

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

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

**COMMENTS OF NATIONAL FOOTBALL LEAGUE**

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**Summary and Introduction**

Lawmakers, regulators, sports leagues, and the general public have long supported policies that seek to maximize viewership of professional sports games, both through live attendance and on free, broadcast television. Key among those policies is the Commission’s sports blackout rule, which protects the broadcast system and is essential to ensuring that professional sports games are available to the largest number of fans. Though much has changed in sports and television since the FCC’s blackout rule was first adopted, significant features have not: every professional football game remains available on free, over-the-air television; fan interest in seeing the games of the National Football League (“NFL” or “the League”) on free TV is remarkably high (typically 23 of the top 25 television programs viewed each year are NFL games); the NFL continues to offer games that are “big, live” events marked by full stadiums with excited crowds and fans watching on broadcast television; and the compulsory copyright could be used by cable and satellite companies to undermine the League’s media and stadium objectives.

Because of these simple, important, and unchanged facts, the NFL urges the Commission to maintain its blackout rule and reject the proposal to repeal. These comments and the attached economist's report and declaration establish four reasons to support this conclusion. ***First***, the system is working. If ever there was a case of "if it ain't broke, don't fix it," that applies here. The NFL, alone among the major professional sports leagues, has put all of its games on free, over-the-air television for more than 50 years and has committed to doing so well into the next decade. Local fans of NFL teams can watch *every* game for free; no other sports league can make that statement. The number of blackouts has decreased steadily and precipitously since the rule was first adopted, and last year only two games out of 267 experienced a blackout. ***Second***, because the basic facts surrounding professional sports on broadcast television have not changed over the years, the public interest in promoting sports on broadcast television also remains important, and the FCC's sports blackout rule advances that goal. ***Third***, contrary to the claims of repeal proponents, contractual provisions cannot achieve the same results as the sports blackout rule. ***Fourth***, the Commission lacks authority to repeal the blackout rule entirely. Congress first sanctioned blackouts in adopting the Sports Broadcasting Act of 1961, and since then Congress twice has enacted laws that *require* the Commission to promulgate sports blackout rules. The Commission should not ignore this congressional mandate especially because, to use the Commission's words from 1975, the blackout rule "*follows the sports telecasting policy which has been established by Congress.*"<sup>1</sup>

The NFL's ultimate goal is the same today as it was when Congress authorized blackouts many years ago: to maximize the number of people who view professional sports,

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<sup>1</sup> *Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programs on Cable Television Systems*, Report and Order, 54 FCC 2d 265, ¶ 63 (1975) (hereinafter, "Sports Blackout Order") (emphasis added).

both on television and in person. As documented in the attached report of economist Dr. Hal J. Singer, the Commission's sports blackout rule promotes both television viewership and live attendance by reinforcing the contractual obligations that cannot be achieved in the market. The sports blackout rule is rarely invoked, which is welcome both for the NFL and its fans, but its existence nonetheless remains a vital part of the League's broadcast policy, and should be maintained for the long-term interest of NFL fans and the League's broadcast partners.

### **I. The Current System Works Well for the Public and NFL Fans.**

NFL football over the past few decades has become the most popular, most watched professional sport in America. It is more popular than the next three professional sports—baseball, auto racing, and basketball—combined.<sup>2</sup> Not only is the Super Bowl consistently the most-watched program in America,<sup>3</sup> and the playoff games always ranked in the top ten programs of the year, each NFL game throughout the season is viewed by 17.5 million viewers, on average, and regular-season NFL games typically account for 23 of the 25 most-watched programs on television.<sup>4</sup> This popularity flows from the NFL's longstanding commitment to fan engagement, and that principle guides the NFL's media policies and its vision of professional football going forward. This fan engagement is one reason why recent Super Bowls have been marked by small-market teams attracting huge national audiences. In

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<sup>2</sup> *The Harris Poll*, January 2014 (poll taken Dec. 2013).

<sup>3</sup> Super Bowl XLVIII, between the Denver Broncos and the Seattle Seahawks, was the most-watched program in U.S. television history, with an average audience of 111.5 million people. NFL.com, *Super Bowl XLVIII Most-Watched TV Program in U.S. History* (Feb. 3, 2014), at <http://www.nfl.com/superbowl/story/0ap2000000323430/article/super-bowl-xlvihi-mostwatched-tv-program-in-us-history>.

<sup>4</sup> NFL Communications, *More than 200 Million Tune in to NFL Games in 2011—NFL TV Recap* (Jan. 5, 2012), at <http://nflcommunications.com/2012/01/05/more-than-200-million-tune-in-to-nfl-games-in-2011-nfl-tv-recap/>.

Super Bowl XLV, the Green Bay Packers, playing in the 69th market, went against the Pittsburgh Steelers, from the 23rd market, and that game was at the time the most watched broadcast show in television history. The year before saw another set of smaller market teams, the New Orleans Saints and the Indianapolis Colts, play in Super Bowl XLIV before a record-breaking audience.

