

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

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

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

I. Introduction

The National Association of Broadcasters (“NAB”)¹ hereby submits its reply to comments in this proceeding,² opposing a petition for rulemaking to eliminate the sports blackout rules (“the Rules”).³ Elimination of the Rules would harm local broadcasters and, more importantly, the viewing public they are licensed to serve in at least two ways: (1) it would severely undermine local broadcasters’ program exclusivity which, as Congress and the Commission have repeatedly recognized, is essential to support their investment in high quality, diverse informational and entertainment programming; and (2) it could accelerate the migration of popular sports programming from free to pay TV.

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 *Public Notice*, “Commission Seeks Comments on Petition for Rulemaking Seeking Elimination of the Sports Blackout Rule,” MB Docket No. 12-3 (rel. Jan. 12, 2012) (“*Notice*”).

³ See 47 C.F.R §76.111; 47 C.F.R. §76.120(e)(3); 47 C.F.R. §76.127; 47 C.F.R. §76.130.

Those supporting the petition provide no evidence or legal argument to suggest otherwise.⁴ Accordingly, the petition should be denied.

Elimination of the FCC's sports blackout rules will not force sports leagues to end their blackout policies.⁵ But what elimination of the Rules would do is upset a carefully designed and balanced structure that supports America's unique local broadcasting system and favor pay TV providers at the expense of local stations and their viewers.

NAB appreciates the concerns of those sports fans filing comments in this proceeding. But elimination of the Rules will not assuage those concerns. To the contrary, elimination of the Rules could jeopardize the continued availability of sports programming to everyone on free TV, and especially harm fans that cannot afford pay TV, as more and more sports programming is moved behind a paywall. Although Petitioner claims to represent sports fans, by failing even to address statutory language that affirms a sports league's right to blackout home games and the enormous subsidies provided by the cable and satellite compulsory licenses,⁶ it reveals its true motivation – the advancement of the economic interests of multichannel video programming distributors ("MVPDs"), the Coalition's primary financial backers.

⁴ See, e.g., Comments of the Sports Fan Coalition, Inc., et al., in MB Docket No. 12-3 at 4 (filed Feb. 13, 2012) ("Petitioner's Comments").

⁵ See Comments of the National Association of Broadcasters in MB Docket No. 12-3 (filed February 13, 2012) ("NAB Comments"); Opposition of the National Football League in MB Docket No. 12-3 (filed Feb. 13, 2012) ("NFL Comments"); Comments of The Office of the Commissioner of Baseball in MB Docket No. 12-3 at 2 (filed Feb 13, 2012) ("Baseball Comments").

⁶ 17 U.S.C. §§ 111 & 119.

II. The Sports Blackout Rules Enable Local Broadcasters to Better Serve Their Viewers and Help Ensure Major Sporting Events Remain on Free TV

The FCC's Rules do not require local TV stations to blackout sports programming and are, therefore, not the source of the few sports blackouts that occur each year.⁷ Rather, the Rules merely prohibit cable and satellite TV providers from unfairly circumventing the regulatory structure carefully constructed by Congress and the FCC that helps maintain the local broadcasting system and ensures major sporting events remain on free TV.⁸

The record in this proceeding shows that the FCC's sports blackout rules cannot be considered in isolation from other rules and laws. It is noteworthy, for example, as Major League Baseball ("MLB") points out, that the Sports Fans Coalition's ("SFC") petition and initial comments fail to mention the compulsory copyright licenses, as if they "did not exist."⁹ It is disingenuous to claim, as SFC does, that the sports blackout rules are "a regulatory subsidy" that works "as a corporate welfare tool to prop up multi-billion dollar operations"¹⁰ and then fail to address in any way the clear governmental subsidy that MVPDs receive through the distant signal compulsory license.

