

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Petition for Rulemaking to Eliminate the)	MB Docket No. 12-3
Sports Blackout Rule)	DA 12-44
)	
)	

**COMMENTS OF SPORTS FANS COALITION, INC.; NATIONAL CONSUMERS
LEAGUE; PUBLIC KNOWLEDGE; LEAGUE OF FANS; MEDIA ACCESS PROJECT**

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I. INTRODUCTION AND SUMMARY

Americans love sports. In an era of niche marketing and fractious political debate, sports are one of the few cultural elements that unite vast numbers of Americans, as the record-high ratings of this year’s Super Bowl illustrated.¹ The Federal Communications Commission (“Commission”) has recognized that the public interest is served by the widespread televising of sports events.² Certain Commission rules and policies impacting sports, however, have been

¹ See Marisa Guthrie, *Super Bowl XLVI Becomes Most-Watched Program in U.S. TV History*, HOLLYWOOD REPORTER (Feb. 6, 2012) available at <http://www.hollywoodreporter.com/live-feed/super-bowl-ratings-giants-patriots-287279>.

² For example, the Commission often refers to “news, weather, and sports” as key elements of localism and required that Regional Sports Networks (“RSNs”) be available to competing cable and satellite providers (*see Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 792-93, paras. 69-70 (2010), *affirmed in part and vacated in part sub. Nom. Cablevision Systems Corp. et al. v. FCC*, ___F.3d___ (D.C. Cir. June 10, 2011), 2011 WL 2277217 (C.A.D.C.) (eliminating the so-called “terrestrial loophole” such that the program access rules apply to RSNs in which cable operators have an attributable interest and are transmitted to the cable headend terrestrially, as opposed to via satellite)).

rendered obsolete as the economics of sports and the technological means of distributing the games have changed. In the name of maintaining the availability of sports, the Commission ironically perpetuates the practice of restricting the availability of games on various video platforms through the Sports Blackout Rule.³

At a time of persistently high unemployment, sluggish economic growth, and consumer uncertainty, the Sports Blackout Rule supports blatantly anti-fan, anti-consumer behavior by professional sports leagues. In particular, the NFL requires a game to be blacked out from broadcast television if tickets to the game have not sold out. The Commission then perpetuates the problem by requiring other TV distributors also to black out the game.

The leagues are at the root of the problem because they currently charge exorbitant prices for tickets, which in turn results in lower attendance. The leagues then punish fans by blacking out games from television because a few seats remain unsold, under the theory that doing so will help ticket revenues and avoid television images of empty seats. For example, the NFL last season blacked out 75% of local games in Cincinnati, Ohio; 71.4% of games in Tampa Bay, Florida, 37.5% of games in Buffalo, New York, and 25% of games in San Diego, California. Meanwhile, it is highly unlikely that these blackouts serve any purpose economically for the NFL. The Commission should not be propping up leagues' anti-consumer behavior through the Sports Blackout Rule, particularly in such difficult economic times.

Moreover, when professional and collegiate sports enjoy vast public subsidies in the form of taxpayer-funded stadiums; federal anti-trust exemptions; roads, highways, and public transit serving sports arenas; tax-exempt status for professional sports leagues; state and federal grants

³ 47 C.F.R. §§ 76.111, 76.120, 76.127-30 (hereinafter "Sports Blackout Rule").

to public universities; and other support, the public –sports fans—should be able to watch the games that they helped to finance. The Commission does not need to add yet another public subsidy to sports leagues at the expense of fans.

Petitioners believe that the Commission can help to make sports more available, not by introducing new regulations, but rather by eliminating an outdated regime that in effect subsidizes multi-billion dollar industries and harms consumers. Specifically, the Commission should eliminate the Sports Blackout Rule. The Commission has ample authority to do so, since Congress never mandated the imposition of the Sports Blackout Rule in the first place.

The Commission’s original rationale for adopting the Sports Blackout Rule was, among other things, to keep sporting events available on broadcast television as much as possible. By prohibiting cable operators at the time from televising games that broadcasters could not carry, the Commission reasoned, sports leagues would be more inclined to license games to broadcasters. The rule also was adopted in the context of leagues’ insistence that blackouts were necessary to maintain strong ticket sales revenue. The very premise of the Commission’s reasoning, however, has been undermined by almost four decades of changes in both technology and sports economics. Ticket sales now are dwarfed by television revenues. Gone are the days when “rabbit ear” TV sets were how most Americans watched video. Sports leagues engage in direct contractual negotiations with pay-TV providers regularly and can address blackout policies without the federal government’s support. The Sports Blackout Rule therefore only serves to preserve an archaic and anti-consumer approach to disseminating sporting events.

