

**Before the  
Federal Communications Commission  
Washington, D.C.**

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<b>In the Matter of</b>	)	
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<b>Sports Blackout Rules</b>	)	<b>MB Docket No. 12-3</b>
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**COMMENTS OF THE  
OFFICE OF THE COMMISSIONER OF BASEBALL**

The Office of the Commissioner of Baseball (“Baseball”) submits the following comments in response to the Commission’s Notice of Proposed Rulemaking, published at 79 Fed. Reg. 4138 (Jan. 24, 2014) (“NPRM”). The NPRM proposes elimination of Commission rules that prohibit various multi-channel video programming distributors (“MVPD”) from importing certain out-of-market telecasts of live sports events, including Major League Baseball (“MLB”) games. *See* 47 C.F.R. §§ 76.111, 76.127, 76.128, 76.1506(m) (2013) (“Sports Rules”). Baseball strongly opposes elimination of the Sports Rules.

**INTRODUCTION AND SUMMARY**

1. The Sports Rules prohibit cable systems, satellite carriers and open video systems (“OVS”), upon proper notification, from retransmitting a distant signal telecast of a sports event to subscribers within approximately thirty-five miles of the event — provided that a local broadcast station is not televising the same event. Thus, for example, cable systems in the Washington, D.C. area may not import a WGN-TV (Chicago, IL) telecast of a Cubs-Nationals game played at Nationals Park, as long as no Washington-area over-the-air broadcast station televises that game. Although the Commission refers to the Sports Rules as “blackout” rules, the term “blackout” is a misnomer when applied to MLB. That is because a telecast of an MLB game covered by the

Sports Rule is almost always available to local fans on another channel that the affected MVPD offers, *i.e.*, a regional sports network (“RSN”), such as MASN, or a national non-broadcast network, such as ESPN. In 2013 MASN, for example, televised all of the games involving the Nationals and Cubs. The Sports Rules simply prevent the MVPD from carrying a *second* telecast of the same MLB game in disregard of the exclusive rights licensed to a local telecaster by availing itself of a government-imposed compulsory license (17 U.S.C. §§ 111 & 119).

2. The NPRM requests comments on (1) whether the Commission has the authority to repeal the Sports Rules (NPRM at ¶¶ 14 & 15); (2) whether the economic rationale underlying the Rules remains valid in today’s marketplace (*id.* at ¶¶ 14 & 16-28); and (3) how elimination of the rules would affect sports leagues, their rightsholders and consumers. *Id.* at ¶¶ 14 & 29-39. As discussed below, the Commission has no authority to repeal the Sports Rules; nor is there any proper basis for doing so. The overarching purpose of the Rules is to “ensure to the greatest extent possible the continued availability of sports programming to the public.” *Id.* at ¶ 1. Elimination of the Sports Rules would undermine this important objective by allowing MVPDs to nullify the exclusivity that MLB clubs license their rightsholders. As the Commission has correctly concluded in adopting the syndicated exclusivity (“syndex”) and network nonduplication rules, preserving such exclusivity is integral to ensuring a continued supply of programming. That conclusion, affirmed by the U.S. Court of Appeals for the D.C. Circuit, applies equally in the context of live sports programming and supports not only retention but strengthening of the Sports Rules.

3. Under the Sports Rules as currently drafted, a sports club or league loses protection if it licenses an over-the-air broadcast television station (as opposed to an RSN or other non-broadcast network) the rights to televise a game. The Sports Rules should be

amended to require cable systems, satellite carriers and OVS to delete the distant signal telecast of a game licensed exclusively to a local broadcaster (as well as an RSN or other non-broadcast network).

## DISCUSSION

### I. The Commission Lacks Authority to Eliminate the Sports Rules.

4. In the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”), Pub. L. No. 106-113, 113 Stat. 1501, 1536, Congress expressly directed the Commission to apply the then-existing cable Sports Rule (as well as the network nonduplication and syndex rules) to satellite carriers. NPRM at ¶ 9. Section 1008 of the SHVIA amended Section 339 of the Communications Act, providing in pertinent part that:

[T]he Commission *shall* commence a single rulemaking proceeding to establish regulations that—

(A) apply network nonduplication protection (47 CFR § 76.92), syndicated exclusivity protection (47 CFR § 76.151), and sports blackout protection (47 C.F.R. § 76.67) to the retransmission of the signals of nationally distributed superstations by satellite carriers to subscribers; and

(B) to the extent technically feasible and not economically prohibitive, apply sports blackout protection (47 C.F.R. § 76.67) to the retransmission of the signals of network stations by satellite carriers to subscribers.