MLB also notes in its comments that the Copyright Act requires that if any changes are made to the sports blackout rules, a whole new set of proceedings would be required at the Copyright Royalty Board ("CRB") to adjust cable compulsory license

⁷ According to the NFL, only 6 percent of NFL games were blacked out in the home team's market in 2011. This number is down sharply from the nearly 60 percent of games which were blacked out in 1974, suggesting that elimination of the rule is far less imperative now than it might have been in the past. NFL Comments at 3-4.

⁸ See NAB Comments at 1-2.

⁹ Baseball Comments at 2.

¹⁰ Petition for Rulemaking, Sports Fans Coalition, et al., at 4, 13 (filed Nov. 11, 2011) ("Petition").

royalties.¹¹ The Commission should consider whether elimination of the Rules justify this expensive and cumbersome effort – especially in light of the fact, highlighted by the NFL, that blackouts of home games have been on the decline since the 1970s, when more than half of all home games were blacked out in the home market compared to only 6 percent of games in 2011.¹²

Broadcasters remain concerned about the migration of sports programming from free television. The Sports Broadcasting Act and the sports blackout rules have worked effectively to ensure that NFL games remain available on free TV.¹³ Absent a rule that prevents MVPDs from importing distant signals in the event of a league-mandated blackout, the rights holders may well migrate to platforms where they have more control over distribution – be it to a cable network or online.¹⁴ Only MVPDs stand to gain if the rules are eliminated. “[B]ecause the contractual and compulsory copyright challenges ... would make broadcast television distribution more difficult, expensive, and uncertain,” it would “make cable network distribution a more appealing prospect.”¹⁵ This concern over sports migration is very real, and no commenter provides any evidence or sound argument suggesting that elimination of the sports blackout rules will not accelerate that migration.

¹¹ Baseball Comments at 9 (citing 17 U.S.C. §801(b)(2)(C)).

¹² NFL Comments at 3-4.

¹³ *Id.* at 4. (“We work closely with our broadcast partners to give our fans a high quality product that is available for free, and we think the current system is working and should not be altered.”).

¹⁴ NAB Comments at 8.

¹⁵ NFL Comments at 11.

III. The Sports Blackout Rules Remain Necessary in Today's Television Environment

Petitioner provides no basis for its claim that the sports blackout rules are an “outdated regime” that no longer serve the public interest. Indeed, changes in the television industry over the last 40 years suggest that the sports blackout rules are more necessary now than when they were first implemented. 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.¹⁶ As the sports blackout rules are not the root cause of sports blackouts, eliminating the Rules will not end the limited blackouts that occur.

NAB, MLB, and the NFL all provided detailed history of Congressional and Commission reasoning for implementing laws and rules that serve to ensure sports leagues have control over the distribution of their content.¹⁷ As recently as 2005 the Commission advised Congress that no changes to the Rules were necessary or appropriate.¹⁸ Neither Petitioner, nor any other commenter, provides evidence that circumstances have changed in any way since 2005 that would necessitate reversal of that recommendation. Petitioner does suggest that because of these “difficult economic times,” the FCC should eliminate its Rules. However, difficult economic conditions hardly call for a policy that would remove sports from local free TV and require fans to subscribe to pay services.

¹⁶ NAB Comments at 5-6.

¹⁷ See Baseball Comments at 3-5; NFL Comments at 4, 6, 9-10.

¹⁸ See FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* at ¶150 (rel. Sept. 8, 2005).