Eliminating the Sports Blackout Rule would be a pro-fan, pro-consumer, de-regulatory action serving the public interest by expanding the availability of sports to the public without

adding any regulatory compliance costs to the private sector. Without a regulatory subsidy from the federal government in the form of the Sports Blackout Rule, sports leagues would be forced to confront the obsolescence of their blackout policies and could voluntarily curtail blackouts. Better yet, they might lower ticket prices such that games sell out, much the way airlines lower ticket prices shortly before a flight in order to ensure that every seat on a plane is occupied.

II. THE COMMISSION SHOULD ELIMINATE THE SPORTS BLACKOUT RULE

The Commission should repeal the Sports Blackout Rule. The public interest would be served by eliminating an unnecessary regulatory prop for an obsolete league practice. Given the absence of any Congressional mandate to impose the Sports Blackout Rule in the first place, the Commission has ample authority to end it.

a. The Sports Blackout Rule is an Anti-Consumer, Unnecessary Public Subsidy to Professional Sports Leagues That are Highly Qualified to Protect Their Business Interest Through Private Negotiations Rather Than Public Regulations

At a time of persistently high unemployment, sluggish economic growth, and consumer uncertainty, the Sports Blackout Rule supports blatantly anti-fan, anti-consumer behavior by professional sports leagues. A trifecta of forces punishes consumers.

First, professional sports leagues have various types of blackout policies. For example, the National Football League's ("NFL's") sports blackout policy decrees that no game shall be televised if the stadium or arena has not sold out 72 hours prior to game day. This policy ostensibly exists to protect gate receipts and concession revenues, under the assumption that – as NFL Commissioner Roger Goodell said when asked about this proceeding -- fewer people will

buy tickets to the live sporting event if they can watch the game on television, or because televised games should not include images of empty seats.⁴

Second, ticket prices are at historic highs, with an average NFL ticket costing over \$77.00, up from sixty-two dollars just five years ago.⁵ Add to that the cost of concessions and parking and an American family of four will spend about \$400.00 to attend a professional football game in 2011. Such high costs dissuade economically distressed Americans from attending games in person.

Ticket prices are increasing despite the economic downturn and what appears to be a negative impact on attendance. For example, prior to the recent recession, the NFL had set

⁴ See NFL Commissioner Roger Goodell Super Bowl XLVI Press Conference, Indianapolis IN, Feb. 3, 2012:

Reporter: *How concerned are you about the attendance issues in Tampa and Cincinnati, and also, the FCC has opened up to public comments on the blackouts, and (what's) the league's view on that?*

Commissioner Goodell: "I'm always concerned about making sure that our stadiums are full. We're fortunate that we had a terrific effort this year. We had only 16 blackouts. We'd like to have zero, and we'll continue to work to try to get to that point. We want our stadiums full, and we want to continue to stay on free television. And we're fortunate to be able to extend those television agreements to stay on free television, which is unique within professional sports, and that has to be balanced with driving people to your stadiums with offering your games on free television. I think the policy has served us very well over four-plus decades. I believe that it's a balanced approach, and we'll continue to go through the FCC process if they desire."

See also Roy Cummings, *Blackout Rule a 'Balancing Act' for N.F.L., Goodell Tells Bucs Fans*, THE TAMPA TRIBUNE, June 8, 2011, available at <http://m2.tbo.com/content/2011/jun/08/081628/nfl-commissioner-goodell-fields-questions-from-buc/sports-bucs/>.

⁵ See 2011 NFL Team Marketing Report, available at <http://sportsfans.org/wp-content/uploads/2011/10/fancostindex2011.pdf>. See also 2006 NFL Team Marketing Report, available at <http://sports.espn.go.com/nfl/news/story?id=2576495>.

attendance records for five consecutive seasons.⁶ NFL attendance has slipped slightly or remained flat in every year from 2008-2010.⁷ During this same time period, teams have raised ticket prices.⁸ The result has been record-high revenue for the NFL, despite the recession and flagging attendance.⁹

The third element of the anti-fan trifecta is persistently high unemployment. According to the U.S. Department of Labor, the unemployment rate nationally has remained between 8 and 9% over the last year, with some of the hardest-hit areas of the nation, such as Tampa Bay, Florida; Jacksonville, Florida; and Oakland, California suffering even higher rates of unemployment.¹⁰

⁶ *NFL Regular-Season Attendance Increases for Fifth Consecutive Year*, ESPN.COM, (Jan. 3, 2008), available at <http://sports.espn.go.com/nfl/news/story?id=3179820> (“The NFL has set records for average attendance every season since 2003”).

⁷ Mark Maske, *Local TV Blackouts Up Only Modestly From Last Season*, WASHINGTON POST, (Dec. 23, 2010), available at <http://views.washingtonpost.com/theleague/nflnewsfeed/2010/12/local-tv-blackouts-up-only-modestly-from-last-season.html>).

