Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	
Sports Blackout Rules	)	MB Docket No. 12-3
	)	

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

I. Introduction

The National Association of Broadcasters ("NAB")[1] continues to oppose elimination of the sports blackout rules ("SBR"), as proposed in the *Notice* in this proceeding.[2] As demonstrated below, commenters who favor elimination of the SBR have failed to show why such action will not harm the viewing public and the long-term viability of popular sporting events on free over-the-television.

Proponents of eliminating the sports blackout rules continue to misunderstand the purpose of the rules, and they offer no clear evidence that the rules' elimination will either: (a) end sports blackouts, or (b) facilitate a marketplace for sports programming that will benefit consumers, especially those relying on free over-the-air TV. Instead, those commenters, especially the "Sports Fans Coalition" ("SFC"), rely heavily on hyperbolic protestations, backed by flimsy – or even grossly incorrect – factual and legal arguments

[1] NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] *See Sports Blackout Rules*, Notice of Proposed Rulemaking, in MB Docket No. 12-3 (rel. Dec. 18, 2013) ("*Notice*").

and multiple unsupported assumptions. They cannot clearly explain how eliminating the SBR will help sports fans rather than harm their ability to access sports programming. Assertions that the rules are "anti-fan" or that the National Football League ("NFL") is a "bad actor" and should be punished are not reasons to eliminate a nearly 40-year old rule that has promoted the proliferation of live sports on local TV. As we explain below, these rules are more relevant today than when they were first put in place.

These reply comments focus on three points. First, contrary to the claims of some commenters, changed circumstances in both the sports and television industries not only do not support elimination of the SBR, they support retaining the rules. Second, absent the SBR, neither contracts nor existing regulations will prevent pay TV systems from importing distant signals, thereby harming localism. Third, focus on the financial viability of sports leagues, and particularly on NFL ticket sales, is misplaced and irrelevant to the principle purpose of the rules – to ensure the widespread availability of sports on free, local television and local stations' ability to contract for exclusive coverage of sporting events in their local markets.

II. Changing Circumstances in the TV and Sports Industries Do Not Warrant Elimination of the Rules

Several commenters proposing elimination of the SBR suggest that "changing circumstances" in the television and sports industries since the rules' inception in the 1970s render the SBR obsolete.[3] This is incorrect. Changes in the industries – especially the increased availability of, and subscribership to, pay TV – make the rules more important today than when they were first enacted. In 1975, roughly 14 percent of

[3] *See, e.g.,* Comments of Brent Skorup, Mercatus Center at George Mason University, in MB Docket No. 12-3 (filed Feb. 24, 2014) at 2 ("Mercatus Center Comments"); Comments of the Independent Telephone & Telecommunications Alliance in MB Docket No. 12-3 (filed Feb. 24, 2014) at 1 ("ITTA Comments"); and Comments of the Sports Fan Coalition, Inc., in MB Docket No. 12-3 (filed Feb. 24, 2014) at 4 ("SFC Comments").

households subscribed to pay TV.[4] Today, more than 80 percent of households subscribe to pay TV.[5] Indeed, there are more households subscribing to pay TV today (about 95 million) than there were *total households* (about 73 million) in 1975. The figures demonstrate that importing a distant signal into a local market would have a much larger negative impact on local TV stations, particularly their ability to sell advertising, than it would have when the SBR was first adopted. Accordingly, were the Commission to consider "changing circumstances" in the television industry, those circumstances would support the rules' maintenance, not their elimination. No commenter that proposes the rules' elimination addresses this critical point.

Sports teams and leagues' increased reliance on television revenue viś-a-viś gate receipts does not support eliminating the SBR either. The rules remain important to both sports leagues and broadcasters. The NFL notes, for example, that gate receipts still provide approximately 25 percent of team revenue and that "no business could rightly ignore a potential threat to up to a quarter of its revenues."[6] Further, the NFL has a clear interest in promoting its games as major events, and notes that advertisers find large in-game crowds more appealing.[7] Of course, for broadcasters, NFL games are indeed major events and, due to their DVR-proof content, they are critical for selling advertising and as

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[4] *See* Mari Rondeli, "History of Cable Pay TV Revenues," SNL Kagan Multichannel Market Trends (August 27, 2008), *available at*: http://www.snl.com/interactivex/article.aspx?id=8302189&KPLT=6. Roughly 9.8 million households were pay TV subscribers of some sort in 1975. According to census data, there were about 73 million households in 1975.

[5] *See* GfK, "Home Technology Monitor 2013 Ownership Survey and Trend Report" (Spring 2013) (estimating that 19.3 percent of television households relied solely on over-the-air broadcast television).

[6] Comments of the National Football League in MB Docket No. 12-3 (filed Feb. 24, 2014) at 9-10 ("NFL Comments").

