

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

In the Matter of
Sports Blackout Rules

MB Docket No. 12-3

**COMMENTS OF SPORTS FANS COALITION, INC.; NATIONAL CONSUMERS LEAGUE;
PUBLIC KNOWLEDGE; LEAGUE OF FANS; FANFREEDOM.ORG**

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I. INTRODUCTION AND SUMMARY

The Federal Communications Commission (“FCC” or “Commission”) stated in a unified voice, without dissent, that the Sports Blackout Rules should be eliminated because the market has changed significantly since the rules’ inception, and leagues can achieve through marketplace negotiations what heretofore the Sports Blackout Rules achieved for them by regulatory fiat. We agree. The federal government should not prop up an anti-fan, anti-consumer practice by professional sports leagues, most notably the National Football League (“NFL”), particularly when the underlying practice is rife with arbitrary and irrational enforcement by the NFL and is easily manipulated by the league and its teams. NFL Commissioner Roger Goodell himself recently conceded that his league’s blackout policies are plagued by problems, admitting in his pre-Super Bowl press conference that the NFL, not fans, was at fault for the near blacking out of three of the four first round playoff games.

There is no economic basis for the Sports Blackout Rules. The NFL and any other sports leagues that wish to perpetuate the Commission’s Sports Blackout Rules bear the burden of proof that local blackouts are necessary to maintain financial viability and therefore justify Commission action to maintain the Sports Blackout Rules. To that end, the NFL at a minimum must produce *audited financial*

statements of the league and its member teams supporting the contention that the local blackout policy serves the league's financial interest. Such financial data can help to answer basic questions raised in the Notice about the degree to which gate receipts and other stadium-related revenues comprise a meaningful proportion of overall league revenues.

The NFL is a multi-billion dollar entertainment juggernaut that negotiates business agreements with the largest broadcast, cable, satellite, merchandising, and retail companies in the world. Rather than rely on government regulations to carry out its local blackout policy, it can contract individually with distributors to ensure that its copyrighted programs are only distributed where the league wants them to be shown.

Eliminating the Sports Blackout Rules would not leave sports leagues prone to unwanted distribution of their content. Leagues are supported by a veritable safety net of regulations and statutes that would serve to protect local blackout policies if the leagues decided to perpetuate their anti-fan practices in the absence of the Sports Blackout Rules. Even if, *arguendo*, the NFL and other sports leagues somehow were unable to bargain contractually with their pay-TV distributors to perpetuate the local blackout policy, existing Commission regulations and federal copyright statutes offer significant protection to the leagues. Recent events support this conclusion. There have been major takedowns of broadcast network programming during retransmission consent disputes with cable and satellite operators that would have been opportune times for distant signal importation on a grand scale. It did not occur.

If the Commission required any further proof of the destructive, anti-fan, and anti-public interest nature of the NFL's local blackout policy, the NFL itself provided a spectacular answer through its own behavior during the first round of playoff games in the just ended season. The NFL threatened three of the four first-round playoff games with local blackouts, including at Green Bay's Lambeau Field, where regular-season tickets are sold out decades into the future, Indianapolis, and Cincinnati. The degree of fan uncertainty, business disruption, and community upheaval the NFL's action caused in three of the hardest-working towns in the USA should eliminate any doubt that the federal regulations upholding the

NFL's local blackout policy do not serve the public interest and must go.

The markets hardest hit by NFL local blackouts experienced a remarkable improvement after the Commission opened this docket and prominent Members of Congress introduced bills to end local blackouts. The NFL, no doubt mindful of this proceeding, nearly eliminated blackouts altogether in the 2013 season. Senator Richard Blumenthal (D-CT), a member of both the Senate Committee on Commerce, Science, and Transportation and the Committee on the Judiciary, who introduced with Senator John McCain (R-AZ) the "FANS Act" that would eliminate the antitrust exemption for local blackouts, said "it's wonderful that [the NFL and its member clubs] haven't been abusing fans this year, but they know . . . legislation [and regulatory action are] looming if they engage in blackouts. It's a not-so-subtle pressure."

The sudden and stark reduction in local blackouts coinciding with the Commission's instant docket and the bills introduced by influential Members of Congress likely did not happen by accident. A representative of Sports Fans Coalition, during an in-person meeting with a senior professional sports executive who wishes to remain anonymous, was led to conclude, upon information and belief, that during the 2013 regular season and post-season playoffs, the NFL likely pressured broadcast networks to purchase unsold tickets in order to avoid local blackouts. If true, this would amount to coercion of Commission licensees in order to increase the revenues of the NFL and its clubs and avoid an embarrassing blackout event for the NFL. The Commission should investigate immediately and thoroughly whether the NFL did, in fact, coerce broadcast networks and/or affiliates into purchasing unsold tickets to NFL regular and post-season games, and whether such coercion took place in order to avoid local blackouts. The Commission has a responsibility to ensure that its licensees, as guardians of a public resource—electromagnetic spectrum—are not strong-armed into paying cold cash to a professional sports league rather than using those resources to support local news, weather, sports, and public interest programming.

Eliminating the Sports Blackout Rules will not hasten the migration of NFL games off broadcast

TV. As long as major advertisers like General Motors, Pepsi, and Budweiser are willing to spend top dollar to reach the most households possible, and NFL games continue to be the most widely viewed programming on television, the leagues likely will have an incentive to keep their games on broadcast.

II. THE COMMISSION CORRECTLY CONCLUDES THAT THE SPORTS BLACKOUT RULES SHOULD BE ELIMINATED.

The Commission stated in a unified voice, without dissent, that the Sports Blackout Rules should be eliminated because the market has changed significantly since the rules' inception, and leagues can achieve through marketplace negotiations what heretofore the Sports Blackout Rules achieved for them by regulatory fiat.¹ We agree. The federal government should not prop up an anti-fan, anti-consumer practice by professional sports leagues, most notably the NFL, particularly when the underlying practice is rife with arbitrary and irrational enforcement by the NFL and is easily manipulated by the league and its teams.

NFL Commissioner Roger Goodell himself recently conceded that his league's blackout policies are plagued by problems. He admitted in his pre-Super Bowl press conference that the NFL, not fans, was at fault for the near blacking out of three of the four first round playoff games and the manner in which those threats were carried out:

I don't take the challenges that we had on Wild Card Weekend as any reflection of our fans' passion. Those were mistakes that were made by us, the NFL, and our clubs. . . . Green Bay, as an example, sold close to 50,000 tickets over a five-day period, including New Year's Day. We shouldn't be in that position, and that's on us, and we have to fix it, and we will. But that is not an indication in any way of the fans' passion.²

When the NFL's top executive admits at his most important annual press conference the fallibility

¹ "We propose to eliminate the sports blackout rules . . . It appears that the sports blackout rules have become obsolete." *Sports Blackout Rules*, Notice of Proposed Rulemaking, 28 FCC Rcd. 17214 ¶ 29 (2013) ("NPRM"). See also NPRM ¶ 1 ("We recognize that elimination of our sports blackout rules alone might not end sports blackouts, but it would leave sports carriage issues to private solutions negotiated by the interested parties in light of current market conditions and eliminate unnecessary regulation.").

² Bob Condotta, *Roger Goodell: The Commissioner Speaks*, THE SEATTLE TIMES, Jan. 31, 2014, <http://blogs.seattletimes.com/seahawks/2014/01/31/roger-godell-the-commissioner-peaks/>.

of his league's local blackout policy, one must ask why the federal government should be involved in perpetuating such a practice at all. Moreover, Commissioner Goodell attempted to explain low stadium attendance by lauding the quality of NFL television coverage,³ without making any reference to the most obvious cause of tickets not selling: the price is too high for most people to afford. As Buffalo Bill's President and CEO Russ Brandon stated, professional football teams are "a volume-based business, and for us to be successful, we need to keep our ticket prices low and sell a greater number of tickets."⁴ Commissioner Goodell's admission of the failed NFL blackout policy and his flimsy explanation for why the local blackouts occur bolster this Commission's conclusion that the federal government's support of the blackout policy through the Sports Blackout Rules must end.

a. There is no Economic Basis for Local Blackout Practices.