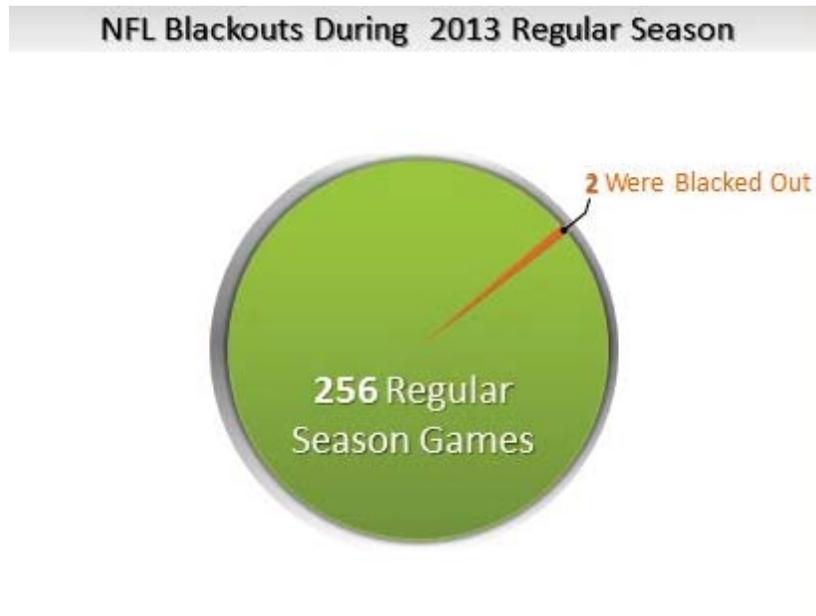
The League promotes fan engagement by having a stadium policy that promotes attendance, which dovetails with its media strategy of presenting “big, live” events on broadcast television to its local fans. The League stands out among professional sports in its commitment to universal availability of its games via traditional broadcast television. The NFL is the only sports league that provides fans with access to all games, both regular season and playoffs, on free, over-the-air television. The League recently reaffirmed its commitment to broadcast television, entering into significant extensions of its agreements with the CBS, FOX, and NBC television networks that ensure the NFL will remain on broadcast television through the 2022 season. With the League’s recent entry into a ten-year labor agreement with the players, fans can be assured of long-term stability as to both the playing of games and the ability to watch them on free, local television.

Proponents of repeal ignore the fact that the NFL’s blackout policy—and the Commission’s corresponding blackout rule—are rarely invoked. One reason for this success is that the League has adjusted its policy in recent years to give teams more flexibility as they seek to strike the right balance between promoting the in-stadium experience and engaging fans over television.<sup>5</sup> The result: NFL blackouts are at record lows, and the overwhelming majority of

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<sup>5</sup> See NFL.com, *NFL Eases Local TV Blackout Restrictions for Upcoming Season*, (June 30, 2012), at <http://www.nfl.com/news/story/09000d5d82a406ee/article/nfl-eases-local-tv-blackout->

NFL games are televised without blackouts. As shown in the chart below, only two of the 256 regular-season games in 2013 were blacked out. This statistic is consistent with the Commission’s prediction in 1975 that the sports blackout rule “will have minimal impact on present and future cable television viewers.”<sup>6</sup>



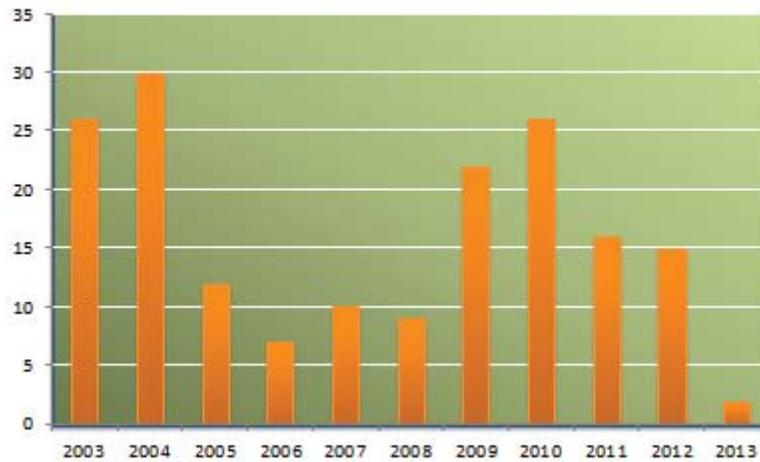
Moreover, blackouts have steadily decreased in the past decade, as seen in the chart below. In the 2003 NFL regular season, twenty-six games were blacked out. That number plunged by nearly 92 percent over the next decade.

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restrictions-for-upcoming-season; Letter of Gerard J. Waldron, Counsel to the National Football League, to Marlene Dortch, Secretary, FCC, MB Docket No. 12-3 (Nov. 14, 2013).

<sup>6</sup> Sports Blackout Order ¶ 56.

Number of Blackouts During NFL Regular Season



At bottom, proponents of eliminating the sports blackout rule have failed to identify a problem in need of solving. While their existence is critical, the NFL’s stadium policy and the Commission’s corresponding sports blackout rule lead to very few actual blackouts. But more broadly, the rule has led to NFL games being widely available on free, over-the-air television to millions of Americans who cannot or do not subscribe to a pay-TV service.<sup>7</sup> The Commission should not upend a system that is inarguably working for the public and NFL fans.

## **II. The Sports Blackout Rule Continues to Serve the Public Interest by Promoting Sports on Broadcast Television.**

Advocates of repealing the sports blackout rule contend that the rule no longer serves the public interest. Yet they provide no credible support for this claim. The sports blackout rule continues to promote the availability of professional sports via broadcast television

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<sup>7</sup> Declaration of Hal J. Singer, Attachment A (hereinafter, “Singer Declaration”) ¶ 20 (“That the percentage of Americans (in particular, lower-income Americans) dependent on [over-the-air] broadcasts is increasing is unsurprising, given the rising costs of cable and satellite programming services.”).

*and* live game attendance. Congress repeatedly has determined these goals to be consistent with the public interest. Moreover, critics of the rule present no evidence that the sports blackout rule on the whole harms consumers. The NFL has committed to broadcast television for the next decade, and last season more than 98% of all Americans had no experience with a blackout.

