

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

In the Matter of)
)
Amendment of the Commission’s Rules) MB Docket No. 10-71
Related to Retransmission Consent)

To: The Commission

**REPLY COMMENTS OF
THE NATIONAL FOOTBALL LEAGUE**

The National Football League (the “NFL” or the “League”) consistently supplies the most watched television programs in the country and is proud of its longstanding commitment to free over-the-air television. The League’s embrace of broadcast television is grounded in its desire to encourage widespread involvement in the sport of professional football. The NFL is unique among professional sports leagues in the tremendous number of its games appearing on over-the-air broadcasting, and it supports a retransmission consent process that gives broadcasters fair value for their content.¹ The initial comments reflect the reality that the current retransmission consent system is working in the manner that Congress intended in adopting the 1992 Cable Act.² Thus, the current retransmission consent regime acts to keep local

¹ See NFL Reply Comments, MB Docket No. 10-71, at 4 (June 3, 2010) (“The League strongly supports broadcasters’ right to negotiate for fair compensation for their programming when it is retransmitted by pay-TV providers”).

² Comments of the National Association of Broadcasters (“NAB”), MB Docket No. 10-71, at 9 (May 27, 2011) (“the current process is working and benefiting consumers”); Comments of Nexstar Broadcasting, Inc., MB Docket No. 10-71, at 5 (May 27, 2011) (“the Cable Act and the rules the Commission adopted pursuant thereto finally are operating as intended”); Comments of Gray Television, Inc., MB Docket No. 10-71, at 2 (May 27, 2011) (“To an overwhelming extent, our experiences demonstrate that the market-based approach to retransmission consent continues to function well. The existing system has allowed carriage agreements to continuously adapt to an ever-changing media marketplace.”).

broadcasting strong, and in the process helps fans by ensuring the broad distribution of NFL games by free, universal, over-the-air television. Because the NFL stands committed to a healthy and robust broadcast industry, we urge the Commission not to adopt measures that would undermine broadcasters' ability to negotiate for fair retransmission consent fees.

In the remainder of these reply comments, we respond to the comments of the Sports Fan Coalition (the "SFC").³ The SFC proposes a modification to the sports blackout rule that would be contrary to the public interest and harm the sports fans for whom the SFC purports to speak. The SFC reaches this misguided recommendation because it misreads the historical context and import of the Sports Broadcasting Act of 1961.

I. THE COMMISSION SHOULD REJECT THE SFC'S PROPOSAL TO UNDERMINE THE SPORTS BLACKOUT RULE.

The sports blackout rule—approved repeatedly by Congress—serves the public interest, and the Commission should not alter it as the SFC proposes. In its comments, the SFC asks the Commission to "waive its sports blackout rule" when a retransmission consent agreement expires without a renewal or extension in place.⁴ The Commission should reject the SFC's proposal, which would gut the purpose of the rule and create perverse incentives for MVPDs to engage in brinksmanship tactics in order to take advantage of the proposed exception to the sports blackout rule. The SFC's proposal would not help fans, but instead would work to the advantage of only one interest: pay-TV providers.⁵

³ SFC Comments, MB Docket No. 10-71 (May 27, 2011).

⁴ SFC Comments at 5.

⁵ Commenters have called the SFC "a house organ for Dish Network," and SFC has received substantial financial support from Verizon and Time Warner Cable. *See* John Branch, "Fan Advocate Seeks Edge in Washington Game," *New York Times* (Oct. 22, 2010).

To promote home game attendance, the NFL has maintained a blackout policy for over half a century. In enacting the Sports Broadcasting Act of 1961, Congress expressly permitted blackouts “within the home territory of a member club of the league on a day when such a club is playing at home.”⁶ In 1973, Congress adopted legislation that prohibited blackouts in the home team’s local market when the game was sold out 72 hours in advance.⁷ This law was in effect during the 1973-75 seasons, but was not extended in light of the NFL’s commitment to Congress voluntarily to abide by these terms in the future. The League continues to honor that commitment to this day.

The FCC’s sports blackout rules prevent cable and satellite providers from carrying a game locally when the over-the-air broadcast is blacked out.⁸ In adopting the sports blackout rule, the Commission found that it “is consistent with the policy established by Congress and helps to assure the continued availability of sports telecasts to the public.”⁹ The Commission explained:

[T]eams have a reasonable interest in protecting their home gate receipts from the potentially harmful financial effects of invading telecasts of their games from distant television stations. If cable television carriage of the same game that is being played locally is allowed to take place, the local team’s need to protect its gate receipts might require that it prohibit the telecasting of its games on television stations which might be carried on local cable systems. *If this were to result, the overall availability of sports telecasts would be significantly reduced.*¹⁰

⁶ 15 U.S.C. § 1292.

⁷ Pub. L. No. 93-107.

⁸ 47 C.F.R. §§ 76.111, 76.120, 76.127-30.

⁹ *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).

¹⁰ *Id.* at para. 55 (emphasis added).