⁸ Sean Leahy, *NFL Tickets Prices Rise Again in 2010, up 30% Since 2005*, USA TODAY THE HUDDLE, (Sep. 22, 2010), available at <http://content.usatoday.com/communities/thehuddle/post/2010/09/nfl-tickets-price-rise-again-in-2010-up-30-since-2005/1>). The article notes that the average cost of a single ticket in 2010 rose to \$76.47.

⁹ See Matthew Futterman, *The NFL's \$1 Billion Game of Chicken*, WALL STREET JOURNAL, (Feb. 17, 2011), available at <http://online.wsj.com/article/SB10001424052748703373404576148712424300234.html>) (reporting that the NFL made a record \$9 billion in revenue in 2010). The NFL is not satisfied with this revenue and is seeking to grow to make \$25 billion in annual revenues by 2027. *Goodell Sets Revenue Goal of \$25B by 2027 for NFL*, SPORTS BUSINESS JOURNAL, (Apr. 5, 2010), available at [http://www.sportsbusinessdaily.com/Journal/Issues/2010/04/20100405/This-Weeks-News/Goodell-Sets-Revenue-Goal-Of-\\$25B-By-2027-For-NFL.aspx](http://www.sportsbusinessdaily.com/Journal/Issues/2010/04/20100405/This-Weeks-News/Goodell-Sets-Revenue-Goal-Of-$25B-By-2027-For-NFL.aspx)).

¹⁰ According to the Bureau of Labor Statistics, the unemployment rates during 2010-11 for affected markets have hit: Tampa-St. Petersburg-Clearwater, 11.0%; Jacksonville, Florida, 10.4%; San Francisco-Oakland-Fremont, 9.7%. See Bureau of Labor Statistics, *Unemployment Rates for Metropolitan Areas, Monthly Rankings, Not Seasonally Adjusted*, August, 2011, available at <http://bls.gov/web/metro/laummtrk.htm>.

The result of this trifecta –league blackout rules; high ticket prices; and high unemployment -- has been rampant television sports blackouts, particularly in communities hardest hit by the recent recession. As the table below illustrates, several major American cities experienced drastic NFL blackout rates, from 25% to 75%, in the 2011 season:

<u>MARKET</u>	<u>% LOCAL NFL GAMES BLACKED OUT¹¹</u>
Cincinnati, Ohio	75%
Tampa Bay, Florida	71.4%
Buffalo, New York	37.5%
San Diego, California	25%

This fuels consumer frustration. For example, an unemployed American in Tampa Bay or Cincinnati probably cannot afford a ticket to a local NFL game. Unable to afford stadium seats, the fan goes home to watch the game on TV, either broadcast, cable, or satellite, but because there are many other unemployed people in that market, the game has not sold out and therefore is not televised locally. The fan’s tax dollars helped to build the stadium. Her federal government grants anti-trust exemptions and regulatory protections to the team owners. The fan herself, however, is left with nothing.

The Commission’s Sports Blackout Rule is part of the problem. It operates as a regulatory backstop to an obnoxious and outdated league policy. In general, a sports league licenses the right to broadcast games but only on the condition that local broadcasters abide by

¹¹ Based on a review by Sports Fans Coalition, out of eight regular-season local NFL games in the 2011 season (seven in the case of Tampa Bay), local blackouts numbered six in Cincinnati, five in Tampa Bay, three in Buffalo, and two in San Diego.

the leagues' blackout policies. The Commission rule operates to extend the leagues' policy beyond their private contracts. The league strikes a deal with the local broadcaster, who must abide by the league's blackout policy. The federal Sports Blackout Rule then requires any cable, satellite, or other distributor to abide by the same blackout policy.¹²

The federal government should have no place in propping up and expanding private agreements between well-funded market participants. Instead, the sports leagues themselves, which do business with cable, satellite, and other pay-TV distributors, should include in their contract negotiations the demand that their blackout policies be followed, if that is their wish. In the absence of the federal government's full backing, however, leagues might decide to relax or eliminate their current blackout policies, which arguably have outlived their usefulness.

b. Leagues' Blackout Policies Have Been Rendered Obsolete

The league practice of blacking out locally televised games in order to bolster ticket sales is itself an antiquated model that should be voluntarily eliminated, or at the very least not facilitated by federal regulations. Members of Congress¹³ and others¹⁴ have called into question

¹² See Sports Blackout Rule (requiring cable and satellite providers to black out any game that the applicable local broadcaster must black out under that broadcaster's agreement with the relevant sports league).

¹³ Several U.S. Senators and House Members already have commented in this proceeding, including Sen. Sherrod Brown (D-OH); Sen. Richard Blumenthal (D-CT); Rep. Brian Higgins (D-NY), and others. See also Office of Senator Sherrod Brown, *Sen. Brown Calls on NFL Commissioner to Reexamine Television Blackout Policies*, (Sept. 9, 2010), available at http://brown.senate.gov/newsroom/press_releases/release/?id=bfe8edab-082b-4f10-8367-2172674d25b0).