A. The Sports Blackout Rule Furthers Congressional Goals Set Forth in the Sports Broadcasting Act

It bears emphasis that the FCC's adoption of the blackout rule did not occur in a vacuum. Rather, it came in the wake of Congress expressly recognizing the necessity for blackouts when it adopted the Sports Broadcasting Act of 1961 ("SBA"). Congress adopted the blackout provision not for the sake of protecting the gate in its own right, but instead for the purpose of promoting sports on broadcast television. In 1961, a federal judge invalidated a contract for exclusive broadcast rights between the NFL and a broadcast network, ruling that the deal violated antitrust laws. The reaction in Congress was swift and resolute. Senator Roman Hruska bemoaned the "widespread anxiety among fans of professional football, including this speaker, that televised professional games may be severely restricted this fall."<sup>8</sup> Within a few months of this court ruling, Congress enacted the SBA, which expressly permits the four major professional sports leagues to enter into exclusive contracts with broadcasters, and to black out television broadcasts in a team's home territory.<sup>9</sup> Congress determined that the statute serves "the public interest in viewing professional league sports."<sup>10</sup> Thus, even in the early days of broadcast, Congress recognized the importance of government policies that promote broadly televised professional sports.

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<sup>8</sup> 107 Cong. Rec. 15223 (Aug. 9, 1961).

<sup>9</sup> 15 U.S.C. § 1292.

<sup>10</sup> H.R. Rep. No. 1178, at 3 (1961).

After Congress passed the SBA, the NFL and other professional sports leagues were free to negotiate contracts with the networks, thereby increasing the availability of free and live professional sports to millions of fans over broadcast television. Some NFL clubs were understandably concerned that televised games might discourage game attendance; therefore the NFL and broadcasters negotiated clauses that required games to be blacked out in the home market. As cable television became more widely available in the 1970s, both broadcasters and sports leagues were concerned that cable companies could use their compulsory copyright to circumvent the blackout provisions by importing distant signals of the blacked-out games. The Commission responded with the sports blackout rule in 1975. The FCC's blackout rule serves the same purpose as the SBA: to enable sports leagues to have a strategy that balances in-game attendance and the promotion of sports on broadcast television.<sup>11</sup> When the Commission adopted the sports blackout rule, it concluded, as Congress did, that the policy "helps to assure the continued availability of sports telecasts to the public."<sup>12</sup> Because Congress has not sought to repeal or amend the SBA, the Commission should be wary about amending its own rules which were designed to reinforce that legislative judgment.

B. The Rule Promotes Sports on Broadcast Television Because It Enables Sports Leagues to Achieve Their Media and Stadium Strategies

The blackout rule, though rarely invoked, continues to serve an important role today by giving sports leagues that distribute games on broadcast television the necessary tools to achieve their media and stadium strategies of encouraging in-stadium attendance and fan

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<sup>11</sup> See Sports Blackout Order ¶ 63 ("Having weighed the various comments from sports entrepreneurs, cable system operators, television broadcasters, members of Congress and private citizens, we have found that the public interest lies in the middle ground which we have taken. We expect our rule to preserve the overall availability of sports telecasts to the public, without unreasonably restricting the distant programming available to cable subscribers.").

<sup>12</sup> *Id.* ¶ 54.

engagement with games on broadcast television. Without that tool, a sports league would not be able to achieve its dual goals if its games aired on broadcast television. As Dr. Singer concluded, the NFL's ability to provide its games on free television is facilitated by the Commission's sports blackout rule.<sup>13</sup>

The Commission's Notice of Proposed Rulemaking<sup>14</sup> asserts that the rule was adopted to promote sports on broadcast television, and not to protect the revenues of sports leagues. In that context, however, the Commission must acknowledge that sports leagues have multiple goals: promoting attendance in person at live events *and* engaging fans through various media outlets. The sports blackout rule enables the NFL to manage that balance of encouraging a full stadium and enabling fans to enjoy the game on television, and Congress held those dual interests to be well-grounded and worthy of protection.<sup>15</sup> The Commission seeks comment on the relative importance of gate receipts compared to other revenue sources.<sup>16</sup> Proponents of repeal trivialize the importance of ticket sales, and ignore the fact that gate receipts provide teams with a significant portion of their annual revenues. Gate receipts account for approximately one-quarter of team revenue, or about \$51 million per team.<sup>17</sup> Gate revenues may be a smaller percentage of a team's total revenues than they were in 1975, but no business could rightly ignore a potential threat to up to a quarter of its revenues. While maintaining a sports

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<sup>13</sup> Singer Declaration ¶ 18.

<sup>14</sup> Notice of Proposed Rulemaking, In the Matter of Sports Blackout Rules, MB Docket No. 12-3 (Dec. 18, 2013) (hereinafter, "NPRM").

<sup>15</sup> See Sports Blackout Order ¶ 9 (discussing Congress's decision "that home territory blackouts to protect local gate receipts were a 'reasonable' restraint of trade"); *id.* ¶ 54 (stating that the sports blackout rule "is consistent with the policy established by Congress and helps to assure the continued availability of sports telecasts to the public").

<sup>16</sup> NPRM ¶ 22.

<sup>17</sup> Singer Declaration ¶ 26.

league's gate revenues may not be the purpose of the rule, the rule recognizes that such revenues are of great interest to sports leagues and influence their decisions on how to televise games. Consequently, if the rule is repealed, decisions about how to televise games may be revisited. Such a process is not in the best interests of the NFL, its teams, or, most importantly, the fans.

