

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

In the Matter of

Petition for Rulemaking Seeking
Elimination of the Sports Blackout Rule

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MB Docket No. 12-3

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

I. Introduction

The National Association of Broadcasters (“NAB”)¹ hereby responds to the Commission’s *Public Notice*² seeking comment on the petition for rulemaking (“Petition”) proposing elimination of the sports blackout rules.³ Because elimination of these rules would harm local broadcasters and localism, NAB opposes the Petition.

The so-called sports blackout rules contained in Part 76 of the Commission’s rules are not the source of sports blackouts. Sports blackouts stem from privately negotiated agreements that sports leagues use to provide geographic distribution rights to sports content. These private agreements facilitate access to sports content on free, over-the-air television. The sports blackout rules serve to prevent multichannel video

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.

program distributors (“MVPDs”) from using statutory compulsory copyright licenses⁴ to circumvent the sports leagues’ privately negotiated contracts for distribution of their content. Contrary to Petitioners’ assertions, there is no evidence that elimination of the FCC’s rules will alter those private contractual agreements, eliminate the relatively few blackouts that occur, or cause sports leagues to lower ticket prices.⁵ These assertions are purely speculative, and the Commission cannot, and should not, rely upon them to eliminate the sports blackout rules.

Petitioners have created confusion between the contractual provisions that require networks and local broadcasters to abide by sports league-generated blackouts and FCC rules that merely facilitate the enforcement of those provisions. These rules also are part of the framework of local programming arrangements that enable local stations to serve the needs and interests of their communities by prohibiting MVPDs from circumventing those arrangements. As Congress and the FCC have consistently recognized, market exclusivity agreements facilitate our system of local broadcasting and allow broadcasters to better serve their local viewers.

Broadcasters understand and sympathize with fan frustration over sports blackouts. Ideally, no blackouts would ever occur. But elimination of the FCC’s rules would not solve the problem, as Congress has codified sports leagues’ rights to blackout home games. Elimination of the rules, however, would hurt local broadcasters and their viewers and could accelerate the migration of popular sports programs from free to pay TV.

⁴ See 17 U.S.C. §§ 111 & 119.

⁵ See Petition for Rulemaking, Sports Fans Coalition, et al. (filed Nov. 11, 2011).

II. The FCC's Sports Blackout Rules Are Not the Root Cause of Sports Blackouts

The sports blackout rules originated from litigation 60 years ago in which the United States sued the National Football League ("NFL") over certain provisions in its by-laws that prevented teams from broadcasting their games into the home territory of another team. The government alleged these by-laws eliminated competition among member clubs in selling the broadcast rights of their games.⁶ In 1953, the court agreed, holding that some of the provisions in the NFL's by-laws violated the Sherman Antitrust Act.⁷

In 1961, the NFL asked the court whether the 1953 decree prevented the league from pooling the teams' television broadcast rights as a combined package in negotiations with national networks.⁸ The court held that it did, enjoined the pooling arrangement, and barred the NFL from entering into any other similar contract or agreement.⁹ Because other professional sports leagues were not bound by the court's ruling and could pool their teams' television rights,¹⁰ Congress, in the Sports Broadcasting Act of 1961, granted a very narrow exemption from antitrust law

⁶ *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953).

⁷ *Id.* Notwithstanding its ruling, the court found that the NFL's policy of allowing teams to prevent the broadcast of out of market games into a home team's market when the home team is playing at home was not an unreasonable restraint on trade and that protecting gate receipts was a valid reason to limit telecasts of certain games. *Id.* at 326. ("The purposes of the Sherman Act certainly will not be served by prohibiting the defendant clubs, particularly the weaker clubs, from protecting their home gate receipts from the disastrous financial effects of invading telecasts of outside games.")

⁸ *United States v. Nat'l Football League*, 196 F. Supp. 445, 447 (E.D. Pa. 1961).

⁹ *Id.*

¹⁰ See *Telecasting of Professional Sports Contests*, 107 Cong. Rec. 20059-64 (1961); See also S. Rep. No. 87-1087, 87th Cong., 1st Sess. 1961, reprinted in 1961 U.S.C.C.A.N. 3042-3044.

authorizing certain “pooling” television sports contracts.¹¹ That antitrust exemption still exists today. This Act also codified a sports league’s right to blackout home games in the team’s home territory.¹² That provision also remains law today.

During the 1950s and 60s, nearly all NFL home games were blacked out in the teams’ local markets, regardless of whether the game was sold out.¹³ In response to public pressure concerning these blackouts, Congress passed a law in 1973 that barred sports leagues, including the NFL, from blacking out home games that sold out at least 72 hours before game time.¹⁴ That law expired in December 1975, but the NFL continues to follow this policy voluntarily.