47 U.S.C. § 339(b)(1) (A) & (B) (emphasis added).<sup>1</sup> The Commission concluded that it was “technically feasible and not economically prohibitive” to apply the cable Sports Rule to satellite retransmissions of network stations. *In re SHVIA Implementation*, at 21,694-95. Accordingly, and consistent with its Congressional mandate, the Commission required satellite carriers to

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<sup>1</sup> When Congress enacted the SHVIA, the cable Sports Rule was codified at 76 C.F.R. § 76.67. In its order implementing the SHVIA, the Commission renumbered the cable Sports Rule as Section 76.111. See *In re Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals*, 15 FCC Rcd. 21,688, 21,741-42, Appendix B (2000) (“*In re SHVIA Implementation*”), recon. granted in part, denied in part, 17 FCC Rcd. 27,875 (2002).

comply with the Sports Rule provisions then applicable to cable systems when retransmitting both independent and network stations. *See id.* at 21,691.

5. In the Telecommunications Act of 1996 (“1996 Act”), Pub. L. No. 104-104, 110 Stat. 56, 121, Congress likewise directed the Commission to apply the cable Sports Rule (as well as the network nonduplication and syndex rules) to OVS. *See* NPRM at ¶ 8. It added Section 653 to the Communications Act, which provides in pertinent part:

Within 6 months after [February 8, 1996], the Commission *shall* complete all actions necessary (including any reconsideration) to prescribe regulations that—

...

(D) extend to the distribution of video programming over open video systems the Commission’s regulations concerning sports exclusivity (47 C.F.R. § 76.67), network nonduplication (47 C.F.R. § 76.92 *et seq.*), and syndicated exclusivity (47 C.F.R. § 76.151 *et seq.*).

47 U.S.C. § 573(b)(1)(D) (emphasis added).

6. Congress has never enacted any legislation authorizing the Commission to repeal the Sports Rules (or other rules) adopted pursuant to these statutory directives. To the contrary, Congress has required the Commission only to provide “recommendations” as to whether the applicable statutory provisions should be altered. *See* Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”), Pub. L. No. 108-447, § 208, 118 Stat. 2809; *see also* NPRM at ¶ 11. As this suggests, Congress has not directed the Commission to take unilateral action to revoke the Sports Rules (or the syndex and network nonduplication rules). Congress envisioned that it, not the Commission, would determine the fate of the Sports Rules (and other rules) based on the Commission’s recommendations. The Commission has not recommended to Congress any changes in these

statutory provisions. *See* FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* 3 (Sept. 8, 2005); *see also* NPRM at ¶ 11. And Congress, accordingly, has made no changes in those statutory provisions.

7. An agency has no authority to repeal a rule “contrary to an intent of Congress expressed in unambiguous terms.” *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992). The SHVIA’s use of the term “shall” and citation of the existing Sports Rule make clear that Congress intended to require satellite carriers and OVS to comply with that Rule. *See, e.g., Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (“Congress’ use of the term ‘shall’ indicates an intent to impose discretionless obligations.” (quotation omitted)); *see also Transp. Intelligence, Inc. v. FCC*, 336 F.3d 1058, 1065 (D.C. Cir. 2003) (accepting Commission’s argument that “may” denotes discretion while “shall” denotes obligation). Moreover, SHVERA’s instruction that the Commission provide only “recommendations” to Congress concerning the Sports Rules makes equally clear Congress’s intent that the Commission not repeal those Rules for any MVPD.

8. The Commission’s suggestion that “Congress . . . only directed the Commission to establish parity between the cable and DBS regimes” (NPRM at ¶ 15) does not, and cannot, arise from the language of the SHVIA and 1996 Act. The statutory provisions at issue make no reference to “parity.” Parity between the cable and satellite industries was doubtless a consideration motivating Congress’s choice of language in Section 339, as was Congress’s measured judgment to protect program exclusivity. *See* H.R. Rep. No. 106-86, at 9, 10 (1999). But Congress decided that the Commission should achieve parity in a specific way, namely, by extending the existing Sports Rule for cable systems to satellite carriers and OVS, and not by

repealing the cable Sports Rule. While a handful of congressmen have urged the Commission to eliminate the Sports Rules, Congress itself has not passed any legislation directing the Commission to do so. Unless and until Congress intervenes, the Commission should do no more than issue appropriate recommendations to Congress.