Additionally, sports teams rely on live attendance not just for ticket sales, but for many other forms of revenue. As Dr. Singer concluded, NFL teams “derive a significant portion of their revenues from the sale of not only game tickets, but also from the sale of concessions, parking, team merchandise and other stadium-based goods and services.”<sup>18</sup> Moreover, it is well-documented that large in-stadium crowds make the televised games more appealing to advertisers.<sup>19</sup> Companies have less incentive to sign long-term deals for in-stadium advertising and to purchase advertising during NFL games if the crowds are not maximized.

Both the Commission and Congress have agreed that live attendance is important to sports teams' finances. In adopting its initial sports blackout rule, the Commission recognized teams' legitimate interest “in protecting their home gate receipts from the potentially harmful financial effects of invading telecasts of their games from distant television stations.”<sup>20</sup> Likewise, a primary reason for Congress's passage of the SBA in 1961 was the protection of gate receipts, particularly in smaller markets.<sup>21</sup>

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

<sup>19</sup> *Id.* ¶ 27.

<sup>20</sup> Sports Blackout Order ¶ 55; *see also id.* ¶ 57 (“The potential loss of gate receipts resulting from these importations could force sports clubs to extend their blacked out zone of protection to include all distant stations which may be carried by local cable television systems. Thus, the games would be available to fewer television viewers, contrary to our communications policy and the sports broadcasting policy of Congress.”).

<sup>21</sup> *Telecasting of Professional Sports Contests*, Committee on the Judiciary, H.R. 9096, 87th Cong. Rep. No. 1178, Sept. 13, 1961 at 3 (concluding that if “weaker teams are allowed to

C. The Sports Blackout Rule Promotes Game Attendance

Nearly four decades after its enactment, the Commission’s sports blackout rule continues to promote attendance at live games. Proponents of repeal claim that blackouts do not have any meaningful effect on attendance at NFL games.<sup>22</sup> This claim is not only unsupported, it is contrary to compelling evidence.

Economic research clearly demonstrates that the sports blackout rule plays a vital role in ensuring that professional sports games reach near-capacity attendance.<sup>23</sup> Blackouts are associated with a statistically significant increase in attendance and decrease in “no-shows.”<sup>24</sup> A comprehensive economic analysis of sports blackouts in 2000 concluded that blackouts were correlated with a maximum average decrease in no-shows of 4,959, a maximum increase in overall tickets sold of 11,310, and an average maximum per-game increase in revenues of \$414,336 per team.<sup>25</sup> This research demonstrates that blackouts are crucial to driving live game attendance and comports with the multitude of evidence showing that the threat of blackouts spurs attendance for NFL games.<sup>26</sup>

Repeal proponents ignore that NFL teams properly seek to maximize revenues from all sources, including gate receipts and television broadcast contracts, and that they price

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founder, there is danger that the structure of the [NFL] would become impaired and its continued operation imperiled.”).

<sup>22</sup> In the Matter of Petition for Rulemaking to Eliminate the Sports Blackout Rule, *Comment of Sports Economists on The FCC’s Sports Blackout Rules*, MB Docket No. 12-3 (hereafter “Sports Economists Comments”).

<sup>23</sup> Singer Declaration ¶ 38.

<sup>24</sup> *See id.* ¶ 39.

<sup>25</sup> William P. Putsis Jr. & Subrata K. Sen, *Should NFL Blackouts be Banned?*, 32 APPLIED ECONOMICS 1502, 1503 (2000).

<sup>26</sup> *See* Singer Declaration ¶ 24.

the tickets accordingly.<sup>27</sup> The sports blackout rule provides teams with an economic incentive to ensure that games are well-attended and not blacked out; otherwise, the teams could lose significant revenue. Thus, as Dr. Singer concludes, the sports blackout rule encourages teams to price tickets *below* the levels that would exist if teams were maximizing gate receipts only.<sup>28</sup> Even if a team could increase its total gate receipts by raising ticket prices, the team likely would keep prices low in an effort to fill seats and avoid a blackout, as certain advertising revenues are threatened in the event of a blackout. Dr. Singer concludes that elimination of the sports blackout rule likely would lead to higher ticket prices because sports teams would no longer have reason to keep attendance above a certain level; instead, their ticket pricing strategy would focus on maximizing gate receipt revenue.<sup>29</sup> In other words, repealing the Commission’s rule would likely result in higher ticket prices *and* reduced live attendance. Clearly, such a change would not be in the best interests of sports fans or the general public.

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<sup>27</sup> See *id.* ¶ 32 (“Indeed, basic pricing theory indicates that in the case of a sellout, increasing the price of tickets (to a point where the game would not sell out) would lead to an increase in short-term ticket revenue. This is due to the fact that NFL teams face a downward-sloping demand curve for their games; the associated downward-sloping marginal revenue will generally intersect the marginal cost at a point well in advance of stadium capacity.”); *id.* ¶ 40 (“More fundamentally, that the NFL would choose to perpetuate (over several decades) a policy expressly designed to increase attendance if that policy did not, in fact, increase attendance (and profits), is dubious and inconsistent with fundamental economic principles.”).

<sup>28</sup> *Id.* ¶ 32.

<sup>29</sup> *Id.* ¶ 43 (“As explained above, the NFL’s blackout policy incentivizes teams to keep ticket prices lower than they would otherwise, by putting certain advertising revenue (such as local avails) at risk in the event of a blackout. In the absence of the blackout policy, NFL teams could choose to increase ticket prices, as they would no longer fear putting those revenues at risk in the event that game does not sell out.”).