¹⁴ Joe Henderson, *NFL's Archaic Blackout Policy has Fans Feeling the Blues*, TAMPA TRIBUNE, (Oct. 23, 2010) (available at <http://www2.tbo.com/content/2010/oct/23/232018/nfls-archaic-blackout-policyhas-fans-feeling-the-b/>) ("[The current NFL blackout policies have] been in place since 1973, when TV sets had tubes and rabbit ears. In a hi-def, 500-channel world filled with a

the necessity of any blackouts. Sports leagues, however, seem to be unwilling to even consider reforming or removing the practice.¹⁵

Sports leagues, most notably the NFL, erroneously argue that eliminating blackouts would end professional sports as we know them and lead to a decrease in the availability of games, especially on free over-the-air broadcast television. The NFL claims that sports blackouts are necessary to preserve leagues' viability and accessibility.¹⁶ As if oblivious to the economic plight of millions of Americans, and to the bloated cost of game tickets, the NFL defends the Sports Blackout Rule "in order to encourage local fans to attend the game. . . ."¹⁷ The NFL defends its very existence and its media practices, presumably including its blackout policy, as "playing a key role" without which teams, particularly in small markets, could not "share the broadcast revenues" and "the widest audience" could not be reached.¹⁸ As NFL Commissioner Roger Goodell said a few days ago in response to a journalist's question about this proceeding:

I'm always concerned about making sure that our stadiums are full. . . . We want our stadiums full, and we want to continue to stay on free television . . . [which] has to be

billion different entertainment options, it really doesn't make sense for the league to continually hide its product").

¹⁵ Gregg Rosenthal, *NFL Won't Be Altering Blackout Rule*, NBC SPORTS PRO FOOTBALL TALK, (Aug. 31, 2009) (available at: <http://profootballtalk.nbcsports.com/2009/08/31/nfl-wont-be-altering-blackout-rule/>) (quoting NFL spokesman Brian McCarthy as saying that "There is no consideration being given to amending the blackout policy. The policy is important in supporting the ability of the clubs to sell tickets and keeping our games attractive as television programming with large crowds so we can keep all our games on free TV.").

¹⁶ *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd. 2718 (2011) ("Retransmission Consent Reform Proceeding"), NFL Comments at 3 (*hereinafter* "NFL Comments") ("[t]o promote home game attendance, the NFL has maintained a blackout policy for over half a century").

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 6.

balanced with driving people to your stadiums. . . . I think the [blackout] policy has served us very well over four-plus decades. I believe that it's a balanced approach. . . .¹⁹

The NFL is wrong. Along with all the other professional sports leagues, it has conspicuously failed to offer any financial proof for the sweeping assertion that blackouts are necessary to preserve the financial health of the leagues or for the preservation of televising games on free over-the-air broadcast TV. The NFL relies on a Commission statement from 1975 that “the local team’s need to protect its gate receipts might require that it prohibit the telecasting of its games” but for the blackout rule.²⁰

The sports leagues’ arguments that blackouts are necessary in order to sustain revenues, either through gate receipts or television audiences, does not stand up to economic scrutiny or intuitive common sense. Professor Roger Noll of Stanford University’s economics department has written extensively on the positive economic effects for leagues of expanding, rather than restricting, the televising of professional sports.²¹

Surely in the nearly four decades since that Commission order, the relative importance of gate receipts has shrunk in comparison to the revenues from broadcast, cable, satellite, Internet, wireless, merchandizing, and promotional revenues. Petitioners believe that television revenues, which are shared equally among teams, are 80 times what they were in 1970 and now account for

¹⁹ NFL Commissioner Roger Goodell, Super Bowl XLVI News Conference, Indianapolis, Indiana (February 3, 2012). *See supra* n.19 for complete quote.

²⁰ NFL Comments at 3, *citing 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 FCC 2d 265, at para. 54 (1975).

²¹ *See, e.g.*, Roger Noll, *Broadcasting and Team Sports*, 54 SCOTTISH JOURNAL OF POLITICAL ECONOMY 400 (July, 2007).

50% of total revenues.²² This is more than twice the “gate” revenues, which account for 21.6% of total revenues. Gate revenues are split 60/40 between home team and visiting team.²³

It does not stand to reason that blacking out games in order to support gate revenues is critical to the survival of sports or the distribution of games. Moreover, nothing would stop the league from facilitating further revenue-sharing among teams, including the smaller-market teams, and promoting the wide distribution of games on multiple platforms, even in the absence of the blackout policy.