The Commission asks for economic evidence to justify the local blackout policy upon which the Sports Blackout Rules are premised.⁵ There is none. Despite repeated assertions that its blackout policy remains necessary to maintain its financial health, the NFL to date has offered no evidence on the record demonstrating how local blackouts serve the league's financial interest. Dr. Roger Noll and the other sports economists who filed a White Paper in this docket, by contrast, explain that blackouts actually can serve to diminish long-term league revenues by depressing fan interest.⁶

The NFL's only rebuttal is a bald and unsubstantiated claim that local blackouts are necessary to maintain stadium-related revenue, as they have argued repeatedly on this docket. This means that the

³ "What we have to do is recognize that technology has changed and that we have to use technology more efficiently and more intelligently . . . With the experiences at home through our broadcast partners and all the other media alternatives that we have, it's an incredible experience and it will continue to get better as technology advances. What we have to do is say, 'That's a great experience, but let's make the most important experience and the best experience, which is our stadium experience, better.'" *Id.*

⁴ Gene Warner, *Bills Game Will Be Only Second NFL Blackout This Year*, BUFFALO NEWS, Dec. 16, 2013, <http://www.buffalonews.com/city-region/bills-game-will-be-only-second-nfl-blackout-this-year-20131216>.

⁵ See *NPRM* ¶ 25 ("Are the sports blackout rules necessary to sustain gate receipts or other revenues for NFL clubs?").

⁶ See Sports Economists Comments at 16, MB Docket No. 12-3 (filed Feb. 13, 2012). See also *NPRM* ¶ 27.

NFL on the one hand demands government assistance in the form of the Sports Blackout Rules to perpetuate its local blackout policy but refuses to produce any meaningful evidence on the record to substantiate its claim of financial necessity.

The NFL and any other sports leagues that wish to perpetuate the Commission's Sports Blackout Rules bear the burden of proof that local blackouts are necessary to maintain financial viability and therefore justify Commission action to maintain the Sports Blackout Rules. The NFL cannot have it both ways: it cannot insist, on the one hand, that its local blackout policy is financially necessary, deserving Commission protection through the Sports Blackout Rule, and then insist, on the other hand, that its financial statements must remain secret.

The NFL at a minimum must produce *audited financial statements of the league and its member teams* supporting the contention that the local blackout policy serves the league's financial interest. Such financial data can help to answer basic questions raised in the Notice about the degree to which gate receipts and other stadium-related revenues comprise a meaningful proportion of overall league revenues.⁷

The Commission typically regulates public companies, particularly when dealing with multi-billion dollar organizations, and as such has access to Securities Exchange Commission ("SEC") filings of those regulated companies, including audited financial statements, quarterly and annual SEC filings, risk factor disclosures, and other financially material information. Here, however, the Commission must rely solely on financial data possessed by the only organization with any first-hand knowledge of NFL finances: the NFL itself, a non-profit business association, along with its privately held member clubs. Thus, if the Commission wishes to entertain reversing its unanimous decision to eliminate the Sports Blackout Rules (which we hope it will not), it should at the very least demand audited financial statements from the NFL and member clubs proving that the local blackout policy is necessary to

⁷ See *NPRM* ¶ 22 ("We invite commentators to supplement the record with more current data on NFL revenues, including total revenues, gate receipts, and television revenues, to the extent that such data are available.").

maintain the financial viability of the NFL.

If the NFL, its member clubs, or other sports leagues are concerned about disclosing sensitive financial data on this docket, the Commission can maintain the confidentiality of such information in any number of ways, as it has in the context of merger reviews and other proceedings, by:

- Adopting a protective order under which sensitive data may be reviewed only by outside counsel and without disclosure to the parties;
- Entering a document-sharing agreement with the Department of Justice whereby documents may be submitted to the DOJ under its stringent confidentiality regime and shared on a selective basis with key Commission staff subject to a non-disclosure requirement; and
- Allowing redacted documents to be placed on the public record in the rulemaking proceeding.

In any event, a failure by the NFL or any other sports leagues to produce detailed, audited financial statements proving the financial necessity of the league's underlying blackout policy would be a classic *res ipsa loquitor*. The absence of such data on the public record would speak for itself and demonstrate why the Sports Blackout Rules must go.

b. The Leagues can Accomplish Through Contract what the Sports Blackout Rules Were Intended to Do by Regulatory Fiat.

The NFL is a multi-billion dollar entertainment juggernaut that negotiates business agreements with the largest broadcast, cable, satellite, merchandising, and retail companies in the world. Rather than rely on government regulations to carry out its local blackout policy, it can contract individually with distributors to ensure that its copyrighted programs are only distributed where the league wants them to be shown.⁸

We agree with the conclusions reached in the Notice and the Sports Economists' White Paper that "the sports blackout rules are unnecessary because sports leagues can pursue local blackout protection

⁸ "The Professional Sports Leagues . . . say the protection afforded by the sports blackout rule is more limited than the protection the Professional Sports Leagues routinely negotiate regarding games not covered by the sports blackout rule." Also, "In contrast to the sports blackout rule, which permits blackouts only in a limited 35-mile zone around a Commission-determined 'reference point' for the home club, the contractually negotiated blackout throughout the home territories of Professional Sports teams generally extends well beyond 35 miles." 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 17 (2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf.

through private contractual negotiations.”⁹ In the case of cable and satellite distributors, to which the Sports Blackout Rules apply, the NFL today has privity of contract with all such firms through its NFL Network affiliation agreements.¹⁰ It has the right and ability to amend those agreements such that cable and satellite firms must honor local broadcast blackouts as a condition of receiving the NFL Network. If, as the NPRM states, blackout policies “are given effect primarily through contractual arrangements negotiated between the leagues . . . and the entities to which they grant distribution rights, including television networks, local television broadcast stations, Regional Sports Networks, and MVPDs” then the FCC is merely assisting to uphold these anti-consumer practices through the Sports Blackout Rules.¹¹ This must end.

c. Commission Regulations and Existing Copyright Statutes Would Prevent Blackout Circumvention by Cable and Satellite Providers.

The Commission asks “how the compulsory licenses would affect the ability of sports leagues and sports teams to obtain through market based negotiations the same protection that is currently provided by the sports blackout rules.”¹² In addition to having a free hand to negotiate with their pay-TV distributors terms under which local blackouts must be honored, the leagues are supported by a veritable safety net of regulations and statutes that would serve to protect local blackout policies if the leagues decided to perpetuate their anti-fan practices in the absence of the Sports Blackout Rules. Even if, *arguendo*, the NFL and other sports leagues somehow were unable to bargain contractually with their pay-TV distributors to perpetuate local blackout policy, existing Commission regulations and federal copyright statutes offer significant protection to the leagues.

First, the Commission’s network non-duplication and syndicated exclusivity rules would remain in effect, such that a cable or satellite operator could not import an NFL game carried on a broadcast

⁹ NPRM ¶ 29.

¹⁰ NPRM ¶ 32; Sports Fans Coalition Reply Comments at 14, MB Docket No. 12-3 (filed Feb. 28, 2012).

¹¹ NPRM ¶ 12.

¹² NPRM ¶ 32.

network into a local market served by an affiliate of that same network.¹³

Second, regarding cable operators, Section 111 of the Copyright Act requires such operators to pay a significant compulsory copyright fee for every home served with a distant network signal, multiplied over a six-month period.¹⁴ Cable operators have found this to be prohibitively expensive, as discussed further below.