D. Game Attendance Ensures a High-Quality Experience for Both Television Viewers and Live Attendees

The sports blackout rule reflects a longstanding recognition that live attendance improves both the stadium experience and the quality of games that are viewed on television.<sup>30</sup>

When the Commission enacted the sports blackout rule for cable companies in 1975, it recognized that “the need to maximize live audiences is shared by all spectator sports, intercollegiate and interscholastic as well as professional, and individual as well as team sports.”<sup>31</sup>

Increased attendance leads to audience engagement, which improves the viewing experience for sports fans both in the stadium and watching on television. Indeed, earlier this month, the *New York Times* profiled the NFL and the Super Bowl as an example of the value of must-see, live television. The *Times* aptly noted that “[a]t a time of atomization in which we all end up down the hobbit holes of our special interests, *big, live* television fulfills a need to have something, anything, in common.”<sup>32</sup> The packed stadium with a roaring crowd is an essential component of the NFL’s “big, live” event that it seeks to display every week of the season.

Sporting events are a classic example of what economists refer to as “mob goods,” whose overall consumer utility depends on the excitement of crowds.<sup>33</sup> As economists

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<sup>30</sup> See *id.* ¶ 34 (“Sold-out stadiums populated by boisterous, visible fans make telecasts more appealing to the marginal, national fan, thereby improving individual fans’ viewing experiences, and increasing the value of NFL programming on a national level.”).

<sup>31</sup> Sports Blackout Order ¶ 58.

<sup>32</sup> David Carr, *Super Bowl Underscores the Big Business of Must-See, Live TV*, *The New York Times* (Feb. 2, 2014) (emphasis added).

<sup>33</sup> See Allan C. DeSerpa & Roger L. Faith, *Bru-uu-uce: the Simple Economics of Mob Goods*, 89 *PUBLIC CHOICE* 77, 78 (1996) (“the behavior of others during the event is part of the consumption experience. Cheering (at sports contests), raucous enthusiasm (screaming ‘Bru-u-uce’ at a Springsteen concert), spontaneous applause (at a live on-stage theatre), or a buzz of

have observed, “fans do not only consume the on-field excitement, but also the atmosphere and noise created by fans. In this sense, each additional fan is a co-producer who increases the overall value of sports consumption.”<sup>34</sup> Any sports fan can relate to this economic phenomenon; the crowd’s energy is an essential component of the game experience.

E. The Sports Blackout Rule *Increases* the Availability of Games on Broadcast Television

Proponents of repeal rely on the entirely unsupported assumption that the Commission’s sports blackout rule reduces the availability of professional sports on television. To the contrary, over the long run the blackout rule actually *increases* the availability of sports games on television by encouraging broadcasters and professional sports leagues to reach deals for exclusive broadcast rights.<sup>35</sup>

The NFL is committed to providing its games to consumers on free broadcast television, and the sports blackout rule is a crucial part of that strategy. By ensuring that televising games will not reduce live attendance, the sports blackout rule encourages sports leagues to reach deals with broadcast networks.<sup>36</sup> In other words, the Commission’s sports

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conversation (at popular restaurants) all add a second dimension (X), which tends to make the full event more enjoyable than private consumption of the commodity.”).

<sup>34</sup> Helmut Dietl & Tobias Duschl, *The Organization of Professional Sports Leagues: A Comparison of European and North-American Leagues from the Perspective of Platform Organization*, University of Zurich Working Paper No. 119 (Dec. 2009).

<sup>35</sup> See Singer Declaration ¶¶ 17–18 (“By mandating that MVPDs abide by the blackout clauses in the NFL’s private contracts with networks and broadcasters, the SBR obviates the need for the NFL to engage in myriad, time-consuming individual contract negotiations to establish new agreements between (1) itself and television networks, (2) CBS, FOX, NBC and their network affiliates, and (3) network affiliates and MVPDs.”)

<sup>36</sup> See *id.* ¶ 18 (concluding that the sports blackout rule “serves the important function of reducing the contracting costs associated with maintaining control of the distribution rights to its programming.”).

blackout rule provides sports teams with a rational economic incentive to allow broadcasters to televise their games in the broadest way possible.

The Commission has recognized that the blackout rule serves the public interest by assuring the continued availability of sports telecasts to the public. When the Commission adopted the sports blackout rule, it explained:

If cable television carriage of the same game that is being played locally is allowed to take place, the local team's need to protect its gate receipts might require that it prohibit the telecasting of its games on television stations which might be carried on local cable systems. If this were to result, the overall availability of sports telecasts would be significantly reduced.<sup>37</sup>

The Commission's conclusion in 1975 holds equally true today. If cable and satellite carriers were permitted to circumvent the contracts between sports leagues and broadcasters, the eventual result likely would be a *decrease* in the amount of professional sports on broadcast television. Supporters of the rule's elimination fail to demonstrate how a decrease in free broadcast sports is in the public interest.