Blacking out games actually might harm, rather than support, ticket sales.²⁴ Moreover, when Congress during the early 1970’s prohibited any blackouts for a one-year period, the

²² See also Jeff Howe, *Judge David Doty Rules That NFL Will Not Have Access to \$4 Billion in Television Revenue During a Lockout*, NESN, (Mar. 1, 2011) (noting NFL total revenue at about \$8 billion a year with television revenue at about \$4 billion of that) (available at: <http://www.nesn.com/2011/03/judge-rules-that-nfl-will-not-have-access-to-4-billion-in-television-revenue-during-a-lockout.html>). This stands in stark contrast to 1975 when the FCC relied on the fact that gate receipts were the “primary” source of revenue for sports leagues as partial justification for a limited sports blackout rule. 40 Fed. Reg. 30641, 30647, *supra note 1*, at ¶ 55.

²³ John Vrooman, *The Football Players’ Labor Market*, ECONOMICS OF THE NATIONAL FOOTBALL LEAGUE: THE STATE OF THE ART (2011), available at <http://www.vanderbilt.edu/econ/faculty/Vrooman/vrooman-football-labor-market.pdf>.

²⁴ See Joshua Huffman, *NFL Attendance Down for Third Consecutive Season: Blackouts to Blame?*, YAHOO! SPORTS, (Dec. 13, 2010), available at <http://sports.yahoo.com/nfl/news?slug=ycn-7320368>) (blaming drops in NFL attendance in part on blackouts themselves as well as the economy, improved home TV-viewing experiences, overpriced ticket prices combined with overpriced concession prices at games, long-term fan uncertainty about the NFL lockout, and the family-unfriendly environments of NFL stadiums) ; see also Cork Gaines, *NFL Attendance Down for 4th Straight Year; Blackout Rule Not Working*, BUSINESS INSIDER, (Nov. 10, 2010), available at <http://www.businessinsider.com/nfl-attendance-down-for-4th-straight-year-blackout-rule-not-working-2010-11>) (suggesting the NFL’s blackout strategy is proving to be a poor one from a business standpoint).

parade-of-horribles predicted by professional sports leagues at the time never materialized.²⁵

Then-NFL Commissioner Pete Rozelle predicted that in the absence of TV blackouts, the NFL would play games in front of half-filled stadiums in 1973 as season ticketholders were “no-shows” and stayed at home.²⁶ He was wrong.

Lifting blackouts of games that had not sold out apparently impacted the NFL and game attendance minimally. The weather on game day and a team’s record turned out to be far more important than blackout policies in determining whether fans showed up to games.²⁷ Similarly, more recent empirical studies suggest that media broadcast of professional sports may actually have a positive impact on home attendance.²⁸

²⁵ See Jerry Kirshenbaum, *Chirp-chirp, Crunch-crunch*, SPORTS ILLUSTRATED, (Oct. 1, 1973) (available at: <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1087838/1/index.htm>) (reporting at that moment the depth of concerns that the anti-blackout law passed by Congress would cripple the NFL’s future growth and imperil the survival of the league). One of the more quotable lines in Kirshenbaum’s article reads: “To judge from their reaction to the anti-blackout law, Tose and other NFL owners evidently feared that pro football might soon need to be covered by the endangered species bill, one of several important pieces of pending legislation that Congress pushed to one side in its haste to get at the blackout.”

²⁶ See Jerry Kirshenbaum, *Chirp-chirp, Crunch-crunch*, SPORTS ILLUSTRATED, (Oct. 1, 1973), available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1087838/1/index.htm> (quoting Rozelle as saying “We mustn’t let ourselves become just a TV-studio show. We need the electricity of the crowd. It isn’t enough to sit in the stadium and hear just the chirp of pigeons and the crunch of peanuts.”).

²⁷ Dave McKenna, *A Blackout for the Redskins?*, WASHINGTON CITY PAPER, (Sept. 3, 2010) (referencing the FCC report), available at <http://www.washingtoncitypaper.com/articles/39678/a-blackout-for-the-redskins-the-odd-history-of-the/>.

²⁸ Chia-heng Seetoo, *Note: Can Peer-to-Peer Internet Broadcast Technology Give Fans Another Chance? Peer-to-Peer Streaming Technology and Its Impact*, 7 U. ILL. J.L. TECH. & POL’Y 369, 394 (Fall 2007); citing James J. Zhang, Dale G. Pease & Dennis W. Smith, *Relationship Between Broadcasting Media and Minor League Hockey Game Attendance*, 12 J. SPORT MGMT. 103, 107 (1998) (discussing the idea that television coverage has a positive impact on fan consumption of sports by increasing interest in attendance); James J. Zhang & Dennis W. Smith, *Impact of Broadcasting on the*

Changes in technology also call into question the relevance of league blackout policies. The leagues' blackout policy by definition applies to free over-the-air broadcast TV but video distribution has undergone massive change since the rabbit-ear era of the mid-1970's, when the Sports Blackout Rule arose. Most significantly, the Internet has afforded new pathways to the consumer. The leagues, however, resist fans' access to sports in new media, endeavoring to prohibit live blogging of sports events;²⁹ team distribution of home games via the Internet;³⁰ or even players "Tweeting" on the sidelines.³¹

Finally, sports teams and leagues have circumvented and unevenly applied their own blackout policies. Sometimes leagues allow teams to exclude club seats, suite seats, standing-room spots, and many other ticket categories from tallying sellouts for blackout purposes.³² With the underlying league blackout policies themselves applied unevenly, the Commission should ask whether eliminating a federal regulation upholding the blackout practice would have any more effect than the leagues' own behavior today.

Attendance of Professional Basketball Games, 6 SPORT MKTG. QUARTERLY 23 (1997) (discussing the positive relationship between broadcasting and attendance in home games).

²⁹ Dannika Lewis, *No Updates from the Bench, Stands or ...Press Box?: The Legality of Live Blogging from Sports Events*, Vol.1, No. 2 ELON JOURNAL OF UNDERGRADUATE RESEARCH IN COMMUNICATIONS 87, (Fall 2010).

³⁰ See NFL Bylaws at 2001-8 (2001 Resolution JC-1, as amended) ("NFL Internet Network Fundamental Principles and Operating Guidelines") ("All NFL game video is a collective League asset and will be managed and distributed by the NFL Network. Video will be available on Club sites as [League rules dictate]").

³¹ Nate Davis, *Bengals WR Chad Ochocinco Fined \$25,000 for Using Twitter During Game*, USA TODAY, (Aug. 24, 2010) (available at <http://content.usatoday.com/communities/thehuddle/post/2010/08/bengals-wr-chad-ochocinco-fined-25000-for-using-twitter-during-game/1>).

³² Dave McKenna, *A Blackout for the Redskins?*, WASHINGTON CITY PAPER, (Sept. 3, 2010), available at <http://www.washingtoncitypaper.com/articles/39678/a-blackout-for-the-redskins-the-odd-history-of-the/>).

In practice, if the Commission were to eliminate the Sports Blackout Rule, the leagues might find that preserving their blackout policy in an era when television distribution revenues far outstrip ticket and concession revenues is no longer in the best interest of fans, teams, or players. Better yet, leagues might be forced to consider reducing ticket prices enough to sell out games, much the way airlines lower ticket prices shortly before a flight in order to ensure that every seat on a plane is occupied.

Even if the leagues believe that the best way to preserve sports is to prevent fans from watching games, then leagues should negotiate directly with non-broadcast distributors to make sure that cable, satellite, and any other distributor obey the blackout policy, just as the leagues have negotiated with broadcasters to do so. Sports leagues do business today with every major pay-TV distributor and can negotiate directly with those firms to perpetuate the blackout policy if that is the leagues' wish. The federal government, however, in the form of the Commission, should not be used as a corporate welfare tool to prop up multi-billion dollar operations with significant market power across multiple distribution platforms.

c. The Commission Has Ample Authority to Repeal the Sports Blackout Rule

The Commission has total discretion to amend, waive, or repeal the Sports Blackout rule. Congress never directed the Commission to implement the rule. For almost forty years, the Sports Blackout Rule has vexed, annoyed, and infuriated American sports fans, who—through their elected representatives in Congress—never asked for the rule in the first place.

The Sports Blackout Rule was the result of lobbying by the sports and broadcast industries when federal courts found that professional football was violating anti-trust laws and Congress subsequently granted leagues a narrow anti-trust exemption for negotiating broadcast distribution deals. A federal court found in 1953 that professional football violated anti-trust laws

by requiring all teams to grant their broadcast rights to the league, which in turn would bargain directly with broadcasters.³³

After losing in the federal courts, however, the NFL successfully lobbied Congress for special interest legislation, the Sports Broadcasting Act of 1961 (“SBA”), which granted the NFL and other major professional sports leagues a limited exemption from antitrust laws, allowing exclusive TV contracts with broadcasters that include blackout provisions.³⁴ The SBA is widely referred to as “special interest legislation” by legal scholars, judges, and commentators.³⁵ The NFL disputes this characterization.³⁶

The SBA only applies to free, over-the-air broadcasting, as the plain meaning of the statute and its legislative history make clear. The statute refers to “sponsored telecasting,”³⁷ a term of art referring exclusively to broadcast television.³⁸ The SBA’s legislative history reflects

³³ *U.S. v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953); *U.S. v. NFL*, 196 F. Supp. 445 (E.D. Pa. 1961).