Third, satellite operators must abide by the “unserved household” limitation whenever importing a distant network signal.¹⁵ A local blackout of an NFL game does not render an entire market’s homes “unserved,” therefore precluding DIRECTV or DISH Network from importing the signal of an out-of-market station carrying the locally blacked out game.

Finally, even if a cable or satellite operator were able to navigate a way out of the statutory and regulatory maze protecting the NFL’s local blackout, broadcasters have the ability—which they seem to exercise often—to preclude through their retransmission consent agreements with cable and satellite operators the use of their signal for importation into another market. Thus, as summarized below in Figure 1, even in the absence of the Sports Blackout Rules, the NFL and other leagues will continue to enjoy significant regulatory, statutory, and even contractual protections of league-imposed local blackouts.

¹³ See 47 C.F.R. § 76.92-95 (Network Non-duplication rules) and 47 C.F.R. § 76.101-110 (Syndicated Exclusivity Rules).

¹⁴ See 17 U.S.C. § 111; 47 C.F.R. § 76.111; NPRM ¶¶ 1, 7.

¹⁵ See 17 U.S.C. § 119.

FIGURE 1

	Cable Company	DISH Network	DIRECTV
What compulsory copyright protections exist?	Section 111 makes market-wide importation cost-prohibitive (rate of up to 3.75% of revenue; carriage could trigger payment for entire 6-month period).	“If-Locals-No-Distants” rules preclude distant network signals to all 210 DMAs served with locals by DISH, including major media markets with sports stadiums.	“If-Locals-No-Distants” rules apply, because DIRECTV provides locals in major media markets with sports stadiums. The only exception might be grandfathered distant network signal subscribers.
Will the network non-duplication rule apply?	Yes—no game on network broadcast can be imported.	Yes	Yes
Will retransmission consent limitations imposed by out-of-market broadcasters apply?	Probably—out-of-market station retransmission consent agreements likely restrict out-of-market use of signal.	Probably	Probably

d. Recent Programming Takedowns Demonstrate That Widespread Signal Importation does not Occur.

The Commission need not rely on theoretical legal arguments as to why the NFL and other leagues should not fear massive circumvention of local blackouts in the absence of the Sports Blackout Rules. There have been major takedowns of broadcast network programming during retransmission consent disputes with cable and satellite operators that would have been opportune times for distant signal importation on a grand scale. It did not occur. This suggests that the legal theory outlined above in fact plays out in the marketplace.

When CBS removed its signal from millions of Time Warner Cable homes last summer during a protracted retransmission consent dispute, the cable operator had every incentive to import distant

network signals yet did not.¹⁶ CBS removed its signal from over three million subscribers of Time Warner Cable in New York, Dallas, and Los Angeles, but Time Warner, instead of importing a distant network signal, showed its customers a blank screen with a message about their negotiations with CBS.¹⁷ Time Warner apparently did not have sufficient bargaining power to prevail¹⁸ and even when faced with a loss of customers,¹⁹ did not import an out-of-market CBS signal.

Similarly, broadcaster takedowns on DIRECTV did not result in rampant distant network signal importation. During a retransmission consent dispute and programming takedown with Northwest Broadcasting, which caused fans to miss games leading up to the World Series between the Giants and the Tigers during the nine week blackout, DIRECTV never engaged in wholesale importation of a distant network signal into the impacted markets.²⁰

Thus, in addition to demanding that the federal government prop up its local blackout policy through the Sports Blackout Rules, the NFL appears to be crying wolf when describing a doomsday

¹⁶ In fact, TWC encouraged users to put up their own antennae rather than trying to import a distant signal. See Matt Mitovich, *Time Warner Drops CBS, Showtime in Major Markets as Retrans Fee Negotiations Stall*, TV LINE, Aug. 2, 2013, <http://tvline.com/2013/08/02/time-warner-cable-drops-cbs-showtime/> (“TWC subs turning on CBS will be met with a message that says, ‘CBS has demanded an outrageous increase for programming that CBS delivers free over the air and online’ — and then suggests people go old-school and rig an antenna to see the Tiffany Network.”).

¹⁷ Kyle Stock, *The CBS Blackout was a Horror Show for Time Warner Cable*, Business Week, Oct. 31, 2103, <http://www.businessweek.com/articles/2013-10-31/the-cbs-blackout-was-a-horror-show-for-time-warner-cable>.

¹⁸ “The balance of power between operators and content owners effectively has been destabilized by TWC’s ‘horrible’ results. ‘If you thought the scales were tipped in programmers’ favor before, now you know that it is worse than you imagined,’ he [analyst Craig Moffet] said.” See Anthony Crupi, *CBS Blackout Took a Bite Out of Time Warner Cable Earnings*, ADWEEK, Oct. 31, 2013, <http://www.adweek.com/news/television/cbs-blackout-took-bite-out-time-warner-cable-earnings-153525>.

¹⁹ Julianne Pepitone, *Time Warner Cable Lost 300,000 TV Subscribers Amid CBS Blackout*, CNN MONEY, Oct. 31, 2013, <http://money.cnn.com/2013/10/31/technology/time-warner-cable-cbs/>. See Jerry Brito, *How Government Regulations Created the Time Warner-CBS Blackout*, REASON, Aug. 13, 2013, <http://reason.com/archives/2013/08/13/how-government-regulation-created-the-ti>.

²⁰ Press Release, DIRECTV, DIRECTV Completes Six Retransmission Deals; Northwest Broadcasting Only Station Owner to Black Out Local Channel in Attempt to Extract Outrageous (Dec. 31, 2010), <http://investor.directv.com/press-releases/press-release-details/2010/DIRECTV-Completes-Six-Retransmission-Deals-Northwest-Broadcasting-Only-Station-Owner-to-Black-Out-Local-Channels-in-Attempt-to-Extract-Outrageous/default.aspx>.

scenario of cable and satellite companies wantonly circumventing its precious local blackouts. In reality, even in the most pressing of circumstances during widespread signal take-downs, no such wanton signal importation occurs. Perhaps the NFL's true concern is the prospect of having to negotiate marketplace agreements, in full public view, to preserve its anti-fan local blackout policy, without any help from the United States government.

III. THE NATIONAL FOOTBALL LEAGUE'S RECENT BEHAVIOR ILLUSTRATES HOW CURRENT BLACKOUT PRACTICES HARM FANS AND WHY ELIMINATING THE SPORTS BLACKOUT RULES WOULD BENEFIT FANS.

The Commission asks whether removing its tacit endorsement of the leagues' blackout policies by eliminating the Sports Blackout Rules would serve the public interest²¹ and whether televising games rather than blacking them out would generate fan interest in the sport, thereby promoting higher attendance in home games.²² The answer to both questions is a Seattle Seahawks 12th-man sized, "YES!"

If the Commission required any further proof of the destructive, anti-fan, and anti-public interest nature of the NFL's local blackout policy, the NFL itself provided a spectacular answer through its own behavior during the first round of playoff games in the just ended season. The NFL threatened three of the four first-round playoff games with local blackouts, including at Green Bay's Lambeau Field, where regular-season tickets are sold out decades into the future, Indianapolis, and Cincinnati.²³ The degree of fan uncertainty, business disruption, and community upheaval the NFL's action caused in three of the hardest-working towns in the USA should eliminate any doubt that the federal regulations upholding the NFL's local blackout policy do not serve the public interest and must go.

Green Bay, Wisconsin.

In the very cradle of professional football, Lambeau Field, in the smallest market in the NFL, Green Bay, Wisconsin, where the only fan-owned team in professional sports, the Green Bay Packers,

²¹ *NPRM* ¶ 35.

²² *NPRM* ¶ 27.