Likewise, both the NFL and MLB refute Petitioner's claim that the sports leagues will be able to achieve blackouts through contract if the rules were eliminated. Sports leagues often lack privity with local stations and with the MVPDs that retransmit the broadcast signal.¹⁹ And because of the compulsory copyright license, MVPDs have no incentive to honor a sports league's blackout policy if they can gain a competitive advantage by importing a distant signal that carries a blacked out game. *Id.* MLB notes that "compulsory licenses effectively trump any" potential contract negotiations between a sports league and an MVPD.²⁰

The hypothesis of sports economists that elimination of the Rules will not harm the NFL, and therefore will not cause them to migrate its programming to cable in the event that the Rules are eliminated,²¹ is refuted by two facts: (1) there is no evidence that the NFL or any other league will end their blackout policies; and (2) the NFL has stated that eliminating the rule will make distribution through pay TV "more appealing."²² Further, their analysis is flawed by their failure to address the negative impact on local stations' advertising revenue if MVPDs are allowed to import distant signals into the blacked out market. The only question the Commission should consider, as it did when it first implemented the policy in 1975, is whether the sports blackout rules are necessary to ensure a competitive balance between broadcasters and the MVPDs that carry their signals. All available evidence and history included in this record, parsed of

¹⁹ NFL Comments at 6.

²⁰ Baseball Comments at 10.

²¹ See Comments of Sports Economists on the FCC's Sports Blackout Rules in MB Docket No. 12-3 (filed Feb. 13, 2012) ("Economists' Comments").

²² *Supra*, n. 15.

its emotional resonance, leads to only one conclusion: the rules are indeed still necessary.

IV. SFC's Primary Objective Is to Undermine Retransmission Consent and Promote the Economic Interests of MVPDs

SFC, the group that is primarily responsible for this petition, is generally supported by several pay TV companies, including Time Warner Cable and Verizon.²³ Evidence from other proceedings suggests that the primary motivation of the SFC is to weaken existing retransmission consent rules in a manner that would favor MVPDs. For example, in the Commission's most recent examination of the rules governing retransmission consent, SFC advocated not just for the elimination of the sports blackout rules, but all program exclusivity rules, thereby allowing cable systems to import distant signals in the event of a carriage negotiation impasse.²⁴ Similarly, SFC's petition to eliminate the sports blackout rules fails to address the codification of a sports league's right to blackout home games,²⁵ thus suggesting that its incentive is to

²³ See, e.g., "Television Blackout Rule for Professional Sports Events Faces FCC Review," Todd Shields, BLOOMBERG, Jan. 12, 2012 ("The Washington-based Sports Fans Coalition, a nonprofit advocacy group for fans, accepts funding from Time Warner Cable Inc. and Verizon Communications Inc. (VZ), David Goodfriend, a spokesman for the coalition, said in an interview in November."); "NFL rebuffed Nixon's attempt to lift TV blackout only for playoff games," THE NEW YORK POST, Feb. 11, 2012 ("[SFC] receives money from Verizon, which provides pay TV, and has received funding from Time Warner Cable in the past."); "FCC Seeks Comment on the NFL Blackout Rules," Katy Bachman, ADWEEK, Jan. 31, 2012 ("David Goodfriend, the organization's founder, is DISH's former chief lobbyist.").

²⁴ See Comments of the Sports Fan Coalition in MB Docket No. 10-71 at 11 (filed May 27, 2011) ("Because of the interrelated nature of the network non-duplication, syndicated exclusivity, and sports blackout rules, the FCC needs to carefully examine whether the sports blackout rule should be waived during retransmission consent disputes in addition to the related network non-duplication and syndicated exclusivity rules.").

²⁵ 15 U.S.C. §1292.

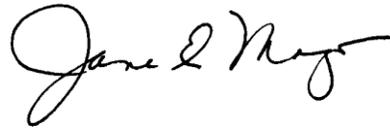
maximize the advantage of MVPDs in the marketplace, not eliminate all league blackout rules for sports fans.

V. Conclusion

The sports blackout rules are part of a larger framework of statutes and Commission rules that maintain a competitive balance between pay and free television that is necessary to sustain America's unique local broadcasting model. Elimination of the Rules will adversely upset this competitive balance. While broadcasters sympathize with sports fans in those very few markets that occasionally are unable to watch their favorite teams, elimination of the Rules will, in the long-term, be detrimental to all sports fans. Accordingly, the Commission should deny this petition.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
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