

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

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

**REPLY COMMENTS OF THE
OFFICE OF THE COMMISSIONER OF BASEBALL**

The Office of the Commissioner of Baseball (“Baseball”) submits the following reply 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) (collectively, “Sports Rules”).

I. The Commission Has No Authority to Eliminate the Sports Rules That Congress Directed the Commission to Adopt.

1. As Baseball and the National Football League (“NFL”) explained in their initial comments, the Commission lacks the authority to repeal the Sports Rules. Congress specifically directed the Commission to extend the Sports Rules (then applicable to cable alone) to satellite carriers and open video systems (“OVS”). And it later instructed the Commission to provide Congress with “recommendations” only as to whether Congress should alter those rules (and companion rules relating to syndicated exclusivity and network nonduplication). *See* Comments of the Office of the Commissioner of Baseball (“Baseball Comments”) at 3-6; Comments of National Football League (“NFL Comments”) at 19-24.

None of the comments (other than Baseball's and NFL's) addresses the issue of the Commission's authority, with the exception of those submitted by the Mercatus Center at George Mason University ("Mercatus"), which relies solely on *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501 (D.C. Cir. 1986) ("TRAC"). That decision, however, does not support Mercatus's claim that the Commission has the necessary statutory authority to repeal the Sports Rules.

2. At issue in *TRAC* was whether Congress had imposed a "binding statutory obligation" on the Commission to maintain the "fairness doctrine" when it amended the Communications Act, or whether Congress had merely recognized the FCC's administrative interpretation of the Act. The statutory language in question provided that: "Nothing in the foregoing sentence shall be construed as relieving broadcasters . . . from the obligation imposed on them under this Act to operate in the public interest and to afford reasonable opportunity for the presentation of conflicting views on issues of public importance." *Id.* at 517 (quoting 47 U.S.C. § 315(a)). The D.C. Circuit concluded that this "language, by its plain import, neither creates nor imposes any obligation." *Id.* The court thus ruled that this provision did not ratify the FCC's fairness doctrine as "a fixed requirement frozen in place by the Act," but merely reflected Congress "recogniz[ing] . . . an administrative construction," *id.* at 517, 518, specifically, the Commission's interpretation and application of the statutory requirement to serve the "public interest." The court emphasized that its decision rested on "the words employed" by Congress. *Id.* at 517.

3. The difference between the "words employed" in *TRAC* and here is the difference between "recognizing an administrative construction" and creating a "binding statutory directive." *Id.* In stark contrast to the fairness doctrine, which reflected merely the

Commission’s construction of a statutory requirement, Congress unequivocally transformed the Sports Rule into a “statutory directive” in two separate statutes. The Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1536, and the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 121, both stated “the Commission *shall*” extend the Sports Rule to satellite and OVS. *See* 47 U.S.C. § 339(b)(1) (emphasis added); *id.* § 573(b)(1)(D) (emphasis added). Mercatus’s claim that Congress merely “reference[d]” these rules when it passed legislation relating to OVS and satellite carriers and that neither statute “provide[d]” a “separate mandate” cannot be squared with the actual language of those statutory provisions, which Mercatus never quotes.

4. In short, *TRAC* stands for the unremarkable proposition that an agency may repeal a rule that Congress has not directed it to adopt. Here, however, Congress twice expressly directed the Commission to adopt the Sports Rules and then instructed the Commission to do no more than provide “recommendations” as to whether *Congress* should make any changes in those rules. Congress did not authorize the Commission to make such changes on its own. 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). If the Commission believes that the Sports Rules should be eliminated, it should recommend that action to Congress, as Congress has specifically directed, so that Congress can decide whether to revisit its judgment regarding the application of the Sports Rules. Moreover, the Commission should make that recommendation only as part of a comprehensive revision to all rules that the Commission has adopted in response to the compulsory licensing provisions in Sections 111 and 119 of the Copyright Act and that afford protection to sports programmers and the other programmers with which they compete.

II. The Sports Rules Remain Necessary to Ensure the Continued Supply of Sports Programming.

5. As Baseball explained in its initial comments, the Commission adopted the Sports Rules to help ensure the continued supply of sports programming. *See* Baseball Comments at 6-9. The Sports Rules continue to serve that objective. *See id.* They prevent MVPDs from unfairly exploiting the compulsory licenses in Sections 111 and 119 of the Copyright Act, 17 U.S.C. §§ 111 & 119, by importing distant broadcasts of games that Baseball clubs have licensed other rightsholders (*e.g.*, cable networks such as MASN and YES Network) to televise on an exclusive basis. The ability to protect these exclusive rights under the Sports Rules incentivizes Baseball to televise games on the distant broadcast stations notwithstanding the compulsory licenses, and it incentivizes the cable networks, as exclusive licensees, to televise the games in their local markets—thereby “maintain[ing] the totality of sports programming now made available to television viewers.” *In re Amendment of Part 76 of the Commission’s Rules and Regulations to Cable Television Systems and the Carriage of Sports Programs on Cable Television Systems*, 54 F.C.C. 2d 265, 266 (1975). Because the Sports Rules continue to achieve the very objective for which they were adopted by the Commission, the Commission would act arbitrarily and capriciously if it now eliminated those rules. Indeed, the Sports Rules should not be repealed but should be strengthened by preventing MVPDs from destroying exclusive rights licensed to a local over-the-air broadcast television station, as well as a cable network. *See* Baseball Comments at 9.

6. Those opposing the Sports Rules have not demonstrated that the rules fail to achieve their objective of incentivizing the distribution of sports programming. The comments of the Sports Fan Coalition, Inc. *et al.* (“SFC”) claim “there is no economic

basis for the Sports Rules.” Comments of Sports Fan Coalition, Inc.; National Consumers League; Public Knowledge; League of Fans; Fanfreedom.org (“SFC Comments”) at 5. But that claim is simply wrong. The economic basis underlying the Sports Rules is the same economic basis underlying the syndex and network nonduplication rules: preserving exclusive distribution agreements and thereby promoting the supply of programming. *See, e.g., United Video, Inc. v. FCC*, 890 F.2d 1173, 1178-79 (D.C. Cir. 1989) (upholding the Commission’s re-institution of syndicated exclusivity rules based upon the Commission’s determination of the value of exclusive rights); *In re Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd. 5299, 5308-13 (1988).

7. Opponents of the Sports Rules also claim that the rules are no longer necessary because sports organizations can achieve the same protection in negotiations with MVPDs over the carriage of affiliated sports programming services, *i.e.*, in negotiating over the carriage of the MLB Network (for example), MLB can supposedly require MVPDs to black out distant signal telecasts of MLB games MVPDs have a statutory right to carry under the cable and satellite compulsory licenses without MLB’s consent. *See* SFC Comments at 7-8; Comments of National Cable & Telecomm. Ass’n (“NCTA Comments”) at 3-4. As a threshold matter, Baseball does not have any contractual relationships with MVPDs serving a sizeable number of subscribers because those MVPDs do not carry the programming services offered by Baseball. As to the MVPDs with which Baseball does have licensing agreements, it is simply unrealistic to believe that Baseball can force those MVPDs to relinquish their statutory rights to carry certain MLB telecasts in order to obtain access to different programming. The NFL and

National Association of Broadcasters (“NAB”) already have demonstrated that contractual negotiations over affiliated services do not provide a practical substitute for the Sports Rules. *See* NFL Comments, Dec. of Brian Rolapp; NAB Comments at 8. Indeed, if the SFC/NCTA view of sports’ negotiating leverage were correct (and it is not), Baseball and other sports interests would long ago have received protection against the utilization of compulsory licensing, which would be much broader than that afforded by the limited Sports Rules.