²³ See Sam Farmer, *TV Blackouts Threaten Three of Four NFL Playoff Games*, L.A. TIMES, Jan. 2, 2014, <http://articles.latimes.com/2014/jan/02/sports/la-sp-sn-nfl-blackouts-20140102>.

have played since the 1920s, Commissioner Roger Goodell and the NFL committed football blasphemy, threatening a local blackout of the Packers' first round playoff game against the San Francisco 49ers. The stadium, where regular season tickets are sold out decades into the future, apparently was 7,500 seats short of a sellout at the 72 hour deadline.²⁴ Perhaps recognizing the uproar it would cause by enforcing its own local blackout policy, the NFL approved an extension for ticket sales.²⁵

Reasonable minds may differ as to why tickets had not sold as briskly as the NFL would have liked. For one thing, the weather at the game was predicted to be in the negative Fahrenheit temperatures, precluding even some die-hard Packers fans from attending, including children, elderly, or disabled people.²⁶

Perhaps starting quarterback and former MVP Aaron Rodgers' then-recent return from the injured reserve list after his broken collarbone had healed meant that fans did not expect the Packers to make it into the playoffs and therefore had not purchased tickets in advance. Or, at the risk of stating the obvious, perhaps the fact that the NFL raised ticket prices during playoff games above the current average regular season price of almost \$100 per ticket meant that many people in predominantly middle class Green Bay simply could not afford the tickets.

Whatever the cause, the impact on the community was swift and devastating. To sell out the tickets and avoid a local television blackout, team sponsors Associated Bank and Fox 6, an affiliate of the Fox Television Network, bought all the remaining tickets. Fox 6 was the exclusive broadcaster of the

²⁴ Geraldine Amiel, *Tickets Remain for Green Bay Packers Game*, WALL STREET JOURNAL, Jan. 1, 2014, <http://online.wsj.com/news/articles/SB10001424052702304325004579294701934825012>.

²⁵ Darren Rovell, *Packs, Colts, Bengals Avoid Blackouts*, ESPN, Jan. 4, 2014, http://espn.go.com/nfl/playoffs/2013/story/_/id/10236672/2013-nfl-playoffs-indianapolis-colts-green-bay-packers-get-sellout-cincinnati-bengals-wait.

²⁶ Tom Pelissero, *Ice Bowl II? 49ers, Packers Brace for Brutal Weather*, USA TODAY, Jan. 5, 2014, <http://www.usatoday.com/story/sports/nfl/2014/01/04/nfl-playoffs-49ers-packers-brace-for-brutal-winter-weather-ice-bowl-ii/4319025/>.

²⁶ As the Sports Economists said in this docket, weather can be one of the major determining factors in "no-shows" and ticket sales. Sports Economists Comments at 16, MB Docket No. 12-3 (filed Feb. 13, 2012). See Sports Fans Coalition Petition for Rulemaking to Eliminate the Sports Blackout Rule at 11, MB Docket No. 12-3 (filed Nov. 4, 2011).

game in the area around Green Bay and would have lost about 1,000,000 viewers if the game had been blacked out.²⁷ The tickets sold, the ransom paid, the game aired.

Indianapolis, Indiana.

The Indianapolis Colts, recent Super Bowl champions, were scheduled to play the Kansas City Chiefs, who had racked up an impressive record during the regular season, for a Midwestern gridiron showdown at the Colts' home field. Nevertheless, tickets to the game did not sell out.

Perhaps, like in Green Bay, the weather was a factor even though it was an indoor game because there had been over six inches of snow, making driving to the game dangerous. Perhaps high ticket prices played a role because even before the higher playoff ticket prices went into effect, the average cost of a regular season game, plus parking and concessions, equaled 46% of the average Indianapolis wage earner's weekly salary.²⁸ Perhaps slow ticket sales were due to the local NBA team, the Indiana Pacers, playing a sold out game at the same time, as did the legendary, Bobby Knight-inspired Indiana University college basketball team. With the Pacers and the Colts playing about a block away from each other, maybe the prospect of finding a parking place on a cold, snowy night dissuaded a large number of fans. Perhaps the lackluster ticket sales were due to the Colts game being the last one scheduled for that night, since the Colts barely made the playoffs. In mid-sized Indianapolis, Indiana, with a population of about 850,000, competing sporting events were being held on the same night at facilities that together comprised about an eighth of the city's total population.²⁹

Regardless of the reasons why, the fact remained that the Colts' Lucas Oil Stadium did not sell

²⁷ Cary Docter & Jenna Sachs, *Sponsors Purchase Remaining Packers Playoff Tickets*, FOX6, Jan. 3, 2014, <http://fox6now.com/2014/01/03/fox6-sponsors-purchase-remaining-packers-playoff-tickets-2/>.

²⁸ *Sortable Table: What It Costs to Go to An NFL Game*, AL JAZEERA AMERICA, <http://america.aljazeera.com/multimedia/2014/1/sortable-table-whatitcoststogotoannflgame.html>.

²⁹ Lucas Oil Stadium has 67,000 seats, Assembly Hall (Indiana University) 17,472 seats, Banker's Life Fieldhouse (Pacers) 18,165 seats, for a total of 102,637 seats. See LUCAS OIL STADIUM, <http://www.lucasoilstadium.com/about.aspx> (last visited Feb. 19, 2014); INDIANA FACILITIES, <http://www.iuhoosiers.com/facilities/ind-facilities.html> (last visited Feb. 19, 2014); BANKER'S LIFE FIELDHOUSE, http://espn.go.com/travel/stadium/_/s/nba/id/11/bankers-life-fieldhouse (last visited Feb. 19, 2014).

out. Again showing its willingness to waive its own rule when embarrassment, ridicule, and outrage seem the likely result otherwise, the NFL extended its ticket sales deadline twice in order to allow third parties to purchase blocks of tickets.³⁰ Meijer, a corporate sponsor, bought the remaining tickets and distributed them to veterans.³¹

The NFL and Colts team ownership, of course, simply could have given those tickets to the veterans, or sold the tickets for a \$1 nominal charge, but that would have resulted in less revenue for the team owners and the league. Instead, by threatening a local television blackout of the game, the NFL succeeded in extracting its price from the good people at Meijer, leaving any charitable acts towards our nation's veterans to be conducted by the local business paying the tab for the tickets. Such behavior by the NFL is hardly a policy worthy of the public interest standard under which the Federal Communications Commission functions.

Cincinnati, Ohio

The Cincinnati Bengals' home playoff game against the San Diego Chargers ironically was a rematch of one of the two games blacked out during the regular season, when the teams met at Qualcomm Stadium in San Diego.³² Cincinnati, a community that in 2011 had suffered the worst local blackout average of any NFL city in the United States (see Figure 2, below) was threatened with a local blackout of its first playoff game in many years, despite the team having turned in a stellar regular season record.

Once again, the NFL threatened the community with a blackout and concurrently extended its

³⁰ See Anthony Schoettle, *UPDATE: Colts get an Extension on Blackout*, INDIANAPOLIS BUSINESS JOURNAL, Jan. 2, 2014, <http://www.ibj.com/colts-must-sell-4000-plus-tickets-to-avoid-blackout/PARAMS/article/45379>.

³¹ “[Nationwide] by Friday [Jan. 3, 2014] sponsors stepped in and prevented a catastrophe, purchasing a combined 21,000 tickets. . . Meijer bought up 1,200 tickets for Indianapolis Colts fans . . . P&G and regional supermarket Kroger purchased ‘thousands’ of tickets for Bengals fans . . . and a team of the Packers’ corporate sponsors led by Associated Bank saved Green Bay from potential chaos. In each case, the sponsor-bought tickets will be available for free to military veterans and their families.” Richard Feloni, *Corporate Sponsors Save NFL Blackouts*, BUSINESS INSIDER, Jan. 3, 2014, <http://www.businessinsider.com/corporate-sponsors-save-nfl-blackouts-2014-1>.