³⁴ See 15 U.S.C. § 1291 *et seq.*

³⁵ See, e.g., *Professional Sports Ltd. P’ship v. NBA*, 95 F.3d 593, 595-96 (7th Cir. 1996) (calling the Sports Broadcasting Act “a special-interest exception to the antitrust laws”); *Shaw v. Dallas Cowboys Football Club*, 1998 U.S. Dist. LEXIS 9896, No. 97-5184, at *12-13 (E.D. Pa. 1998) (“The Sports Broadcasting Act did not pronounce a broad, sweeping policy, but rather engrafted a narrow, discrete, special-interest exemption upon the normal prohibition on monopolistic behavior.”).

³⁶ See NFL Comments at 6 (“The SBA has served fans well by permitting the NFL and other professional sports leagues to play an essential role in creating and marketing games”).

³⁷ 15 U.S.C. § 1291.

³⁸ *Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177, 1183 (S.D. Cal. 2002) (“‘Sponsored telecasting’ under the SBA pertains only to network broadcast television and does not apply to non-exempt channels of distribution such as cable television, pay-per-view, and satellite television networks.”); Ross C. Paolino, *Upon Further Review: How the NFL Network is Violating the Sherman Act*, 16 SPORTS LAWYERS JOURNAL 1, 9 (Spring 2009) (“The SBA only exempts pooled broadcasting arrangements in “sponsored telecasting” 55 - “a term of art which ... means [only] free network television.”

that "[t]he bill does not apply to closed circuit or subscription television."³⁹ In fact, the NFL admitted to Congress in 1961 that the SBA covers only the free telecasting of professional sports contests and does not cover pay-TV.⁴⁰

After enactment of the SBA, broadcasters and sports leagues petitioned the Commission to impose a sports blackout rule, such that when leagues demanded that a broadcaster black out a game, the cable operator must follow suit. They argued that Congress, in granting the anti-trust exemption, allowed leagues to demand local blackouts of games. Therefore, petitioners reasoned, if broadcasters must black out games under federally sanctioned league procedures, cable TV providers carrying the broadcast signal must do likewise or the broadcaster's exclusivity arrangement would be undermined.⁴¹

The Commission initially resisted acting on the broadcasters' and leagues' request in 1971, instead asking Congress for guidance.⁴² In 1972, in the context of implementing a new regulatory regime for cable, the FCC issued a Notice of Proposed Rulemaking regarding cable sports programming and suggested that, in the absence of Congressional action, the Commission would promulgate rules.⁴³

³⁹ *Shaw*, 1998 U.S. Dist. LEXIS 9896, at *10-11 (citing *Telecasting of Professional Sports Contests: Hearing before the Antitrust Committee of the House Committee on the Judiciary on H.R. 8757*, 87th Cong. 4 (Sept. 13, 1961)).

⁴⁰ *See id.* at *11.

⁴¹ *See Cable Television Service - Sports Programs*, Report and Order, 34 Rad. Reg. 2d 68340 ¶ 28 (P&F) (1975) ("*Sports Blackout Order*") (recounting the arguments of sports and broadcast interests, including the claim that "the public interest in viewing sports events over conventional television is also jeopardized by unrestricted cable television importation of sports events broadcast by distant television stations").

⁴² *In Re Commission Proposals for Regulation of Cable Television*, Opinion, 31 F.C.C.2d 115 (1971) ("Letter").

⁴³ *See 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*, Notice of Proposed Rulemaking, 36 F.C.C.2d 641 ¶ 2 (1972) (stating that "if Congress chooses not to legislate in this area, we believe that we should institute this proceeding").

In 1975, its requests for Congressional guidance unheeded, the Commission chose to move forward under its general authority.⁴⁴ Rather than using express statutory authority to justify the Sports Blackout Rule, the Commission alluded to the SBA, an anti-trust statute.⁴⁵

Ironically, the only Communications Act amendment enacted during this period was an *anti*-blackout law that restricted sports leagues' ability to black out games at will.⁴⁶ The anti-blackout statute enacted in 1973 and cited by the Commission in implementing the Sports Blackout Rule was far from a mandate to impose sports blackouts. To the contrary, it grew out of then-President Nixon's direct appeal to the NFL to end its blackouts of sold-out local games.⁴⁷

Even the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), which led to the satellite sports blackout rule, only required that the cable rule also be imposed on satellite television when "technically feasible."⁴⁸ It was not a Congressional directive to impose the rule in the first place but rather a requirement to maintain regulatory parity between cable and satellite providers.

Notably, in response to the above arguments, the NFL has failed to rebut the central premise that Congress never directed the Commission to promulgate the Sports Blackout Rule. In a related Commission proceeding in which both the NFL and Sports Fans Coalition

⁴⁴ See *Sports Blackout Order*, 34 Rad. Reg. 2d 68340.

⁴⁵ See *id.* ¶ 4. The Commission also reasoned that "cable systems should not be permitted to circumvent the purpose of the [SBA] by importing the signal of a station carrying the home game of a professional team if that team has elected to blackout the game in its home territory." *Id.* ¶ 11.