### **III. Contractual Provisions Cannot Replace the Sports Blackout Rule.**

The Commission acknowledges that because the Copyright Act provides cable and satellite carriers with compulsory licenses, sports leagues might be unable to use private

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<sup>37</sup> Sports Blackout Order ¶ 55 (continuing ¶ 57, "In the case of cable television importations of blacked out home games, the ultimate effect of frustrating local blackouts might be to reduce overall sports telecasts. The potential loss of gate receipts resulting from these importations could force sports clubs to extend their blacked out zone of protection to include all distant stations which may be carried by local cable television systems. Thus, the games would be available to fewer television viewers, contrary to our communications policy and the sports broadcasting policy of Congress."); *id.* ¶ 63 ("[T]he rule which we adopt today best serves the public interest in the larger and more effective use of the airways and follows the sports telecasting policy which has been established by Congress.").

contracts to control the transmission of their games.<sup>38</sup> The Commission seeks comment on how such compulsory licenses would affect the ability of sports leagues to obtain through private contracts the same protection provided by the sports blackout rules, and whether other marketplace tools would be available to accomplish the same end result.<sup>39</sup>

In 2000, the Commission found that

[t]he network non-duplication, syndicated exclusivity, and sports blackout rules . . . generally protect exclusive contractual rights that have been negotiated between program providers and broadcasters or other rights holders. These exclusive contractual rights are potentially threatened by cable systems that are capable of importing duplicative programming from distant sources beyond the control of the contracting parties.”<sup>40</sup>

The Commission reached the same conclusion in 2005 when it advised Congress that the sports blackout rule—like the network non-duplication and syndicated exclusivity rules—ensures that multichannel video programming distributors (“MVPDs”) “do not undermine contractual arrangements between broadcasters and sports programming rights holders by importing sports programming that is subject to blackout in the local market.”<sup>41</sup> The Commission’s conclusion—reached twice in the past fourteen years and under different Executive Branch Administrations—remains true today and helps to keep sports programming on free, over-the-air broadcast television, available to all viewers.

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<sup>38</sup> See NPRM ¶ 31.

<sup>39</sup> See NPRM ¶¶ 32–33.

<sup>40</sup> See *In re Implementation of the Satellite Home Viewer Improvement Act of 1999*, Report and Order, 15 FCC Rcd 21688, 21889, ¶ 3 (2000) (emphasis added); see also *id.* at 21699, ¶ 22 (“Congress directed the Commission to make the [satellite] rules ‘as similar as possible’ to the cable rules and to protect the contractual exclusivity rights purchased by broadcasters and sold by program rights holders.”).

<sup>41</sup> *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 WL 2206070, at \*18, ¶ 58 (Sept. 8, 2005).

As the attached Declaration of Brian Rolapp establishes, the NFL’s contracts with broadcast television networks do not contain provisions requiring the broadcast networks to ensure that their affiliates prohibit cable and satellite providers from retransmitting their signal including blacked out NFL games into a local market.<sup>42</sup> The contracts between the NFL and the broadcast networks will not expire until 2023,<sup>43</sup> and the networks have no incentive to reopen them to add such a provision, which would require the networks to amend all of their affiliation agreements to prohibit any affiliate from allowing its signal to be so imported.<sup>44</sup> (This multi-step process is necessary because the NFL lacks privity with the local broadcast station.)

Another reason the broadcast networks have no incentive to accept such a provision is because they likely would not be able to ensure compliance.<sup>45</sup> Their affiliation agreements with nearly 200 local broadcast stations are staggered contracts with multiple-year terms.<sup>46</sup> As a result, the broadcast networks could not accomplish any possible contractual obligation involving amendment of each of these affiliation agreements in the near- or medium-term.<sup>47</sup> Moreover, an affiliate would have no incentive to open its existing affiliation agreement for early renegotiation to accept such a provision.<sup>48</sup> Affiliates also may have already consented in retransmission consent agreements with MVPDs to allow carriage of their signals in areas where a local game may be blacked out. In such cases, the local affiliates may be contractually

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<sup>42</sup> Declaration of Brian Rolapp, Attachment B (hereinafter, “Rolapp Declaration”), ¶ 3.

<sup>43</sup> *Id.*

<sup>44</sup> *See id.* ¶ 5.

<sup>45</sup> *See id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See id.*

<sup>48</sup> *See id.*

unable to secure an MVPD's assurance that it will honor a sports blackout instance. Thus, it is not credible to claim that the NFL could accomplish the goals of the sports blackout rules through contracts with its broadcast partners.

The NPRM also notes that most cable and satellite carriers carry networks or game packages owned directly by the leagues, such as NFL Network and NFL Sunday Ticket.<sup>49</sup> The Commission seeks comment on whether contracts for distribution of these services include some form of blackout protection, and whether the sports leagues could use such contracts to accomplish the goals of the sports blackout rules.<sup>50</sup> The claim that the NFL could accomplish the goals of the sports blackout rules through its contracts with cable and satellite providers for services such as NFL Network is based on assumptions that simply have no basis in current reality and past experience. ***First***, the Rolapp Declaration establishes that current contracts for distribution of these services do not contain provisions that prohibit cable and satellite providers from importing a distant signal if a game on broadcast TV is blacked out.<sup>51</sup> ***Second***, these contracts are typically seven- to nine-year contracts, many of which have several years remaining.<sup>52</sup> Cable and satellite providers have no incentive to reopen these contracts to accept an unrelated, collateral provision that would limit their ability import distant signals local games that have been blacked out.<sup>53</sup> ***Third***, given the “many years of long and hard negotiations” that were required to achieve widespread carriage of NFL Network and NFL RedZone,<sup>54</sup> the notion

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<sup>49</sup> See NPRM ¶ 31.

<sup>50</sup> See *id.*

<sup>51</sup> See Rolapp Declaration ¶ 7.

<sup>52</sup> See *id.* ¶ 8.