³² See Mike Florio, *Bengals-Chargers Becomes First Blackout of the 2013 Season*, NBC SPORTS, Nov. 28, 2013, <http://profootballtalk.nbcsports.com/2013/11/28/bengals-chargers-becomes-first-blackout-of-the-2013-season/>.

deadline, apparently trying to entice third parties to purchase blocks of tickets. Local businesses scrambled to avoid the NFL's blackout.³³ Jeff Ruby, a local restaurateur, bought 100 tickets and distributed them in an effort to prevent the game from being blacked out. "It's important for local business leaders to support the Cincinnati Bengals as they play their first Playoff home game so we can leverage the national and local television attention on our city," Ruby said. "I challenge other local CEOs to purchase a block of 100 tickets to share with their employees or non-profits . . . so we can avoid the blackout."³⁴ Coincidentally, as the NFL pushed costs of avoiding the blackout onto locals like Jeff Ruby under the threat of otherwise blacking out the game, the league a few weeks later approved a \$44 million dollar salary for Commissioner Goodell.³⁵

Local business owners' interest in keeping the game on the air stemmed in part from their significant loss of revenue that would ensue from a television blackout. For the Bengals/Chargers game, University of Cincinnati Economics Center Analyst Jeffrey Rexhausen told local broadcaster WCPO that blacking out the game could have an economic impact of \$14 million to the Tri-State region, including local bar and eatery spending.³⁶ Sports marketing expert David Carter said companies that purchase unsold tickets can try to get a return on their investment if they have a "compelling marketing and public relations strategy" in place to capitalize on the goodwill that comes from being a good corporate citizen.³⁷ As one commentator put it, "pretty much everybody is better off if this game is shown on TV."³⁸

³³ See Greg Noble, *Cincinnati Bengals: NFL Extends Deadline to Sell Out, Avoid Playoff Blackout*, WPCO CINCINNATI, Jan. 2, 2014, <http://www.wcpo.com/sports/football/bengals/cincinnati-bengals-nfl-allows-another-24-hours-to-sell-out-avoid-playoff-blackout>.

³⁴ Maxim Alter, *Bengals Blackout: Jeff Ruby Challenging Local Businesses to Buy Bengals Tickets to Avoid Blackout*, WPCO CINCINNATI, Jan. 2, 2014, <http://www.wcpo.com/sports/football/bengals/jeff-ruby-challenging-local-businesses-to-buy-bengals-tickets-to-avoid-blackout>.

³⁵ See Kevin Clark, *NFL Commissioner Goodell Gets a Big Raise*, WALL STREET JOURNAL, Feb. 14, 2014, <http://online.wsj.com/news/articles/SB10001424052702303704304579383311319282816>.

³⁶ Casey Weldon, *Kroger, P&G Buy Bengals Tickets for Veterans to Help Avoid Local TV Blackouts*, WPCO CINCINNATI, Jan. 3, 2014, <http://www.wcpo.com/sports/football/bengals/kroger-buys-bengals-tickets-for-veterans-to-help-avoid-local-blackout>.

³⁷ Dan Monk, *Cities Hand over Lunch Money to NFL Bullies*, RTV6, Jan. 4, 2014, <http://www.theindychannel.com/sports/commentary-cities-hand-over-lunch-money-to-nfl-bullies>.

³⁸ *Id.*

Everyone, that is, except the NFL. They win either way.

In the end, Proctor and Gamble bought the remaining unsold tickets to avoid the blackout after the NFL twice extended its deadline.³⁹ Kroger stores also bought and gave away tickets to military personnel.⁴⁰ Unlike during the regular season, when the NFL allows a corporate sponsor or the team to buy unsold tickets at 34 cents on the dollar, these entities had to pay full price during the postseason to avoid a blackout.⁴¹ Instead of covering these costs, the NFL once again left any charitable acts—free tickets for military personnel, in this case—to the third party companies that bought blocks of tickets at full price to prevent the blackout.

The Commission asks whether poor team performance contributes to a lack of ticket sales and therefore local blackouts.⁴² The fact that three of the four first-round playoff games between some of the best teams in the league were threatened with local blackouts, forcing fans and local businesses to scramble in order to meet the NFL's confiscatory demands, should eliminate any doubt that blackouts have little to do with team performance. In fact, as Commissioner Goodell himself conceded at his Super Bowl press conference, they have nothing at all to do with fans' enthusiasm whatsoever.⁴³ Moreover, despite the intimations of Commissioner Goodell⁴⁴ and his staff at the NFL,⁴⁵ blackouts have nothing to

³⁹ See Noble, *supra* note 33.

⁴⁰ Monk, *supra* note 37.

⁴¹ Mike Florio, *Teams Can Buy Unsold Postseason Tickets - At Full Price*, NBC, Jan. 2, 2014, <http://profootballtalk.nbcsports.com/2014/01/02/teams-can-buy-unsold-postseason-tickets-at-full-price/>.

⁴² *NPRM* ¶ 24.

⁴³ Commissioner Goodell's complete statement on the issue of blackouts was as follows: "I don't take the challenges that we had on Wild Card Weekend as any reflection of our fans' passion. Those were mistakes that were made by us, the NFL, and our clubs. What we have to do is recognize that technology has changed and that we have to use technology more efficiently and more intelligently to make sure we don't put our fans in that kind of position. Green Bay, as an example, sold close to 50,000 tickets over a five-day period, including New Year's Day. We shouldn't be in that position, and that's on us, and we have to fix it, and we will. But that is not an indication in any way of the fans' passion." Condotta, *supra* note 2.

⁴⁴ See *Id.* See also Josh Hill, *Roger Goodell Think[s] HDTV is Killing NFL Ticket Sales*, FANSIDE.COM, Nov. 13, 2012, <http://fansided.com/2012/11/13/roger-goodell-think-hdtv-is-killing-nfl-ticket-sales/#!vJEM2>.

⁴⁵ Kevin Clark, *Game Changer: NFL Scrambles to Fill Seats*, WALL STREET JOURNAL, July 2, 2012,

do with high definition television or technology.

Blackouts have everything to do with greed—government subsidized greed—and the reluctance of the NFL to change its ossified ways. They reflect the pure, unobstructed monopoly power of the NFL. Only a monopoly can make money with impunity by withholding its product from willing buyers. When ticket prices, parking fees, and concession charges comprise an ever growing share of a middle class family's income,⁴⁶ and games are held in communities like Green Bay, Indianapolis, and Cincinnati where the economy has been slow to recover, the answer might clearly revolve around the NFL's pricing decisions. Rather than address this obvious remedy, however, the NFL demands that this Commission maintain its forty-year-old regulatory framework upholding the local blackout policy and insists that local businesses purchase blocks of tickets to avoid blackouts.

Threats. Bullying tactics. Shake downs. Whatever label one gives the NFL's blackout policy and ticket sales strategy, there is one label that never should apply: public interest. The Commission, on behalf of fans, local businesses, and the American public at large, should once and for all end the forty years of regulatory support for local blackouts and eliminate the Sports Blackout Rules, which surely do not uphold the public interest.

IV. THE COMMISSION SHOULD INVESTIGATE WHETHER ITS LICENSEES OWNED BY OR AFFILIATED WITH FOX, NBC, ABC, AND CBS PURCHASED BLOCKS OF GAME TICKETS IN ORDER TO AVOID LOCAL BLACKOUTS DURING THE 2013 SEASON, AND WHETHER SUCH PURCHASES WERE MADE AT THE BEHEST OF THE NFL.

The local restaurants, grocery stores, and retail chains described above may not be the only third parties pressured into purchasing NFL tickets in order to avoid local blackouts. As illustrated by the aforementioned Fox affiliate in Green Bay, Wisconsin, local broadcast licensees regulated by this

<http://online.wsj.com/news/articles/SB10001424052702303561504577495083707417526> (“‘The at-home experience has gotten better and cheaper, while the in-stadium experience feels like it hasn't,’” said Eric Grubman, the NFL's executive vice president of ventures and business operations. ‘That's a trend that we've got to do something about.’”).