Thus, the Commission continued:

In the case of cable television importations of blacked out home games, *the ultimate effect of frustrating local blackouts might be to reduce overall sports telecasts.* The potential loss of gate receipts resulting from these importations could force sports clubs to extend their blacked out zone of protection to include all distant stations which may be carried by local cable television systems. Thus, *the games would be available to fewer television viewers, contrary to our communications policy and the sports broadcasting policy of Congress.*¹¹

Congress unambiguously endorsed the sports blackout rule by enacting legislation explicitly requiring the Commission to apply its 1975 rule to direct broadcast satellite (“DBS”) operators. Specifically, in § 1008 of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”),¹² Congress amended § 339(b)(1)(B) of the Communications Act to require 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.”¹³

Setting aside the fact that the SFC’s proposal would be contrary to Congressional endorsement of the sports blackout rule and decades of Commission precedent, the proposal is flawed in other respects.

- First, the SFC’s proposal would, as it claims, “strengthen the hand of the impacted MVPD” against the local broadcaster that the SFC claims “holds too much leverage.”¹⁴ Several commenters in this proceeding have provided

¹¹ *Id.* at para. 57 (emphasis added). *See also id.* (the sports blackout rule helps ensure “the availability of television broadcast programming to the general public”); *id.* at para. 63 (“the rule which we adopt today best serves the public interest in the larger and more effective use of the airways and follows the sports telecasting policy which has been established by Congress”).

¹² Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 (codified in scattered sections of titles 17 and 47 U.S.C.), Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (1999).

¹³ *See Implementation of the Satellite Home Viewer Improvement Act of 1999*, Report and Order, 15 FCC Rcd 21688, at para. 62 (2000) (“the SHVIA requires us to apply the sports blackout rule from the cable context to satellite carriers”).

¹⁴ SFC Comments at 6.

ample data showing that MVPDs have the upper hand in retransmission consent negotiations.¹⁵ Giving MVPDs further advantage would be unwarranted, harmful to viewers, and contrary to Congressional intent that broadcast stations be free to grant retransmission consent *or to withhold that consent* if a mutually satisfactory agreement cannot be reached.¹⁶

- Second, the SFC’s proposal would gut the purpose of the sports blackout rule, which is not to give any party (broadcaster or MVPD) an unfair negotiating advantage, but rather to ensure “the continued general availability of sports programming to the public.”¹⁷ Whether or not the local station is carried by a particular MVPD, the sports blackout rule should apply in order to encourage local fans to attend the game, thereby advancing the interests described above.

The sports blackout rule, as the Commission has noted repeatedly, is in the public interest and helps to ensure the overall availability of sports on television. It should not be undermined to give an advantage to MVPDs, at the expense of local broadcast service and the viewing public.

II. THE SPORTS BROADCASTING ACT OF 1961 WAS PUBLIC INTEREST, NOT SPECIAL INTEREST, LEGISLATION.

The SFC’s misguided proposal to repeal the sports blackout rule stems from its misreading of the history and purpose of the Sports Broadcasting Act of 1961.¹⁸ The SFC’s

¹⁵ See, e.g., NAB Comments at 28-32; Comments of the CBS Television Network Affiliates Association (May 27, 2011) at 13-15; Joint Broadcasters Comments at 9-11 and 17-18.

¹⁶ We disagree with the SFC’s proposal that “purposefully taking down sports programming in order to gain negotiating leverage should be a per-se violation of the good faith standard.” SFC Comments at 12. First, per se violations should turn on objective facts, not suspected motives. Second, the Commission is taking on a lot if it seeks to regulate every instance of “negotiating leverage,” since many instances are commercially reasonable practices, not evidence of bad faith and not something that Congress intended to prohibit. Third, broadcasters have every incentive to maintain carriage of their signals. At the end of the day, however, “it takes two to tango.”

¹⁷ See *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 WL 2206070, at para. 28 (2005); *id.* at para. 58 (advising Congress that the Commission recommended no changes “to the relevant statutes or regulations” concerning sports blackouts).

¹⁸ 15 U.S.C. §§ 1291-95.

comments repeatedly refer to the SBA as “special interest” legislation.¹⁹ It couldn’t be more wrong. In enacting the SBA, Congress acted to reverse an aberrant judicial decision that would have seriously *undermined* fans’ ability to watch NFL games and the games of other professional and collegiate sports leagues. With the SBA, the federal government provided protection from antitrust challenge to all professional sports leagues collectively marketing television rights to their member teams’ games. 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. Had Congress not enacted the SBA, games would not be nearly as competitive or as broadly distributed as they are today. This section outlines the NFL’s role in creating and marketing games and describes how the SBA has served fans.²⁰

A. Overview of League Operations.

The NFL plays a key role in negotiating the broadcast contracts on behalf of all teams in the League. Without the League, none of the clubs could produce and present games on its own. In connection with that role, the SBA helps the NFL achieve two goals that are decidedly in the best interests of sports fans. First, it permits the NFL to share the broadcast revenues that it obtains equally among all member teams. This process supports the viability and competitiveness of teams located in smaller media markets. Second, the SBA helps the NFL to secure the widest possible audience for NFL games, predominantly on free, over-the-air television service, and in other instances on low-cost pay-TV packages.

¹⁹ SFC Comments at 8.