With the rise of cable television in the 1960s and 1970s, the Commission enacted rules preventing cable from importing duplicating distant signals into local broadcast markets.¹⁵ As we show more fully below, Congress and the Commission have repeatedly reaffirmed these rules, finding them necessary to maintain a competitive balance between the cable and broadcast industries and promote our unique American system of local television service.¹⁶

¹¹ Exemption from Antitrust Laws of Agreements Covering the Telecasting of Sports Contests and the Combining of Professional Football Leagues, 15 U.S.C. § 1291 *et seq.*

¹² 15 U.S.C. §1292.

¹³ See, e.g. Dean Rosen, *Back to the Future Again: An Oblique Look at the Sports Broadcasting Act of 1961*, 13 Ent. L. Rptr., Vol. 13, No. 5 (Oct. 1991) at 13-15 (available at <http://elr.carolon.net/BI/V13N05.PDF>).

¹⁴ Pub. L. No. 93-107, 87 Stat. 350 (1973). Petitioners state that Congress “prohibited any blackouts for a one-year period” during the early 1970s. Petition at 10. This is inaccurate. This law only prevented blackouts if a game was sold out 72 hours before game time.

¹⁵ See NAB Comments in MB Docket No. 10-71, Attachment D, “A Short History of the Program Exclusivity Rules” (filed May 27, 2011).

¹⁶ See, e.g., *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

Following the “spirit and letter” of the sports antitrust exemption, the Commission first considered a sports blackout rule in 1971, which would prevent cable operators from circumventing the distribution system specified by private sports programming agreements by “importing the signal of a station carrying the home game of a professional team if that team has elected to black out the game in its home territory.”¹⁷ In 1975, the Commission adopted the current cable sports blackout rule that prevents cable systems from importing distant signals carrying sports events that are blacked out pursuant to contract in a local television market.¹⁸ In 1999, Congress mandated a similar rule for Direct Broadcast Satellite (“DBS”), limiting the importation of local sports telecasts by satellite providers, which the FCC adopted in 2000.¹⁹

Petitioners contend that changes in technology and “sports economics” since the blackout rules were first adopted have rendered the rules obsolete.²⁰ While the market for TV programming has indeed changed in the last 40 years, rather than impel

of Proposed Rule Making, 2 FCC Rcd 2393 (1987) (“To ensure free and efficient functioning of competitive market processes, the Commission seeks to permit equality, to the extent possible within our regulatory framework, of contractual opportunity among competing modes of distribution. In the instant setting, that means permitting broadcasters to acquire and enforce the same kinds of exclusive performance rights that competing suppliers are now permitted to exercise.”).

¹⁷ Commission Proposals for Regulation of Cable Television, 31 F.C.C.2d 115, 124 (1971).

¹⁸ 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 F.C.C.2d 265 (rel. July 22, 1975). The current regulatory provision is located at 47 C.F.R. § 76.111.

¹⁹ Implementation of the Satellite Home Viewer Improvement Act of 1999, *Report and Order*, 15 FCC Rcd 21688 (rel. Nov. 2, 2000). The current regulatory provision is located at 47 C.F.R. § 76.127.

²⁰ Petition at 3, 12.

elimination of the rules, those changes have made local programming exclusivity rules even more important now than they were when first implemented.

In 1975, competitive cable networks, including those that carry sports programming, did not yet exist. Satellite television was a decade away from becoming a relevant consumer option. Contrast that with today: nationally and regionally concentrated MVPDs dominate the distribution of TV programming into American homes, and broadcasters compete against several hundred cable networks, including national and regional sports networks. While in the 1970s it may have been technologically cumbersome for MVPDs to import a distant broadcast signal and circumvent the sports blackout rule, in today's digital world, it can be done more easily and affect a much larger base, by orders of magnitude, of pay TV subscribers.

The Commission must evaluate Petitioners' request in light of how local program exclusivity rules remain vital to promoting congressional and agency localism goals in today's competitive environment. Neither the Commission (nor local stations) have control over the terms of privately negotiated program distribution contracts, from which sports blackouts actually stem. NAB takes no position regarding the status of those contracts.

III. Elimination of the Sports Blackout Rules Would Undermine Local Market Program Exclusivity and Harm Localism

The sports blackout rules, together with the network non-duplication and the syndicated program exclusivity rules, provide the foundation for local broadcast program exclusivity. Both Congress and the Commission have repeatedly recognized these exclusivity rules as integral to the promotion and maintenance of our locally-based television broadcasting system. To be clear, none of these rules *creates* exclusivity on

their own. Instead, they merely prevent pay TV operators from circumventing the exclusivity agreements through technology and the distant signal compulsory license on which these operators rely.

These exclusivity rules remain essential to a vibrant local broadcast system.²¹ The rules support local broadcasters' investments in high quality, diverse informational and entertainment programming.²² Because television stations must invest significant resources in producing local news and providing other information and critical services, revenues from advertising are essential to their ability to serve their local communities. Local stations always have negotiated with program suppliers for exclusive rights within their markets. Hindering the ability to enforce exclusive local program rights would "make it more costly for broadcasters and owners of program rights to enter into and enforce efficiency-enhancing contracts."²³ Advertisers on local broadcast stations expect – and pay for – this exclusivity. If the Commission were to curtail broadcasters' ability to enforce that exclusivity, it would weaken broadcasters' capacity to attract advertising, thereby reducing their ability to pay for popular programming generally and to invest in local programming specifically.