⁴⁶ While ticket prices have climbed more than 50% over the past decade, parking prices have more than doubled, and beer prices have climbed about 35% from 2003's average of \$5.21. Melanie Hicken, *The High Cost of Being a Football Fan*, CNN MONEY, Sep. 7, 2013, <http://money.cnn.com/2013/09/07/pf/football-prices/?iid=EL>.

Commission also seem to have fallen prey to the NFL’s blackout policy, purchasing blocks of unsold tickets in order to air the games. Sports Fans Coalition has come to understand upon information and belief, however, that the NFL may have deployed unusual tactics against broadcast networks and affiliates to inspire such ticket purchases. If proven true, this would constitute a severe abuse of Commission licensees.

a. The Markets Hardest Hit by NFL Local Blackouts Experienced a Remarkable Improvement After the Commission Opened this Docket and Prominent Members of Congress Introduced Bills to End Local Blackouts.

The Commission seeks comment on “the extent to which sports events continue to be blacked out locally as a result of the failure of the events to sell out.”⁴⁷ As illustrated in Figure 2 below, the NFL, no doubt mindful of this proceeding, nearly eliminated blackouts altogether in the 2013 season. Senator Richard Blumenthal (D-CT), a member of both the Senate Committee on Commerce, Science, and Transportation and the Committee on the Judiciary, who introduced with Senator John McCain (R-AZ) the “FANS Act” that would eliminate the antitrust exemption for local blackouts, said “it’s wonderful that [the NFL and its member clubs] haven’t been abusing fans this year, but they know . . . legislation [and regulatory action are] looming if they engage in blackouts. It’s a not-so-subtle pressure.”⁴⁸

It seems that a kind of regulatory and legislative “Heisenberg Uncertainty Principle” is at work here. German physicist Werner Heisenberg theorized that it is not possible to conduct an experiment without the interference of human influence⁴⁹ and that even something as seemingly inconsequential as

⁴⁷ NPRM ¶ 16.

⁴⁸ Brooks Boliek, *NFL TV Blackout Rule Flagged by Lawmakers*, POLITICO PRO, Nov. 28, 2013, <http://www.politico.com/story/2013/11/nfl-tv-blackout-rule-flagged-by-lawmakers-100441.html>. See generally S. 1721, 113th Cong. (2013); H.R. 3452, 113th Cong. (2013) (Furthering Access and Networks for Sports Act (FANS Act)—a bill to decrease the frequency of sports blackouts, to require the application of the antitrust laws to Major League Baseball, and for other purposes—introduced both in the House (H.R. 3452) by Representative Brian Higgins (D-NY) and in the Senate (S. 1791) by Senators Richard Blumenthal (D-CT) and John McCain (R-AZ).)

⁴⁹ Waldemar Kaempffert, *Details Concepts of Quantum Theory*, NEW YORK TIMES, Sept. 2, 1927, <http://query.nytimes.com/mem/archive/pdf?res=F30714F93D5812738DDDAB0894D1405B878EF1D3>.

the light used to observe an experiment influences the subject’s behavior.⁵⁰ What applies in physics apparently applies to the NFL. Like the light shining on Heisenberg’s experiments, the Commission’s mere act of opening this docket and the introduction of legislation by prominent Members of Congress seemingly changed the NFL’s behavior for the better.

In 2011 for example, the four cities with the worst pattern of local blackouts had anywhere from 25% to 75% of their home games blacked out.⁵¹ In 2013—following the Commission’s release of its Public Notice⁵² soliciting comment on the Sports Fans Coalition Petition for Rulemaking—the number of home game blackouts decreased dramatically. Unlike 2011 where the NFL blacked out 16 home games, only 2 games were blacked out in 2013.⁵³

FIGURE 2

Community	2011 Percentage of NFL Home Games Blacked Out	2012 FCC OPENS PROCEEDING TO END SPORTS BLACKOUT RULES	2013 Percentage of NFL Home Games Blacked Out
Cincinnati, OH	75%		0%
Tampa Bay, FL	71.4%		0%
Buffalo, NY	37.5%		14.2%
San Diego, CA	25%		12.5%

The Commission aptly noted that, following the commencement of this docket, the NFL modified its blackout policy by presenting team owners the option of reducing their blackout benchmark—preventing blackouts where at least 85% of tickets sold 72 hours in advance of any home game.⁵⁴ As such, the Commission asks which teams elected to participate in the lower threshold; the extent to which

⁵⁰ *Id.*

⁵¹ *NPRM* n.79.

⁵² *Commission Seeks Comment on Petition for Rulemaking Seeking Elimination of the Sports Blackout Rule*, PUBLIC NOTICE, MB Docket No. 12-3 (rel. Jan. 12, 2012).

⁵³ *NPRM* n.79.

⁵⁴ *NPRM* ¶ 18.

this new policy has impacted blackouts of NFL games; and whether these results support or undermine the Commission's proposal to eliminate the current Sports Blackout Rules.⁵⁵ Only four teams—the Miami Dolphins, Minnesota Vikings, Oakland Raiders, and Tampa Bay Buccaneers—took advantage of the NFL's revised blackout policy during the 2012 season.⁵⁶ Except for the Minnesota Vikings, who elected to lower their benchmark to 90%, those teams lowered their benchmark to 85%, the furthest extent possible.⁵⁷ Three of those four teams maintained their lower blackout benchmark for the 2013 season; the Minnesota Vikings elected to return to the standard blackout rules.⁵⁸

Teams that had suffered the highest percentage of local blackouts in 2011, however, including the Buffalo Bills (37.5% of home games blacked out in 2011), Cincinnati Bengals (75%), and the San Diego Chargers (25%), declined the NFL's offer to lower their blackout benchmark, fearing penalties could cost hundreds of thousands of dollars.⁵⁹ Indeed, the NFL disincentivized lower benchmarks by penalizing teams when ticket sales exceed their chosen benchmark. Under the NFL's revised policy, for every ticket sold above the benchmark, the home team is required to pay the visiting team \$0.50 on the dollar, as opposed to the traditional \$0.34 on the dollar.⁶⁰

Despite their decision not to accept the lower blackout benchmark, the Buffalo Bills, Cincinnati

⁵⁵ *Id.*

⁵⁶ Jason Notte, *Five NFL Grinches for the 2012 Holiday Season*, THE STREET, Dec. 13, 2012, <http://m.thepostgame.com/blog/list/201212/5-nfl-grinches-2012-holiday-season>.

⁵⁷ *Id.*

⁵⁸ Brian Murphy, *Vikings: To Avoid Local TV Blackouts, Metrodome Will Have to be Full Again*, PIONEER PRESS, Sept. 4, 2013, http://http://www.twincities.com/vikings/ci_24015618/vikings-avoid-local-tv-blackouts-metrodome-will-have.

⁵⁹ Tim Graham, *Bills Roundup: A Closer Look at NFL Blackout Policy*, THE BUFFALO NEWS, July 3, 2012, <http://blogs.buffalonews.com/press-coverage/2012/07/bills-roundup-a-closer-look-at-nfl-blackout-policy-.html> (“Teams opting into the new policy must pay additional gate receipts into a league revenue pool. This could cost the Bills ‘several hundred thousand dollars per season,’ Warner writes. Teams would have to absorb that cost or raise ticket prices to fill the void.”); Notte, *supra* note 56 (“The Oakland Raiders, Miami Dolphins and Minnesota Vikings have since [adopted the 85% benchmark], but the Buffalo Bills, Cincinnati Bengals and San Diego Chargers didn't feel quite as strongly. Those three teams stuck to the 100 percent mark despite blacking out games in each of the past two seasons and trying to get taxpayers to pony up for stadium construction and improvements.”).