[7] *Id.* at 10.

launching pads for promoting other broadcast programming. Of the top 10 shows during the 2012-2013 television season, nine were either NFL games or NFL-related programming, all of which appeared on broadcast television.[8]

III. In the Absence of the Sports Blackout Rules, Neither Contracts Nor Current Regulatory Structures Will Prevent Importation of Blacked-Out Games on Distant Signals

Facing increasing competition for advertising, eyeballs and quality content from cable networks, multichannel video program distributors ("MVPDs"), the Internet and mobile platforms, broadcasters must have the same ability as their competitors to contract with sports leagues and entities for exclusive carriage of sports programming in their markets. Several commenters suggest that stakeholders could achieve through marketplace negotiations the same level of control over their content as the SBR provides today.[9]

As the NFL makes clear in its comments, this is not accurate. The NFL's long-term contracts with broadcast networks include "no provision that would enable the NFL to require the broadcast network to take any, let alone all necessary, actions to ensure that cable and satellite providers will not be able to import distant signals of blacked out NFL games into local markets."[10] SFC suggests that the NFL could simply use its contracts with pay TV providers for carriage of the NFL Network to effectuate blackouts, going so far as to say that the NFL "has the right and ability to amend those agreements."[11] The NFL

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[8] *See* TVB, "The 2012/2013 Television Season: The More Things Change …," *available at*: http://www.tvb.org/measurement/2012-13_Season_Recap. The lone non-NFL program on the list was the Academy Awards.

[9] SFC Comments at 7-8; Comments of the National Cable & Telecommunications Association in MB Docket No. 12-3 (filed Feb. 24, 2014) at 3 ("NCTA Comments").

[10] NFL Comments, Declaration of Brain Rolapp, Chief Operating Officer of NFL Media, at ¶ 3 ("NFL Comments - Rolapp Declaration").

[11] SFC Comments at 8.

refutes this erroneous assumption, noting that those contracts resulted from many difficult negotiations, currently contain no provisions that would limit an MVPD from importing a distant non-NFL Network signal, and that MVPDs would have "no incentive to reopen those contracts" and "accept an unrelated, collateral provision" limiting their ability to import distant signals.[12] In short, proponents of eliminating the SBR have provided no credible evidence that the marketplace will simply work it all out, rendering the rules unnecessary or obsolete.

Proponents of the rules' elimination also argue that, even if stakeholders could not resolve their content distribution strategies through contract, the current regulatory structure effectively prevents MVPDs from importing locally blacked out games via distant signals. NCTA argues, for example, that cable systems are unlikely to import distant signals for just a few games because they would be required to pay for a full six-month compulsory license. This may be accurate in some cases, but it is hardly an absolute truth. The compulsory copyright license scheme is highly complex and the cost of importing distant signals varies widely by cable system. Under certain circumstances, a cable system's marginal cost for importing additional distant signals might be little or nothing.[13] Given the very high popularity of NFL games, a cable system that offers packages to its subscribers for locally blacked out games could more than offset these costs, and could use the package to unfair advantage in negotiating retransmission consent agreements.

To supports its argument that the regulatory structure would prevent cable systems from importing distant signals, the SFC presents two wholly inaccurate legal arguments.

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[12] NFL Comments - Rolapp Declaration at ¶8.

[13] For example, cable systems with gross receipts not exceeding a specified amount can carry an unlimited number of distant signals without incurring any additional fees. 17 U.S.C. §111(d)(1)(E)-(F).

They first argue that the Commission's network non-duplication and syndicated exclusivity rules prevent cable systems from importing a game on a distant signal that has been blacked out on a local broadcast station.[14] That may be an argument they suggest now, but if the sports blackout rules were eliminated, they would undoubtedly contend that the network non-duplication and syndicated exclusivity rules are irrelevant, because the network non-duplication rule prevents the importation only of *duplicative network programming*. In the case of a local blackout, the network may supply the local station with an alternative NFL game. Thus, without the sports blackout rule, an MVPD would be expected to argue it has the right to import a distant signal carrying the locally blacked-out game without regard for the network non-duplication rule.

Indeed, the duplicity of the SFC's position is apparent when one considers its assertion that the network non-duplication rules do not prevent the importation of a distant signal during a retransmission consent dispute.[15] SFC argues that cable systems could elect to import distant signals during a retransmission consent dispute but do not.[16] They then suggest that this is evidence that operators would not bring in a distant signal during a sports blackout. As an initial matter, the SFC's characterization of the distant signal rule is incorrect. The Commission has long held that a television station need not be carried by a cable system – or have any existing contract with that cable system – to evoke the network non-duplication rules.[17] Therefore, the instances the SFC cites to show that cable

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[14] SFC Comments at 8-9.

[15] SFC Comments at 10-11.

[16] *Id.*

[17] *See Amendment of Parts 73 and 76 of the Commission's Rules relating to program exclusivity in the cable and broadcast industries*, Report and Order, 3 FCC Rcd 5299, 5320 (1988).

operators have not imported signals during retransmission consent disputes are not relevant to the SBR or what cable operators might do if the SBR were eliminated.