²⁰ The SFC also asserts in its comments that the SBA applies only to sports games broadcast over-the-air and does not apply to other forms of distribution. *Id.* at 8-9. The SFC misses the mark substantively, but because SFC’s erroneous claim has nothing to do with a proceeding concerning the Commission’s rules related to retransmission consent, it is unnecessary to respond.

B. The Need for the Sports Broadcasting Act.

Although it is sometimes associated with the NFL, it bears emphasis that the SBA applies to all sports leagues, and all can and do take advantage of it. Congress passed the SBA in 1961 to overturn a questionable federal court ruling that prohibited the NFL's contract with CBS for the broadcast of League games.²¹ When Commissioner Pete Rozelle appeared before Congress in 1961 alongside representatives from Major League Baseball and the NCAA to support Congressional relief from this decision, he testified that the NFL faced "an emergency situation."²² In the course of the NFL's history, 41 clubs had failed.²³ The NFL faced a more severe form of a problem that already had beset baseball: the "rich [teams] get richer and the poor get poorer."²⁴ The rich teams were generally those in the largest markets that could attract the largest game attendance and the largest broadcast audience. Congress intervened on the grounds that fan engagement and competitive balance are in the public interest.

The NFL believed at the time of the decision and continues to believe that the underlying court decision misapplied antitrust principles and was bad for fans. *Congress agreed.* In passing the SBA, Congress found that a sports "league needs the power to make 'package' sales of the television rights of its member clubs to assure the weaker clubs of the league

²¹ *United States v. Nat'l Football League*, 116 F.Supp. 319 (E.D. Penn. 1953). In this case, the court adopted an expansive interpretation of antitrust law. Notably, however, it accepted the basic premise of the League's control over broadcast contracts—to maintain some parity among the clubs and defend against the natural tendency of the larger market clubs to dominate the smaller market clubs.

²² Statement of NFL Commissioner Pete Rozelle, Hearing Before the Antitrust Subcommittee of the House Committee on the Judiciary, H.R. 8757, Aug. 28, 1961 at 10; *see also id.* at 6 (describing how judgment arising from *U.S. v. NFL* had been interpreted earlier that year by the court to apply to a single network contract and joint negotiation by the NFL, although the court conceded that such a contract was not "at issue" in the original litigation and the court "could not remember why" the pertinent prohibition had been made a part of the judgment).

²³ *Id.* at 4.

²⁴ *U.S. v. NFL*, 116 F.Supp. at 323.

continuing television income and television coverage on a basis of substantial equality with the stronger clubs.... If the league is unable to exercise some control over the telecasting of league games.... viewers in such communities as Green Bay, Minneapolis-St. Paul, Dallas, St. Louis, Detroit, and even such cities as San Francisco and Philadelphia may be unable to see the road games of their home team on television.”²⁵ Congress understood that “if weaker teams [are] allowed to founder, there is danger that the structure of the league would become impaired and its continued operation imperiled.”²⁶ It thus acted to secure “the public interest in viewing professional league sports.”²⁷

The SBA is still needed today because it continues to ensure the existence of competitive games and the wide availability of NFL games on television. If the SBA were repealed, each team would have to negotiate its own broadcast contracts (and those contracts currently provides the bulk of team revenue). In short order, small market teams would not be able to compete for talent with big city teams. Teams also could and likely would migrate programming away from free broadcast television to pay-TV services. The fans would lose.

In short, the SBA has enabled the NFL to implement broadcast policies that make professional football accessible to all Americans. The League uses its negotiating authority in the public interest and makes professional football broadly available on free television to viewers all over the country. No other sports league comes remotely close to this record. Indeed, in a

²⁵ *Telecasting of Professional Sports Contests*, S. Report No. 1087, 87th Cong., Sept. 20, 1961, at 2; *see also Telecasting of Professional Sports Contests*, Committee on the Judiciary, H. Report No. 1087, 87th Cong., Sept. 13, 1961 at 2-3.

²⁶ S. Report No. 1087 at 2; H. Report No. 1178 at 3.

²⁷ S. Report No. 1087 at 3; H. Report No. 1178 at 3. Even the judge in the underlying court case acknowledged that “the net effects of allowing unrestricted business competition among the clubs are likely to be, first, the creation of greater and greater inequalities in the strength of the teams; second, the weaker teams being driven out of business; and, third, the destruction of the entire League.” *U.S. v. NFL*, 116 F.Supp. at 324.

1994 report, the Commission found that the NFL's television policies were consistent with the public interest and recommended no amendments to limit the application of the SBA.²⁸

CONCLUSION

The NFL has a long-standing commitment to broadcast television and believes that today's retransmission consent process is working to support broadcasters' ability to invest in quality programming. The Commission should decline to amend the sports blackout rule as proposed by the SFC, since that would undermine the retransmission consent regime and give cable and satellite operators excessive leverage in retransmission consent negotiations, contrary to Congressional intent in establishing the retransmission consent framework and contrary to the public interest.

Respectfully submitted,

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²⁸ *Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992, Inquiry into Sports Programming Migration*, Final Report, 9 FCC Rcd 3440, at paras. 154, 171 (1994).