<sup>53</sup> See *id.*

<sup>54</sup> *Id.* ¶ 6.

of adding a collateral provision to bind the cable and satellite providers on unrelated matters is simply unrealistic in the difficult negotiations between the cable and satellite providers and the NFL.<sup>55</sup>

As the Commission has recognized, the sports blackout rule provides protections that cannot be achieved reliably or efficiently, let alone exclusively, in the marketplace. Claims that the goals of the sports blackout rules could be accomplished through private contracts therefore have no foundation in the current marketplace dynamic and cannot be the basis for a dramatic reworking of the longstanding regulatory framework underpinning the League's TV distribution model.

#### **IV. The FCC Lacks Authority to Repeal the Sports Blackout Rule to DBS and OVS Providers, and Repeal Runs Counter to Congressional Intent.**

Even if the Commission were to determine that repealing the rule is in the public interest, it would not have the statutory authority to repeal the rule for satellite- and telephone-based video distributors, and such action would run counter to congressional recognition of blackouts in the SBA. In the past two decades, Congress has twice expressly required the Commission to adopt sports blackout rules; in the absence of a congressional repeal of these statutes, the Commission lacks authority to eliminate its sports blackout rules.

The Commission adopted the sports blackout rule for cable systems in 1975. The SBA and other applicable statutes allowed—but did not require—the Commission to adopt this regulation for cable carriers. The Commission promulgated the sports blackout rule because it recognized that by importing distant signals of sports programming, “cable systems infringe upon the ability of sports teams and leagues to control the areas in which events may be

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<sup>55</sup> *See id.* ¶ 9.

viewed.”<sup>56</sup> The Commission concluded that the cable sports blackout rule “serves the public interest in the larger and more effective use of the airways *and follows the sports telecasting policy which has been established by Congress.*”<sup>57</sup>

Two decades later, Congress twice directed the Commission to adopt sports blackout rules for the transmission of video signals via newer distribution methods. In the Telecommunications Act of 1996 (“the 1996 Act”), Congress explicitly required the Commission to adopt the sports blackout rule for “open video” systems (“OVS”).<sup>58</sup> More importantly, in 1999, Congress enacted the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”), imposing a similar requirement that the Commission adopt the rule for satellite carriers.<sup>59</sup>

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<sup>56</sup> Sports Blackout Order ¶ 10.

<sup>57</sup> *Id.* ¶ 63 (emphasis added).

<sup>58</sup> See 47 U.S.C. § 573(b)(1)(D). The statute states:

Regulations required[.] Within 6 months after [the date of enactment of the Telecommunications Act of 1996, enacted Feb. 8, 1996], the Commission *shall* complete all actions necessary (including any reconsideration) to prescribe regulations that . . . 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.).

*Id.* (emphasis added).

<sup>59</sup> See 47 U.S.C. § 339(b). SHVIA states, in relevant part:

(1) Extension of protections[.] Within 45 days after [the date of the enactment of the Satellite Home Viewer Improvement Act of 1999, enacted Nov. 29, 1999], the 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 CFR 76.67) to the retransmission of the signals of nationally distributed superstations by satellite carriers to subscribers; and

Both statutes are crystal-clear: the Commission “shall” adopt sports blackout protections for both satellite- and OVS-based video distribution. The statutes do not provide the Commission with leeway to determine whether to adopt these rules. The D.C. Circuit has observed, “[t]he word ‘shall’ generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.”<sup>60</sup> In a case stemming from the Commission’s decision to not give full weight to the word “shall” in section 203 of the Communications Act, Justice Scalia, in overturning the Commission, wrote, “For better or worse, the Act establishes a rate-regulation, filed-tariff system for common-carrier communications, and the Commission’s desire to increase competition cannot provide [it] authority to alter the well-established statutory filed rate requirements. As we observed in the context of a dispute over the filed-rate doctrine more than 80 years ago, ‘such considerations

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

(2) Deadline for action[.] The Commission shall complete all actions necessary to prescribe regulations required by this section so that the regulations *shall* become effective within 1 year after [such date of enactment].

*Id.* (emphasis added).

<sup>60</sup> *Ass’n of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994). *Accord, MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186, 1191 (D.C. Cir. 1985) (“‘Shall,’ the Supreme Court has stated, ‘is the language of command;’ ‘[a]bsent a clearly expressed legislative intention to the contrary,’ courts ordinarily regard such statutory language as conclusive.” (citations omitted)). *See Exelon Generation Co., LLC v. Local 15, IBEW*, 676 F.3d 566, 571 (7th Cir. 2012) (“‘must,’ like ‘shall,’ is mandatory and generally forecloses discretion.”); *Feder v. Frank (In re HP Inkjet Printer Litig.)*, 716 F.3d 1173, 1181, n.9 (9th Cir. 2013) (“The traditional, commonly repeated rule [of statutory interpretation] is that ‘shall’ is mandatory . . . .”) (quoting Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 112 (2012)); *see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“[T]he mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion.”).

address themselves to Congress, not to the courts.”<sup>61</sup> The Commission’s desire to change the current blackout system for some or all MVPDs cannot trump clear direction from Congress. The Commission must heed that mandate and suggest possible legislative changes to Congress if it determines that change is needed.<sup>62</sup>

Thus, the Sports Fans Coalition is simply wrong in its unsupported assertion that Congress “never directed the Commission to implement the rule.”<sup>63</sup> There are two provisions in the Communications Act which do exactly that. The Sports Fans Coalition seeks to evade this unambiguously clear statutory language by suggesting that these statutory mandates apply *only if* the Commission has required blackout rules for cable companies.<sup>64</sup> This interpretation is contrary to the longstanding rule that an administrative agency must interpret a statute so as to give effect to every word in the statute.<sup>65</sup> It also is contrary to other provisions in the 1996 Act

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<sup>61</sup> *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994) (alteration in original) (citations and internal quotation marks omitted).