IV. Sports League Finances are Totally Irrelevant to the Purpose of the SBR – Ensuring the Widespread Availability of Sports on Television

The SFC argues that the Commission should eliminate the SBR on the basis that it believes the NFL and other sports entities do not have – or should not have – an economic incentive to impose sports blackouts. It even suggests that the Commission, which has no direct regulatory authority over the NFL or any other sports entity, should require the NFL to provide audited financial statements because the league bears "the burden of proof that local blackouts are necessary to maintain financial viability."[18] Absent such proof, they argue, "would be classic *res ipsa loquitor*."[19]

Law school Latin aside, the SFC's argument is completely irrelevant to the purpose of the SBR or to consideration of whether it should be eliminated. The Commission articulated the purpose of the SBR very succinctly in 1975: "We emphasize that our interest *is not to assure the profitability of organized sports*. Our concern is with the availability of television broadcast programming to the general public."[20] Despite changes to the television and sports industries since that time, the core purpose of SBR remains relevant and important today. There is absolutely no reason to examine the economic condition of the NFL or any other sports league. The fact that gate receipts are not now the primary source of revenue for the NFL or other sports leagues does not render the SBR obsolete. If the NFL, or any other sports entity, determines that blackouts are still important

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[18] SFC Comments at 6.

[19] *Id.* at 7.

[20] *Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programming on Cable Television Systems*, Report and Order, 54 FCC 2d 265, 281 (1975) (emphasis added).

to their economic health, it is not the Commission's role to sort through financial statements of non-licensees to determine the validity of that decision. Instead, the Commission should be focused on ensuring the availability of sports programming on television. In this case, that means providing a regulatory structure that does not incentivize the NFL or any other sports league to move their content to a place, like pay TV, where they can better control the distribution of that content.

The pivotal question in this proceeding is: will elimination of the sports blackout rule help the consumer? Curiously, none of the proponents of eliminating this rule has answered this critical question. The closest either NCTA or the SFC comes even to addressing the question is suggesting that elimination of the SBR will likely make no difference, given that existing regulatory and copyright rules either supposedly prevent cable systems' ability or diminish their incentive to import distant signals.[21] NCTA even suggests that elimination of the rule "will have no meaningful effect."[22] The Commission should be skeptical of arguments from interested stakeholders that suggest they are merely interested in clearing "regulatory underbrush."[23] Eliminating the rule *will* have a meaningful effect, and its most lasting long-term effect will be to diminish what should be one of the Commission's core goals – preserving localism.

In truth, both the SFC and NCTA hope that the Commission will eliminate the rule so that one, or both, of two things will happen: (1) pay TV providers will be able to import distant signals carrying locally blacked-out games (and charge their customers for the privilege), or (2) the NFL will be incentivized to move their games to pay TV. The SFC

[21] SFC Comments at 8-12; NCTA Comments at 2-4.

[22] NCTA Comments at 4.

[23] *Id.*

suggests, without any foundation, that the NFL would never dare take their ball to pay TV, because "major advertisers" are willing to pay top dollar for top content.[24] This unsupported premise is undermined, indeed contradicted, by the fact that multiple other major sports and events – including the college football championships – have migrated to pay TV. Moreover, the advertisers SFC cites will move wherever the eyeballs move. Budweiser has no control over how the NFL distributes its games.

None of the likely scenarios resulting from the Commission's elimination of the SBR will be ultimately beneficial to local sports fans. In the short-term, pay TV systems could import distant signals, undermining localism and moving local games behind a pay wall.[25] In the long-term, the real loser is the local sports fan – the one that the SFC claims to represent – who could once watch sports for free, but will eventually have to pay hundreds of dollars a year to see it on the same screen. [26]

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[24] SFC Comments at 24-28.

[25] For an illustrative example of how sports moving behind a pay wall can be problematic and against the public interest see the current controversy over carriage of Los Angeles Dodgers games in Southern California. Last year, fans could watch about 50 Dodgers games free on local TV. This year, thanks to a new deal with Time Warner Cable, zero games will be available on free TV. Indeed, the majority of local fans, even those that subscribe to an MVPD, will not have access to *any* Dodgers games because other pay TV providers are balking at Time Warner's $5 per subscriber asking fee for SportsNet LA, a Time Warner-controlled regional sports network. *See, e.g.,* Becky Sullivan, "In LA, Watching Home Team's Ball Games Just Got More Complicated," NPR (March 23, 2014); *See also*, Joe Flint, "Most Dodger fans to be shut out from viewing games on opening day," The Los Angeles Times (March 21, 2014) (noting that "[t]he long-term implications of all these deals have some observers worried that sports — once a common denominator that cut across economic status — will become too expensive for many people.").

[26] Even if, *arguendo,* nothing were to result from elimination of the SBR, as NCTA and SFC claim, that would be only *the best possible result*. That begs the question – why eliminate a rule when there is no clear path to a public interest benefit and the very real possibility that eliminating the rule will harm viewers' access to sports in the long term?

V. Conclusion

The Commission should resist the temptation to succumb to what certain parties have sought, incorrectly, to characterize as a popular desire to eliminate the sports blackout rules. There is no evidence that suggests elimination of the rules will have a positive effect for local sports fans. To the contrary, as we and the sports leagues have shown, the only benefactor of eliminating of the rules will be pay TV providers who are hoping to put all popular sports behind a pay wall, thereby reducing the popularity of free TV to their benefit.

Respectfully submitted,

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