance of kickoff in order for the game to be shown on local television. On July 2nd of this year, the Wall Street Journal reported² – and the NFL later confirmed³ – that in May, NFL owners agreed to relax the local blackout rule so that games with as low as 85% of non-premium tickets sold can be televised in the local market. However, individual teams must determine their own blackout threshold – anywhere from 85% to 100% -- and adhere to that number the entire season. Moreover, if ticket sales exceed the threshold that owners set, 50% of the revenue from those tickets must be split with visiting teams, compared to the normal level of 34%. This means individual teams face a dilemma – set the threshold too low and give away more revenue to the rest of the league, or set it too high and black out local fans.

NFL team owners in markets hardest hit by local blackouts last season appear to be responding unevenly to the recent policy change, and it is unclear exactly when teams must make a final decision. The Tampa Bay Buccaneers announced that they will lower their threshold to 85%, while the Indianapolis Colts, San Diego Chargers, Jacksonville Jaguars and Buffalo Bills have announced they will not change their own policies. NFL spokesman Greg Aiello initially told the *Buffalo News* that teams had until Sunday, July 15, to decide their individual blackout policies,⁴ while the *Palm Beach Post* reported that teams must make a final decision by August 9.⁵

This turn of events makes at least two things clear: First, the statements by the NFL and others in this proceeding that local blackouts must be maintained to preserve the financial health of the league⁶ are belied by the NFL's own actions. By loosening their blackout policy, the NFL demonstrates that the league can maintain its impressive financial strength while keeping more games on the air.

Moreover, the NFL's actions seem to underscore the assertion by sports economists in this proceeding that there is no economic evidence that blackouts lead to greater ticket sales.⁷ The NFL has not provided data to the contrary.

Comments of Sports Economists (Noll et al.), MB Doc. No. 12-3, at 4-5 (summarizing history of the NFL's blackout policy).

² See Kevin Clark, *Game Changer: NFL Scrambles to Fill Seats*, THE WALL STREET JOURNAL, July 2, 2012, available at: <http://online.wsj.com/article/SB10001424052702303561504577495083707417526.html>.

³ See *NFL eases local TV blackout restrictions for upcoming season*, NFL.COM, July 2, 2012, available at: <http://www.nfl.com/news/story/09000d5d82a406ee/article/nfl-eases-local-tv-blackout-restrictions-for-upcoming-season>.

⁴ See <http://www.buffalonews.com/city/capital-connection/washington/article944711.ece>.

⁵ See Ben Volin, *Dolphins plan to do 'everything we can' to prevent TV blackouts in 2012*, PALM BEACH POST, July 12, 2012, available at: <http://www.palmbeachpost.com/news/sports/football/dolphins-guarantee-that-home-games-will-not-be-blacked-out/nPsBR/>.

⁶ See Opposition of the National Football League, MB Doc. No. 12-3, at 7 (“Sports blackout policies, supported by the FCC’s sports blackout rule, promote live attendance. . .”).

⁷ See Comments of Sports Economists, MB Doc. No. 12-3, at 1 (“Academic research supports the conclusion that local television blackouts have little or no effect on ticket sales or attendance for the game that is being televised. Local blackouts of home games harm consumers without producing a significant financial benefit to teams”).

Second, the effects of the policy change cannot be fully understood until the regular season is underway. With some teams opting in to the new policy and others opting out, and with the 85% threshold not yet applied during an actual season, it remains to be seen whether this policy change will have any material effect at all, or turns out to be a Trojan Horse in shoulder pads.

Sports Fans Coalition therefore recommends that the Commission amend the Sports Blackout Rule by adding an **automatic two-year sunset provision**, such that the rule will cease to be in effect unless the NFL, other sports leagues, and their supporters can prove on the record that the rule is necessary to serve the public interest, convenience, and necessity. As demonstrated in this record, the Sports Blackout Rule plays an integral role in sustaining the NFL's blackout policy and in effect subsidizes that practice.⁸ With a two-year time frame, the Commission may take into account any effects of the NFL's new blackout policy. If the new policy fails after two years to curtail blackouts in the hardest-hit markets, the Commission can decide at that time whether the Sports Blackout Rule should remain in place.

An automatic sunset provision carries other benefits, as well. Just as it does with other media regulations with sunset provisions,⁹ the Commission regularly can take into account the rapidly evolving technology and marketplace changes in determining whether a rule written almost four decades ago remains relevant and necessary.

Sincerely,

/s/

Brian Frederick, Executive Director
Sports Fans Coalition

⁸ The NFL stipulates that the Sports Blackout Rule supports the league's blackout policy. See *supra* n. 6.

⁹ See, e.g., 47 C.F.R. 76.1002(c)(6), implementing 47 U.S.C. 548(c)(5) (ban on exclusive distribution agreements with respect to certain MVPDs sunsets after ten years "unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming").