

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Sports Blackout Rules
MB Docket No. 12-3

REPORT AND ORDER

Adopted: September 30, 2014

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By the Commission: Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai and O’Rielly
issuing separate statements.

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## I. INTRODUCTION

1. In this *Report and Order*, we eliminate our sports blackout rules, which prohibit cable operators, satellite carriers, and open video systems from retransmitting, within a protected local blackout zone, the signal of a distant broadcast station carrying a sporting event if the event is not available live on a local television broadcast station.<sup>1</sup> The sports blackout rules have reinforced the sports leagues’ private blackout policies since 1975, with the objective of helping to ensure that sports telecasts are widely available to the public. The sports industry has evolved dramatically over the last 40 years, however. The sports blackout rules have little relevance today for sports other than professional football. With respect to professional football, television revenues have replaced gate receipts as the primary source of revenue for NFL teams. For this reason, among others, we conclude that the sports blackout rules are no longer needed to ensure that sports programming is widely available to television viewers.

2. Eliminating the sports blackout rules will also remove unnecessary and outdated regulations.<sup>2</sup> Additionally, eliminating the rules will remove regulatory reinforcement (and the FCC’s implicit endorsement) of the NFL’s private blackout policy, which prevents consumers – many of whom cannot attend games because they are elderly or disabled or are fans who have been priced out of attending games due to increased costs for tickets, parking, and concessions, yet have subsidized NFL teams with their tax dollars through publicly-financed stadiums and other tax benefits – from watching their teams’ games on local television. For these reasons, we find that eliminating our sports blackout rules will serve the public interest. We acknowledge that elimination of our sports blackout rules may not end local blackouts of sports events because the NFL and other sports leagues may choose to continue their private blackout policies. Nevertheless, to the extent that the NFL or any other sports league decides to continue its blackout policies, it will no longer be entitled to additional protections under our sports blackout rules, but instead must rely on the same processes available to any other entities that wish to protect their distribution rights in the private marketplace.

## II. BACKGROUND

3. In the *Notice of Proposed Rulemaking* (“*NPRM*”), the Commission provided extensive background on the history of the sports blackout rules, which we incorporate by reference and do not repeat here.<sup>3</sup> The sports blackout rules bar cable operators, satellite carriers, and open video systems from

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<sup>1</sup> See 47 C.F.R. §§ 76.111 (cable operators), 76.127 (satellite providers), 76.1506(m) (open video systems). In its comments on the *Further Notice of Proposed Rulemaking* in MB Docket No. 10-71, which seeks comment on whether the Commission should eliminate or modify the network non-duplication and syndicated exclusivity rules (collectively, “exclusivity rules”), the National Football League argues that the Commission should examine the exclusivity rules and the sports blackout rules in the same proceeding, because “the exclusivity rules and the sports blackout rule are both designed to prevent cable and satellite carriers from circumventing private contracts that promote free, over-the-air broadcast television.” See Comments of National Football League, MB Docket No. 10-71, at 4; see also *Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-29, ¶ 40 (rel. March 31, 2014) (“*Exclusivity FNPRM*”). We decline to consolidate these two proceedings. We have developed a complete and thorough record on which to address the issues raised in this proceeding and see no reason to delay its resolution. Nothing in this *Report and Order* prejudices the outcome of the pending exclusivity proceeding.

<sup>2</sup> See Exec. Order No. 13,579, § 2, 76 Fed. Reg. 41,587 (July 11, 2011) (“[t]o facilitate the periodic review of existing significant regulations, independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned”); *Final Plan for Retrospective Analysis of Existing Rules*, 2012 WL 1851335 (May 18, 2012).

<sup>3</sup> See *Sports Blackout Rules*, Notice of Proposed Rulemaking, 28 FCC Rcd 17214, 17215-21, ¶¶ 2-12 (2013) (“*NPRM*”).

retransmitting, within a 35-mile zone of protection, a distant broadcast station carrying a sports event that is not available live on a television broadcast station licensed to the community in which the event is taking place.<sup>4</sup> The Commission first adopted a sports blackout rule for cable operators in 1975, when game ticket sales were the primary source of revenue for sports leagues.<sup>5</sup> This rule was intended to ensure that the potential loss of gate receipts resulting from cable system importation of distant stations did not lead sports clubs to refuse to sell their rights to sports events to distant stations, which would reduce the overall availability of sports programming to television viewers.<sup>6</sup> The Commission's objective in adopting the cable sports blackout rule was not to ensure the profitability of organized sports, but rather to ensure the overall availability of sports telecasts to the general public.<sup>7</sup> Indeed, in 1975, had sports teams refused to allow sports events to be televised on distant broadcast stations, their games likely would not have been televised at all or perhaps only carried on cable systems to which few Americans subscribed. At the direction of Congress, the Commission later applied the cable sports blackout rule to open video systems and then to satellite carriers to provide parity between cable and newer video distributors.<sup>8</sup>

4. Sports leagues' blackout policies determine which games are blacked out on local television stations. These policies are implemented primarily through contracts negotiated between the leagues or individual teams that hold the distribution rights to the games and the entities to which they grant those rights, including television networks, local television broadcast stations, Regional Sports Networks ("RSNs"), and multichannel video programming distributors ("MVPDs").<sup>9</sup> The Commission's rules supplement these contractual relationships by barring MVPDs from retransmitting, within the local blackout zone, games that the sports leagues or individual teams require local television stations to black out.<sup>10</sup>

5. In November 2011, the Sports Fan Coalition, Inc., National Consumers League, Public Knowledge, League of Fans, and Media Access Project (collectively, "SFC") filed a joint Petition for Rulemaking arguing that the Commission should no longer facilitate the sports leagues' "anti-consumer"

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<sup>4</sup> See 47 C.F.R. §§ 76.111, 76.127, 76.1506(m).

<sup>5</sup> 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*, Report and Order, 54 FCC 2d 265, 274, ¶ 31 (1975) ("Cable Sports Blackout Order"), recon. granted in part, denied in part, 56 FCC 2d 561 (1975).

<sup>6</sup> See *Cable Sports Blackout Order*, 54 FCC 2d at 282, ¶ 57.

<sup>7</sup> See *id.* at 281, ¶ 57.

<sup>8</sup> Section 653(b)(1)(D) of the Communications Act of 1934, as amended ("Act"), which was added by the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996), directed the Commission to "extend to the distribution of video programming over open video systems the Commission's regulations concerning sports exclusivity (47 C.F.R. 76.67)." See 47 U.S.C. § 573(b)(1)(D); see also *Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 18223, 18226-7, ¶ 1 (1996) ("*OVS Second Report and Order*"), recon. granted in part, denied in part, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227 (1996). Section 339(b) of the Act, which was added by the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), P.L. No. 106-113, 113 Stat. 1501, Appendix I (1999), directed the Commission to "apply ... sports blackout protection (47 CFR 76.67) to the retransmission of the signals of nationally distributed superstations by satellite carriers" and, "to the extent technically feasible and not economically prohibitive, apply sports blackout protection (47 CFR 76.67) to the retransmission of the signals of network stations by satellite carriers." See 47 U.S.C. § 339(b); see also *Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals*, Report and Order, 15 FCC Rcd 21688, 21689, ¶ 1 (2000) ("*Satellite Exclusivity Order*"), recon. granted in part, denied in part, Order on Reconsideration, 17 FCC Rcd 27875 (2002).

<sup>9</sup> See *NPRM*, 28 FCC Rcd at 17221, ¶ 12.

<sup>10</sup> See 47 C.F.R. §§ 76.111, 76.127, 76.1506(m).

blackout policies and urging the Commission to eliminate the sports blackout rules.<sup>11</sup> On January 12, 2012, the Media Bureau issued a Public Notice seeking comment on the Petition.<sup>12</sup> The record compiled in response to the Public Notice suggested that, given the dramatic changes in the sports industry in the nearly 40 years since the first of the sports blackout rules was originally adopted, the sports blackout rules may no longer be necessary to ensure that sports programming is widely available to television viewers and, in fact, may be reinforcing a private policy that promotes just the opposite (*i.e.*, more restrictive access for consumers to televised games with little, if any, countervailing public interest benefit).<sup>13</sup> On December 18, 2013, the Commission released an *NPRM* proposing to eliminate the sports blackout rules. The *NPRM* sought comment on whether the sports blackout rules have become outdated due to marketplace changes since their adoption and whether modification or elimination of those rules is appropriate.<sup>14</sup> It tentatively concluded that the Commission has the authority to repeal the cable sports blackout rule and sought comment on whether the Commission also has the authority to repeal the sports blackout rules for satellite and OVS.<sup>15</sup> In addition, the *NPRM* requested comment on whether the economic rationale underlying the sports blackout rules remains valid.<sup>16</sup> Finally, the *NPRM* sought comment on the potential benefits and harms of eliminating the rules on interested parties, including sports leagues, broadcasters, and consumers.<sup>17</sup>

### III. DISCUSSION

6. For the reasons set forth below, we eliminate the sports blackout rules. First, we conclude that the Commission has the authority to eliminate the sports blackout rules for cable operators, satellite carriers, and open video systems. Second, we review the changes in the sports industry since the cable sports blackout rule was first adopted nearly 40 years ago and conclude that, in light of these substantial changes, the sports blackout rules are no longer needed to ensure that sports programming is widely available to television viewers. We further conclude that elimination of the sports blackout rules will serve the public interest by removing unnecessary regulation and removing regulatory reinforcement of the NFL's blackout policy, which prevents many consumers who have subsidized the NFL through publicly-funded stadiums and other tax benefits from watching locally blacked out games. To the extent that the NFL (or any other sports league) chooses to continue its blackout policies through private contractual arrangements, it will no longer be entitled to additional protections under our sports blackout rules, but instead must rely on the same processes available to any other entities that wish to protect their distribution rights in the private marketplace. Finally, we conclude that repeal of the sports blackout rules will not adversely impact broadcasters, consumers, or local businesses.

#### A. Authority to Eliminate Sports Blackout Rules

7. We conclude that the Commission has the authority to eliminate the sports blackout rules for cable operators, satellite carriers, and open video systems. While there is no statutory provision

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<sup>11</sup> See Sports Fan Coalition, Inc. *et al.*, Petition for Rulemaking, MB Docket No. 12-3, at 3 (Nov. 11, 2011) ("Petition"). The Sports Fan Coalition, Inc. is a non-profit organization that advocates for "fair return to the fans for public resources used in sports" and "fair access to sporting events at the game and in the media." See <http://www.sportsfans.org/about/>; see also Reply Comments of the National Association of Broadcasting on Petition for Rulemaking in MB Docket No. 12-3 at 7 n.23 (noting that the Sports Fan Coalition has acknowledged that it accepts funding from Verizon and Time Warner Cable).

<sup>12</sup> See *Commission Seeks Comment on Petition for Rulemaking Seeking Elimination of the Sports Blackout Rule*, Public Notice, 27 FCC Rcd 260 (MB 2012).

<sup>13</sup> See *NPRM*, 28 FCC Rcd at 17215, ¶ 1, 17237, ¶ 34.

<sup>14</sup> See *id.* at 17215, ¶ 1.

<sup>15</sup> See *id.* at 17222-23, ¶ 15.

<sup>16</sup> See *id.* at 17224-31, ¶¶ 17-28.

<sup>17</sup> See *id.* at 17231-36, ¶¶ 29-39.

mandating that the Commission adopt a sports blackout rule for cable,<sup>18</sup> the Commission premised its adoption of the cable sports blackout rule in large part on the policy established by Congress in the Sports Broadcasting Act of 1961,<sup>19</sup> which exempts from the antitrust laws joint agreements among individual teams engaged in professional football, baseball, basketball, or hockey that permit the leagues to pool the individual teams' television rights and sell those rights as a package and expressly permits these four professional sports leagues to black out television broadcasts of home games within the home territory of a member team.<sup>20</sup> Subsequent legislation directed the Commission to apply the cable sports blackout rule to open video systems and satellite television operators. Thus, Section 653(b)(1)(D) of the Act, as added by the 1996 Act, directed the Commission to extend to open video systems "the Commission's regulations concerning sports exclusivity (47 C.F.R. 76.67)."<sup>21</sup> Similarly, Section 339(b) of the Act, as added by SHVIA in 1999, directed the Commission to "apply ... sports blackout protection (47 CFR 76.67) to the retransmission of the signals of nationally distributed superstations by satellite carriers" and, "to the extent technically feasible and not economically prohibitive, apply sports blackout protection (47 CFR 76.67) to the retransmission of the signals of network stations by satellite carriers."<sup>22</sup>

8. We find that elimination of the cable sports blackout rule is authorized under the Commission's general rulemaking power, which grants the Commission the authority to revisit its rules and modify or repeal them if it finds that such action is warranted.<sup>23</sup> As discussed above, Congress never required the Commission to adopt a sports blackout rule for cable. Further, when it directed the Commission to apply the sports blackout protection in 47 C.F.R. § 76.67 to DBS and OVS,<sup>24</sup> Congress left intact the Commission's general rulemaking authority with respect to the cable sports blackout rule, including the authority to modify or repeal this rule should it find that such action is appropriate. We also note that no commenter disputes our authority to eliminate the cable sports blackout rule.<sup>25</sup>

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<sup>18</sup> See *id.* at 17216-18, ¶¶ 4-7.

<sup>19</sup> P.L. 87-331, §1, 75 Stat. 732 (1961), codified at 15 U.S.C. §§ 1291-1295.

<sup>20</sup> See 15 U.S.C. §§ 1291 ("The antitrust laws ... shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs."); 1292 ("Section 1291 of this title shall not apply to any joint agreement described in the first sentence in such section which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home."). See also *Cable Sports Blackout Order*, 54 FCC 2d at 278-81, ¶¶ 43-54.

<sup>21</sup> See 47 U.S.C. § 573(b)(1)(D). We note that the cable sports blackout rule was originally codified in Section 76.67 of the Commission's rules. See *Cable Sports Blackout Order*, 54 FCC 2d at 285, Appendix C. In 2000, the cable sports blackout rule was renamed, slightly revised, and renumbered as Section 76.111 of the Commission's rules. See *Satellite Exclusivity Order*, 15 FCC Rcd at 21741-42, Appendix B.

<sup>22</sup> See 47 U.S.C. § 339(b); see also *supra* n.21.

<sup>23</sup> See 47 U.S.C. §154(i) (authorizing the agency to "perform any and all acts, make such rules and regulations, and issue such orders not inconsistent with this Act, as may be necessary in the execution of its function"); 47 U.S.C. § 303(r) (providing that the Commission may "[m]ake such rules and regulations ... not inconsistent with this law, as may be necessary to carry out the provisions of this Act....").

<sup>24</sup> See *supra* n.21.

<sup>25</sup> See Comments of Mercatus Center at George Mason University ("Mercatus Comments") at 2 ("The FCC can repeal its [cable sports blackout rule] because there is no statute requiring it and the FCC has authority to modify and repeal its rules when such action is appropriate."); Comments of The National Football League ("NFL Comments") at 19 ("The Commission adopted the sports blackout rule for cable systems in 1975. The [Sports Broadcasting Act] and other applicable statutes allowed—but did not require—the Commission to adopt this regulation for cable carriers."); Reply Comments of DIRECTV, LLC ("DIRECTV Reply Comments") at 1 ("No

(continued....)

9. Additionally, we conclude that we have the authority to eliminate the sports blackout rules for DBS and OVS. We find unpersuasive assertions in the record that the Commission may not eliminate the sports blackout rules for DBS and OVS absent congressional repeal of Sections 339(b) and 653(b)(1)(D) of the Act.<sup>26</sup> The NFL argues that, since these statutory provisions provide that the Commission “shall” apply the cable sports blackout rule to DBS and OVS,<sup>27</sup> the Commission has no discretion to eliminate the sports blackout rules for DBS and OVS.<sup>28</sup> We disagree. In enacting Sections 339(b) and 653(b)(1)(D), Congress did not enact sports blackout protection for DBS or OVS but rather directed the Commission to apply to DBS and OVS the same sports blackout protection regulation that the Commission applied to cable.<sup>29</sup> Thus, the use of “shall” in Sections 339(b) and 653(b)(1)(D) merely instructed the Commission to apply to DBS and OVS the same sports blackout protection that is applicable to cable. The Commission discharged its statutory obligation through adoption of sports blackout rules for OVS in 1996 (47 C.F.R. § 76.1506(m)) and for DBS in 2000 (47 C.F.R. § 76.127).<sup>30</sup> Nowhere did Congress require the Commission to maintain these rules in perpetuity, and Congress was aware that the Commission has general rulemaking power to revisit its rules and modify or repeal them if it finds that such action is appropriate.<sup>31</sup> Sections 339(b) and 653(b)(1)(D) do not limit the Commission’s authority to repeal or modify its cable sports blackout rule at some future time, nor is there any indication in the legislative history that Congress intended to withdraw this authority. Accordingly, we conclude that, by expressly tying these statutory provisions to the cable sports blackout rule, Congress demonstrated its intent that the Commission accord the same regulatory treatment to DBS and OVS as it does to cable with respect to sports blackouts, including modification or repeal of the sports blackout

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statute requires the Commission to impose a sports blackout rule on cable operators.”); Reply Comments of Sports Fan Coalition (“SFC Reply Comments”) at 2 (“Congress did not direct the Commission to adopt the original [sports blackout rule] for cable; rather, the Commission adopted the [sports blackout rule] for cable and later was instructed by Congress to extend whatever policy exists for cable to OVS and DBS services.”).

<sup>26</sup> See NFL Comments at 19; Reply Comments of The National Football League (“NFL Reply Comments”) at 13-14; see also Comments of The Office of the Commissioner of Baseball (“Baseball Commissioner Comments”) at 5-6.

<sup>27</sup> Section 339(b) provides that within six months of enactment of SHVIA, the Commission “shall commence a single rulemaking proceeding to establish regulations that ... apply ... sports blackout protection (47 CFR 76.67) to the retransmission of the signals of nationally distributed superstations by satellite carriers” and, “to the extent technically feasible and not economically prohibitive, apply sports blackout protection (47 CFR 76.67) to the retransmission of the signals of network stations by satellite carriers.” 47 U.S.C. § 339(b)(1) (emphasis added). Section 653(b)(1)(D) provides that within six months of enactment of the 1996 Act, the Commission “shall complete all actions necessary (including any reconsideration) to prescribe regulations that ... extend to the distribution of video programming over open video systems the Commission’s regulations concerning sports exclusivity (47 C.F.R. 76.67).” 47 U.S.C. § 573(b)(1)(D) (emphasis added).

<sup>28</sup> See NFL Comments at 21 (citing *Ass’n of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (“The word ‘shall’ generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.”)); see also Baseball Commissioner Comments at 5 (“SHVIA’s use of the term ‘shall’ and citation of the existing Sports Rule make clear that Congress intended to require satellite carriers and OVS to comply with that Rule.”).

<sup>29</sup> See 47 U.S.C. §§ 339(b), 573(b)(1)(d).

<sup>30</sup> See *OVS Second Report and Order*, 11 FCC Rcd at 18327, ¶ 203; *Satellite Exclusivity Order*, 15 FCC Rcd at 21689, ¶ 1.

<sup>31</sup> See *Hall v. United States*, 132 S.Ct. 1882, 1889 (2012) (“We assume that Congress is aware of existing law when it passes legislation.”).

rules for these services if it determines that modification or repeal of the cable sports blackout rule is warranted.<sup>32</sup>

10. The legislative history of SHVIA supports this conclusion. The legislative history makes clear that Congress sought to place satellite carriers on an equal footing with cable operators with respect to the availability of broadcast programming.<sup>33</sup> Specifically, the legislative history indicates that the sports blackout rules for satellite carriers “should be as similar as possible to that applicable to cable services.”<sup>34</sup> Congress’s clear intent to create regulatory parity between cable and satellite, and its preservation of Commission authority to modify or repeal the cable sports blackout rule, thus further support our interpretation that Congress intended that the Commission would retain its authority to repeal the sports blackout rules for OVS and DBS if necessary to maintain regulatory parity with cable in the future.

11. We reject the Baseball Commissioner’s assertion that the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”) evidences Congress’s intent that the Commission do no more than provide to Congress “recommendations” as to whether the sports blackout rules for DBS and OVS should be altered, and that any changes based on those recommendations were to be made by Congress.<sup>35</sup> SHVERA directed the Commission to complete an inquiry and submit a report to Congress “regarding the impact on competition in the multichannel video programming distribution market of the current retransmission consent, network non-duplication, 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 (‘DBS’) industry in the provision of digital broadcast television signals to consumers.”<sup>36</sup> SHVERA further directed the Commission to “include such recommendations for changes in any statutory provisions relating to such rules as the Commission deems appropriate.”<sup>37</sup> Contrary to the Baseball Commissioner’s suggestion, we do not believe this latter directive can reasonably be interpreted to reflect an intent on the part of Congress to limit the Commission only to making recommendations about the sports blackout rules for DBS and OVS. As noted above, the purpose of the SHVERA inquiry and report was to evaluate the impact of the specified rules on competition in the MVPD market, including their impact on the ability of rural cable operators to compete with DBS in the

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<sup>32</sup> See SFC Reply Comments at 12 (“By referencing a rule that the Commission has complete authority to repeal, Congress granted the Commission the same latitude to amend or repeal the cable, OVS and DBS rules, provided that parity is maintained between all platforms.”); see also DIRECTV Reply Comments at 2 (asserting that SHVIA directs the Commission to “‘apply sports blackout protection . . . to the retransmission of the signals of network stations by satellite carriers to subscribers.’ The Commission cannot continue to ‘apply’ the cable sports blackout rule to satellite if the rule no longer exists.”) (emphasis in original).

<sup>33</sup> See *Satellite Exclusivity Order*, 15 FCC Rcd at 21690, ¶¶ 4-5.

<sup>34</sup> See Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106<sup>th</sup> Cong. (“Joint Explanatory Statement”), 145 Cong. Rec. H11792, H11796 (daily ed. Nov. 9, 1999) (stating that the sports blackout rule for satellite carriers “should be as similar as possible to that applicable to cable services”); H.R. Conf. Rep. No. 106-464, at 103 (1999) (directing that the sports blackout rules on DBS “are to be imposed ‘to the extent technically feasible and not economically prohibitive’ with respect to affected parties. The burden of showing that conforming to rules similar to cable would be ‘economically prohibitive’ is a heavy one. It would entail a very serious economic threat to the health of the carrier. Without that showing, the rules should be as similar as possible to that applicable to cable services”).

<sup>35</sup> See Baseball Commissioner Comments at 4; Reply Comments of The Office of the Commissioner of Baseball (“Baseball Commissioner Reply Comments”) at 1, 3; see also Pub. L. No. 108-447, 118 Stat. 2809 (2004).

<sup>36</sup> Pub. L. No. 108-447, § 208.

<sup>37</sup> *Id.*

provision of digital broadcast television signals.<sup>38</sup> If Congress had intended to suspend or limit the Commission's general rulemaking powers under the Communications Act with respect to the sports blackout rules for DBS and OVS, Congress would have done so rather than direct that "such report shall include such recommendations for changes in any statutory provisions relating to such rules as the Commission deems appropriate."<sup>39</sup> There is nothing in the SHVERA directive that indicates that Congress's objective was to preclude the Commission from making any modifications to the sports blackout and other listed rules. Indeed, given the inclusion of retransmission consent in the relevant SHVERA provision, the Baseball Commissioner's argument, if accepted, would lead to the conclusion that Congress barred the Commission from revising any of its rules pertaining to retransmission consent. We reject this position, which has no basis in the text of the statute. Rather, we think the more reasonable interpretation is that Congress simply intended that the Commission provide recommendations for any legislative changes that it deemed necessary or appropriate to address the impact of the specified rules on competition among MVPDs.<sup>40</sup>

## **B. Sports Blackout Rules No Longer Needed to Ensure that Sports Telecasts Are Widely Available to the Public**

12. Our policy inquiry begins with an evaluation of whether the sports blackout rules are still needed to achieve the objective of ensuring the wide availability of sporting events on television in light of the dramatic changes that have occurred in the sports industry over the last 40 years. As an initial matter, we find that the sports blackout rules have little relevance today for sports other than professional football. We therefore focus our analysis on whether the sports blackout rules remain necessary to preserve the overall availability to television viewers of NFL games. We conclude that sports blackout rules are no longer needed to serve that purpose. We find that, during the past 40 years, television revenues have replaced gate receipts as the principal source of revenue for NFL teams and there has been

<sup>38</sup> See *id.*; see also *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 (Sept. 5, 2005) ("*SHVERA Section 208 Report to Congress*"), at \*1, ¶ 1.

<sup>39</sup> See *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942) (noting that absent a specific repeal of jurisdictional authority, "[t]he search for significance in the silence of Congress is too often the pursuit of a mirage"); *U.S. v. Hsia*, 176 F.3d 517, 525 (D.C. Cir. 1999) (citing the presumption "that Congress legislates with knowledge of former related statutes, . . . and will expressly designate the provisions whose application it wishes to suspend" and stating the court "will not find repeal absent 'clear and manifest' evidence that it was intended").

<sup>40</sup> In the *SHVERA Section 208 Report to Congress*, the Commission stated:

Cable commenters in particular advocate substantial modification of the regulations governing retransmission consent, as well as significant reduction or even elimination of network non-duplication, syndicated exclusivity, and sports blackout rules. For the most part, these commenters' objections to the current rules focus on how they impact the relative market power of broadcasters and cable operators -- *i.e.*, which party has the upper hand when negotiating retransmission consent, the prices (monetary and in-kind) MVPDs pay for retransmission consent, the use of retransmission consent to facilitate carriage of affiliated non-broadcast networks, and the prices consumers pay for popular tiers of MVPD programming. Although we have examined the arguments and proposals advanced in the record, we do not believe comments directed at the foregoing concerns can be properly considered within the scope of our examination. Underlying these comments, however, is an implication that the current rules impede cable operators' ability to compete with DBS, which cable commenters appear to view as subject to more lenient requirements. Consistent with the scope of our mandate, we focus on these concerns in detail. For the reasons set forth herein, we do not recommend specific statutory revisions or propose to revise related Commission regulations at this time.

See *SHVERA Section 208 Report to Congress* at \*10, ¶ 34; see also *id.* at \*18, ¶ 58 ("Having examined the sports blackout rule and comments in the record, we conclude that the rule *does not affect competition among MVPDs* and we do not recommend any changes to the relevant statutes or regulations.") (emphasis added).

a substantial decline in the number of NFL games blacked out due to failure to sell out. We further find that the loss to consumers of their ability to view the game on television when an NFL game is blacked out exceeds any gain in gate receipts and other revenue that may accrue to the NFL as a result of a blackout. In addition, the record demonstrates that changes in the industry make it unlikely that the NFL would move its games to pay TV as a result of the elimination of the sports blackout rules, notwithstanding the NFL's claims to the contrary.<sup>41</sup> Given that the goal of the rules was not to protect the profitability of sports leagues but rather to ensure that sports programming is widely available to television viewers, we believe that all of these factors weigh in favor of eliminating the sports blackout rules.

### 1. Primary Relevance to Professional Football

13. The record confirms that the sports blackout rules are no longer relevant for sports other than professional football. As explained in the *NPRM*, in professional sports leagues other than the NFL, individual teams, rather than the league, hold and sell the distribution rights for all or most of their games, both home and away games, in their home markets.<sup>42</sup> Thus, each individual team is in control of deciding how many of its home games are telecast live in its home market, and individual teams have generally chosen to telecast all or most of their home games in the team's local market.<sup>43</sup> Moreover, most individual teams distribute the majority of their televised games today through RSNs rather than over-the-air television stations.<sup>44</sup> The *NPRM* accordingly sought comment on whether the sports blackout rules are still relevant for these other professional sports leagues.<sup>45</sup> The *NPRM* also requested specific data on the extent to which games of other professional sports leagues, as well as other professional, collegiate, and high school sports events, are blacked out locally pursuant to the Commission's sports blackout rules and the reasons for any such blackouts (*i.e.*, whether they are blacked out due to failure to sell out or for some other reason).<sup>46</sup> No commenter asserts, or provides supporting data showing, that sports events other than NFL games are blacked out locally today pursuant to the Commission's sports blackout rules.<sup>47</sup> In the

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<sup>41</sup> See NFL Comments, Declaration of Dr. Hal J. Singer ("Singer Declaration") at ¶ 19. The NFL provided the declaration from Dr. Singer in support of its comments. Dr. Singer is an economist and principal at Economists Incorporated, a Senior Fellow at Progressive Policy Institute, and an Adjunct Professor at Georgetown University's McDonough School of Business. See *id.* at ¶ 9.

<sup>42</sup> See *NPRM*, 28 FCC Rcd at 17225-26, ¶ 19.

<sup>43</sup> See *id.*; see also Comments of Sports Economists on Petition for Rulemaking in MB Docket 12-3 ("Sports Economists Petition for Rulemaking Comments"), at 7 (suggesting that individual teams telecast most of their home games because the revenue from the sale of the distribution rights exceeds the effect of the telecasts on ticket sales and other in-stadium revenues). The Sports Economists are a group of nine sports economists who jointly filed comments on the Petition for Rulemaking in this proceeding: Robert Baade of Forest College; Dennis Coates of the University of Maryland Baltimore County; Rodney Fort of the University of Michigan; Ira Horowitz of the University of Florida; Brad Humphreys of the University of Alberta; Roger G. Noll of Stanford University; Allen Sanderson of the University of Chicago; John J. Siegfried of Vanderbilt University; and Andrew Zimbalist of Smith College. See *NPRM* at 17221 n.61; see also Sports Economists Petition for Rulemaking Comments at 1. The Sports Economists indicated they are academic economists who have published research on the economics of major league team sports, that they prepared their comments independently, and that they have received no payment or assistance of any kind from any party for preparing their comments. See Sports Economists Petition for Rulemaking Comments at 1.

<sup>44</sup> See e.g. <http://www.satellitesolutions.com/dishnetwork/sports-channels-and-packages.asp> (last viewed Aug. 27, 2014) (listing RSNs and the various sports teams whose games are televised on those networks); <http://www.directv.com/DTVAPP/global/contentPageIF.jsp?assetId=P3000004> (last viewed Aug. 27, 2014) (same).

<sup>45</sup> See *NPRM*, 28 FCC Rcd at 17225-26, ¶¶ 19-20.

<sup>46</sup> See *id.* at 17226-27, ¶¶ 20-21.

<sup>47</sup> The only sports leagues other than the NFL to file comments were MLB, the NBA, and the NHL, none of which assert that their sports events are blacked out locally due to failure to sell out. The Baseball Commissioner argues

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absence of any such assertions or data, we conclude that the sports blackout rules are no longer relevant for sports other than professional football. Accordingly, we focus our analysis herein on whether the sports blackout rules are still needed to ensure the overall availability to television viewers of NFL games.

## 2. NFL Gate Receipts and Other Revenues

14. The substantial shift in importance of gate receipts vis-à-vis television and other revenues for NFL clubs over the past 40 years supports our conclusion that the sports blackout rules are no longer needed to meet their underlying policy objective of ensuring that sports programming is widely available to the viewing public. When the Commission adopted the cable sports blackout rule in 1975, it found that “gate receipts were the *primary* source of revenue for sports clubs.”<sup>48</sup> The Commission acknowledged that “teams 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” and found that “a local team’s need to protect its gate receipts might require that it prohibit the telecasting of its games on [distant] television stations which might be carried on local cable systems.”<sup>49</sup> Gate receipts, however, are no longer the primary source of revenue for the NFL. According to the NFL, gate receipts account for approximately 25 percent of NFL team revenue today.<sup>50</sup> Other estimates suggest that gate receipts account for closer to 20 percent of NFL revenue.<sup>51</sup> In either event, gate receipts are now dwarfed by television revenues, which have grown exponentially over the past four decades. In 1975, annual television revenues for the NFL were estimated at \$55 million (which in today’s dollars would be approximately \$242 million).<sup>52</sup> In 2011, the NFL entered into long-term contracts totaling an estimated \$27.6 billion with CBS, Fox, and NBC to air NFL games from 2014 to 2022.<sup>53</sup> The NFL also has an

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that the sports blackout rules are still necessary to protect the ability of MLB clubs to license to RSNs the exclusive right to televise home games. See Baseball Commissioner Comments at 8; Baseball Commissioner Reply Comments at 4; see also *infra* ¶ 45. The NBA and NHL simply state that they remain supportive of local exclusive contracts and maintaining the protection of those local contracts through the continuation of the sports blackout rules. See Reply Comments of National Basketball Association and National Hockey League at 1.

<sup>48</sup> See *Cable Sports Blackout Rules*, 54 FCC 2d at 281, ¶ 55 (emphasis added).

<sup>49</sup> *Id.*

<sup>50</sup> See NFL Comments at 9 & Singer Declaration at ¶ 26. In support of the 25 percent figure, the NFL cites a 2011 article that states that ticket sales are 21.6 percent of annual NFL revenues and a 2010 article that states that ticket sales accounted for approximately 24.2 percent of the Green Bay Packers’s annual revenue in 2009. See *id.*, Singer Declaration at ¶ 26, n.32 (citing John Vrooman, *The Football Players’ Labor Market*, ECONOMICS OF THE NATIONAL FOOTBALL LEAGUE: THE STATE OF THE ART, at 3 (2011) (“Vrooman, *The Football Players’ Labor Market*”), available at <http://www.vanderbilt.edu/econ/faculty/Vrooman/vrooman-football-labor-market.pdf> and Jake Fisher, *Getting Down to Business: Part 2*, THE HARVARD SPORTS ANALYSIS COLLECTIVE, March 5, 2010 (“Fisher, *Getting Down to Business*”), available at: <http://harvardsportsanalysis.wordpress.com/2010/03/05/getting-down-to-business-part-2/>). Notably, the 24.2 percent gate revenue figure for the Green Bay Packers includes both premium and non-premium seating. See Fisher, *Getting Down to Business* (“Past figures from Forbes seem to indicate that local ticket revenue makes up a little over 20% of total team revenue in the NFL. For the Packers the figure is 19.1% or 24.2% depending on whether you include private boxes or not.”). The NFL does not count premium seats (*i.e.*, club level seats and luxury boxes or suites) for purposes of determining whether a game is sold out under its blackout policy. See, e.g., Matt Cowlshaw, *Oakland Raiders Avoid TV Blackout, Again*, FANSIDED, Dec. 12, 2013, available at <http://fansided.com/2013/12/12/oakland-raiders-avoid-tv-blackout/>.

<sup>51</sup> See Fisher, *Getting Down to Business*; Vrooman, *The Football Players’ Labor Market*, at 3. Gate receipts are shared 66/34 (60/40 after standard 15 percent deduction for game expenses) in a straight-pool home/visitor formula. See Vrooman, *The Football Players’ Labor Market*, at 3.

<sup>52</sup> See Vrooman, *The Football Players’ Labor Market*, at 5 (estimating annual television revenues for the NFL for the four-year period from 1974 to 1977 at \$55 million/year).

<sup>53</sup> See NFL Comments at 4 (noting that the NFL recently reaffirmed its commitment to broadcast television, entering into significant extensions of its agreements with the CBS, Fox and NBC networks that ensure the NFL games will

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eight-year, \$15 billion deal with ESPN for the rights to Monday Night Football, which extends from 2014 to 2021.<sup>54</sup> Additionally, the NFL's four-year deal with DIRECTV for NFL Sunday Ticket, which runs through 2014, is reportedly worth an estimated \$4.1 billion.<sup>55</sup> Further, the NFL recently entered into a one-year contract with CBS to air eight Thursday Night Football games, which is estimated to be worth \$275 million or \$34.4 million per game.<sup>56</sup> The NFL is expected to collect an estimated \$6 billion per year in total television revenues beginning in 2014.<sup>57</sup> Other significant sources of revenue for the NFL include sponsorships, which totaled an estimated \$1.07 billion in 2013,<sup>58</sup> merchandising and licensing, which are estimated at around \$1 billion per year,<sup>59</sup> and in-stadium revenues such as concessions and parking.<sup>60</sup> Total NFL revenues reportedly topped \$10 billion for the first time during the 2013 season.<sup>61</sup> The NFL is the most lucrative sports league in the world, with each of its 32 teams worth on average \$1.17 billion.<sup>62</sup>

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remain on broadcast television through the 2022 season); *see also* Deana Myers, *NFL Rights Secured on Broadcast Through 2022*, SNL KAGAN, Dec. 15, 2011 (“Myers, *NFL Rights*”), available at <http://www.snl.com/interactivex/article.aspx?id=13873109&KPLT=6>. Under these contracts, Fox will pay an estimated \$1.1 billion per year for the NFC package, CBS will pay an estimated \$1 billion per year for the AFC package, which also includes a handful of NFC games, and NBC will pay an estimated \$950 million per year for the Sunday night prime-time package. *See* Matthew Futterman, Sam Schechner and Suzanne Vranica, *NFL: The League That Runs TV*, WALL STREET JOURNAL, Dec. 15, 2011 (“Futterman, Schechner, and Vranica”), available at <http://online.wsj.com/news/articles/SB10001424052970204026804577098774037075832>.

<sup>54</sup> *See* Myers, *NFL Rights*, *supra* n.53.

<sup>55</sup> *See* Deana Myers, *Could Sunday Ticket Create OTT Threat?*, SNL KAGAN, Apr. 30, 2009, available at <http://www.snl.com/InteractiveX/article.aspx?ID=9426212>; Haseeb Ali, *DIRECTV, NFL Extend Partnership*, SNL KAGAN, March 24, 2009, available at <http://www.snl.com/InteractiveX/article.aspx?ID=9251674>.

<sup>56</sup> *See* Deana Myers, *CBS Nabs NFL on Thursday Night*, SNL KAGAN, Feb. 10, 2014, available at <http://www.snl.com/interactivex/article.aspx?id=26804077&KPLT=6>. Under this agreement, CBS will air eight early season Thursday night games, which will be simulcast on the NFL Network. The NFL Network alone will air eight late-season games, including six Thursday night games and two Saturday games. *See* Sarah Berry James, *CBS CEO on NFL Deal: “It Wasn’t About the Money,”* SNL KAGAN, Feb. 12, 2014, available at <http://www.snl.com/interactivex/article.aspx?id=26867911&KPLT=6>.

<sup>57</sup> *See* Darren Rovell, *NFL Teams Split \$6B in Revenue*, ESPN.com, July 10, 2014, available at [http://espn.go.com/nfl/story/\\_/id/11200179/nfl-teams-divided-6-billion-revenue-according-green-bay-packers-financials](http://espn.go.com/nfl/story/_/id/11200179/nfl-teams-divided-6-billion-revenue-according-green-bay-packers-financials) (stating that financials released by the Green Bay Packers indicate that NFL teams split more than \$6 billion in national revenues, which is mostly derived from the league's television rights, for the first time in 2013); *see also supra* nn.53-56 and accompanying text.

<sup>58</sup> *See NFL Sponsorship Revenue Totals \$1.07 Billion in 2013 Season*, IEG SPONSORSHIP REPORT, Jan. 27, 2014, available at [http://www.sponsorship.com/IEGSR/2014/01/27/NFL-Sponsorship-Revenue-Totals-\\$1-07-Billion-in-20.aspx](http://www.sponsorship.com/IEGSR/2014/01/27/NFL-Sponsorship-Revenue-Totals-$1-07-Billion-in-20.aspx).

<sup>59</sup> *See* Brent Schrottenboer, *NFL Takes Aim at \$25 Billion, But at What Price?*, USA TODAY, Feb. 5, 2014 (“Schrottenboer, *NFL Takes Aim*”), available at <http://www.usatoday.com/story/sports/nfl/super/2014/01/30/super-bowl-nfl-revenue-denver-broncos-seattle-seahawks/5061197/>.

<sup>60</sup> While total in-stadium revenue data are not available, the average cost of some typical in-stadium items at an NFL game are as follows: parking - \$30.57; beer - \$7.05; hot dog - \$5.07; soda - \$4.48; program - \$3.71. *See NFL 2013 Team Marketing Report*, available at <https://www.teammarketing.com/public/uploadedPDFs/nfl%20fci%202014.pdf>. The 2013 Fan Cost Index®, which represents the average cost for a family of four to attend an NFL game, including tickets and other in-stadium revenue, was \$459.65. *See id.* We note that in-stadium revenues appear to provide an incentive to fill the stadium separate from avoiding a blackout, since a blackout can be avoided with a sell-out and a number of “no-shows,” while in-stadium revenues are earned only from those who show up for the game. *See* NFL Comments, Singer Declaration at ¶ 26 (stating that NFL teams “derive a significant portion of their revenues from ... the sale of concessions, parking, team merchandise and other stadium-based goods and services.”).

<sup>61</sup> *See* Darren Rovell, *Goodell Made \$44.2 Million in '12*, ESPN.com, Feb. 14, 2014, available at [http://espn.go.com/nfl/story/\\_/id/10457530/roger-goodell-nfl-commissioner-made-442-million-2012](http://espn.go.com/nfl/story/_/id/10457530/roger-goodell-nfl-commissioner-made-442-million-2012); Eben Novy-

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15. We find that the replacement of television revenues for gate receipts as the main source of revenue for NFL clubs creates a powerful economic incentive for the industry to make games widely available to television viewers even in the absence of the blackout rules. This change in the NFL's economic structure thus supports our conclusion that the sports blackout rules are no longer necessary to promote attendance at games in order to ensure that sports programming is widely available to television viewers. We are not persuaded by NAB's argument that the Commission should not consider gate receipts or the economic condition of the sports leagues as part of our analysis of whether to eliminate the sports blackout rules.<sup>63</sup> According to NAB, it is misguided to base possible elimination of the sports blackout rules on changing economic conditions.<sup>64</sup> Rather, it maintains that, if the NFL believes that it is economically desirable to maintain a policy of blackouts in local markets when games do not sell out, the Commission should not substitute its judgment for that of the NFL.<sup>65</sup> However, as we stated in the *NPRM*, "[t]he objective of the sports blackout rules is not to ensure the profitability or financial viability of sports leagues, but rather to ensure that sports programming is widely available to television viewers. Thus, we are interested in gate receipts and other revenues only to the extent that such revenues are relevant to this objective."<sup>66</sup> We conclude that it is relevant to our analysis of the continued need for the sports blackout rules that television revenues have supplanted gate receipts as NFL clubs' principal source of revenue and that total revenues for the NFL have skyrocketed since 1975.<sup>67</sup>

### 3. Reduction in NFL Blackouts

16. We also conclude that the substantial decline in the number of NFL games blacked out locally over the past 40 years supports a finding that the sports blackout rules are no longer needed to ensure that sports programming is widely available to television viewers. The record shows that the NFL's rise in popularity since 1975 has made it easier for teams to sell out games than it was at the time the sports blackout rules were first adopted. In 1975, the year the Commission adopted the cable sports blackout rule, 59 percent of regular season NFL games were blacked out locally due to failure to sell out.<sup>68</sup> As the NFL notes, "NFL football over the past few decades has become the most popular, most

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Williams, *NFL's Goodell Earns \$44.2 Million in 2012 on \$40.2 Million Bonus*, BLOOMBERG, Feb. 15, 2014, available at <http://www.bloomberg.com/news/2014-02-14/goodell-s-bonus-pushes-2012-earnings-from-nfl-to-44-2-million.html>; Schrottenboer, *NFL Takes Aim*, *supra* n.59. See also Daniel Kaplan, *Goodell Sets Revenue Goal of \$25 Billion by 2027 for NFL*, SPORTS BUSINESS JOURNAL, Apr. 5, 2010 (noting that NFL Commissioner Roger Goodell has set a revenue goal for the NFL of \$25 billion by 2027), 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).

<sup>62</sup> See Mike Ozanian, *The Most Valuable NFL Teams*, FORBES, Aug. 14, 2013, available at <http://www.forbes.com/sites/mikeozanian/2013/08/14/the-most-valuable-nfl-teams/>; Monte Burke, *How the National Football League Can Reach \$25 Billion in Annual Revenues*, FORBES, Aug. 17, 2013, available at <http://www.forbes.com/sites/monteburke/2013/08/17/how-the-national-football-league-can-reach-25-billion-in-annual-revenues/>; see also Kurt Badenhausen, *The World's 50 Most Valuable Sports Teams 2014*, FORBES, July 16, 2014 (noting that 30 of the NFL's 32 teams are among the world's 50 most valuable sports teams), available at <http://www.forbes.com/sites/kurtbadenhausen/2014/07/16/the-worlds-50-most-valuable-sports-teams-2014/>.

<sup>63</sup> See Comments of the National Association of Broadcasters ("NAB Comments") at 9.

<sup>64</sup> See *id.*

<sup>65</sup> See *id.* at 10. See also *infra* ¶¶ 32-36 (discussing the NFL's ability to protect its program distribution rights through private contractual arrangements with broadcasters and MVPDs).

<sup>66</sup> See *NPRM*, 28 FCC Rcd at 17229, ¶ 24.

<sup>67</sup> See William P. Putsis, Jr. & Subrata K. Sen, *Should NFL Blackouts Be Banned?*, Applied Economics, 32:12 (2000), at 1504 ("Putsis and Sen") ("[I]n today's environment, television revenue is by far the dominant source of team revenue and rules protecting non-television revenue appear to be antiquated.").

<sup>68</sup> See NFL Comments, Singer Declaration at ¶ 35, Figure 1.

watched professional sport in America.”<sup>69</sup> The Sports Economists explain that televising NFL games has substantially increased the fan base for professional football, which in turn has allowed teams to sell more tickets.<sup>70</sup> Indeed, the immense popularity of NFL football has ensured that the vast majority of NFL teams sell out all of their games every season.<sup>71</sup> Thus, the number of regular season NFL games blacked out has declined substantially since 1975.<sup>72</sup> Between 1975 and 2013, the percentage of regular season NFL games blacked out dropped by more than 58 percent.<sup>73</sup> During the 2013 NFL season, only two (0.78 percent) of 256 regular season NFL games were blacked out.<sup>74</sup> Total attendance at NFL games in 1975 was approximately 10.2 million.<sup>75</sup> In 2013, total NFL attendance rose for the third straight year to approximately 17.3 million.<sup>76</sup> In addition, blackouts of NFL games have been limited in recent years to a few markets.<sup>77</sup>

17. The NFL asserts that one reason for the “success” of its blackout policy is that “the League has adjusted its policy in recent years to give teams more flexibility as they seek to strike the right balance between promoting the in-stadium experience and engaging fans over television.”<sup>78</sup> There is little evidence, however, that the NFL’s relaxation of its blackout policy in 2012 has had a significant impact on the number of NFL games blacked out during the past two NFL seasons. Moreover, the NFL fails to explain why it believes that its relaxed policy favors retention of the sports blackout rules. Under the revised blackout policy, NFL teams have the option of deciding at the beginning of each season to reduce

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<sup>69</sup> NFL Comments at 3; *see also* Darren Rovell, *NFL Most Popular for 30th Year in a Row*, ESPN.com, Jan. 26, 2014 (noting that a Harris Poll ranked professional football as the most popular sport in America for the 30th straight year), available at [http://espn.go.com/nfl/story/\\_/id/10354114/harris-poll-nfl-most-popular-mlb-2nd](http://espn.go.com/nfl/story/_/id/10354114/harris-poll-nfl-most-popular-mlb-2nd).

<sup>70</sup> *See* Sports Economists Petition for Rulemaking Comments at 12.

<sup>71</sup> *See* Putsis and Sen at 1504 (“[F]or a majority of NFL teams, the blackout rule is a non-issue: for most teams, all games are sold out every season.”); NAB Comments at 6 (“It is true that in most cities, and for most stations carrying NFL football, the vast majority of games sell out (or meet the NFL’s current threshold for airing) and blackout policies do not come into play.”).

<sup>72</sup> *See* NFL Comments, Singer Declaration at ¶ 35 (“Historical data on NFL blackouts demonstrates that the number of blackouts has decreased significantly over time, to the point where only a small number of total games have been blacked out in recent years.”).

<sup>73</sup> *See id.* at ¶ 35, Figure 1; *see also* Fox 11 News, WLUK-TV, *NFL TV Blackout Information*, FOX 11 ONLINE, Feb. 3, 2014, available at <http://fox11online.com/2014/02/03/nfl-tv-blackout-information/>; Daniel Kaplan, *As NFL Looks to Pack Stadiums, Critics Line Up Against Blackout Policy in Comments to FCC*, SPORTS BUSINESS JOURNAL, Feb. 20, 2012, available at <http://www.sportsbusinessdaily.com/Journal/Issues/2012/02/20/Leagues-and-Governing-Bodies/Blackouts.aspx>.

<sup>74</sup> *See* NFL Comments at 4-5. The San Diego Chargers’ December 1, 2013 home game against the Cincinnati Bengals and the Buffalo Bills’ December 22, 2013 home game against the Miami Dolphins were the only NFL games blacked out during the 2013 season. *See* Gene Warner, *Bills Game Will Be Only Second NFL Blackout This Year*, THEBUFFALONEWS.com, Dec. 16, 2013, available at <http://www.buffalonews.com/city-region/bills-game-will-be-only-second-nfl-blackout-this-year-20131216>.

<sup>75</sup> *See* KC Joyner, *No-Hype Review: Attendance in Times of Recession, The Fifth Down*, The New York Times N.F.L. Blog, Dec. 16, 2008, available at [http://fifthdown.blogs.nytimes.com/2008/12/16/no-hype-review-attendance-in-times-of-recession/?\\_php=true&\\_type=blogs&\\_r=0](http://fifthdown.blogs.nytimes.com/2008/12/16/no-hype-review-attendance-in-times-of-recession/?_php=true&_type=blogs&_r=0).

<sup>76</sup> *See* <http://espn.go.com/nfl/attendance>. NFL attendance totaled approximately 17.0 million in 2010, 17.12 million in 2011, and 17.17 million in 2012. *See id.*

<sup>77</sup> Since 2010, only six NFL markets have experienced local blackouts of NFL games: Detroit, Cincinnati, Tampa Bay, Oakland, San Diego, and Buffalo. *See* NPRM, 28 FCC Rcd at 17224-25, ¶¶ 17-18; *see also* Jason Notte, *NFL Blackouts: 16 Games in 2011, NFL Cares 0*, THESTREET, Jan. 2, 2012, available at <http://www.thestreet.com/story/11360934/1/nfl-blackouts-16-games-in-2011-nfl-cares-0.html>.

<sup>78</sup> *See* NFL Comments at 4.

the percentage of tickets that must be sold at least 72 hours prior to the game in order to avoid a blackout to anywhere between 85 and 100 percent and adhering to that alternative blackout threshold throughout the season.<sup>79</sup> Few NFL teams have taken advantage of this policy because, if the team's ticket sales exceed the benchmark threshold set by the team at the beginning of the season, the team must share a higher percentage of the revenue from those ticket sales than usual with the visiting team.<sup>80</sup> The total number of NFL games blacked out dropped by only one game between 2011 and 2012, the first year the revised blackout policy was in effect.<sup>81</sup> One of the teams that elected to lower its benchmark threshold to 85 percent, the Tampa Bay Buccaneers, actually saw an increase in the number of games blacked out from 2011 to 2012; the team took other measures in 2013 to avoid blackouts altogether.<sup>82</sup> In contrast, three teams that experienced blackouts in both 2011 and 2012 – the Cincinnati Bengals, Buffalo Bills, and San Diego Chargers – all reduced their number of blackouts in 2013, despite electing not to lower their benchmark thresholds.<sup>83</sup> Thus, we do not believe that the NFL's recent relaxation of its blackout policy favors retention of the Commission's sports blackout rules.<sup>84</sup>

18. We further note that individual NFL clubs have used a variety of other measures in recent years to avoid blackouts which suggest that they value television revenues more than selling out stadiums. Such measures have included removing seats or covering seats with tarps to reduce stadium capacity;<sup>85</sup>

<sup>79</sup> See *NPRM*, 28 FCC Rcd at 17224-25, ¶18. As previously noted, premium seats (*i.e.*, club level seats and luxury boxes or suites) do not count towards the blackout threshold. See *supra* n.50.

<sup>80</sup> See *NPRM*, 28 FCC Rcd at 17224-25, ¶ 18; see also Comments of the Sports Fan Coalition ("SFC Comments") at 21. Specifically, for every ticket sold above the team's benchmark threshold, the team is required to pay the visiting team \$0.50 on the dollar, as opposed to the traditional \$0.34 on the dollar. In 2011, the Miami Dolphins, Minnesota Vikings, Oakland Raiders, and Tampa Bay Buccaneers were the only teams that elected to lower their benchmarks. Minnesota lowered its benchmark to 90 percent, while the other three teams lowered their benchmarks to 85 percent. Miami and Tampa Bay were the only teams to lower their benchmarks in 2012. See SFC Comments at 21. We note that the Cincinnati Bengals elected to lower its benchmark to 85 percent for the first time at the start of the 2014-2015 season. See *Bengals Opt In To Relaxed NFL Blackout Rule*, Bengals.com, Sept. 3, 2014, available at <http://www.bengals.com/news/article-1/Bengals-Opt-In-To-Relaxed-NFL-Blackout-Rule/4b8c016c-daab-44cf-b2b1-8114a4a0a191>.

<sup>81</sup> Specifically, there were 16 NFL games blacked out locally in 2011 and 15 NFL games blacked out locally in 2012. See *NPRM*, 28 FCC Rcd at 17224-25, ¶¶ 17-18.

<sup>82</sup> In 2011, the NFL blacked out five (71.4 percent) of Tampa Bay's home games. See *NPRM*, 28 FCC Rcd at 17224 n.79. In 2012, the NFL blacked out six (75 percent) of Tampa Bay's home games. See *id.* at 17225 n.85. Tampa Bay avoided any blackouts in 2013 when team owners committed to buying up any unsold tickets under the 85 percent threshold. See SFC Comments at 22; see also Jason Notte, *Why Tampa Bay Bucked NFL Blackouts*, THE STREET, Oct. 11, 2013, available at <http://www.thestreet.com/story/12065852/1/why-tampa-bay-bucked-nfl-blackouts.html>.

<sup>83</sup> In 2011, the NFL blacked out six (75 percent) of Cincinnati's home games, three (37.5 percent) of Buffalo's home games, and two (25 percent) of San Diego's home games. See *NPRM*, 28 FCC Rcd at 17224 n.79. In 2012, the NFL blacked out four (50 percent) of San Diego's home games, two (25 percent) of Buffalo's home games, and two (25 percent) of Cincinnati's home games. See *id.* at 17225 n.85. In 2013, Buffalo and San Diego each had only one blackout and Cincinnati had no blackouts. See *supra* n.74.

<sup>84</sup> See NFL Comments at 4.

<sup>85</sup> The Jacksonville Jaguars have covered approximately 10,000 seats at EverBank Field with tarps since 2005, reducing the stadium capacity from 76,877 to 67,164. See Vito Stellino, *Covering Seats Might Become an Official NFL Policy*, THE FLORIDA TIMES-UNION, June 2, 2011, available at <http://members.jacksonville.com/sports/football/jaguars/2011-06-02/story/covering-seats-might-become-official-nfl-policy>. The Washington Redskins reduced seating capacity at FedEx Field by removing approximately 8,000 seats in 2010 and another 4,000 seats in 2012. See Mike Jones and Ovetta Wiggins, *Washington Redskins to Remove Another 4,000 seats from FedEx Field*, THE WASHINGTON POST, Apr. 2, 2012, available at [http://www.washingtonpost.com/blogs/football-insider/post/redskins-to-remove-another-4000-seats-from-fedex-field/2012/04/02/gIQAc88brS\\_blog.html](http://www.washingtonpost.com/blogs/football-insider/post/redskins-to-remove-another-4000-seats-from-fedex-field/2012/04/02/gIQAc88brS_blog.html). In 2013, the Oakland Raiders covered nearly 10,000 seats in O.co

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reducing ticket prices;<sup>86</sup> and buying tickets themselves at a discounted price.<sup>87</sup> In addition, local television network affiliates that would otherwise be airing these games and other local businesses that would benefit from the games being televised have purchased outstanding tickets to help avert blackouts.<sup>88</sup> The fact that many NFL clubs, as well as local network affiliates and other local businesses, choose to take such measures to avoid blackouts, even when it entails an economic cost, reflects the industry trend toward maximizing television revenues above other considerations, including selling out stadiums.

19. We conclude that the substantial decrease in the number of NFL games blacked out locally since 1975 demonstrates that the sports blackout rules are no longer necessary to ensure the wide availability of sports telecasts to the general public and thus weighs in favor of eliminating the sports blackout rules. At the time that the sports blackout rules were first adopted, nearly 60 percent of NFL games were blacked out locally due to failure to sell out. Since that time, the popularity of NFL football has soared, making it far easier for most teams to sell out all of their games and making blackouts of NFL games increasingly rare.<sup>89</sup> Additionally, the measures taken by NFL teams in recent years to prevent blackouts indicate that these teams are more concerned with television revenues than with selling out every seat in the stadium.<sup>90</sup> NAB argues that the fact that the 2013 NFL season featured the fewest local blackouts since the league's inception "demonstrates that the existing blackout policies ... are working

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Coliseum with tarps, thereby reducing the stadium capacity from 63,132 to 53,200. See SFC Comments at 22; see also Jerry McDonald, *Oakland Raiders to Reduce Capacity of Stadium to Avoid Blackouts*, INSIDEBAYAREA.com, Feb. 6, 2013, available at [http://www.insidebayarea.com/raiders/ci\\_22534155/oakland-raiders-reduce-capacity-stadium?source=most\\_viewed](http://www.insidebayarea.com/raiders/ci_22534155/oakland-raiders-reduce-capacity-stadium?source=most_viewed).

<sup>86</sup> For example, during the 2013 season, the Buffalo Bills offered a discount of up to \$15 off on tickets to a game against the Cincinnati Bengals in an effort to avoid a blackout. See John Breech, *Bills Offering Discounted Tickets to Avoid First Blackout of 2013*, CBSSPORTS.com, Oct. 9, 2013, available at <http://www.cbssports.com/nfl/eye-on-football/24057934/bills-offering-discounted-tickets-to-avoid-first-nfl-blackout-of-2013>.

<sup>87</sup> The NFL allows teams to purchase tickets for regular season (but not playoff) games for \$0.34 on the dollar. See SFC Comments at 22. In 2013, the owners of the Tampa Bay Buccaneers committed to preventing blackouts of their home games by buying up any unsold tickets under the team's 85 percent blackout threshold. See *supra* n.82; see also Staff Report, *Bills Owner Ralph Wilson Buys Tickets to Avoid TV Blackout*, DEMOCRAT & CHRONICLE, Nov. 15, 2013 (noting that former Buffalo Bills owner Ralph Wilson purchased the remaining 3,500 tickets to the Bills' November 17, 2013 home game against the New York Jets to avoid a blackout of the game), available at <http://www.democratandchronicle.com/story/sports/football/nfl/bills/2013/11/14/buffalo-bills-have-24-hours-to-avoid-tv-blackout/3531623/>; Kevin Nogle, *Dolphins Buy Tickets (Again), Avoid Blackout*, THEPHINSIDER, Dec. 12 2012 (noting that the Miami Dolphins bought tickets for \$0.34 on the dollar for the seventh time in eight home games in 2012 to ensure that the game would be broadcast to the local Miami market), available at <http://www.thephinsider.com/2012/12/22/3794542/dolphins-buy-tickets-again-avoid-blackout>.

<sup>88</sup> For example, SFC notes that, when three of the four first-round playoff games during the 2013 season were threatened with local blackouts due to failure to sell out, local television network affiliates and local businesses purchased tickets to avoid the blackout. Specifically, Associated Bank and Fox 6 (the local network affiliate scheduled to air the game in the Green Bay area) purchased the remaining tickets for the Green Bay Packers-San Francisco 49ers playoff game; Meijer purchased the remaining tickets to the Indianapolis Colts-Kansas City Chiefs playoff game; and Proctor and Gamble, Kroger, and various other local businesses purchased the remaining tickets for the Cincinnati Bengals-San Diego Chargers playoff game. See SFC Comments at 13-17. See also Eric D. Williams, *Blackout Lifted for Colts-Chargers*, ESPN.com, Oct. 14, 2013 (reporting that ESPN and several local San Diego businesses purchased over 8,000 tickets to a San Diego Chargers-Indianapolis Colts Monday Night Football game in order to avoid a blackout of the game on the local San Diego television station), available at [http://espn.go.com/nfl/story/\\_/id/9816412/san-diego-chargers-avoid-local-blackout-monday-night-football-clash-vs-indianapolis-colts](http://espn.go.com/nfl/story/_/id/9816412/san-diego-chargers-avoid-local-blackout-monday-night-football-clash-vs-indianapolis-colts).

<sup>89</sup> See *supra* ¶ 16.

<sup>90</sup> See *supra* ¶¶ 17-18.

well and should not be upset.”<sup>91</sup> We find this argument unpersuasive. NAB offers no support for its suggestion that the 2013 season featured the fewest local blackouts *as a result of* the NFL’s blackout policies, much less the Commission’s rules. Moreover, even the NFL acknowledges that there are a number of factors apart from its blackout policies – such as stadium capacity, weather, and team performance – that determine whether a team sells out a particular home game.<sup>92</sup> Thus, we cannot conclude that the very low number of blackouts during the 2013 season is attributable to the NFL’s blackout policies or that it establishes that the sports blackout rules should be retained. Rather, if anything, the very low number of blackouts in 2013 seems to suggest that stadium revenues that once were preserved by blackouts are less significant than the television revenues the NFL enjoys by preventing blackouts.

#### 4. Impact of Blackouts on NFL Attendance and Gate Receipts

20. As reviewed above, the Commission adopted the sports blackout rules to promote the availability of sports programming to television viewers, not to boost sports leagues’ financial bottom line. Nevertheless, based on the record before us, we conclude that the loss to consumers of their ability to view an NFL game that has been blacked out locally exceeds any gains in gate receipts and other in-stadium revenues that may accrue to the NFL as a result of blacking out the game. In the *NPRM*, we sought comment on the conclusion of the Sports Economists that, based on their review of several econometric studies of attendance at NFL games as well as other team sports in the U.S. and Europe, there is no evidence that local blackouts of NFL games significantly affect either ticket sales or no-shows at those games.<sup>93</sup> The NFL disputes this conclusion, arguing that recent empirical research demonstrates that the sports blackout rules play a vital role in ensuring that professional sports games reach near-capacity attendance and that blackouts are associated with “a statistically significant increase in attendance and decrease in ‘no-shows.’”<sup>94</sup> Specifically, the NFL’s economist expert, Dr. Singer, asserts that a 2000 study by Putsis and Sen demonstrates that the NFL’s blackout policy has a positive effect on attendance at NFL games.<sup>95</sup> The Putsis and Sen study examined the impact of blackouts on attendance at NFL games using data on economic, demographic, team, and game specific variables for the eight NFL teams that experienced blackouts of at least one home game during the 1996-1997 NFL season.<sup>96</sup> The study found that, for these eight teams, blackouts were associated with an average *maximum* increase in overall tickets sold per game of 11,310, an average *maximum* decrease in no-shows per game of 4,959, and an average *maximum* per game increase in revenues of \$414,336 per team.<sup>97</sup>

21. We acknowledge that the Putsis and Sen study indicates that blackouts have a positive

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<sup>91</sup> NAB Comments at 5; *see also* NFL Comments, Singer Declaration at ¶ 46 (“That the NFL’s blackout policy has resulted in only a small number of blackouts is not evidence that the policy is ineffectual from the NFL’s perspective. To the contrary, it is equally likely that there have been so few blackouts in recent years because the NFL’s blackout policy has been successful in driving marginal attendance at games that would otherwise have failed to sell out ....”).

<sup>92</sup> *See* NFL Comments at 6.

<sup>93</sup> *NPRM*, 28 FCC Rcd at 17229, ¶ 24.

<sup>94</sup> *See* NFL Comments at 10 (citing Singer Declaration at ¶ 10).

<sup>95</sup> *See id.*, Singer Declaration at ¶ 23; *see also* Putsis and Sen at 1495-1507. Dr. Singer acknowledges, however, that “[w]hile blackouts spur more fans to attend games on average, ... blackouts cannot be said to cause NFL attendance to increase in absolute terms for all games in all years.” *See* NFL Comments, Singer Declaration at ¶ 23.

<sup>96</sup> *See* Putsis and Sen at 1498-1504. We note that the Putsis and Sen study, which analyzes data from the 1996-1997 NFL season, is quite dated and does not capture the exponential growth in the NFL’s revenues from television rights and other sources since that time. *See supra* ¶ 14.

<sup>97</sup> *See* Putsis and Sen at 1504. Putsis and Sen assume for purposes of their study that overall broadcast coverage, including coverage in distant markets, will not change. The only change they examine is blacking out local broadcast coverage in the market where the game is played. *See id.* at 1498-1504.

impact on gate receipts and other in-stadium revenues. As the Sports Economists observe, however, Dr. Singer focuses only on the *statistical significance* of this study and fails to consider its *economic significance*.<sup>98</sup> In this regard, Putsis and Sen also find that, when viewed in the broader context of the societal and economic loss due to the game not being broadcast in the local area, the gain to the NFL in on-site stadium revenue due to a blackout (e.g., through additional ticket and concession sales) is small in comparison to the loss to consumers of their ability to view NFL games that have been blacked out locally.<sup>99</sup> Specifically, Putsis and Sen state that “even if one estimates the maximum potential impact on NFL game day revenue – the welfare loss resulting from the blackouts likely exceeds the loss in NFL revenue. Thus, the imposition of a blackout creates a market failure ....”<sup>100</sup> In other words, as the Sports Economists put it, the added money spent by the few fans “driven” to the stadium by a blackout is a gain to the NFL but is not economically significant when compared to the loss of viewer value.<sup>101</sup> The Sports Economists therefore conclude that this study does not provide evidence of an economically significant relationship between attendance and blackouts.<sup>102</sup> We agree. Particularly when considered in relation to the NFL’s \$6 billion annual television revenues,<sup>103</sup> we cannot conclude based on this study that blackouts have an economically significant impact on attendance at NFL games or gate receipts from those games. Additionally, we cannot conclude based on this study that the positive impact of the sports blackout rule on gate receipts and attendance exceeds the loss of television revenues or the societal loss to consumers of their ability to view locally blacked out NFL games. In any event, the goal of the sports blackout rules is not to protect the profitability of sports leagues but rather to ensure that sports programming is widely available to television viewers.<sup>104</sup>

## 5. Migration of NFL Games to Pay TV

22. We conclude that elimination of the sports blackout rules is unlikely to reduce the availability of NFL games to free, over-the-air television viewers by leading the NFL to migrate its games to pay TV. As noted above, the NFL’s existing contracts with the broadcast networks extend through 2022 so migration of NFL games will not even be an issue until 2023.<sup>105</sup> Dr. Singer asserts that, by spurring attendance at games, the sports blackout rules facilitate the NFL’s “free TV” model.<sup>106</sup> In the

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<sup>98</sup> See SFC Reply Comments, Attachment, Response of Sports Economists on Declaration of Hal J. Singer (“Sports Economists Response”), at 4; *see also supra* n.94 and accompanying text.

<sup>99</sup> *See* Putsis and Sen at 1495.

<sup>100</sup> *Id.* at 1506.

<sup>101</sup> *See* SFC Reply Comments, Sports Economists Response, at 3.

<sup>102</sup> *See id.* at 4-5.

<sup>103</sup> *See supra* ¶ 14.

<sup>104</sup> *See supra* ¶ 15.

<sup>105</sup> *See supra* ¶ 14.

<sup>106</sup> *See* NFL Comments, Singer Declaration at ¶ 18; *see also* Letter from Gerard J. Waldron, Covington & Burling LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-3 (July 17, 2014) (“NFL July 17, 2014 *Ex Parte* Letter”), Attachment at 4; Letter from James L. Winston, Executive Director, National Association of Black Owned Broadcasters, to Thomas Wheeler, Chairman, FCC (Sept. 9, 2014) (“NABOB Sept. 9, 2014 *Ex Parte* Letter”), at 2 (asserting that the elimination of the sports blackout rules could potentially accelerate the migration of sports programming to pay TV platforms, which would harm broadcast station owners and the tens of millions of viewers who depend on free, over-the-air television); Letter from Marc H. Morial, President & CEO, National Urban League, to Thomas Wheeler, Chairman, FCC (Sept. 5, 2014) (“National Urban League Sept. 5, 2014 *Ex Parte* Letter”) (asserting that the sports blackout rules ensure that all Americans, including those who depend on broadcast-only TV, have access to valuable sports content); Letter from Congressional Black Caucus, to Thomas Wheeler, Chairman, FCC (July 31, 2014) (“CBC July 31, 2014 *Ex Parte* Letter”), at 1 (asserting that many communities depend on free, over-the-air television for news, entertainment and sports, including NFL games).

absence of the sports blackout rules, he continues, the NFL would likely be forced to migrate to a “pay TV” model in order to preserve its private blackout policy (and thus its ability to control the distribution of its programming).<sup>107</sup> Dr. Singer states that the NFL would seek to preserve its private blackout policy because this policy is profit-maximizing.<sup>108</sup> Migration of NFL games to pay TV, he maintains, would leave consumers who rely solely on over-the-air television unable to view NFL games (*i.e.*, it would reduce the overall availability of sports telecasts to the public).<sup>109</sup>

23. To support his assertions, Dr. Singer states that the NFL’s calculus for switching from its “free TV” model to pay TV in the absence of the sports blackout rules is as follows: the NFL would switch to pay TV if the value to the NFL of distributing its games via pay TV (*i.e.*, the revenues that the NFL would earn from distributing its games via pay TV) plus the increase in gate revenue from its blackout policy exceeds the value to the NFL of distributing its games via over-the-air television in the absence of the sports blackout rules (*i.e.*, the revenues that the NFL would earn from distributing its games via over-the-air television in the absence of the sports blackout rules).<sup>110</sup> According to Dr. Singer, the value to the NFL of distributing its games via over-the-air television would decrease in the absence of the sports blackout rules because the lack of exclusivity for local broadcasters that would result from elimination of the sports blackout rules would reduce the value of the NFL telecasts to advertisers, which in turn would reduce the value that the networks would pay for rights to NFL games.<sup>111</sup> Dr. Singer also indicates that the NFL’s calculus “assume[s] that no amount of contracting ... can restore the full value of exclusivity.”<sup>112</sup>

24. Even if we were to assume that elimination of the sports blackout rules will result in the reduction in exclusive distribution rights for some local broadcasters and that no amount of contracting could restore the full value of exclusivity,<sup>113</sup> it does not follow that it would be more profitable for the NFL to migrate its games to pay TV. It is necessary to consider the magnitude of the reduction in exclusivity and the impact of that reduction on the rights payment that the NFL would receive from

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<sup>107</sup> See NFL Comments, Singer Declaration at ¶ 19; NFL July 17, 2014 *Ex Parte* Letter, Attachment at 4-5.

<sup>108</sup> See NFL Comments, Singer Declaration at ¶ 22.

<sup>109</sup> See *id.* at ¶ 9.

<sup>110</sup> See NFL July 17, 2014 *Ex Parte* Letter, Attachment at 5. Dr. Singer states this calculus as follows:

Value TV (pay TV) + Increase in Gate Revenue > Value TV (OTA’) (where OTA’ represents a world without the sports blackout rules).

*See id.*

<sup>111</sup> See *id.* at 4.

<sup>112</sup> See *id.* at 5. In support of this assumption, Dr. Singer cites the declaration submitted on behalf of the NFL by Brian Rolapp, Chief Operating Officer of the NFL Media. See *id.* Mr. Rolapp states in his declaration that it was his belief that the NFL cannot enforce its stadium policy and enforce blackouts by contract because the NFL’s existing contracts with the broadcast networks and MVPDs do not contain any provision that the League could invoke to stop, or cause others to stop, importation of a blacked out local game, and because he sees no incentive for broadcasters or MVPDs to reopen their contracts and add such a provision. See NFL Comments, Declaration of Brian Rolapp, Chief Operating Office, NFL Media (“Rolapp Declaration”), at 9.

<sup>113</sup> We question the validity of the NFL’s assumptions that elimination of the sports blackout rules will result in a lack of exclusivity for the local broadcasters and that no amount of contracting can restore the full value of exclusivity. As explained below, to the extent that the NFL chooses to continue its blackout policy, we believe that it may do so by relying on the same processes available to any other entity that wishes to protect its distribution rights in the private marketplace. See *infra* ¶¶ 30-36. Moreover, we note that the NFL is currently in the first year of a nine-year contract with the CBS, Fox, and NBC television networks to air NFL games, ensuring that most NFL games will remain on broadcast television at least through the 2022 season. See *supra* ¶ 14. Because the NFL’s current contracts do not expire until 2023, elimination of the sports blackout rules will have no immediate effect on the NFL’s television revenues.

broadcasters in the absence of the sports blackout rules. We believe that, if there were any reduction, the magnitude would be small because only a small number of games are blacked out locally today due to failure to sell out. Moreover, both Putsis and Sen and the Sports Economists agree that the increase in gate revenue to the NFL from its blackout policy is small.<sup>114</sup> Under the NFL's calculus, the NFL would not be expected to migrate its games to pay TV unless the NFL could earn almost as much from distributing its games via pay TV as it could from distributing its games via over-the-air television in the absence of the sports blackout rules. Because the record does not show that eliminating the sports blackout rules would have a significant impact on the NFL's over-the-air revenues, and for the reasons provided below, we think that this is highly unlikely.

25. While the NFL currently distributes a limited number of games via pay TV, the fact that it distributes the majority of its games via broadcast television stations (which may be viewed by consumers on free, over-the-air television or on basic MVPD service) indicates that it is more profitable for it to do so.<sup>115</sup> Indeed, we note that NFL games are consistently the highest rated programs on broadcast television.<sup>116</sup> According to a recent NFL press release, average viewership of NFL games on broadcast television has increased 31 percent from 15.5 million in 2003 to 20.3 million in 2013.<sup>117</sup> NFL games accounted for 34 of the 35 most-watched television shows among all programming during the 2013 NFL regular season and 22 of these games were watched by at least 25 million viewers.<sup>118</sup> In addition, NFL games attract the young male demographic highly coveted by advertisers,<sup>119</sup> and most consumers watch NFL games live, which is important to advertisers at a time when many viewers record programs and then skip the commercials when they watch them.<sup>120</sup> The high viewership of NFL games on broadcast television stations (whether viewed by consumers over-the-air or via MVPD service) enables television networks and their local affiliates to command the highest possible advertising rates for spots during NFL games.<sup>121</sup> In contrast, ESPN and NFL Network, the two pay TV networks that

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<sup>114</sup> See *supra* ¶ 21.

<sup>115</sup> See NFL Comments, Singer Declaration at ¶ 22 (stating that a central tenet of economics is that firms engage in profit-maximizing behavior). Given that over 85 percent of broadcast programming is viewed through a basic MVPD service and that these subscription revenues are used by MVPDs to purchase retransmission of broadcast programming including NFL programming and that such retransmission fees combined with increasingly higher advertising revenues from increased viewership from non-subscription viewers enable broadcast networks to pay increasingly higher fees to the NFL, maximizing broadcast television revenues has become the profit-maximizing behavior for the NFL.

<sup>116</sup> See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd at 10667-68, ¶¶ 343-44 (2013) (“2013 Competition Report”); see also Press Release, *NFL 2013 TV Recap* (rel. Jan. 8, 2014) (“NFL 2013 TV Recap”), available at <http://nflabor.files.wordpress.com/2014/01/2013-ratings-season-recap1.pdf>; Reply Comments of the National Association of Broadcasters (“NAB Reply Comments”) at 4 (noting that nine of the ten top-rated shows during the 2012-2013 television season were either NFL games or NFL programming, all of which aired on broadcast television).

<sup>117</sup> See *NFL 2013 TV Recap*, *supra* n.116.

<sup>118</sup> See *id.* NFL games nearly tripled broadcast primetime viewership. NFL games on CBS, Fox and NBC averaged 20.3 million viewers – 190 percent higher than the average primetime viewership among the four major over-the-air networks (7.0 million average). See *id.*

<sup>119</sup> See *2013 Competition Report*, 28 FCC Rcd at 10667, ¶ 343; see also Claire Atkinson, *CBS Lands Thursday Night NFL Package*, NY POST, Feb. 5, 2014 (“Atkinson, CBS Lands”), available at <http://nypost.com/2014/02/05/cbs-lands-thursday-night-nfl-package/>; Futterman, Schechner, and Vranica, *supra* n.53.

<sup>120</sup> See Chris Isidore, *Why Football Is Still a Money Machine*, CNNMONEY, Feb. 1, 2013, available at <http://money.cnn.com/2013/02/01/news/companies/nfl-money-super-bowl/>; Futterman, Schechner, and Vranica, *supra* n.53.

<sup>121</sup> See SFC Comments at 25 (noting that NFL games continue to attract the highest advertising revenue of any content on television today, due to the record-high ratings); NAB Reply Comments at 3-4 (noting that for

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currently hold rights to distribute some NFL games, do not attract nearly the same level of viewership as the television networks. In 2013, ESPN's Monday Night Football averaged 13.7 million viewers and NFL Network's Thursday Night Football averaged 8.1 million viewers.<sup>122</sup> ESPN and NFL Network therefore are unable to charge as much as broadcast networks for advertising spots aired during NFL games.<sup>123</sup> Specifically, estimates for a 30-second spot aired during an NFL game on ESPN in 2013 range from \$325,000 to \$410,000, while estimates for a 30-second spot aired during an NFL game on broadcast television in 2013 range from \$593,000 to \$628,000.<sup>124</sup> The substantial difference in viewership of NFL games on broadcast television stations and pay TV networks – and the corresponding difference in the advertising rates that broadcast television and pay TV networks charge for spots during NFL games – reflects, among other things, the fact that a significant number of consumers rely exclusively on broadcast television received over the air or subscribe only to basic MVPD service.<sup>125</sup> According to the NFL, approximately 22.4 million households (almost 20 percent of all U.S. households with a television) relied

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broadcasters, NFL games are major events and, due to their “DVR-proof content, are critical for selling advertising and as launching pads for promoting other broadcast programming”); *see also* Brian Steinberg, *Ad Buyers Hope to Use CBS' Thursday NFL Package to Tackle Football Prices*, VARIETY, Apr. 14, 2014 (“Steinberg, *Ad Buyers Hope*”) (stating that in 2013, the average price of a 30-second spot during NBC's Sunday Night Football – the most expensive program for commercials in primetime broadcast television – was estimated at \$628,000 and during Fox's Sunday afternoon NFL broadcasts was estimated in the \$600,000 range), available at <http://variety.com/2014/tv/news/ad-buyers-hope-to-use-cbs-thursday-nfl-package-to-tackle-football-prices-1201156984/>; Atkinson, *CBS Lands*, *supra* n.119 (stating that, according to Ad Age, NBC charged \$593,700 for a 30-second spot during Sunday Night Football in 2013); Deana Myers, *Broadcast Ad Prices Stumble*, SNL KAGAN, Nov. 12, 2013 (“Myers, *Broadcast Ad Prices Stumble*”) (stating that the top-priced program for the 2013 season was NBC's Sunday Night Football, which was asking \$595,000 per 30-second spot), available at <http://www.snk.com/InteractiveX/article.aspx?ID=25880341>.

<sup>122</sup> *See NFL 2013 TV Recap*, *supra* n.116. The NFL Network's less robust ratings are apparently what prompted the NFL to sell half of the Thursday Night Football games to CBS for the 2014 season. *See* Richard Sandomir, *Small Deal for N.F.L. Games Has Major Implications and Potential*, THE NEW YORK TIMES, Jan. 14, 2014 (“The league wants to expand the appeal of football on Thursday nights beyond the 72 million subscribers who have NFL Network, and it covets the greater reach of its partners, especially the broadcasters.”), available at [http://www.nytimes.com/2014/01/15/sports/football/small-deal-for-nfl-games-has-major-implications-and-potential.html?\\_r=0](http://www.nytimes.com/2014/01/15/sports/football/small-deal-for-nfl-games-has-major-implications-and-potential.html?_r=0); Sarah Berry James, *How the NFL Might Sell Thursday Night Games But Avoid Distributors' Wrath*, SNL KAGAN, Jan. 16, 2014 (“Mark Wyche, managing director at Bortz Media & Sports Group Inc., suggested that the league may be hoping to grow the audience for the Thursday night games by putting them on a broadcast network or popular cable network, with the intention of then moving the games back to NFL Network once the viewership base has been established.”), available at <http://www.snk.com/InteractiveX/article.aspx?ID=26544433>; Atkinson, *CBS Lands*, *supra* n.119 (asserting that the NFL decided to sell half of the Thursday Night Football games to CBS in order to “increase NFL revenues and hopefully tease more viewers to the NFL Network's late season slate of games.”).

<sup>123</sup> *See* Steinberg, *Ad Buyers Hope*, *supra* n.121 (stating that in 2013, a 30-second spot during ESPN's Monday Night Football cost an average of \$408,000); Atkinson, *CBS Lands*, *supra* n.119 (stating that, according to Ad Age, ESPN charged \$325,400 for a 30-second spot during Monday Night Football in 2013); Myers, *Broadcast Ad Prices Stumble*, *supra* n. 121 (stating that ESPN was asking close to \$410,000 per 30-second spot during Monday Night Football in 2013).

<sup>124</sup> *See supra* nn.121-123.

<sup>125</sup> Cable operators are required to offer an entry-level basic service which includes: (1) all commercial and noncommercial local broadcast stations entitled to carriage under the Communication Act's must-carry provisions; (2) any public, educational, and governmental access channels; and (3) any other local broadcast station provided to any subscriber. *See* [47 U.S.C. § 543\(b\)\(7\)\(A\)](#). Cable operators may also offer addition non-broadcast channels on their basic service tiers. *See id.* § 543(b)(7)(B). On average, cable operators offer 54 channels on their basic service tiers. *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, DA 14-672 (rel. May 16, 2014) (“*Report on Cable Industry Prices*”), at ¶ 19 and Table 4.

solely on over-the-air broadcasting in 2013.<sup>126</sup> The Commission recently found that, as of July 2012, approximately 11.1 million U.S. households with a television, which represented 9.7 percent of all television households at that time, relied exclusively on over-the-air television.<sup>127</sup> In addition, a recent Media Bureau survey indicates that, as of January 1, 2013, 14 percent of cable subscribers took basic service only.<sup>128</sup> Thus, in order for the NFL to earn almost as much from distributing its games via pay TV as it could from distributing its games via broadcast television stations, a significant percentage of the over-the-air television households would have to switch to pay TV and the households that subscribe only to basic cable service would have to upgrade to a higher tier of pay TV. While Dr. Singer suggests that if the NFL migrated all of its games to pay TV, some over-the-air television households would subscribe to pay TV in order to receive the games, he does not provide any estimate or evidence of the number of over-the-air television households that would switch to pay TV.<sup>129</sup> There is also no evidence in the record as to the number of basic service tier only subscribers that could be expected to upgrade to a higher service tier if the NFL migrated its games to pay TV. Given the immense popularity of NFL football on broadcast television and the significant number of over-the-air television households and households that subscribe only to basic MVPD service, we think that it is highly unlikely that it would be more profitable for the NFL to distribute its games via pay TV than via broadcast television in the absence of the sports blackout rules.<sup>130</sup> Furthermore, we note that the broadcast networks also value NFL programming highly because it provides them a platform to promote their prime-time lineups and boosts their ratings for prime-time and other network programming, which may allow broadcasters to demand higher retransmission consent fees from MVPDs.<sup>131</sup> Thus, the broadcast networks will have a strong incentive to

<sup>126</sup> See NFL Comments, Singer Declaration at ¶ 20 (citing National Association of Broadcasters, *Over-the-Air TV Renaissance Continues as Pay TV Cord-Cutting Rises*, June 21, 2013, available at: <https://www.nab.org/documents/newsroom/pressRelease.asp?id=3168>); see also NAB Reply Comments at 3 n.5; Letter from National Conference of State Legislatures to Marlene H. Dortch, Secretary, FCC (June 10, 2014) (“NCSL June 10, 2014 *Ex Parte* Letter”), at 1 (asserting that 30 percent of homes having an annual income under \$30,000 are reliant on over-the-air television). The NFL acknowledges, however, that other recent studies have found the number of households that rely exclusively on over-the-air television to be lower. For example, it notes that a 2013 study by the Consumer Electronics Association found that about seven percent of U.S. television households rely exclusively on over-the-air television. See Jeff Baumgartner, *7% of U.S. Homes Rely on Over-the-Air TV: CEA Study*, MULTICHANNEL NEWS, Jul. 30, 2013, available at: <http://www.multichannel.com/distribution/7-us-homesrely-over-air-tv-cea-study/144672>; see also CBC July 31, 2014 *Ex Parte* Letter at 1 (“According to a 2013 survey, 60 million Americans - 41% of whom are minorities - rely exclusively on over-the-air (OTA) television. An estimated 22% of African American, 23% of Asian, and 25% of Latino households are OTA reliant. Many of these households include lower income adults and seniors, who cannot afford the rising cost of pay-TV services.”); National Urban League Sept. 5, 2014 *Ex Parte* Letter at 1 (stating that 22% of African American, 23% of Asian and 25% of Latino households depend on broadcast-only TV and that many of these viewers are low-income and may not be able to afford the monthly subscriptions’ cost of cable and satellite services).

<sup>127</sup> See also 2013 *Competition Report*, 28 FCC Rcd at 10593, ¶ 198.

<sup>128</sup> See *Report on Cable Industry Prices* at ¶ 12.

<sup>129</sup> See NFL July 17, 2014 *Ex Parte* Letter, Attachment at 5.

<sup>130</sup> As the SFC observes, “[t]he advertising revenue generated by NFL programming is necessarily tied to giving the widest possible cross-section of Americans the ability to watch the games, which in this case means distribution via broadcast” television. SFC Comments at 26.

<sup>131</sup> See David S. Cohen, *NFL’s Scores in Ratings Make the TV Biz Willing to Follow the Game Plan*, VARIETY, Sept. 10, 2014 (“The benefits of the NFL ripple outward for any network that acquires it. Sunday afternoon games boost ratings for the CBS and Fox primetime lineups that follow. The Sunday night games pump viewership for NBC affiliates’ late local news and for morning news on Monday.”), available at <http://variety.com/2014/tv/news/nfl-ratings-dominate-tv-business-1201301948/>; Joe Flint, *NFL Signs TV Deals Worth Billions with Fox, NBC and CBS*, LOS ANGELES TIMES, Dec. 14, 2011 (“For the networks, holding onto the NFL was crucial. The games deliver big audiences and are a platform to promote their prime time lineups. As more and more viewers migrate to cable

(continued....)

take measures to ensure that the NFL does not migrate its games to pay TV after their current contracts expire in 2022. Accordingly, we conclude that the NFL is unlikely to migrate a substantial number of its games to pay TV as a result of elimination of the sports blackout rules. Ultimately, we believe that the market, rather than the elimination of our sports blackout rules, will determine whether NFL football stays on broadcast television or moves to pay TV.

## 6. Erosion of Economic Basis for Sports Blackout Rules

26. As previously discussed, the sports blackout rules were premised on the concern that the potential loss of gate receipts resulting from cable, OVS and satellite system importation of distant stations would lead the NFL and other sports leagues to refuse to sell their rights to sports events to distant stations, thereby substantially reducing the overall availability of sports programming to television viewers.<sup>132</sup> We conclude that this concern is no longer valid in today's marketplace. As discussed above, blackouts are no longer relevant for sports other than professional football.<sup>133</sup> With respect to NFL football, television revenues have become the dominant source of NFL revenues with a corresponding decrease in gate receipts as a proportion of overall revenues.<sup>134</sup> Moreover, the number of sell-outs and total attendance at NFL games has increased substantially since 1975, reflecting an increase in the popularity of NFL games.<sup>135</sup> These trends undermine the notion that the NFL would find it profitable to significantly restrict television broadcasts of its games to protect gate receipts and in-stadium revenues. Additionally, the record shows that the loss to consumers of their ability to view a game on local television when an NFL game is blacked out exceeds any gain to the NFL in gate receipts and other in-stadium revenue as a result of a blackout and that the NFL is unlikely to migrate its games to pay TV as a result of elimination of the sports blackout rules because it would not be profitable for it to do so.<sup>136</sup> Accordingly, based on all of these factors, we conclude that the economic considerations underlying the sports blackout rules are no longer valid and, therefore, the sports blackout rules are no longer needed to ensure that NFL games are widely available to the viewing public.

## 7. Elimination of the Sports Blackout Rules

27. As explained in detail above, the sports blackout rules are no longer necessary to ensure the overall availability of NFL games to television viewers.<sup>137</sup> Accordingly, we conclude that the sports blackout rules are outdated and should be eliminated. We recognize that eliminating our sports blackout rules is unlikely to end all sports blackouts. The NFL has stated that it most likely will continue its underlying blackout policy.<sup>138</sup> Thus, consumers may still be unable to view locally blacked out NFL games despite repeal of our rules. Nevertheless, we conclude that it will serve the public interest to eliminate regulations that are no longer needed to serve their original purpose of ensuring that sports

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television, the value of programming that can bring in big ratings has increased.”), *available at* <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/12/nfl-signs-billion-dollar-deals-with-fox-nbc-and-cbs.html>; Eric Deggans, *CBS's Thursday Night Football: An Ambitious Alliance With A Lot At Stake*, NPR.org, Sept. 4, 2014 (“The advantages for CBS [of airing Thursday Night Football] range beyond advertising revenue that night; a successful Thursday can help CBS contend as the top network in young viewers year-round and allow them to ask for even more money from cable systems that carry their broadcast signals.”), *available at* <http://www.npr.org/2014/09/04/345586417/cbss-thursday-night-football-an-ambitious-alliance-with-a-lot-at-stake>.

<sup>132</sup> See *supra* ¶ 3.

<sup>133</sup> See *supra* ¶ 13.

<sup>134</sup> See *supra* ¶ 14.

<sup>135</sup> See *supra* ¶ 16.

<sup>136</sup> See *supra* ¶¶ 21-25.

<sup>137</sup> See *supra* ¶¶ 13-26.

<sup>138</sup> See *infra* ¶ 30.

telecasts are widely available to the viewing public. If regulations are no longer serving a public interest purpose, they should be eliminated.<sup>139</sup>

28. We also find that the public interest will be served by removing regulatory reinforcement of the NFL's blackout policy. With annual revenues totaling around \$10 billion, the NFL is the most lucrative sports league in the world.<sup>140</sup> In addition, most NFL teams are heavily subsidized by consumers through publicly funded stadiums and other tax benefits.<sup>141</sup> Yet consumers – including elderly and disabled sports fans who are physically unable to attend games in person and sports fans who cannot afford to attend games due to high ticket prices or the economy – are sometimes unable to watch their favorite teams on television simply because a game is not completely sold out.<sup>142</sup> We acknowledge that repeal of our sports blackout rules may not provide an immediate, direct benefit to these consumers. We find, however, that rather than fulfilling their intended goal of ensuring the widespread availability of sports programming to the viewing public, our sports blackout rules may be having the opposite effect by reinforcing and implicitly endorsing a private policy that deprives many consumers of the ability to watch on television the teams that they have subsidized through their tax dollars. Accordingly, we conclude that the public interest will be served by eliminating regulatory reinforcement and endorsement of the NFL's blackout policy.

### C. Impact of Eliminating Sports Blackout Rules on NFL's Ability to Control Distribution of its Games

29. The NFL claims that the sports blackout rules provide protections that cannot be achieved through other regulatory means or by private contract and thus without the rules, there would likely be a decrease in the amount of professional sports on broadcast television, thereby decreasing the availability of sports programming to the public.<sup>143</sup> Specifically, the NFL and NAB raise a number of arguments as to why, as a result of the compulsory copyright licenses and contractual limitations, the NFL will be unable to control the distribution of its games or obtain blackout protection in the private marketplace – measures they claim are necessary to “[help] keep sports programming on free, over-the-air

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<sup>139</sup> See *supra* n.2.

<sup>140</sup> See *supra* ¶ 14.

<sup>141</sup> For example, taxpayers paid approximately \$619.6 million (86 percent) of the \$719.6 million cost of the Indianapolis Colts' Lucas Oil Stadium (2008); \$300.3 million (65 percent) of the \$461.3 million cost of the Seattle Seahawks' Century Link Field (2002); \$424.8 million (94 percent) of the \$449.8 million cost of the Cincinnati Bengals' Paul Brown Stadium (2000); and \$194 million (100 percent) of the \$194 million cost of the Tampa Bay Buccaneers' Raymond James Stadium (1998). See *NFL Stadium Funding Information, Stadiums Opened Since 1997*, Dec. 2, 2011, available at <http://cbsminnesota.files.wordpress.com/2011/12/nfl-funding-summary-12-2-11.pdf> (last viewed July 21, 2014). Public stadium funding sources may include, among other things, city and county sales taxes, lodging taxes, excise taxes, food and beverage taxes, property taxes, income taxes, utility taxes, lottery and gaming funds, parking taxes and revenues, grants, operating subsidies, interest-free loans, and infrastructure improvements. See *id.*; see also Gregg Easterbrook, *How the NFL Fleeces Taxpayers*, THE ATLANTIC, Sept. 18, 2013 (noting that Judith Grant Long, a Harvard University professor of urban planning, calculated that league-wide, approximately 70 percent of the capital cost of NFL stadiums has been provided by taxpayers), available at <http://www.theatlantic.com/magazine/archive/2013/10/how-the-nfl-fleeces-taxpayers/309448/>; Tom Precious, *Bills Agree to Lease Deal with \$130 Million in Stadium Upgrades*, THE BUFFALO NEWS, Dec. 21, 2012 (noting that the Buffalo Bills' new 10-year lease for Ralph Wilson Stadium included \$130 million in stadium renovations, \$95 million of which (73 percent) would be funded by taxpayers), available at <http://www.buffalonews.com/apps/pbcs.dll/article?AID=/20121221/CITYANDREGION/121229867/1109>; NCSL June 10, 2014 *Ex Parte* Letter at 1 (“since 1992, public funds have helped to construct or modernize 29 of the NFL's 32 clubs' stadiums throughout the country”).

<sup>142</sup> See *NPRM*, 28 FCC Rcd at 17233-34, ¶ 34.

<sup>143</sup> See NFL Comments at 14-19.

broadcast television, available to all viewers.”<sup>144</sup> Below, we address these arguments and explain that the protections that will remain available to the NFL after repeal of the sports blackout rules will be adequate to ensure that broadcast television remains an attractive medium for distributing sports content. Accordingly, if the NFL (or any other sports league) chooses to continue its blackout policy, it must do so by relying on the same processes available to any other entity that wishes to protect its distribution rights in the marketplace.

### 1. NFL’s Blackout Policy

30. Elimination of the sports blackout rules will not, by itself, preclude blackouts of future NFL games because the NFL’s blackout policy, rather than the Commission’s rules, determines whether games are blacked out on local television stations.<sup>145</sup> The NFL’s blackout policy is given effect through contractual arrangements between the NFL and the entities to which it grants distribution rights, including television networks and their affiliates, national sports networks such as ESPN and the NFL Network, and MVPDs.<sup>146</sup> The Commission’s sports blackout rules have merely reinforced these contractual arrangements by barring MVPDs from retransmitting, within the specified local blackout zone, games that the NFL has required local television stations to black out.<sup>147</sup> Thus, repeal of the sports blackout rules will not remove the NFL’s private blackout policy or likely end blackouts on local television stations. The NFL indicates that it likely will continue to enforce its blackout policy in the absence of the sports blackout rules.<sup>148</sup> As we explain below, to the extent that the NFL chooses to continue its blackout policy, we find it to be in the public interest to require it to rely on the same avenues available to other market participants in order to protect its distribution rights rather than provide additional protections under sports blackout rules which no longer serve their original purpose of ensuring that sports telecasts are widely available to the viewing public.

### 2. Compulsory Copyright Licenses

31. The compulsory copyright licenses granted under the Copyright Act permit cable systems and, to a more limited extent, satellite carriers to retransmit the signals of distant broadcast stations without obtaining the consent of owners of content carried on the stations, including the sports leagues whose games are carried on those stations, when the carriage of such stations is permitted under FCC rules.<sup>149</sup> The NFL and NAB argue that, in the absence of the sports blackout rules, the compulsory

<sup>144</sup> See *id.* at 16-18; see also NAB Comments at 5-8.

<sup>145</sup> See *supra* ¶ 4.

<sup>146</sup> See *id.*

<sup>147</sup> See *id.*

<sup>148</sup> See NFL Comments, Singer Declaration at ¶¶ 21-22, 28; see also SFC Comments at 27 (asserting that “regardless of the outcome of this proceeding, the NFL will retain the exclusive ability to distribute its content”); Comments of Consumers Union at 2 (noting that ending the sports blackout rules may not immediately end all blackouts).

<sup>149</sup> Under the Copyright Act, unlicensed retransmission of the copyrighted material in a broadcast signal constitutes copyright infringement. See 17 U.S.C. § 111(b). The Copyright Act grants cable systems a compulsory license for the retransmission of all local broadcast signals and distant signals that the Commission has permitted them to carry. See *id.* § 111(c). The Copyright Act also grants satellite carriers a compulsory license to retransmit the signals of local stations to any subscriber within a station’s local market (“local-into-local” service). See *id.* § 122(a). In addition, satellite carriers may retransmit signals of superstations (non-network stations) to any household and may retransmit the signals of distant network stations to subscribers only if local network stations are unavailable to the subscribers as part of a local-into-local satellite package and cannot be received by the subscribers over the air. See *id.* § 119(a); see also 47 U.S.C. § 339. Under the cable compulsory license, cable systems must pay government-established royalty fees for the right to retransmit copyrighted material contained in broadcast programming. See *id.* § 111(d). In contrast, the royalty fees paid by satellite carriers are determined through voluntary negotiation or, in the absence of a voluntary agreement, are determined through arbitration and are based on the fair market value of the copyrighted transmission. See *id.* § 119(c).

copyright licenses will enable MVPDs to circumvent the private contractual agreements between the NFL and broadcasters and retransmit distant stations carrying locally blacked out games.<sup>150</sup> This “loss of control” over program distribution, according to commenters, “would threaten the continued distribution of major sporting events on free, over-the-air television” thereby leading sports leagues to move the programming to “pay platforms where the compulsory license would not undermine their ability to control distribution.”<sup>151</sup> We do not agree with the NFL and NAB that the Copyright Act, left unchecked by sports blackout rules, will make broadcast television less competitive in obtaining rights to popular sports programming and accelerate its migration to pay TV.<sup>152</sup> With respect to satellite carriers, we expect that the limited nature of the compulsory license granted to satellite carriers by the Copyright Act may largely preclude them from retransmitting the signals of distant network stations carrying locally blacked out NFL games.<sup>153</sup> Satellite carriers may retransmit the signals of distant network stations to subscribers only if local network stations are unavailable to the subscribers as part of a local-into-local satellite package *and* the subscribers are “unserved” by the local network stations over the air.<sup>154</sup> Satellite carriers currently offer local-into-local service to more than 99 percent of U.S. television households, including all markets that are home to NFL teams.<sup>155</sup> Thus, with certain exceptions, it appears that satellite carriers may be precluded by statute from retransmitting distant network stations carrying locally blacked out NFL games.<sup>156</sup> And although cable operators may in certain circumstances use the compulsory copyright license to retransmit the signals of distant broadcast stations without obtaining the

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We note that the issue whether open video systems are eligible for a cable compulsory copyright license under Section 111 of the Copyright Act remains an open question. In August 1997, the Copyright Office issued a report to Congress, which among other things recommended that the definition of “cable system” in Section 111(f) be amended to specifically include open video systems. *See A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, A Report of the Register of Copyrights, U.S. COPYRIGHT OFFICE (August 1997) (“Copyright Report”),* at 76, available at <http://www.copyright.gov/reports/study.pdf>; *see also Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, Fourth Annual Report, 13 FCC Rcd 1034, 1155, ¶ 243 (1997).* To date, however, Congress has not acted on the Copyright Office’s recommendation and the Copyright Office has not taken up the issue again.

<sup>150</sup> *See* NAB Comments at 6; NFL Comments, Singer Declaration at ¶15; NFL Reply Comments at 10.

<sup>151</sup> *See* NAB Comments at 6-7.

<sup>152</sup> *See id.* at 7; *see also* NABOB Sept. 9, 2014 *Ex Parte* Letter at 2.

<sup>153</sup> We note that the Satellite Television Extension and Localism Act of 2010 (“STELA”), the most recent extension of the statutory copyright licenses for satellite carriage of distant broadcast stations, will expire on December 31, 2014, absent reauthorization by Congress. *See* Pub. L. 111-175, 124 Stat. 1218 (2010).

<sup>154</sup> *See* 17 U.S.C. § 119(a); *see also* 47 U.S.C. § 339. The Copyright Act defines an unserved household, with respect to a particular television network, as “a household that cannot receive, through the use of an antenna, an over-the-air signal of a primary network television station affiliated with that network of Grade B intensity as defined by the Federal Communications Commission under Section 73.683(a) of Title 47 of the Code of Federal Regulations, as in effect on January 1, 1999.” 17 U.S.C. § 119(d)(10)(A). An unserved household can also be one that is subject to one of four statutory waivers or exemptions. *See id.* § 119(d)(10)(B)-(E).

<sup>155</sup> DISH Network offers local-into-local service in all 210 television markets. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fourteenth Report, 27 FCC Rcd 8610, 8659, ¶ 119 (2012) (“2012 Competition Report”).* DIRECTV currently offers local-into-local service in 197 television markets (representing more than 99.2% of U.S. TV households), including all markets that are home to NFL teams. *See* [http://www.directv.com/DTVAPP/content/hd/hd\\_locals](http://www.directv.com/DTVAPP/content/hd/hd_locals) (last viewed Sept. 9, 2014). *See also Measurement Standards for Digital Television Signals Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004, Report and Order, 25 FCC Rcd 16471, 16481, ¶ 22 (2010)* (finding that satellite carriers’ new local-into-local offerings will significantly reduce the number of instances in which satellite subscribers would be eligible to request delivery of distant network signals).

<sup>156</sup> *See, e.g.,* 47 U.S.C. §§ 339(a)(2)(A) (rules for certain grandfathered subscribers); 339(a)(2)(E) (waivers).

consent of the content owners, including the sports leagues whose games are carried on those stations, we believe, as explained below, that the NFL can adequately protect its distribution rights through private contractual arrangements with broadcast networks and MVPDs.

### 3. Retransmission Consent and Contractual Arrangements with Broadcasters

32. The NFL asserts that private contractual arrangements with broadcast networks will not adequately protect its program distribution rights and, therefore, eliminating the sports blackout rules will result in the migration of sports programming from broadcast television to pay TV, thereby decreasing public access to games.<sup>157</sup> We disagree. As explained above, we believe that it would not be in the NFL's economic interest to remove their games from broadcast television. And in any event, as explained below, the retransmission consent requirement and its contractual arrangements with broadcasters will provide the NFL with adequate protection to control the distribution of its programming following elimination of the sports blackout rules. When the cable sports blackout rule was first adopted nearly 40 years ago, the Communications Act prohibited a broadcast station from rebroadcasting another station's signal without the latter's permission, but did not prohibit cable retransmission of broadcast stations without permission.<sup>158</sup> In the 1992 Cable Act, however, Congress extended this restriction on unauthorized retransmission of broadcast stations to cable operators.<sup>159</sup> The restriction on unauthorized retransmission of broadcast stations was later extended to all MVPDs.<sup>160</sup> Thus, with limited exceptions, MVPDs today may not carry a broadcaster's signal without the permission of the broadcaster.<sup>161</sup> Accordingly, the retransmission consent requirement helps to ensure that broadcast television remains an attractive medium for distributing sports content.

33. The NFL argues that without sports blackout rules, private contracts with broadcasters will not adequately protect its distribution rights. According to the NFL, it is unable to prevent contractually network affiliates from allowing their signals to be imported into a market where an NFL game has been blacked out because it lacks direct privity of contract with the affiliates;<sup>162</sup> its contracts with the broadcast networks do not contain provisions requiring the networks to ensure that their affiliates prohibit MVPDs from retransmitting blacked out NFL games into a local market;<sup>163</sup> and the networks

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<sup>157</sup> See NFL Comments at 15-18.

<sup>158</sup> See 47 U.S.C. § 325(a) (1990) (amended 1992); see also *United Video, Inc. v. FCC*, 890 F.2d 1173, 1176 (D.C. Cir. 1989) ("The Communications Act forbids a broadcast station from rebroadcasting another broadcast station's signal without permission, 47 U.S.C. § 325(a), but does not forbid cable retransmission.... Accordingly, cable companies were free, as far as copyright law was concerned, to pick up signals aired by broadcasters and retransmit them throughout the country."); see also Comments of the National Cable & Telecommunications Association ("NCTA Comments") at 2 (noting that when the cable sports blackout rule was adopted in 1975, it was the only way that a sports rights holder could prevent a cable system from carrying a distant broadcast station airing a game being played in the cable system's local community because there was no prohibition on cable retransmission of broadcast signals).

<sup>159</sup> See 47 U.S.C. § 325(b)(1) (as added by Section 6 of the 1992 Act).

<sup>160</sup> *Id.* §§ 325(b)(1)(B) (as amended by Section 1008 of SHVIA); 573(c)(1)(B) (as enacted by Section 302 of the 1996 Act).

<sup>161</sup> See *id.*; 47 C.F.R. § 76.64. Section 325(b)(2) of the Act sets forth certain limited exceptions to the restriction on unauthorized retransmission of broadcast stations. See 47 U.S.C. § 325(b)(2); see also 47 C.F.R. § 76.64(b). For example, satellite carriage of distant network stations to unserved households is exempt from the restriction on unauthorized retransmission of broadcast stations. See 47 U.S.C. § 325(b)(2)(C); 47 C.F.R. § 76.64(b)(3)(ii).

<sup>162</sup> See NFL Comments at 17 & Rolapp Declaration, at ¶ 4; see also NAB Comments at 7-8 (asserting that the NFL has no direct privity of contract with local broadcast stations).

<sup>163</sup> See NFL Comments at 17 & Rolapp Declaration at ¶ 3; see also NAB Reply Comments at 4 (stating that the NFL's long-term contracts with the broadcast networks contain no provision which would enable the NFL to require the networks to take any action to ensure that MVPDs would not import distant stations carrying blacked-out NFL games into local markets).

have no incentive to reopen these contracts to add such a provision.<sup>164</sup> A review of network affiliation agreements on file with the Commission, however, indicates that many *existing* network affiliation agreements already include provisions prohibiting the affiliate from allowing its signal to be retransmitted by an MVPD in a distant market.<sup>165</sup> It appears, therefore, that such provisions are likely standard clauses routinely included in network affiliation agreements.<sup>166</sup> Given that many, if not all, existing network affiliation agreements effectively provide the NFL with blackout protection, we find that the NFL's assertion that the networks would be required to amend their affiliation agreements with each of their

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<sup>164</sup> See NFL Comments at 17 & Rolapp Declaration at ¶ 5 (asserting that adding such a provision to the network contracts would require the networks to amend their affiliation agreements with each of their nearly 200 local network affiliates to prohibit the affiliates from allowing their signals to be so imported); see also NFL Reply Comments at 8-9.

<sup>165</sup> Commission staff reviewed 48 network affiliation agreements (covering 54 broadcast stations) with CBS, Fox, and NBC – the three broadcast television networks that currently hold rights to distribute NFL games – on file at the Commission. See Appendix A for a list of the stations whose network affiliation agreements were reviewed by the Commission. Each of the 48 network affiliation agreements reviewed by Commission staff includes language prohibiting the affiliate from granting retransmission consent for network programming to any MVPD located outside of the affiliate station's DMA. See *id.* In addition, each of the Fox network affiliation agreements reviewed by the Commission also includes a separate provision addressing Fox's NFL Sports Package, which provides that the "Station's rights to the NFL Sports Package are subject to and must be exercised consistent with the rights conveyed to Fox by the NFL, as those rights may be conditioned, limited or restricted from time to time by the NFL in its discretion." See, e.g., Station Affiliation Agreement between Fox Broadcasting Company and Meredith Corporation, Licensee of Station KPTV-TV, Portland Oregon, July 1, 2012, ¶ 1(c), available at [https://stations.fcc.gov/station-profile/kptv/ownership-reports/documents/browse-%3Econtracts\\_and\\_agreements](https://stations.fcc.gov/station-profile/kptv/ownership-reports/documents/browse-%3Econtracts_and_agreements). This provision appears to give the NFL broad discretion to limit or restrict the covered Fox affiliates from allowing their signals to be imported into a market where an NFL game has been blacked out.

<sup>166</sup> We note that Section 76.65(b)(1)(vi) of the Commission's rules provides that it is a *per se* violation of the good faith negotiation provision for a television broadcast station to execute "an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcasting station or multichannel video programming distributor...." See 47 C.F.R. § 76.65(b)(1)(vi). The Commission has concluded that provisions in network affiliation agreements that restrict a broadcaster's ability to grant retransmission consent outside of a specified geographic area, such as outside of the broadcaster's DMA, are not *per se* violations of Section 76.65(b)(1)(vi). See *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339, 10355, ¶ 34 (2005) ("*Reciprocal Bargaining Order*"). With respect to the broadcaster's reciprocal bargaining obligation, the Commission stated that

it is incumbent on broadcasters subject to such contractual limitations that have been engaged by an out-of-market MVPD to negotiate retransmission consent of its signal to at least inquire with its network whether the network would waive the limitation with regard to the MVPD in question. We believe that in many situations retransmission of the broadcaster's signal by a distant MVPD would be deemed advantageous to the network as well as the broadcaster and MVPD. In such situations, we believe that a network that has otherwise restricted a broadcaster's redistribution rights might be amenable to a limited waiver of the restriction.

See *Reciprocal Bargaining Order*, 20 FCC Rcd at 10355, ¶ 35. See also *ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 1645, 1650, ¶ 12 (MB, Policy Div. 2009) (finding that a broadcast television station that sought a waiver from its affiliated network of the prohibition on out-of-market carriage of its signal contained in its affiliation agreement did not violate its obligation to negotiate for retransmission consent in good faith). The fact that all of the affiliation agreements reviewed by Commission staff include provisions prohibiting the affiliate from granting retransmission consent for network programming to any MVPD located outside of the affiliate station's DMA suggests that networks favor such provisions and are unlikely to grant waivers of such provisions.

nearly 200 local network affiliates to adequately protect its distribution rights (e.g., include blackout protection) is at least greatly overstated.<sup>167</sup>

34. To the extent that any existing network affiliation agreements do not already include such provisions, the record suggests that the NFL has the ability to adequately protect its rights (e.g., obtain blackout protection) through negotiations with broadcast networks in the private marketplace. Contrary to the NFL's assertion, the record shows that the networks would have a very strong incentive to reopen their contracts with the NFL and affiliates to include blackout protection for the NFL – namely, to increase the chances that each network will be able to continue airing NFL games after 2022, when their existing contracts with the NFL expire. For example, were CBS to reopen its contracts but NBC failed to take this step, presumably CBS would enjoy an advantage over NBC in the next competition for NFL television rights. As discussed above, NFL games are consistently the most highly-rated programs on broadcast television, which translates into the highest possible advertising revenues for the networks.<sup>168</sup> The popularity of the NFL games and the steep ad rates that these games command appear to provide the networks ample motivation to reopen their contracts with the NFL to include blackout protection, where such protection is needed. In addition, NFL programming is highly valuable to the broadcast networks because it provides them a platform to promote their prime-time lineups and boosts their ratings for prime-time and other network programming.<sup>169</sup> Further, while the NFL contends that an affiliate would have no incentive to open its existing affiliation agreement for early renegotiation to accept such a provision,<sup>170</sup> the record shows that the affiliates will likewise be highly motivated to keep the NFL games on their network.<sup>171</sup> In any event, regardless of the NFL's ability to obtain blackout protection without the rules, we conclude that there is no public interest justification for retaining the rules because we find that there is little risk that sports telecasts on broadcast television will be significantly curtailed without them.

#### 4. Contractual Arrangements with MVPDs

35. The NFL similarly asserts that it cannot adequately protect its program distribution rights through its private contractual agreements with MVPDs and, therefore, repeal of the sports blackout rules may force it to move its games from broadcast television to pay TV, resulting in reduced public access to NFL games.<sup>172</sup> But so long as the NFL is able to protect its program distribution rights through agreements with broadcasters, it need not do so through agreements with MVPDs. In any event, contrary to the NFL's arguments, we observe that the NFL also has the ability to obtain blackout protection through private contractual arrangements with MVPDs. The NFL indicates that it has contracts with nine major operators of cable, satellite, and telecommunications services and a national cooperative that

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<sup>167</sup> See NFL Comments at 17 & Rolapp Declaration at ¶ 5; see also NFL Comments, Singer Declaration at ¶ 18 (asserting that the sports blackout rules obviate the need for the NFL to engage in myriad, time-consuming individual contract negotiations to establish new agreements between (1) itself and television networks; (2) television networks and their affiliates; and (3) network affiliates and MVPDs).

<sup>168</sup> See *supra* ¶ 25.

<sup>169</sup> See *id.*

<sup>170</sup> See NFL Comments at 17 & Rolapp Declaration at ¶ 5.

<sup>171</sup> The NFL also argues that the networks would be unwilling to reopen their contracts with the NFL to accept a blackout provision because some affiliates may have already consented in retransmission consent agreements with MVPDs to allow carriage of their signals in areas where a game may be blacked out and therefore may be contractually unable to secure an MVPD's assurance that it will honor a blackout. See NFL Comments at 17-18. To the extent that such agreements exist, however, based on the record, we expect that they are relatively rare. See *supra* n.166. Additionally, a network could reopen its contract with the NFL to accept a blackout provision, excepting from such provision any previously-executed retransmission consent agreements authorizing carriage of an affiliate station's signal outside of its local market.

<sup>172</sup> See NFL Comments at 15-18.

represents many smaller MVPDs that distribute the NFL Network and NFL RedZone,<sup>173</sup> but asserts that these contracts contain no provisions that prohibit the MVPDs from importing a distant signal of a non-NFL Network game into a market where that game has been blacked out on the local broadcast station.<sup>174</sup> The NFL claims that without such protection, it cannot accomplish the goals of the sports blackout rules through these contracts.<sup>175</sup> The NFL argues that it took many years of difficult negotiations with the MVPDs to achieve widespread carriage of the NFL Network and NFL RedZone and that it sees no incentives for the MVPDs to reopen these contracts – which typically run for seven to nine years – and accept an unrelated, collateral provision that limits their ability to import a distant signal of a local non-NFL Network game that has been blacked out.<sup>176</sup> Based on the record gathered in this proceeding, we believe the NFL’s claimed difficulty is overstated. We recognize that contract negotiations can be difficult. Nevertheless, the record shows that the NFL is sufficiently positioned to incentivize the MVPDs to reopen their contracts and include blackout provisions to protect the NFL’s distribution rights of its games shown on broadcast television if necessary.<sup>177</sup> The NFL Network is one of the fastest growing cable networks,<sup>178</sup> and is highly valued by MVPDs.<sup>179</sup> Accordingly, we expect that MVPDs will

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<sup>173</sup> See NFL Comments, Rolapp Declaration at 2; see also <http://nflonline.nfl.com/> (listing MVPDs that offer the NFL Network) (last viewed July 16, 2014). The NFL does not specifically identify the MVPDs with which it has contracts for the NFL Network and NFL RedZone. However, online research indicates that the NFL has contracts with Comcast, Time Warner Cable, Cox, Charter, Cablevision, DIRECTV, DISH, Verizon, and AT&T, plus over 200 smaller MVPDs. Thus, we estimate that the NFL has contracts with MVPDs representing at least 93 percent of the MVPD market.

<sup>174</sup> See NFL Comments, Rolapp Declaration at 3; see also NFL Reply Comments at 8. We note that the NFL also has a four-year agreement with DIRECTV for NFL Sunday Ticket, which expires at the end of 2014. See *supra* ¶ 14. While the NFL does not address in its comments what, if any, blackout provisions are included in this agreement, we suspect that this agreement does include blackout protection for the NFL. In any event, DIRECTV has a pending merger deal with AT&T which is contingent on the renewal of DIRECTV’s agreement with the NFL for NFL Sunday Ticket. See *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90 (filed June 11, 2014); see also Sarah Berry James, *DIRECTV’s Golden Sunday Ticket*, SNL KAGAN, June 11, 2014 (“[I]n announcing its planned \$48.5 billion purchase of DIRECTV, AT&T stated in a Form 8-K that unless DIRECTV’s agreement for the NFL Sunday Ticket service is renewed ‘substantially on the terms discussed between the parties,’ AT&T may elect not to consummate the merger.”) (“James, *DIRECTV’s Golden Sunday Ticket*”), available at <http://www.snk.com/InteractiveX/article.aspx?Id=28335046&KPLT=2>. Thus, we expect that the NFL will have substantial leverage to include a blackout provision in any agreement with DIRECTV to renew NFL Sunday Ticket. See James, *DIRECTV’s Golden Sunday Ticket* (“[LHB Sports Entertainment & Media Inc. CEO Lee] Berke noted that given the pending AT&T/DIRECTV deal, the NFL will have a great deal of leverage in negotiating favorable terms. ‘The pressure is on to get this deal done. And the pressure is on DIRECTV in particular,’ he said, noting that the NFL could use its leverage to negotiate additional revenues or a shorter-term deal, which would free the league up in the future to pursue nonexclusive options.”).

<sup>175</sup> See NFL Comments at 18.

<sup>176</sup> See *id.* at 2-3; Letter from Gerard J. Waldron, Counsel for NFL, to Marlene H. Dortch, Secretary, FCC (June 5, 2014), at 2 (asserting that the NFL has “hardly any leverage” with respect to its agreements with MVPDs for the NFL Network); NFL Reply Comments at 8-9; see also NAB Comments at 8 (stating that there is no evidence in the record to suggest that MVPDs would be motivated to renegotiate existing contracts to limit their ability to import certain signals).

<sup>177</sup> See SFC Reply Comments at 20 (“It is not the Commission’s responsibility to help [the NFL] reduce contracting costs and avoid difficult negotiations with its media partners. The NFL must offer an economic benefit to incentivize its distribution partners to reopen contract negotiations and include a provision regarding a local blackout policy.”).

<sup>178</sup> See Derek Baine, *FXX Continues Gains; Hispanic Channels Driving Some Growth in Carriage*, SNL KAGAN, March 26, 2014 (stating that the NFL Network was the third fastest growing cable network over the past five years, growing from 55.6 million subscribers to 72.3 million subscribers between February 2010 and February 2014), available at <http://www.snk.com/InteractiveX/article.aspx?ID=27543496&KPLT=2>; see also Economics of Basic Cable Networks, SNL KAGAN (2013 ED.), at 19, 501 (indicating that subscribership to the NFL Network has risen

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be motivated to reopen their contracts and discuss inclusion of a blackout provision, if the NFL offers adequate incentives.<sup>180</sup> Even if the MVPDs are unwilling to do so, however, as discussed above, we find that there is little risk that the NFL will move its games from broadcast television to pay TV.<sup>181</sup>

36. We note, moreover, that the NFL offers no explanation as to why MVPDs currently comply with the NFL's policy of blacking out games that are not sold out throughout the NFL clubs' home territories, which generally extend well beyond the 35-mile zone of protection afforded by the Commission's sports blackout rules.<sup>182</sup> The NFL has more broadly defined a club's "home territory" to include the surrounding territory 75 miles in every direction from the exterior corporate limits of the city in which the club is located.<sup>183</sup> In addition, the NFL has defined one or more "secondary markets" for most teams, which include any network affiliate station(s) whose signal can be seen within 75 miles of the game site.<sup>184</sup> Under the NFL's blackout policy, if a game is not sold out within 72 hours prior to kickoff, the game is blacked out on network affiliates in both the team's home market and any secondary markets.<sup>185</sup> And notwithstanding the fact that the Commission's sports blackout rules only provide a 35-mile zone of protection, MVPDs apparently comply with the NFL's policy of blacking out games in both the home and secondary markets.<sup>186</sup> Such blackouts clearly go well beyond the scope of what is required

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from 11 million in 2003, when it first launched, to an estimated 75.4 million by the end of 2014), available at <http://www.sn1.com/interactivex/article.aspx?id=26995872&KPLT=6>.

<sup>179</sup> A recent survey of 88 cable operators by Beta Research in which the operators estimated a perceived value of cable networks to their systems placed the NFL Network as the third most valuable cable network. See Wayne Friedman, *Cable Providers Tout High Value of Sports Networks*, MEDIADAILYNEWS, Feb. 25, 2014 (noting that ESPN's value was estimated at 77 cents per subscriber per month; ESPN2 at 44 cents; and NFL Network at 40 cents), available at <http://www.mediapost.com/publications/article/220289/cable-providers-tout-high-value-of-sports-networks.html>. According to the survey, the NFL Network is also one of the top ten cable networks in terms of subscriber retention and acquisition. See *id.*

<sup>180</sup> For example, the NFL could induce the MVPDs to reopen their existing agreements by offering the MVPDs a short-term extension of their contracts at the current or a favorable rate. See *supra* n.177.

<sup>181</sup> See *supra* ¶¶ 22-25.

<sup>182</sup> See *NPRM*, 28 FCC Rcd at 17232-33, ¶ 32 (seeking comment on why sports leagues need the sports blackout rules to avoid the impact of the compulsory licenses if they are able to obtain greater protection than that afforded under the sports blackout rules in arm's length marketplace negotiations); see also *SHVERA Section 208 Report to Congress* at \*17, ¶ 56 (noting that "the protection afforded by the sports blackout rule is more limited than the protection the Professional Sports Leagues [joint commenters in that proceeding which included the NFL] routinely negotiate regarding games not covered by the sports blackout rule.").

<sup>183</sup> See Constitution and Bylaws of the National Football League (Eff. Feb. 1, 1970, 2006 Rev.), at 12, available at [http://static.nfl.com/static/content/public/static/html/careers/pdf/co\\_.pdf](http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf); see also <http://www.verizon.com/support/residential/tv/flostv/guide/tv+programming/questionone/128322.htm> ("Blackout Radius for Regional Games: The NFL considers the home market for an NFL team to be within a 75 mile radius of the home team's city.").

<sup>184</sup> See *NFL on CBS Press Information Guide 2012* at 128 (defining "secondary blackout market" as a "television market in the home territory (with station(s) having signal penetration to within 75 miles of the game site) of an NFL franchise that is subject to blackout restrictions."), available at <https://www.cbspressexpress.com/cbs-sports/media-guides/the-nfl-on-cbs-2012/download-mediaguide>.

<sup>185</sup> See *id.* ("For a home game to be aired locally in the franchised market and in any secondary blackout market(s), the game must be sold out 72 hours in advance of kickoff. If the game is not a sellout by the 72 hour cutoff, both the home franchised market and the secondary markets of the carrying network will air an alternate game.").

<sup>186</sup> For example, when a San Diego Chargers home game is blacked out on the local network affiliate due to failure to sell out, the game is blacked out not only by MVPDs in San Diego, but also by MVPDs in Los Angeles, one of the Chargers' secondary markets which is over 100 miles away. See [http://support.directv.com/app/answers/detail/a\\_id/484/kw/nfl%20sunday%20ticket%20blackouts/related/1](http://support.directv.com/app/answers/detail/a_id/484/kw/nfl%20sunday%20ticket%20blackouts/related/1) ("The

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under the Commission's sports blackout rules and indicate that the NFL has the ability to obtain even greater blackout protection from MVPDs in the private marketplace than that afforded under the Commission's sports blackout rules.<sup>187</sup> In any event, regardless of the NFL's ability to obtain blackout protection without the rules, we conclude that there is no public interest justification for retaining the rules because we find that there is little risk that sports telecasts will not be widely available on television without them.

## 5. Compulsory License and Retransmission Consent Fees

37. The NFL and NAB argue that the current copyright royalty system would not discourage all cable systems from retransmitting distant signals of locally blacked out games.<sup>188</sup> We expect, however, that even if cable operators are able to obtain consent to retransmit a distant signal of a locally blacked out game, compulsory license fees, along with retransmission consent fees, may make it unprofitable for them to do so in many cases. The copyright royalty system is highly complex and the cost of importing distant signals varies widely by cable system, depending on the size of the cable system and the number of distant signals carried.<sup>189</sup> As NCTA and SFC point out, cable systems that retransmit a distant signal for a single day, or even a single sports event, must pay royalties for the signal as if it had been carried for the entire six-month compulsory license accounting period.<sup>190</sup> Thus, in some cases, compulsory license fees alone may make it prohibitively expensive for cable systems to retransmit a distant signal carrying a locally blacked out sports event.<sup>191</sup>

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*NFL* has extended certain team's home territory to cover all markets based on the nearest *NFL* franchise. For example, the San Diego Chargers home team territory has been extended to cover the Los Angeles area. This means that any home Chargers game will be blacked out in the entire Chargers home territory on both *NFL SUNDAY TICKET* and local CBS or FOX affiliates if it does not sell out at least 72 hours prior to kickoff." (last viewed July 19, 2014); Arash Markazi, *NFL Looks at Los Angeles' TV Schedule*, espn.go.com, Sept. 22, 2011 (noting that Los Angeles is a "secondary market" for the San Diego Chargers because "its affiliates' TV signals reach within 75 miles of the Chargers stadium"), available at [http://espn.go.com/los-angeles/nfl/story/\\_/id/7005271/nfl-air-full-game-la-cutting-away](http://espn.go.com/los-angeles/nfl/story/_/id/7005271/nfl-air-full-game-la-cutting-away); see also *Chargers-Bengals Game Blacked Out in Southern California*, Chargers.com, Nov. 28, 2013 ("Per the National Football League's long-standing policy that requires all games not sold out 72 hours prior to kickoff to be blacked out in the local market, the game between the San Diego Chargers and the Cincinnati Bengals on Sunday, Dec. 1 at 1:25 pm PT at Qualcomm Stadium will not be televised live in Southern California [including Los Angeles]. The NFL's policy affects all telecasts, including cable and satellite."), available at <http://www.chargers.com/news/article-1/Chargers---Bengals-Game-Blacked-Out-in-Southern-California/cd743726-748b-4ad9-9482-90395c653cc1>. Similarly, when a non-sold-out Buffalo Bills home game is blacked out on the local network affiliate, the game is blacked out both by MVPDs in Buffalo and by MVPDs in Syracuse, one of the Bills' secondary markets located more than 150 miles away. See *No NFL Blackout Rule Changes for CNY*, CNYRadio.com, July 13, 2012 (explaining that the cause for blackouts of Buffalo Bills' games in Syracuse, which is more than 150 miles from Buffalo, is that television signals from the Syracuse market reach Ontario and Yates Counties, which are within the 75-mile blackout radius of the Buffalo Bills).

<sup>187</sup> It is not clear from the record why MVPDs comply with the NFL's 75-mile blackout radius. We note that it is possible that MVPDs are simply unable to obtain retransmission consent for out-of-market carriage from any distant station.

<sup>188</sup> See NFL Reply Comments at 10-11; NAB Reply Comments at 5.

<sup>189</sup> See NAB Reply Comments at 5; NFL Reply Comments at 10-11; see also 17 U.S.C. § 111(d). In general, the greater the number of distant signals a system carries, the greater the percentage the system must apply against its gross receipts and the greater the royalty it will pay under the cable compulsory license. See *Copyright Report*, Executive Summary at iii.

<sup>190</sup> See NCTA Comments at 4; SFC Comments at 9; see also 17 U.S.C. § 111(d); *Copyright Report* at 8.

<sup>191</sup> See NCTA Comments at 4; SFC Comments at 9; see also NAB Reply Comments at 5 (conceding that NCTA's argument that cable systems are unlikely to import distant signals for just a few games because they would be required to pay for a full six-month compulsory license "may be accurate in some cases"); but see NFL Reply

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38. Additionally, we note that retransmission consent fees have risen sharply in recent years, and the trend is expected to continue.<sup>192</sup> The rising costs for sports rights have been a significant factor in broadcasters' demands for larger retransmission consent fees.<sup>193</sup> NFL games are among the most popular and costly programming on television.<sup>194</sup> Moreover, unlike a situation where a station cannot reach an agreement on retransmission consent with a cable system for in-market carriage – resulting in a loss of the station's local audience and a corresponding loss in local advertising revenues – a distant station does not risk losing any local advertising revenues if it cannot reach an agreement with a cable system for out-of-market carriage; thus, a distant station would be in a very good bargaining position vis-à-vis the cable system to demand high retransmission consent fees. Accordingly, we expect that retransmission consent fees charged by distant stations for retransmission of locally blacked out NFL games would be substantial and, along with the compulsory license fees, may make it cost prohibitive for cable systems to carry such distant stations in at least many situations.<sup>195</sup> In any event, regardless of the NFL's ability to obtain blackout protection without the rules, we conclude that there is no public interest justification for retaining the rules because we find that there is little risk that sports telecasts will not be widely available on television without them.

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Comments at 10 (“The copyright royalty system would not discourage all cable systems from transmitting distant signals of blacked out local games.”). We acknowledge that the compulsory license fees certain cable systems must pay to import an additional distant signal carrying a locally blacked out sports event may be minimal or nothing and are unlikely, on their own, to deter the system from carrying the locally blacked out game. *See* NAB Reply Comments at 5; NFL Reply Comments at 10-11. For example, cable systems with gross receipts not exceeding a specified amount may carry an unlimited number of distant signals without incurring any additional fees. *See* 17 U.S.C. §111(d)(1)(E)-(F). In addition, for each six-month accounting period, larger cable systems pay a minimum royalty that covers up to one distant signal equivalent (“DSE”) and then the royalty increases gradually based on the number of additional DSE carried in the accounting period. Each primary or multicast stream of a distant independent station equals one DSE, and each primary or multicast stream of a distant network or NCE station equals ¼ of a DSE. Thus, a cable system could transmit up to four distant network stations (each of which counts as ¼ of a DSE) and still only pay the minimum royalty. *See id.* at §§ 111(d)(1)(B), (f)(5); *see also* Letter from Gerard J. Waldron, Counsel for the NFL, to Marlene H. Dortch, Secretary, FCC (filed Nov. 20, 2013).

<sup>192</sup> *See 2013 Competition Report*, 28 FCC Rcd at 10599-60, ¶ 209 (noting that broadcast stations are demanding larger retransmission consent fees from MVPDs and that SNL Kagan data show that retransmission consent fees represented about 8.1 percent, or \$1.76 billion in broadcast television station industry revenues in 2011, and about 9.4 percent, or \$ 2.36 billion in 2012); *see also Economics of Broadcast TV Retransmission Revenue*, SNL KAGAN INDUSTRY REPORT (2014 Ed.), at 3 (projecting retransmission consent fees to reach \$7.64 billion by 2019, up from \$3.31 billion in 2013), *available at* <http://www.snk.com/interactivex/NewslettersDetails.aspx?ID=28119001&FID=23641039&RID=80522&PRName=05/14/2014&KeyDocID=1>.

<sup>193</sup> *See* Robin Flynn, *Putting Retrans Fees in Perspective Following FCC's Recent Retrans Ruling*, SNL KAGAN, Apr. 14, 2014 (“Broadcast networks invest significant capital in sports rights and programming, which TV network affiliates help pay for, and retrans fees have become an important part of that economic picture.”), *available at* <http://www.snk.com/interactivex/article.aspx?id=27746128&KPLT=6>.

<sup>194</sup> *See supra* ¶ 25; *see also 2013 Competition Report*, 28 FCC Rcd at 10657, ¶ 331 (noting that premium sports programming is the most expensive type of programming on broadcast television). We note that MVPDs could not offset a portion of these retransmission consent fees by selling local advertising spots in the sports programming. In this regard, advertising time is generally split between the television networks and their local affiliates through their affiliation agreements. *See 2013 Competition Report*, 28 FCC Rcd at 10583, ¶ 178 (noting that within television network programming, local stations are generally permitted to sell a fixed amount of advertising time, about 2.5 to three minutes per hour, while the network sells any remaining advertising). Moreover, the compulsory copyright licenses prohibit MVPDs from inserting their own ads into broadcast programming streams. *See* 17 U.S.C. §§ 111(c)(3), 119(a)(6).

## D. Local Impact of Eliminating Sports Blackout Rules

39. We now examine the impact of eliminating the sports blackout rules on other interested parties. We conclude that eliminating the sports blackout rules will not adversely impact broadcasters, consumers, or local businesses.

### 1. Impact on Localism

40. We conclude that the elimination of the sports blackout rules is unlikely to adversely impact localism in broadcasting. NAB asserts that elimination of the sports blackout rules will result in decreased advertising revenues for local stations in markets prone to NFL blackouts, such as San Diego, Jacksonville, Buffalo, and Cincinnati, which in turn will diminish those stations' ability to provide quality programming, including sports programming.<sup>196</sup> As explained in detail above, however, the record demonstrates that the sports blackout rules are no longer needed to ensure that sports programming is widely available to the viewing public.<sup>197</sup> In addition, elimination of the sports blackout rules is unlikely to accelerate the migration of NFL games from over-the-air to pay TV in the near future or in the longer term.<sup>198</sup> We also note that the record demonstrates that the NFL will be able to achieve exclusivity following the repeal of the sports blackout rules, if it chooses to do so, thus maintaining the attractiveness of NFL games to advertisers.<sup>199</sup> Further, we note that it may benefit localism if the NFL ended its blackout policy because local stations in markets prone to blackouts may carry more games and earn more advertising revenues. Therefore, we conclude that retention of the sports blackout rules is not necessary to preserve or promote localism.

### 2. Impact on Consumers

41. We acknowledge that repeal of the sports blackout rules may not provide consumers relief from local blackouts of NFL games because the NFL may choose to continue its private blackout policy. The NFL has indicated that it will likely still require non-sold-out games to be blacked out locally, and consumers will be unable to watch those games on either broadcast television or pay TV. We also conclude, however, that elimination of the sports blackout rules is unlikely to harm consumers. As we discuss at length above, the record indicates that elimination of the sports blackout rules is unlikely to accelerate the migration of NFL games from free, over-the-air television to pay TV.<sup>200</sup> Moreover, since the NFL is in the first year of nine-year contracts with the CBS, Fox, and NBC television networks to air NFL games on broadcast television, there will be no additional migration of NFL games to pay TV through at least 2022.<sup>201</sup>

42. Additionally, we find unconvincing the arguments that elimination of the sports blackout rules will harm consumers by causing NFL teams to raise ticket prices. The NFL's economist expert, Dr.

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<sup>196</sup> See NAB Comments at 6; see also NAB Reply Comments at 3 (asserting that the increased availability and subscribership to pay TV since 1975 demonstrates that importing a distant signal into a local market today would have a much larger impact on local television stations, particularly their ability to sell advertising, than when the sports blackout rules were first adopted); 8 (asserting that eliminating the sports blackout rules will "diminish what should be one of the Commission's core goals – preserving localism"); NABOB Sept. 9, 2014 *Ex Parte* Letter at 2 (asserting that elimination of the sports blackout rules would "fracture a television station's bargained-for exclusive rights to carry NFL programming in a local market and ultimately result in decreased advertising revenue for local stations, diminishing their ability to provide quality programming").

<sup>197</sup> See *supra* ¶¶ 13-26.

<sup>198</sup> See *supra* ¶¶ 22-25.

<sup>199</sup> See *supra* ¶¶ 32-36.

<sup>200</sup> See *supra* ¶¶ 22-25.

<sup>201</sup> See *supra* ¶ 14.

Singer, asserts that the sports blackout rules provide its teams with an economic incentive to price tickets below the levels that would exist if teams were maximizing gate receipts only.<sup>202</sup> Dr. Singer states that even if a team could increase its total gate receipts by raising ticket prices, the team likely would keep prices low in an effort to fill seats and avoid a blackout because blackouts result in loss of advertising revenues.<sup>203</sup> Thus, he avers that elimination of the sports blackout rules likely would lead to higher ticket prices because sports teams would no longer have an incentive to keep attendance above a certain level; instead, their ticket pricing strategy would focus on maximizing gate receipt revenue.<sup>204</sup> As the Sports Economists observe, however, there is no empirical support for this argument and “there is no logical connection between the [NFL’s blackout] policy and pricing.”<sup>205</sup> In addition, Dr. Singer concedes that “[e]conomists have offered additional hypotheses to explain why NFL teams refrain from raising ticket prices, including public pressure, the need to establish long-term relationships with fans, and the desire to maximize in-stadium revenues, such as concessions and parking.... It is plausible that some or all of these considerations also play a role in tempering ticket prices....”<sup>206</sup> Dr. Singer makes no attempt to quantify the marginal impact of the sports blackout rules on ticket prices given these other factors. Moreover, as the Sports Economists point out, an NFL team can take other measures to avoid blackouts, such as reducing the prices of unsold seats and removing seats or covering them with tarps to reduce a stadium’s seating capacity.<sup>207</sup> Furthermore, to the extent the NFL chooses to continue its blackout policy through other existing regulations and through private contractual agreements, teams will retain their incentive to limit increases in ticket prices.<sup>208</sup>

43. Dr. Singer also asserts that the sports blackout rules benefit national television viewers because “[s]old-out stadiums populated by boisterous, visible fans make telecasts of NFL games more appealing to the marginal, national fan, thereby improving fans’ viewing experiences, and increasing the value of NFL programming” to national audiences and therefore to advertisers.<sup>209</sup> As the Sports

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<sup>202</sup> See NFL Comments at 12 & Singer Declaration at ¶¶ 32-33, 43; see also Sports Economists Petition for Rulemaking Comments at 14 (noting that “[m]ost teams set prices so that ticket demand equals or even exceeds seating capacity”).

