

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

In the Matter of

Sports Blackout Rules

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MB Docket No. 12-3

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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I. Introduction and Summary

The National Association of Broadcasters (“NAB”)¹ opposes the Federal Communication Commission’s (“Commission”) proposal to eliminate the sports blackout rules.² As discussed in detail below, the assumptions behind this proposal are mistaken and the analyses of the effects of the rules’ elimination are flawed.

There continues to be a common misconception that the Commission’s rules are the source of sports blackouts.³ They are not. Instead, the rules simply prevent cable and satellite companies from taking advantage of technological and legal loopholes to circumvent local TV station contracts with networks, sports leagues and teams. Eliminating the sports blackout rules, while perhaps expedient for the Commission now, will ultimately

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*”).

³ See Comments of NAB in MB Docket No. 12-3 (filed Feb. 13, 2012) (“NAB Comments”); see also Reply Comments of NAB in MB Docket No. 12-3 (filed Feb. 28, 2012) (“NAB Reply Comments”).

be a net negative for the average sports fan, especially those that receive sports programming free over-the-air. Without sports blackout rules operating as a backstop, sports leagues could lose control over the distribution of their games on broadcast TV, likely hastening the migration of major sports to pay TV.

NAB respects and appreciates a sports fan's frustration when a game is unavailable on local TV. We share that frustration. Our member stations would prefer to always be able to televise games of interest to their local communities. NAB also respects, however, the need for sports leagues to control the distribution of their content. If there were a solution that could satisfy both constituencies while, at the same time, preserving the clear public benefit of having major sports programming on free television, broadcasters would be the first to support it. Unfortunately, given the interconnection between the Commission's rules governing broadcast carriage on pay TV and the copyright laws – especially the distant signal compulsory copyright laws – no better solution exists and the Commission's sports blackout rules remain a necessity.

In our earlier comments in this proceeding, NAB discussed the historical justifications for the sports blackout rules and why changes in both sports and television since the 1970s have only increased the need for such rules.⁴ We also discussed how parties that support elimination of the rule are the same parties advocating for the elimination of all program exclusivity provisions that would enable pay TV to secure an unfair advantage in retransmission consent negotiations. The proposed elimination of the

⁴ See NAB Comments at 3-6; See *also*, NAB Reply Comments at 5. (“MVPDs control a much larger share of the television distribution market and the negative impact of eliminating the Rules on local stations would be far greater.”).

sports blackout rule is the Trojan Horse these parties hope will open the gates to elimination of the network non-duplication and syndicated exclusivity rules.⁵

We will not restate those arguments here. Instead, we will focus on three points that more directly address assertions and questions in the *Notice*. First, eliminating the sports blackout rules in isolation, without changes in copyright law or communications law, would upset a carefully constructed balance that, until now, has promoted the public interest and localism by providing viewers with a cornucopia of sports programming free over-the-air. Second, the suggestion that eliminating the sports blackout rules “would leave sports carriage issues to private solutions,”⁶ and that those solutions would be beneficial to the public, is mistaken. Third, it would be inappropriate for the Commission to base its determination whether to eliminate the sports blackout rules on its assessment of the adequacy of gate receipts of the National Football League (“NFL”) or any other sports entities. If the NFL or any other sports entity decides that not televising certain games in certain markets makes economic sense, that is a marketplace decision with which the Commission need not, and should not, tamper. The Commission may not properly second-guess the validity of a league’s or any other content provider’s distribution strategy.

II. Eliminating the Sports Blackout Rules Will Harm Localism and Likely Diminish the Availability of Major Sports on Free TV

It is a good time to be a sports fan. Indeed, it could be argued that it is a better time to be a sports fan than at any point since the advent of television. Sporting events are a major component of both local and national television programming. This year’s Super Bowl was the most watched program in the history of television, a remarkable fact

⁵ NAB Reply Comments at 7-8.

⁶ *Notice* at ¶1.

considering how fractured TV viewing has become.⁷ A litany of technological advances – including high-definition TVs, the growth of the Internet, the availability of “second screens” like iPads, and seemingly floating cameras – has made watching sports an all-encompassing experience. Further, there are more sports available on television, both broadcast and cable, than ever before. ESPN alone airs more than 30,000 hours of live sporting events per year.⁸ Additionally, other major media players, including CBS, NBC and Fox, have launched all-sports cable channels in recent years and every part of the country has its own local or regional cable sports network or networks. If, as a sports fan, you are willing to pay for it, you can watch sports programming all day and night, seven days a week, leaving your couch only for the occasional beer and snack.

Of course, most sports fans are not quite that fanatical. And many do not want to pay hundreds of dollars per month to watch their favorite sports or team. Unfortunately for those fans, the landscape has changed. Where once they could view most major sporting events on free television, today many high-profile sporting events, including the college football championships and many NCAA basketball tournament games, have moved behind a pay wall. The NFL, by far the most popular sports league in America, remains the

⁷ Rick Kissell, “Super Bowl XLVIII Is Most-Watched TV Show in U.S. History,” *Variety*, (Feb. 3, 2014), *available at* <http://variety.com/2014/tv/news/super-bowl-xlvi-iii-is-most-watched-event-in-tv-history-1201084643/> (“Sunday’s big haul means the Super Bowl has established the all-time U.S. viewership high in six of the last seven years.”).

⁸ ESPN, *ESPN, Inc. Fact Sheet*, ESPN.COM, *available at*: <http://espnmediazone.com/us/espn-inc-fact-sheet/>.

lone exception among all major sports.⁹ Every NFL game is made available on free television in some part of the country.¹⁰

It is ironic that the NFL's blackout policies are the primary focus of the instant proceeding. The 2013-14 NFL season featured the fewest local blackouts since the league's inception.¹¹ This fact alone demonstrates that the existing policies which help support continued access to America's favorite sport on free TV are working well and should not be upset. Instead, the *Notice* uses this fact to suggest that elimination of the sports blackout rules would have little to no impact on the current sports media landscape.¹² This is wrong. While fewer blackouts may have occurred than in previous years, the FCC's blackout rules are still critical to maintaining the delicate balance of rights granted under the current regulatory landscape. Eliminating the sports blackout rules will have a negative effect on both local television stations and the long-term relationship between the NFL and broadcasters. It will create substantial uncertainty and will be detrimental to the public interest.

Elimination of the sports blackout rules, absent any unlikely changes to existing contracts between the NFL, TV networks and/or cable companies, would enable local cable systems to import distant television signals that are airing a locally blacked out

⁹ This is not to suggest that Major League Baseball, the National Basketball Association or the National Hockey League have somehow failed the American sports fan. Their teams all play too many games to air them on local broadcast television alone.

¹⁰ Note that even those games aired on ESPN, as part of *Monday Night Football*, and those aired on the NFL Network are also made available on free television in the local market of the respective teams playing in those games any given week.

¹¹ Only two games were blacked out in local markets during the 2013 NFL season. Compare that number with 26 blacked out games ten years ago, and more than 100 games in seasons during the 1970s and 1980s. See NFL Communications, "Record Low Blackouts in 2013," (Dec. 27, 2013) *available at*: <http://nflcommunications.com/2013/12/27/record-low-blackouts-in-2013/>.

¹² *Notice* at ¶17.

sporting event. This fractures the bargained-for exclusivity local television stations obtained via their affiliation agreements, and violates those rights that they have negotiated with the TV networks. It is true that in most cities, and for most stations carrying NFL football, the vast majority of games sell out (or meet the NFL's current threshold for airing) and blackout policies do not come into play.¹³ However, in certain markets more prone to lower NFL game attendance, including San Diego, Jacksonville, Buffalo and Cincinnati, local stations would bear the brunt of this rule change, while local cable systems would reap the reward. Additionally, the availability of games in those local markets via distant signals – notably, only on pay television – would very likely decrease the number of sold out games, creating a spiral that would harm the local station and its viewers still subject to the NFL's blackout policies. The net result for local stations in those markets will be decreased advertising revenue, diminishing those stations' ability to provide quality programming, including, ironically, sports. The consequence for viewers of these stations, particularly those not subscribing to pay TV, will be lower quality programming.

Ultimately, elimination of the sports blackout rules will diminish the availability of sports on free television, harming viewers who cannot afford or choose not to pay for cable or satellite. This is directly contrary to the Commission's reasoning for creating the sports blackout rule.¹⁴ Without the rules, sports leagues would lose control over the distribution

¹³ See NFL.com, "NFL eases local TV blackout restrictions for upcoming season," (July 26, 2012) available at: <http://www.nfl.com/news/story/09000d5d82a406ee/article/nfl-eases-local-tv-blackout-restrictions-for-upcoming-season>.

¹⁴ See *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) ("Our concern is with the availability of television broadcast programming to the general public, which is of vital importance to the larger and more effective use of the airwaves.") ("1975 Cable Sports Blackout Order").

of their programming because pay TV providers could use the distant signal compulsory licenses to import and air games in blacked out markets, circumventing private agreements between the sports leagues and broadcasters. This loss of control would threaten the continued distribution of major sporting events on free, over-the-air television, as sports leagues would have an incentive to move to pay platforms where the compulsory license would not undermine their ability to control distribution. Eliminating the sports blackout rules thus would make broadcast television less competitive in obtaining rights to popular sports programming and would likely accelerate the migration of sporting events from free to pay TV.

III. Given Existing Contractual Arrangements and Copyright Compulsory Licenses, the Commission Should Not Assume that Private Solutions to Blackouts Will Emerge Without More Evidence

The Commission suggests in the *Notice* that elimination of the sports blackout rules “might not end sports blackouts,” but “it would leave sports carriage issues to private solutions negotiated by the interested parties in light of current market conditions.”¹⁵ Despite ample evidence in the record to the contrary,¹⁶ the *Notice* erroneously submits that these “private solutions” will come about naturally via “arm’s length marketplace negotiations” between sports leagues and MVPDs.¹⁷

This assertion ignores multiple concerns and appears to rest on the baseless assertions of commenters like the Sports Fan Coalition (“SFC”), which has no inside knowledge of the relationship between sports leagues and distributors. As the NFL has stated, it has no direct privity of contract with local broadcast stations. And it has no direct

¹⁵ *Notice* at ¶1.

¹⁶ See Comments of the National Football League in MB Docket No. 12-3 at 4-7 (filed Feb. 13, 2012) (“NFL Comments”).

¹⁷ *Notice* at ¶32.

privity of contract regarding carriage of Sunday games with any MVPD other than DirecTV.¹⁸ While the sports leagues may have some relationship with MVPDs through carriage of their affiliated networks, there is absolutely no evidence in the record to suggest that sports leagues may be able to use that relationship to ensure MVPDs do not take advantage of the distant signal compulsory copyright license to import coverage of locally blacked-out games.

Further, no evidence has been submitted suggesting that MVPDs would be motivated to renegotiate existing contracts to limit their ability to import certain signals. In short, any assertion that everything will simply work out is wishful thinking at best. The Commission cannot rely on these assumptions to eliminate the rule.

Another major flaw in the Commission's assumption that, absent the rule, sports carriage issues would be resolved through "private solutions" are the copyright compulsory licenses. These licenses afford cable and satellite companies the ability to circumvent the results of private negotiations, particularly local market exclusivity, by providing a government mandated means of retransmitting the signals of distant television stations without the consent of the copyright holders.

¹⁸ The specific situation regarding DirecTV should not be used by the Commission as an example of how the NFL might negotiate with other MVPDs. DirecTV has an exclusive contract to carry the NFL Sunday Ticket. No other MVPD is likely to share Sunday Ticket rights in the near future. The ways in which the NFL can negotiate carriage and/or blackout zones with DirecTV through Sunday Ticket negotiations has absolutely no bearing on its relationship with other MVPDs.

IV. The Commission Should Not Consider Gate Receipts or the General Economic Condition of the Sports Leagues As Part of its Analysis

The sports blackout rules have never been intended to protect the sports leagues. As the Commission noted in 1975, and as restated in the present *Notice*, it is not the Commission's "interest to assure the profitability of organized sports."¹⁹ That, of course, is true. Neither the NFL nor any other sports entities are directly regulated by the Commission. Rather, these rules were designed to prevent the overall diminishment of sports programming on television and its availability to all Americans.²⁰ As noted above, that concern remains today, especially if major sports entities are incentivized to migrate to pay TV because they cannot control distribution of their product on broadcast television, making it harder for many Americans, especially low-income Americans, to watch their favorite teams.

For this reason, the *Notice's* inquiry into gate receipts as if the sports blackout rules were designed to protect a sports league's or entity's revenue is inappropriate. Indeed, it is misguided to base the possible elimination of the sports blackout rules on changing economic conditions, i.e., whether the sports leagues make enough money from television so that they no longer should be concerned about protecting gate receipts through local blackouts.²¹

The Commission is correct that the sports industry, just like the television industry, has changed substantially since the 1970s when the sports blackout rules were first put into place. And there is no doubt that sports leagues generate more revenue today from selling television rights than they did in the 1970s. Sports teams also sell more tickets, and

¹⁹ 1975 Cable Sports Blackout Order at 281.

²⁰ *Id.*

²¹ *Notice* at ¶¶22-27.

hot dogs, sodas and t-shirts. The Commission has never set a threshold ratio of monies made from television sales vis-à-vis gate receipts that would govern the determination of whether the sports blackout rules are still necessary. Nor should it begin now. If the NFL believes that it is economically desirable to maintain a policy of blackouts in local markets when games do not sell out, the Commission should respect that marketplace determination. The Commission should not substitute its judgment for the NFL's or any other sports entity's when it comes to how those leagues structure their media distribution strategies.²²

While both the sports and television industries have evolved, the general purpose and effect of the sports blackout rules have evolved with them. Industry changes do not automatically result in a regulation's obsolescence. We noted in our earlier comments that the prevalence of, and subscribership to, pay television is substantially greater today than it was when the sports blackout rule was first introduced.²³ It is axiomatic then that the potential harm from importation of distant signals is likewise greater. In this way and others, the sports blackout rules are more necessary than ever. They are still needed to prevent MVPDs from unfairly exploiting technological and copyright loopholes to the detriment of over-the-air viewers and local TV stations.

V. Conclusion

The Commission already has recognized the necessity of permitting "equality . . . of contractual opportunity among competing modes of distribution" to ensure "free and

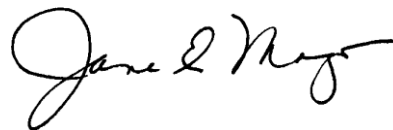
²² Paragraph 27 of the *Notice* goes so far as to ask whether commenters believe that the NFL in particular is "operating pursuant to a mistaken understanding of the relationship between blackouts and attendance." It is not clear to us how this inquiry, in any way, should be part of the sports blackout rules analysis. Mistaken or not, it is remarkable hubris to suggest that anyone, including any commenter in this proceeding, knows how to run the NFL better than the NFL, the most successful sports league in the country.

²³ See NAB Reply Comments at 5-7.

efficient functioning of competitive market processes.”²⁴ The sports blackout rules remain a necessary component of the suite of exclusivity provisions needed to achieve this laudable goal by ensuring MVPDs cannot exploit technology and copyright laws to import distant signals and harm localism. Therefore, the Commission should maintain the sports blackout rules as applied to both cable and satellite television.

Respectfully submitted,

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²⁴ *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Notice of Inquiry and Notice of Proposed Rule Making, 2 FCC Rcd 2393, ¶12 (1987).