⁴⁶ See *id.* ¶¶ 25-27 (discussing P.L. 93-107).

⁴⁷ 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 14 (available at: <http://elr.carolonet/BI/V13N05.PDF>) (discussing P.L. 93-107, the anti-blackout statute, one of the two statutes cited by the Commission in its sports blackout rule implementing order).

⁴⁸ 47 U.S.C. § 339(b)(1)(B).

participated, the NFL points to SHVIA as a tacit endorsement of the rule,⁴⁹ and to the SBA as having helped the NFL to market games to fans,⁵⁰ but never rebuts Sports Fans Coalition's assertion that no statute establishes the Sports Blackout Rule and that the Commission therefore has total authority to amend or eliminate the rule at will. The Commission can and should eliminate the Sports Blackout Rule in its entirety.

d. The Commission Has Not Conducted a Thorough Review of the Sports Blackout Rule and Last Collected Record Evidence in 2005

The time is ripe for a thorough re-examination of the Sports Blackout Rule. The Commission has not opened a proceeding focused solely on the rule in decades and has not collected any record evidence on the subject in over a half-decade. In 2005, under the Satellite Home Viewer Extension and Reauthorization Act of 2004,⁵¹ the Commission conducted an inquiry into the retransmission consent, network non-duplication, syndicated exclusivity, and

⁴⁹ See NFL Comments at 4 (“Congress . . . require[d] that the Commission *extend* the sports blackout rule, which at the time applied only to cable operators, to DBS operators ‘to the extent technically feasible and not economically prohibitive’”) (citations omitted).

⁵⁰ See NFL Comments at 6-8 (describing the “NFL’s role in creating and marketing games and . . . how the SBA has served fans”).

⁵¹ 108 P.L. 447, *Consolidated Appropriations Act, 2005 – Title IX, Satellite Home Viewer Extension and Reauthorization Act of 2004*, 118 Stat. 2809, 3428-3429 at § 208 (Dec. 8, 2004) (“(a) Study Required.--No later than 9 months after the date of enactment of the Satellite Home Viewer Extension and Reauthorization Act of 2004, the Federal Communications Commission shall complete an inquiry regarding the impact on competition in the multichannel video programming distribution market of the current retransmission consent, network nonduplication, syndicated exclusivity, and sports blackout rules, including the impact of those rules on the ability of rural cable operators to compete with direct broadcast satellite industry in the provision of digital broadcast television signals to consumers. Such report shall include such recommendations for changes in any statutory provisions relating to such rules as the Commission deems appropriate. (b) Report Required.--The Federal Communications Commission shall submit a report on the results of the inquiry required by subsection (a) to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate not later than 9 months after the date of the enactment of this Act.”).

sports blackout rules.⁵² Commenters generally focused on the retransmission consent and network non-duplication issues, with relatively little analysis given to the Sports Blackout Rule. Cable and satellite interests suggested minor amendments to the rule⁵³ and professional sports leagues asking that the rule remain unchanged.⁵⁴ Notably, not a single consumer advocate on behalf of sports fans commented on the record (Sports Fans Coalition was founded four years later in 2009).

Thus, the technological changes over the last half decade, the lack of thorough record evidence, and the complete absence of participation from sports-fan consumer advocates in the last docket to examine the Sports Blackout Rule should lead the Commission to conclude that a rulemaking proceeding is necessary and, in turn, that the Sports Blackout Rule no longer serves the public interest.

III. CONCLUSION

For the foregoing reasons, the Commission should eliminate the Sports Blackout Rule. The Commission has total authority to end the anti-consumer subsidization of blackouts by sports leagues. Rather than restrict the availability of games in the name of preserving them, the

⁵² See Federal Communication Commission, *Media Bureau Seeks Comment for Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace*, 20 FCC Rcd 1572 (2005), comments available at <http://fjallfoss.fcc.gov/ecfs/proceeding/view?name=05-28>.

⁵³ National Cable Television Association, *Comments in FCC Docket MB. No. 05-28* at 5-6, 12, available at <http://fjallfoss.fcc.gov/ecfs/comment/view?id=5512551651>; Echostar, *Comments in FCC Docket MB. No. 05-28* at iv (“In general, the unserved household limitation is likely to be a greater limitation on satellite carriers’ ability to provide distant digital stations than the more extensive nonduplication and other blackout rules that apply to cable”), available at <http://fjallfoss.fcc.gov/ecfs/comment/view?id=5512552748>.

⁵⁴ Professional Sports Leagues, *Comments in FCC Docket MB. No. 05-28* at 2, 7-8, available at <http://fjallfoss.fcc.gov/ecfs/comment/view?id=5512552354>. The professional sports leagues endorsing this comment included MLB, the NFL, the NBA, the NHL, and the WNBA. *Id.* at 1.