⁶⁰ Adam Oestmann, *NFL Relaxes Blackout Rule: Explained*, CHICAGO NOW, July 5, 2012, <http://www.chicagonow.com/chicago-bears-huddle/2012/07/nfl-relaxes-blackout-rule-explained/>.

Bengals, and San Diego Chargers all saw dramatic decreases in 2013 in the percentage of home games blacked out.⁶¹ In fact, the Cincinnati Bengals, the team with the greatest percentage of home game blackouts in the 2011 season, did not have a single game blacked out in 2013.⁶² This evidence suggests that the NFL's revised blackout policy was not responsible for the recent dramatic decrease in blackouts.

The Commission's examination of its Sports Blackout Rules and proposed legislation in Congress might have compelled the NFL and its clubs to further alter their blackout behavior. For example, during the 2013 season the Oakland Raiders covered approximately 10,000 seats in its O.co Coliseum with a tarp, thereby reducing capacity from 63,132 to 53,200 seats.⁶³ Previously the second smallest stadium (the Chicago Bears Soldier Field seats 61,500) the Raiders' decision to cover 10,000 seats makes O.co Coliseum the smallest NFL stadium⁶⁴ and therefore less susceptible to local blackouts stemming from unsold tickets.

In addition to covering seats, NFL teams have purchased remaining unsold tickets to prevent local blackouts. In Tampa Bay, where taxpayers footed the entire bill for the \$194 million construction of the Raymond James Stadium, team ownership committed to preventing blackouts of their home games by purchasing enough tickets to reach the 85% benchmark.⁶⁵ The NFL allows teams to purchase regular season tickets for \$0.34 on the dollar and distribute them to charitable organizations.⁶⁶ This practice of purchasing tickets to prevent local blackouts, furthermore, is not uncommon.⁶⁷ Such tactics used to evade

⁶¹ *NPRM* n.79.

⁶² *Id.*

⁶³ Jerry McDonald, *Game Changer: Oakland Raiders to Reduce Capacity of Stadium in order to Avoid Blackouts*, OAKLAND TRIBUNE, Feb. 6, 2012, http://www.insidebayarea.com/raiders/ci_22534155/oakland-raiders-reduce-capacity-stadium?source=most_viewed.

⁶⁴ *Id.*

⁶⁵ Greg Auman, *No Blackouts: All Buccaneers Games to be Televised Locally*, TAMPA BAY TIMES, Sept. 26, 2013, <http://www.tampabay.com/sports/football/bucs/all-of-bucs-remaining-home-games-will-be-televised-locally/2144017>.

⁶⁶ *Id.*

⁶⁷ *See, e.g.* Gene Warner, *Bills Game Will Be Only Second NFL Blackout This Year*, THE BUFFALO NEWS, Dec. 16, 2013, <http://www.buffalonews.com/city-region/bills-game-will-be-only-second-nfl-blackout-this-year-20131216> (Ralph Wilson Jr., owner of the Buffalo Bills, purchased the remaining

the NFL's irrationally enforced blackout policies underscore the arbitrary nature of the League's underlying policy, a policy that the NFL, when placed under scrutiny by this Commission, apparently contorts and manipulates to meet its aims.

b. The Reduction in Blackouts Allegedly Might Have Been Orchestrated by the NFL Through Coercive Tactics Against Broadcasters, Which the Commission Should Investigate.

The sudden and stark reduction in local blackouts coinciding with the Commission's instant proceeding and the bills introduced by influential Members of Congress likely did not happen by accident. A representative of Sports Fans Coalition, during an in-person meeting with a senior professional sports executive who wishes to remain anonymous, was led to conclude, upon information and belief, that during the 2013 regular season and post-season playoffs, the NFL likely pressured broadcast networks to purchase unsold tickets in order to avoid local blackouts.

If true, this would amount to coercion of Commission licensees in order to increase the revenues of the NFL and its clubs and avoid an embarrassing blackout event for the NFL. It seems especially pernicious that even though the league grants itself flexibility to move ticket sales deadlines and otherwise manipulate the application of its own blackout policy,⁶⁸ the league allegedly instead chose to coerce broadcasters into buying unsold tickets rather than waive or remove its blackout policy entirely.

The Commission should investigate immediately and thoroughly whether the NFL did, in fact, coerce broadcast networks and/or affiliates into purchasing unsold tickets to NFL regular and post-season games, and whether such coercion took place in order to avoid local blackouts. The Commission has a responsibility to ensure that its licensees, as guardians of a public resource—electromagnetic spectrum—are not strong-armed into paying cold cash to a professional sports league rather than using those

tickets for the team's home games against the Cincinnati Bengals on October, 13, 2013 and against the New York Jets on November, 17, 2013 to prevent local blackouts.).

⁶⁸ The NFL approved an extension for ticket sales during a threatened local blackout of the Green Bay Packers' first playoff game in the 2013 post-season, revealing a self-granted waiver authority. Darren Rovell, *Packs, Colts, Bengals Avoid Blackouts*, ESPN, Jan. 4, 2014, http://espn.go.com/nfl/playoffs/2013/story/_/id/10236672/2013-nfl-playoffs-indianapolis-colts-green-bay-packers-get-sellout-cincinnati-bengals-wait.

resources to support local news, weather, sports, and public interest programming. While the Commission does not regulate the NFL, it does regulate the owned-and-operated and affiliated stations of NBC, CBS, ABC, and Fox.

The Commission can and should ask those licensees to submit signed affidavits from C-level executives (or the equivalent) on the record in this proceeding, responding to the following questions:

- 1. During the 2013 NFL regular season and post-season playoff games preceding the Super Bowl, did your station (a licensee of the Federal Communications Commission) or its parent corporation, including any corporate parent, affiliate or subsidiary thereof, purchase any tickets to any NFL games?**
- 2. If so, were such purchases made:**
 - a. directly from the NFL or any of its clubs and not on the secondary resale market?**
 - b. with the intent of helping to avoid a local blackout under the NFL's local blackout policy?**
 - c. at the request, suggestion, implication, or other communication of or by the NFL or a third party acting on behalf of the NFL?**

The NFL's alleged behavior with respect to Commission licensees merits serious investigation by the Commission. Answers to the above questions might not only illuminate the degree to which broadcasters are coerced into avoiding local blackouts and financially supporting the NFL's ticket revenues, they also could help to address whether strong-arm tactics by sports leagues raise costs and, therefore, consumer prices across multiple platforms.

V. ENDING THE SPORTS BLACKOUT RULES WILL NOT CONTRIBUTE TO THE MIGRATION OF SPORTS TO PAY TV.

The Commission rightly questions whether the "repeal of the sports blackout rules [would] hasten the migration of NFL games from broadcast television channels to pay TV."⁶⁹ The evidence suggests not. As explained above in Section I, myriad copyright statutes and Commission regulations would protect the NFL's content over broadcast television if it chose to perpetuate its local blackout policy. More powerful economic forces, however, would incentivize the NFL to keep games on broadcast. There simply is too

⁶⁹ *NPRM* ¶ 36.

much money to be made. The empty threat of migrating sports content away from broadcast is merely an attempt to frighten the Commission into reversing its tentative conclusion to eliminate the Sports Blackout Rules.

a. The Leagues Determine if Their Games Are Aired on Broadcast or Pay-TV.