Congress and the Commission have repeatedly underscored the importance of local broadcast program exclusivity in preserving the free over-the-air broadcast

²¹ For a more complete discussion of the significance of these rules, see NAB Reply Comments in MB Docket No. 10-71, at 53-61 (filed June 27, 2011) and NAB Initial Comments in MB Docket No. 10-71, at 55-62 (filed May 27, 2011).

²² See NAB Reply Comments in MB Docket No. 10-71 at 58 (filed June 27, 2011); NAB Initial Comments in MB Docket No. 10-71 at 58 (filed May 27, 2011).

²³ *Reply Declaration of Jeffrey A. Eisenach and Kevin W. Caves*, filed as Attachment A to NAB Reply Comments in MB Docket No. 10-71, at 17 (filed June 27, 2011) (explaining why local program exclusivity arrangements "are presumptively efficient and promote consumer welfare").

system.²⁴ In fact, Congress has observed that amendments to, or deletions of, the program exclusivity rules in a manner that would usurp localism would be “inconsistent with the regulatory structure” crafted by the 1992 Cable Act.²⁵

Moreover, it is clear that broadcasters do not control how the various sports leagues choose to distribute their games and that the terms and conditions of carriage matter in leagues’ distribution decisions. Elimination of the sports blackout rules would result in sports leagues losing control over the distribution of their programming due to MVPDs’ use of the distant signal compulsory license. This loss of control would threaten the continued distribution of major sporting events on free, over-the-air television, as sports leagues wishing to retain control over distribution of their content would have an incentive to move to pay platforms where the compulsory license would not undermine their private agreements. 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. Ultimately, fewer sports events would be accessible to *all* viewers, as sports fans would

²⁴ 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 ¶50 (rel. Sept. 8, 2005) (“2005 FCC Retransmission Consent Report”); S. Rep. No. 102-92 at 34-35, 37-38 (1991) (“Senate Report”) (“Amendments or deletions of [the exclusivity rules] in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would, in the Committee’s view, be inconsistent with the regulatory structure created in [the 1992 Cable Act].”).

²⁵ *Senate Report* at 38; see also *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994), ¶114 (noting that the policies of both retransmission consent and program exclusivity “promote the continued availability of the over-the-air television system, a substantial government interest in Congress’ view”).

be required to pay for televised access to local games because those games would no longer be available free, over-the-air.

Especially in light of these potential unintended consequences arising from elimination of the sports blackout rules, Petitioners fail to provide the requisite legal or evidential basis for the Commission to reverse the nearly 40 years of precedent that underlies the rules. The Petition contains not a shred of evidence that the alleged benefits of eliminating the sports blackout rules – the curtailment of blackouts or lower ticket prices for sports fans – would, in fact, occur. The Commission should not and, indeed, cannot justify a radical change in its sports blackout rules and policies based upon the flimsy evidentiary basis Petitioners have provided.²⁶

IV. Conclusion

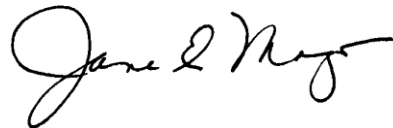
The FCC's sports blackout rules serve the same role as the other program exclusivity rules – ensuring that local broadcaster service is not jeopardized by the importation of distant signals in contravention of privately negotiated contracts to distribute content to a particular geographic area. These rules do not produce the blackouts that the Petitioners seek to end. Rather, the rules promote localism and America's system of community-oriented programming. Without local exclusivity,

²⁶ See *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1810-13 (2009) (agency changing course must offer a “reasoned explanation for its action,” “show that there are good reasons for the new policy,” and provide a detailed justification when “its new policy rests upon factual findings that contradict those which underlay its prior policy”). See also *ACT v. FCC*, 821 F.3d 741, 746 (D.C. Cir. 1987) (FCC had failed to establish “the requisite ‘reasoned basis’ for altering its long-established policy” on certain television commercial limits); *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 763 (6th Cir. 1995) (FCC rules restricting participants in spectrum auctions were arbitrary because agency had no factual support for them); *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (FCC's criterion for licensing broadcast applicants was invalidated as arbitrary and capricious due to lack of evidence that the agency's policy “achieve[d] even one of the benefits ... attribute[d] to it”).

broadcasters' ability to secure highly valued content and, in turn, sell advertising based on that content will be greatly reduced, with local service suffering as a result. If a problem with sports blackouts exists, it should be the province of Congress, not the Commission, to examine and resolve the problem in a manner that does not harm local broadcast service. Accordingly, the Commission should deny Petitioners' request for a rulemaking to eliminate the sports blackout rules.

Respectfully submitted,

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