9. Moreover, Congress has attached equal significance in the 1996 Act, SHVIA and SHVERA to the Sports Rules, syndex rules and network nonduplication rules. Congress never intended that the Commission would repeal the Sports Rules, which protect the exclusive rights granted by sports organizations, while retaining the syndex and network nonduplication rules, which protect the exclusive rights of those with whom such sports organizations compete. There is no statutory basis for the Commission's discriminating among those whose rights are protected by the Sports Rules, syndex rules and network nonduplication rules.

**II. The Commission Should Strengthen, Rather Than Eliminate, the Sports Rules in Order to Promote the Overall Availability of Sports Programming to the Public.**

10. When the Commission adopted the Sports Rule for cable systems in 1975, its primary concern related to the "availability of television broadcast programming to the general public," which the Commission noted was "of vital importance to the larger and more effective use of the airwaves." *In re 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*, 54 F.C.C. 2d 265, 281 (1975) ("Sports Rule Order"); see also *id.* at 283 ("We expect our rule to preserve the overall availability of sports telecasts to the public . . ."). The Commission emphasized that it had no interest in "assur[ing] the profitability of organized sports." *Id.* at 281.

11. In its NPRM, the Commission notes that the Sports Rules protect the gate receipts of professional sports leagues. *See* NPRM at ¶ 1 (“These rules were intended to address concerns that MVPDs’ importation of a distant signal carrying a blacked-out sports event could result in low revenue from ticket sales, which might cause sports leagues to expand the reach of blackouts by refusing to sell their rights to sports events to all distant stations.”). But protecting gate receipts was not the *purpose* of the Sports Rules. As the Commission itself has observed in prior proceedings, “the [Sports Rules] . . . protect a sports team or league’s exclusive distribution rights to a local sporting event.” *Inquiry Regarding the Impact of Certain Rules on Competition in the Multichannel Video Programming Distribution Market*, 70 Fed. Reg. 6593, 6594 (Feb. 8, 2005). And the reason the Commission implemented these protections was to ensure the availability of sports programming; the protection of gate receipts was simply the means by which the Commission achieved this purpose. *See Sports Rule Order*, 54 F.C.C. 2d at 282.

12. Given the actual objective of the Sports Rules, the Commission should focus on whether those Rules continue to serve the purpose of promoting the availability of sports programming to the public, not simply on whether the Rules are necessary to protect gate receipts. The Commission notes that because of changes in the marketplace, television rights fees are more important than they were forty years ago, when gate receipts were the most significant source of revenue for sports leagues.<sup>2</sup> Because of the increasing importance of television rights fees, the Commission suggests that the Sports

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<sup>2</sup> Gate receipts and television revenues are equally important to Baseball. In 2013, Baseball’s gate receipts amounted to approximately \$2.3 billion while television rights fees accounted for approximately \$2.1 billion.

Rules are no longer necessary. But that conclusion does not follow. If gate receipts have diminished in importance relative to television rights fees, the importance of the Sports Rules as a means of protecting those rights fees has increased.

13. To be clear, Baseball believes that the Sports Rules help protect gate receipts; the National Football League (“NFL”) has explained how the Sports Rules continue to serve that purpose. *See* Comments of NFL at 11-12. But there is no reason the Commission should limit its focus to the effect of distant signal importation on gate receipts alone when such importation also impacts the important telecasting revenues of sports leagues and their member clubs.

14. The Sports Rules protect the ability of, for example, an MLB club to license an RSN the exclusive right to televise a particular home game (at least within a defined geographic area surrounding that club’s home stadium). MVPDs must respect that grant of exclusivity by deleting the distant signal telecast of the same game within that area. However, under the current Sports Rules, if a club authorizes the telecast of that game on a local broadcast station, the Rules do not require any MVPD to delete a telecast of the same game on a distant broadcast station. By importing the distant telecast of the same game, an MVPD may destroy the exclusivity that the club has licensed to a local broadcast station.