<sup>62</sup> If the Commission were to entirely repeal the sports blackout rule, it would ignore the statutes’ requirements that the Commission adopt sports blackout rules for satellite and phone carriers. Such an interpretation would be inconsistent with a long line of D.C. Circuit and Supreme Court opinions that prohibit administrative agencies from ignoring express congressional requirements. *See, e.g., Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (“Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes . . . .”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 585 (1992) (Stevens, J., concurring in judgment) (“Certainly the Executive Branch cannot be heard to argue that an authoritative construction of the governing statute by this Court may simply be ignored by any agency head.”).

<sup>63</sup> *See* Comments of Sports Fans Coalition, MB Docket No. 12-3 (hereinafter, “Sports Fans Coalition Comments”).

<sup>64</sup> *See* NPRM ¶ 15 (“Given that the DBS and OVS provisions are expressly tied to the cable sports blackout rule, does this evince an intent on the part of Congress that the Commission should accord the same regulatory treatment to DBS and OVS as cable, *i.e.*, if the Commission modifies or repeals the cable rule it should also modify or repeal the DBS and OVS rules?”)

<sup>65</sup> *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) (“[W]e must give effect to every word of a statute wherever possible”).

which used the same formulation, that the Commission “shall” adopt or amend certain rules.<sup>66</sup>

In both of those instances, the Commission heeded the Congressional mandate and adopted the rules.<sup>67</sup> In imposing the blackout rule on OVS and DBS providers, the Commission followed the same course, and conformed its rules to the statute. Because the statute has not changed, the Commission’s rules cannot change.

Lastly, the Sports Fans Coalition suggests that the sports blackout rule is not mandatory for satellite providers because SHVIA only requires the blackout rule for satellite television when “technically feasible.”<sup>68</sup> But that raises the question: is there *any* showing, any claim whatsoever, that the blackout rule is not “technically feasible”? In adopting the rule in 2000, the Commission found that it was technically feasible.<sup>69</sup> The NFL is unaware of any evidence—or even any unsupported assertion—that the sports blackout rule is no longer technically feasible for satellite carriers. This grasping for straws comes up empty.

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<sup>66</sup> For instance, in the television ownership context, the 1996 Act stated: “The Commission *shall* modify its rules for multiple ownership set forth in section 73.3555 of its regulations.” Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(c)(1), 110 Stat. 56 (emphasis added). Similarly, the 1996 Act directed the Commission to repeal the network-cable cross-ownership rule: “The Commission shall revise section 76.501 of its regulations . . . to permit a person or entity to own or control a network of broadcast stations and a cable system.” *Id.* § 202(f)(1) (emphasis added) (citation omitted).

<sup>67</sup> Significantly, the Commission took those steps without notice and comment procedures “because the rules being modified are mandated by the applicable provisions of the Telecom Act” and “[b]ecause these rule changes simply conform the Commission’s rules to the statute.” *In re Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996*, Order, 11 FCC Rcd 12374 (1996) (ownership cap rule modification); *In re Implementation of Sections 202(f), 202(i), and 301(i) of the Telecommunications Act of 1996*, Order, 11 FCC Rcd 15115, 15117 (1996) (cable cross-ownership rule modification).

<sup>68</sup> Sports Fans Coalition Comments at 17.

<sup>69</sup> See *In re Implementation of the Satellite Home Viewer Improvement Act of 1999*, Report and Order, 15 FCC Rcd 21688, 21721, ¶ 64 (2000) (“[T]he record provides unrefuted information that the technology to implement the network station sports blackout exists.”).

Because the Commission lacks authority to repeal the rule for satellite and OVS companies, it may only, at most, consider whether to repeal the blackout rule for cable companies. A statutory argument and a policy argument counsel against that step. On the policy front, such action would create regulatory preferences<sup>70</sup> and would run counter to the Commission's general policy of remaining technology-neutral.<sup>71</sup> The statutory consideration is that the Commission should proceed with additional caution in light of Congress's deep involvement in sports blackout issues, beginning with the SBA in 1961 and continuing through the adoption of SHVIA in 1999. The Commission stated it well in adopting the rule that it "follows the sports telecasting policy which has been established by Congress."<sup>72</sup> Congress adopted that policy in 1961, affirmed it in 1996, and reaffirmed it in 1999. Rather than creating different standards based on the video distribution platform, the Commission should continue to let Congress, which started this debate in 1961, decide how the policy should be addressed.

### **Conclusion**

Both Congress and the Commission have long recognized that the sports blackout rule promotes two legitimate goals: live game attendance and television viewership. The blackout rule's opponents have not presented any material changes that should cause the Commission to repeal this policy.

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<sup>70</sup> See NPRM ¶ 15 ("Would eliminating the sports blackout rule for cable but not for DBS and/or OVS create undue disparities or unintended consequences for any of these entities?").

<sup>71</sup> See, e.g., *In the Matter of Expanding Access to Broadband and Encouraging Innovation Through Establishment of an Air-Ground Mobile Broadband Secondary Service for Passengers Aboard Aircraft in the 14.0–14.5 GHz Band*, Notice of Proposed Rulemaking, 28 FCC Rcd 6765, 6796, ¶ 101 (2013) ("[W]e strive to establish technology neutral rules that allow for competing technologies and changes in technology over time without the need to change our rules."); *In the Matter of Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4649, ¶ 284 (2011) (discussing the Commission's "goal of being technology-neutral").

<sup>72</sup> Sports Blackout Order ¶ 63.

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Attachments:

Declaration of Hal J. Singer  
Declaration of Brian Rolapp

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