Sports leagues ultimately control whether sports programming airs on broadcast or pay-TV and are driven by factors more powerful than an outdated Commission rule. The leagues negotiate with both pay-TV and broadcast providers to divvy up the rights to the stations or networks willing to pay the most.⁷⁰ The FCC asserts correctly in its Notice that the NFL has the first and last say as to which games are blacked out and which are not.⁷¹ Moreover, as described above, the NFL exercises great latitude in how it applies its own blackout policy.⁷² Ultimately, it is the immense revenues generated by advertising, and not the leagues' good will toward broadcasters or the public, that keeps NFL games on broadcast.

b. The Opportunity Cost of Losing Broadcast Advertising Revenues is too Great for the NFL to Remove Games From Broadcast Altogether.

As long as major advertisers like General Motors, Pepsi, and Budweiser are willing to spend top dollar to reach the most households possible, and NFL games continue to be the most widely viewed programming on television, the leagues likely will have an incentive to keep their games on broadcast. Sporting events generally, and NFL games in particular, continue to attract the highest advertising revenue of any other content on television today,⁷³ due to the record-high ratings for such events.⁷⁴

⁷⁰ See Alex Block, *NFL Extends TV Network Broadcast Deals Through 2022*, HOLLYWOOD REPORTER, Dec. 14, 2011, <http://www.hollywoodreporter.com/news/nfl-extends-TV-network-deals-273789>.

⁷¹ *NPRM* ¶ 3.

⁷² See also Brian McIntyre, *Miami Dolphins will use new NFL blackout policy*, NFL.COM, Aug. 10, 2012, <http://www.nfl.com/news/story/0ap1000000048522/article/miami-dolphins-will-use-new-nfl-blackout-policy> (reporting that the Miami Dolphins will opt-in to the NFL's newly promulgated blackout policy).

⁷³ See Paul Wiseman, Associated Press, *Football's back: NFL is a key player in the economy*, USA TODAY, Sep. 9, 2011, <http://usatoday30.usatoday.com/money/economy/story/2011-09-11/nfl-economy/50339734/1> (“[I]t's no surprise that NFL programming generates \$3.2 billion in advertising revenue for TV networks No other event gives advertisers as much exposure.”).

⁷⁴ *Id.* (“The higher a show's rating, the more money ad time on it fetches.”).

Indeed, NFL games bring in more ad revenue than any other TV programming event, generating more than 3.2 billion dollars.⁷⁵ Advertisers like Bud Light therefore are willing to spend “\$1.2 billion to be the NFL’s official beer sponsor [for] the next six years.”⁷⁶ As the NFL’s “football programming nearly swept the top 10 telecast list in 2013,” it is increasingly apparent that Americans are now more excited in greater numbers about NFL football than anything else they see on TV.⁷⁷ The advertising revenue generated by NFL programming is necessarily tied to giving the widest possible cross-section of Americans the ability to watch the games, which in this case means distribution via broadcast. Thus, the NFL stands to gain by keeping games on broadcast so that the broadcast networks can command the highest possible advertising rates and in turn pay the NFL its handsome fee.⁷⁸

The Commission asks what percentage of consumers watch the sports programming they view on broadcast television channels rather than pay TV or via the Internet.⁷⁹ Data shows that fans prefer to watch the NFL on their local broadcast affiliate.⁸⁰ This holds true even when the same game is aired on cable.⁸¹ Broadcast stations saw nearly 4.5 times more viewers than did their rival networks showing the same game on cable.⁸² In those areas of the country where a regular season game was aired by a cable

⁷⁵ *Id.* (“[I]t’s no surprise that NFL programming generates \$3.2 billion in advertising revenue for TV networks.”).

⁷⁶ *Id.*

⁷⁷ *See Tops of 2013: TV and Social Media, Media and Entertainment*, NIELSEN.COM, Dec. 17, 2013, <http://www.nielsen.com/us/en/newswire/2013/tops-of-2013-tv-and-social-media.html>.

⁷⁸ *See* Matthew Futterman, *NFL: The League That Runs TV*, WALL STREET JOURNAL, Dec. 15, 2011, <http://online.wsj.com/news/articles/SB10001424052970204026804577098774037075832> (“Football remains one of the few programs that still draws tens of millions of viewers who watch live. That gives the networks much-needed leverage with . . . advertisers.”).

⁷⁹ *NPRM* ¶ 36.

⁸⁰ *See NFL on Local TV Stations = Hometown Advantage*, TVB LOCAL MEDIA MARKETING SOLUTIONS, http://www.tvb.org/media/file/TVB-Ratings-Measurement_NFL-Hometown-Advantage.pdf (“Given the option to watch their NFL home team on broadcast TV or cable, football fans overwhelmingly chose their local TV Stations during the 2012 regular season.”).

⁸¹ *Id.*

⁸² *Id.* (“Local TV stations attracted as much as 4.5 times the game day household viewers compared with the cable networks that televised the game at the same time.”).

regional sports network (“RSN”) and on broadcast, the broadcast ratings exceeded cable’s by 74%.⁸³ With such powerful evidence, it appears that the NFL needs broadcast to maximize its profits.

The NFL must acknowledge that broadcast is the best medium to distribute NFL games to its fans. Commissioner Goodell himself said that, “CBS, FOX and NBC have served NFL fans with the highest-quality television production. . . . The networks will continue their outstanding coverage of the NFL while also helping to deliver more football to more fans using the best and most current technology.”⁸⁴ The NFL continues to prefer broadcast television to other television platforms, as evidenced by its recently announced long-term agreement to air more Thursday night games on CBS to harness the “unprecedented promotion and visibility” incumbent on broadcast TV.⁸⁵

While the NFL threatens to “migrate” sports content away from broadcast television, this is a hollow gesture aimed at intimidating the Commission into upholding a regulatory subsidy for the NFL. Coincidentally, the NFL is making the same threat in a pending Supreme Court case.⁸⁶ The NFL’s threat is even less credible in this docket, however, because regardless of the outcome of this proceeding, the NFL will retain the exclusive ability to distribute its content⁸⁷ and enjoy the statutory and regulatory

⁸³ *Id.* (“In the 30 markets where a regular season game was simultaneously offered on both a local TV station and one of the cable nets, the average household broadcast rating exceeded the cable network rating by 74%.”).

⁸⁴ See Robert Seidman, *CBS, FOX and NBC All Renew NFL Deals Through 2022*, ZAP2IT.COM, Dec. 14, 2011, <http://tvbythenumbers.zap2it.com/2011/12/14/fox-sports-renews-its-deal-with-the-nfl-for-nine-additional-years-now-runs-through-2022/113797/>.

⁸⁵ Alex Brown, *Is CBS Really About to Offer Fans Free NFL Football?*, NATIONAL JOURNAL, Feb. 7, 2014, <http://www.nationaljournal.com/technology/is-cbs-really-about-to-offer-fans-free-nfl-football-20140207> (“Our goal is to bring [our new Thursday night] games to more fans on broadcast television with unprecedented promotion and visibility,” NFL Commissioner Roger Goodell said.”).

⁸⁶ Brief of National Football League & Major League Baseball as Amici Curiae Supporting Petitioners at 14, *ABC Inc. et. al. v. Aereo*, No. 13-461 (2014) (“If copyright holders lose their exclusive retransmission licensing rights and the substantial benefits derived from those rights when they place programming on broadcast stations, those stations will become less attractive mediums for distributing copyrighted content. The option for copyright holders will be to move that content to paid cable networks (such as ESPN and TNT) where Aereo-like services cannot hijack and exploit their programming without authorization.”).

⁸⁷ *NPRM* ¶ 1 (“We recognize that elimination of our sports blackout rules alone might not end sports blackouts, but it would leave sports carriage issues to private solutions negotiated by the interested parties in light of current market conditions and eliminate unnecessary regulation.”).

protections that will remain on the books after the Commission eliminates the Sports Blackout Rules.

VI. CONCLUSION

The Commission voted unanimously to end the Sports Blackout Rules. For the aforementioned reasons, it should waste no time bringing this wise conclusion to fruition in a final order during the second quarter of 2014.

Respectfully submitted,

By: /s/

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