8. Furthermore, as Baseball previously explained, the Commission has adopted and retained syndex and network nonduplication rules notwithstanding that the programmers affected by those rules also could theoretically negotiate the same type of protection with MVPDs. *See* Baseball Comments at 10. The Commission, in choosing among the program exclusivity rules it wishes to retain, cannot properly discriminate against sports programmers by requiring them alone (and not their competitors) to negotiate exclusivity protection against statutory licensing rather than rely upon longstanding Commission rules. *See id.*

9. SFC and NCTA argue that sports organizations could require broadcasters, in their retransmission consent negotiations, to insist that MVPDs provide the protection afforded by the Sports Rules. *See* SFC Comments at 10; NCTA Comments at 3. However, as NCTA acknowledges, MVPDs need not obtain retransmission consent to carry superstations such as WGN-TV (Chicago, IL). NCTA Comments at 3, n.5. And WGN, by far the most widely carried distant station in the United States, is the source of the vast majority of MLB telecasts that, as a practical matter, are subject to the Sports Rules. The carriage of WGN throughout the country routinely results in MVPDs offering

dual telecasts of the same game in the same local markets. Baseball cannot use retransmission consent agreements to prevent MVPDs from importing WGN or other superstation telecasts of the same games to which local telecasters have exclusive rights. Only the Sports Rules can prevent MVPDs from negating these exclusive rights (and then only within a narrow 35-mile zone around the stadium where the game is being played).

10. SFC suggests that the Commission's syndex and network nonduplication rules would provide "significant protection" to the sports leagues. *See* SFC Comments at 8-9. SFC is wrong. None of those rules requires an MVPD to delete a WGN or other distant signal telecast of a particular MLB game in order to protect the exclusive right of another broadcaster or cable network to televise the same game in its local market. Indeed, the Commission refused to construe (or waive) the network nonduplication rules to afford such protection, concluding that the rules do not apply to different telecasts of the same games. *See In re Major League Baseball*, 6 FCC Rcd. 5573, 5574 (1991).¹

11. SFC also argues that "current blackout practices harm fans" because they are not able to view telecasts of particular games. SFC Comments at 12. But, as Baseball has explained, the Sports Rules do not deprive MLB fans of the ability to view a game televised by a local rightsholder. They simply prevent an MVPD from importing,

¹ The Commission in that proceeding simply construed the network nonduplication rules and did not consider whether the type of protection afforded by the Sports Rules is necessary to promote the availability of sports programming. Indeed, the Commission recognized that the overall supply of sports programming was inherently linked to protecting exclusivity. *See In re MLB*, 6 FCC Rcd. at 5573 (local rightsholder's exclusivity to televise a game is threatened only when a broadcaster in a distant market is authorized to televise the same game). The Commission also said that the court in *United Video, supra*, "held" that the Commission's "exclusivity rules . . . cannot be applied to noncopyrighted works," such as live sports events. *Id.* at 5574. That suggestion distorts the *United Video* holding. The court "h[e]ld" only that "the syndex rules do not protect noncopyrighted programs." 890 F.2d at 1192. In any event, the court did not hold, or even intimate, that any law prevents the Commission from adopting rules that prevent MVPDs from utilizing statutorily granted privileges to nullify marketplace-negotiated exclusivity, particularly where necessary to promote the overall supply of sports programming.

pursuant to compulsory licensing, a *second* telecast of that game in derogation of the exclusive rights licensed to the local telecaster. *See* Baseball Comments at 2; NAB Comments at 1 (noting that the Sports Rules prevent MVPDs from “taking advantage of technological and legal loopholes to circumvent local TV station contracts with networks, sports leagues and teams”). The “public interest” does not mandate access to two telecasts of the same game, particularly when the effect of doing so would inevitably lead to a reduction in overall sports programming.

CONCLUSION

For the reasons discussed above, and in Baseball’s initial comments, 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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