15. The Commission has correctly recognized that exclusive distribution agreements are a “valuable and legitimate practice in the television and cable industries.” *In re Amendment of Part 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd. 5299, 5300 (1988), *aff’d sub nom. United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989). The Commission



has determined that “reasonable exclusivity in the distribution of programming is an appropriate competitive tool for *any* distributor of video programming.” 3 FCC Rcd. at 5308 n.122 (emphasis added). When the Commission reinstated the syndex rules in 1988, it concluded that significant audience diversion occurs when a syndicator with exclusive rights to distribute a program in a local market must compete with a cable system’s secondary transmission of the same program on a distant broadcast station. *Id.* at 5305. The Commission also recognized that the danger of diversion increases when the two programs air close in time, particularly when they air simultaneously. *Id.* The Commission explained that a broadcaster’s inability to obtain exclusivity would lead to reduced programming availability on broadcast stations, *id.* at 5308, the very concern underlying the Commission’s initial adoption of the Sports Rules in 1975.

16. The D.C. Circuit has upheld the Commission’s conclusion that where a substantial number of viewers watch a duplicate program on a cable and broadcast station, one can reasonably conclude that substantial audience diversion has occurred. *See United Video*, 890 F.2d at 1178-79 (upholding Commission’s re-institution of syndex rules and noting that Commission could reasonably infer that audience diversion would lessen the value of programming). To encourage the continued availability of MLB games on broadcast television, the existing Sports Rules should not be eliminated but should be strengthened to prevent MVPDs from importing distant game telecasts that effectively undermine the exclusive agreements between sports clubs and their broadcast television partners.

**III. Elimination of the Sports Rules Will Leave Baseball and Other Sports Without a Practical Means of Bargaining for Blackout Protection Against Distant Signal Importation and Will Lead to a Rate Adjustment Proceeding.**

17. The Commission requests comment as to whether it should “be left to the sports leagues and individual teams to negotiate in the private marketplace whatever local blackout protection they believe they need.” NPRM at ¶ 30. As the NFL has demonstrated, such negotiations are not a realistic alternative to the Sports Rules. *See* Comments of NFL at 15-19. Perhaps more importantly, the Commission does not require those who invoke the syndex and network nonduplication rules to negotiate exclusivity protection rather than rely upon those rules. It is inappropriate to discriminate against sports interests by requiring them and not their competitors to negotiate such protection.

18. The Commission also seeks comment on whether “a rate adjustment proceeding [would] be mandatory or discretionary” in the event the Sports Rules were eliminated. NPRM at ¶ 38. The Copyright Act makes clear that, if the Commission eliminates the Sports Rules, Baseball and other sports will be entitled to seek an adjustment in the Section 111 compulsory licensing royalty rates applicable to cable systems and the Copyright Royalty Judges (“Judges”) will be required to initiate a rate adjustment proceeding. Section 804(b)(1)(B) of the Copyright Act provides:

[W]ithin 12 months after an event described in [Section 801(b)(2)(C)], any owner or user of a copyrighted work whose royalty rates are specified by section 111 . . . may file a petition with the Copyright Royalty Judges declaring that the petitioner requests an adjustment of the rate. The Copyright Royalty Judges *shall* then proceed as set forth in subsection (a) of this section.

17 U.S.C. § 804(b)(1)(B) (emphasis added). Section 801(b)(2)(C) of the Copyright Act, 17 U.S.C. § 801(b)(2)(C), states that the cable royalty rates may be adjusted “[i]n the event

of any change in the rules and regulations of the Federal Communications Commission with respect to . . . sports program exclusivity after April 15, 1976.” Section 804(a) of the Act, 17 U.S.C. § 804(a), requires the Judges to initiate a proceeding once a petition for a rate adjustment has been filed and the Judges conclude that the petitioner has a “significant interest” in the proceeding.

19. The Judges will determine the amount of any rate adjustment based upon the record evidence before them. Given the importance of the Sports Rules to protecting both gate receipts and broadcasting revenues, Baseball believes that the Judges would make a significant adjustment in the cable royalty rates to account for any elimination of those Rules. *Cf. Nat’l Cable Television Ass’n, Inc. v. Copyright Royalty Tribunal*, 724 F.2d 176, 190 (D.C. Cir. 1983) (affirming former Copyright Royalty Tribunal’s decision to increase the cable royalty rates to account for the FCC’s elimination of the syndex rules).

### **CONCLUSION**

For the reasons discussed above, the Commission may not and should not eliminate the Sports Rules. Rather, those Rules should be strengthened to accomplish the Commission’s primary objective of ensuring the availability of sports programming to the public.

Respectfully submitted,

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February 24, 2014