<sup>203</sup> See NFL Comments at 12 & Singer Declaration at ¶¶ 33, 43. Dr. Singer explains that when a game is blacked out on a local television station, the value of the station’s broadcast to advertisers decreases. Since the network counts on the local station’s advertising availabilities (“ad avails”) – advertising spots in the network programming available to the local station to insert advertising – to justify (in part) its payments to the NFL at the start of the season, multiple blackouts in the same market likely will cause the network to decrease its payments to the NFL, which in turn would place pressure on the underperforming team. Therefore, by putting local ad avails at risk, the threat of a blackout tempers an individual team’s incentive to raise ticket prices at the margin. See *id.*, Singer Declaration at ¶ 33.

<sup>204</sup> See *id.*, Singer Declaration at ¶ 43; see also NFL Reply Comments at 7. Dr. Singer also asserts that “[a] similar phenomenon occurs for in-stadium advertising revenues, which are positively related to attendance.” See NFL Comments, Singer Declaration at ¶ 43.

<sup>205</sup> SFC Reply Comments, Sports Economists Response at 9-10.

<sup>206</sup> See NFL Comments, Singer Declaration at n.42.

<sup>207</sup> See SFC Reply Comments at 19 & Sports Economists Response at 9-10; see also *supra* ¶ 18.

<sup>208</sup> See *supra* ¶¶ 32-36.

<sup>209</sup> See NFL Comments, Singer Declaration at ¶¶ 27, 34; see also NFL July 17, 2014 *Ex Parte* Letter, Attachment at 7. In support of this assertion, Dr. Singer cites an academic paper which found that “the behavior of others during the event is part of the consumption experience.” See NFL Comments, Singer Declaration at n.43 (citing Allan C. DeSerpa & Roger L. Faith, *Bru-uu-uce: the Simple Economics of Mob Goods*, 89 PUBLIC CHOICE 77, 78 (1996) (“DeSerpa & Faith”). While this may be true, we note that this paper also indicates that “an event is consumed jointly and in public in the same place at the same time.” See DeSerpa & Faith at 77. Thus, it appears that the phenomenon discussed in the paper concerns the impact on an attendee’s experience of the presence and behavior of other attendees, not the impact of a full stadium on fans watching the game at home on television.

Economists observe, however, the difference between a fully sold-out stadium and a nearly full stadium subject to a local blackout due to failure to sell out is likely not very significant in terms of appeal to national audiences and advertisers, and it is not technologically difficult for broadcasters to avoid showing empty portions of non-sold-out stadiums.<sup>210</sup> Further, we note that the NFL's blackout policy allows teams to cover seats with tarps in order to reduce stadium capacity and thereby avoid blackouts,<sup>211</sup> and to reduce the percentage of tickets that must be sold in order to avoid a blackout to as low as 85 percent (thereby leaving up to 15 percent of non-premium seats empty).<sup>212</sup> In addition, the NFL does not count non-sold-out premium seats for purposes of its blackout policy.<sup>213</sup> We find it difficult to reconcile these features of the NFL's blackout policy – which allow teams to leave significant numbers of seats empty without facing a blackout – with its argument that the sports blackout rules are needed to make telecasts of NFL games more appealing to audiences and advertisers.

### 3. Impact on Local Businesses and Economies

44. Several commenters express concern that elimination of the sports blackout rules will adversely impact local businesses and economic activity in and surrounding NFL stadiums by removing incentives to fill the stadiums.<sup>214</sup> These commenters assert that NFL stadiums and related infrastructure investment have helped to create jobs, support businesses, and generate tax revenue and are important

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<sup>210</sup> See SFC Reply Comments, Sports Economists' Response at 5.

<sup>211</sup> See *supra* n.85.

<sup>212</sup> See *supra* ¶ 14.

<sup>213</sup> See *supra* n.50.

<sup>214</sup> See, e.g., National Urban League Sept. 5, 2014 *Ex Parte* Letter at 1 (asserting that the sports blackout rules “promote robust game attendance that provides economic benefits for the surrounding community” by “generat[ing] jobs, investment and economic activity in our local communities and urban areas”); Letter from Richard L. Trumpka, President, AFL-CIO, to Thomas Wheeler, Chairman, FCC (Aug. 26, 2014), at 1 (“AFL-CIO Aug. 26, 2014 *Ex Parte* Letter”); Letter from Rev. Jesse L. Jackson, Sr., Founder and President, Rainbow PUSH Coalition, to Chairman Tom Wheeler, Chairman, FCC (Aug. 13, 2014), at 1 (“Rainbow PUSH Aug. 13, 2014 *Ex Parte* Letter”) (asserting that the sports blackout rules have “contributed to fully leased stadiums that, in turn, boost local jobs and revenues for those living and selling within the surrounding communities”); CBC July 31, 2014 *Ex Parte* Letter at 1 (asserting that the sports blackout rules support jobs, businesses and taxes for local communities); Letter from D.R. Taylor, President, UNITE HERE, to Thomas Wheeler, Chairman, FCC (July 22, 2014) (“UNITE HERE July 22, 2014 *Ex Parte* Letter”) at 1 (asserting that the sports blackout rules “generate economic activity, helping to support thousands of jobs and businesses in communities throughout the country”); NCSL June 10, 2014 *Ex Parte* Letter at 1 (asserting that “third-party studies typically estimate that the annual economic impact of an NFL team [on a local community], including its home stadium, exceeds \$100 million”); Letter from Gregory A. Ballard, Mayor, City of Indianapolis, and Chair, Mayors' Professional Sports Alliance, to Marlene H. Dortch, Secretary, FCC (July 11, 2014) (“Ballard July 11, 2014 *Ex Parte* Letter”) at 1 (same); see also Letter from Councilman Jeffrey Johnson, City of Cleveland Ward 10, to Marlene H. Dortch, Secretary, FCC (July 15, 2014) (“Johnson July 15, 2014 *Ex Parte* Letter”), at 1 (asserting that “[o]n average, a home Browns game brings almost \$8 million in economic benefits to the City of Cleveland”); Davis July 15, 2014 *Ex Parte* Letter at 1 (asserting that “a full stadium [has] an estimated annual impact of \$250 million to the City of Houston”); Letter from Jon McCormack, President, Retail Grocers Association of Greater Kansas City, to Marlene H. Dortch, Secretary, FCC (July 15, 2014) (“RGA July 15, 2014 *Ex Parte* Letter”), at 1 (asserting that elimination of the sports blackout rules may result in fewer tailgates and lower returns for grocers); Letter from David Ball, Balls Food Stores, to Marlene H. Dortch, Secretary, FCC (July 15, 2014) (“Ball July 15, 2014 *Ex Parte* Letter”), at 1 (asserting that “hundreds of stores and restaurants in the communities around Arrowhead [Stadium in Kansas City] rely on a packed stadium week after week for their businesses”); Letter from Missouri State Senator Paul LeVota to Marlene H. Dortch, Secretary, FCC (July 15, 2014) (“LeVota July 15, 2014 *Ex Parte* Letter”), at 1 (asserting that elimination of the sports blackout rules “would threaten the game-day economy”); Letter from Missouri State Representative Brandon Ellington to Marlene H. Dortch, Secretary, FCC (July 15, 2014) (“Ellington July 15, 2014 *Ex Parte* Letter”), at 1 (asserting that “[m]any business live or die based upon their relationship to the Chiefs and the economic opportunities the team provides.”).

sources of employment, growth, and development for local communities.<sup>215</sup> We disagree that eliminating the sports blackout rules will remove incentives for NFL clubs to sell out stadiums. In-stadium revenues (e.g., concessions, parking) are a significant source of revenue for NFL clubs and will provide them an economic incentive to fill their stadiums.<sup>216</sup> Additionally, if the NFL chooses to continue its blackout policy, it will be able to control the distribution of its games through other existing regulations or through contractual arrangements in the private marketplace.<sup>217</sup> Accordingly, repeal of the sports blackout rules will not create a disincentive for NFL teams to fill their stadiums or have a negative impact on local economies.

#### E. Other Issues

45. We reject the Baseball Commissioner's assertion that the sports blackout rules remain necessary to protect the ability of MLB clubs to license to RSNs the exclusive right to televise home games.<sup>218</sup> The Baseball Commissioner states that the sports blackout rules prevent MVPDs from exploiting the compulsory copyright license by importing distant broadcasts of games that MLB clubs have licensed to RSNs such as MASN and YES Network to televise on an exclusive basis.<sup>219</sup> According to the Baseball Commissioner, the ability to protect these exclusive rights under the sports blackout rules incentivizes RSNs, as exclusive licensees, to televise the games in their local markets and incentivizes MLB clubs to license the distribution of games on distant broadcast stations (*i.e.*, in the away team's local market), thereby maintaining the overall availability of sports programming to television viewers.<sup>220</sup> We note, however, that the sports blackout rules were not intended to protect the exclusive distribution rights granted by individual sports teams to RSNs, nor were they intended to prevent dual telecasts of the same game in the same local market.<sup>221</sup> Rather, they were intended to promote the wide availability of sports events on television, and the Baseball Commissioner did not submit into the record any economic evidence or analysis that it would be profitable for baseball teams to curtail the availability of games on television if the blackout rules are repealed. Accordingly, we see no need to retain the sports blackout rules to protect RSN exclusivity.<sup>222</sup> Additionally, the Baseball Commissioner's proposal that we "strengthen" the sports blackout rules by prohibiting MVPDs from importing a distant station carrying a

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<sup>215</sup> See National Urban League Sept. 5, 2014 *Ex Parte* Letter at 1; AFL-CIO Aug. 26, 2014 *Ex Parte* Letter at 1; Rainbow PUSH Aug. 13, 2014 *Ex Parte* Letter at 1; CBC July 31, 2014 *Ex Parte* Letter at 1; UNITE HERE July 22, 2014 *Ex Parte* Letter at 1; NCSL June 10, 2014 *Ex Parte* Letter at 1; Ballard July 11, 2014 *Ex Parte* Letter at 1; Johnson July 15, 2014 *Ex Parte* Letter at 1; Davis July 15, 2014 *Ex Parte* Letter at 1; Letter from RGA July 15, 2014 *Ex Parte* Letter at 1; Ball July 15, 2014 *Ex Parte* Letter at 1; LeVota July 15, 2014 *Ex Parte* Letter at 1; Ellington July 15, 2014 *Ex Parte* Letter at 1.

<sup>216</sup> See *supra* n.60.

<sup>217</sup> See *supra* ¶¶ 30-36.

<sup>218</sup> See Baseball Commissioner Comments at 8; Baseball Commissioner Reply Comments at 4.

<sup>219</sup> See Baseball Commissioner Reply Comments at 4.

<sup>220</sup> See *id.*

<sup>221</sup> See *supra* ¶ 3; see also *NPRM*, 28 FCC Rcd at 17218, ¶ 7.

<sup>222</sup> We also note that the vast majority of MLB clubs now license all or most of their games exclusively to RSNs. Moreover, a significant number of MLB clubs, including the Baltimore Orioles, Boston Red Sox, Chicago Cubs, Chicago White Sox, Houston Astros, New York Mets, New York Yankees, San Diego Padres, San Francisco Giants, Seattle Mariners and Washington Nationals, have acquired ownership interests in the RSNs that air their games. By these arrangements, the teams share in the profits of the RSNs commensurate with their ownership stakes. See Wendy Thurm, *Dodgers Could Be Last Team to Strike Gold With Local TV Deal*, FANGRAPHS, Jul. 26, 2013, available at <http://www.fangraphs.com/blogs/dodgers-could-be-last-team-to-strike-gold-with-local-tv-deal/>.

game that is being carried live on a local broadcast station is beyond the scope of this proceeding and we decline to consider it.<sup>223</sup>

#### IV. PROCEDURAL MATTERS

##### A. Regulatory Flexibility Act

46. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),<sup>224</sup> the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to this *Report and Order*. The FRFA is set forth in Appendix C.

##### B. Paperwork Reduction Act

47. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

##### C. Congressional Review Act

48. The Commission will send a copy of this *Report and Order* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

##### D. Additional Information

49. For additional information on this proceeding, contact Kathy Berthot, [Kathy.Berthot@fcc.gov](mailto:Kathy.Berthot@fcc.gov), of the Policy Division, Media Bureau, (202) 418-7454.

#### V. ORDERING CLAUSES

50. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in Sections 1, 4(i), 4(j), 303(r), 339(b), and 653(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 339(b), 573(b), this *Report and Order* **IS ADOPTED**, effective thirty (30) days after the date of publication in the *Federal Register*.

51. **IT IS ORDERED** that, pursuant to the authority found in Sections 1, 4(i), 4(j), 303(r), 339(b), and 653(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 339(b), 573(b), the Commission’s rules **ARE HEREBY AMENDED** as set forth in Appendix B.

52. **IT IS FURTHER ORDERED** that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Report and Order* in MB Docket No. 12-3, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

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<sup>223</sup> *See* Baseball Commissioner Comments at 6, 9; Baseball Commissioner Reply Comments at 4. The Baseball Commissioner states that under the Commission’s current sports blackout rules, if an MLB club authorizes the telecast of a game on a local broadcast station, the rules do not require any MVPD to delete a telecast of the same game on a distant broadcast station. *See* Baseball Commissioner Comments at 8. The Baseball Commissioner asserts that to encourage the continued availability of MLB games on broadcast television, the sports blackout rules should be strengthened to prevent MVPDs from importing distant game telecasts that undermine the exclusive agreements between sports clubs and their broadcast television partners. *See id.* at 9.

<sup>224</sup> *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (“CWAAA”).

53. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this *Report and Order* in MB Docket No. 12-3 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Sample Provisions in Network Affiliation Agreements

**Fox**17. Retransmission Consent:

(a) Fox acknowledges that Licensee may from time to time grant its consent to the transmission or retransmission by MVPDs of Station's signal in its entirety, including Fox Programming. Fox acknowledges that the rights under this Agreement include Licensee's right to retransmission of Fox Programming by MVPDs pursuant to the mandatory carriage provisions or retransmission consent provisions of the Communications Act, as such may be amended from time to time; provided that (i) Licensee grants retransmission consent to such Station's signal in its entirety for simultaneous retransmission on Standard Television without alteration, and (ii) Licensee shall not grant retransmission consent to any MVPD whose subscribers are located outside of the DMA in which Station Community is located. Fox shall have the right to terminate this Agreement immediately upon notice to Licensee upon a breach of the provisions of this Section 17.

Station Affiliation Agreement between Fox Broadcasting Company and Meredith Corporation, Licensee of Station KPTV-TV, Portland, OR, July 1, 2012, ¶ 17(a), available at [https://stations.fcc.gov/station-profile/kptv/ownership-reports/documents/browse-%3Econtracts\\_and\\_agreements](https://stations.fcc.gov/station-profile/kptv/ownership-reports/documents/browse-%3Econtracts_and_agreements).

Similar provisions are included in the network affiliation agreements for the following Fox affiliates, which are available at <https://stations.fcc.gov/>:

1. KABB-TV, San Antonio, TX
2. KARD-TV, West Monroe, LA
3. KBSI-TV, Cape Girardeau, MO
4. KCVU-TV, Paradise, CA
5. KFTA-TV, Fort Smith, AZ
6. KFXF-TV, Fairbanks, AK
7. KSAS-TV, Wichita, KS
8. WBFF-TV, Baltimore, MD
9. WFXP-TV, Erie, PA
10. WHNS-TV, Greenville, SC
11. WLOV-TV, West Point, MS
12. WRGT-TV, Dayton, OH
13. WSYT-TV, Syracuse, NY
14. WTTE-TV, Columbus, OH

**CBS**

## 7. Use of Network Programs.

## (d) Retransmission Consent.

(1) Conditions for Grant. Broadcaster may grant consent to the retransmission of Affiliated Station's signal by a cable system or other multichannel video programming distributor pursuant to the provisions of Section 325(b) of the Communications Act (hereafter, "retransmission consent"),

provided one of the following conditions applies at the time retransmission consent is granted:

- (x) the cable system or other multichannel program service on which Affiliated Station's signal is to be retransmitted serves television homes within Affiliated Station's television market;
- (y) the majority of television homes served by the cable system or other multichannel program service on which Affiliated Station's signal is to be retransmitted are in a county or community in which Affiliated Station's signal is "significantly viewed" as defined in Section 76.54 of the FCC's rules; or
- (z) the cable system or other multichannel program service on which Affiliated Station's signal is to be retransmitted carried such signal on October 5, 1992, and does not receive such signal by satellite delivery.

Notwithstanding anything to the contrary in the foregoing, in no case shall retransmission consent be granted to a television receive-only satellite service, or a direct broadcast satellite service, if Affiliated Station's signal is to be retransmitted to such service to television homes outside of Affiliated Station's television market other than (A) "unserved household(s)," as that term is defined in Section 119(d) of Title 17, United States Code, (B) within a community in which the signal has been determined by the Federal Communications Commission to be "significantly viewed" in accordance with Section 340 of Title 47, United States Code, or (C) households subject to statutory licensing pursuant to Section 119(a)(2)(C) of Title 17, United States Code. For purposes of this paragraph, a station's "television market" shall be defined in the same manner as set forth in Section 76.55(e) and 76.59 of the FCC's rules.

Affiliation Agreement between CBS AFFILIATE RELATIONS and WGME, Inc., Licensee of WGME-TV, Portland, ME, Jan. 1, 2013, ¶ 7(d), available at [https://stations.fcc.gov/station-profile/wgme-tv/ownership-reports/documents/browse-%3Econtracts\\_and\\_agreements](https://stations.fcc.gov/station-profile/wgme-tv/ownership-reports/documents/browse-%3Econtracts_and_agreements).

Similar provisions are included in the network affiliation agreements for the following CBS affiliates, which are available at <https://stations.fcc.gov/> or in the station files in the FCC's Reference Information Center:

1. KAUZ-TV, Wichita Falls, TX
2. KEYE-TV, Austin, TX
3. KFVS-TV, Cape Girardeau, MO
4. KGAN-TV, Cedar Rapids, IA
5. KGIN-TV, Grand Island, NE
6. KGMD-TV, Hilo, HI
7. KGMV-TV, Wailuku, HI
8. KMOV-TV, St. Louis, MO
9. KPHO-TV, Phoenix, AZ
10. KTAB-TV, Abilene, TX
11. KUTV-TV, Salt Lake City, UT
12. WFRV-TV, Green Bay, WI
13. WRGB-TV, Albany/Schenectady, NY
14. WROC-TV, Rochester, NY
15. WTAJ-TV, Altoona, PA

**NBC**16. Unauthorized Copying and Transmission; Retransmission Consent.

(a) No Station shall authorize, cause, or permit, without NBC's consent, any NBC Program or other material furnished hereunder to Station to be recorded, duplicated, rebroadcast or otherwise transmitted or used for any purpose other than broadcasting by Station as provided herein. Notwithstanding the foregoing, no Station shall be restricted in the exercise of its signal carriage rights pursuant to any applicable rule or regulation of the FCC with respect to the retransmission of its broadcast signal by any cable system or multichannel video programming distributor ("MVPD"), as defined in Section 76.64(d) of the FCC Rules, which is (a) located within the DMA in which the Station is located, or (b) was actually carrying Station's signal as of April 1, 1993, or (c) with respect to cable systems, serving an area in which Station is "significantly viewed" (as determined by the FCC) as of April 1, 1993; provided, however, that any such exercise pursuant to FCC Rules with respect to NBC Programs shall not be deemed to constitute a license by NBC. NBC reserves the right to restrict such signal carriage with respect to NBC Programming in the event of a change in applicable law, rule or regulation.

(b) In consideration of the grant by NBC to Stations of the Non-Duplication Amendments, each Station hereby agrees as follows:

(i) Station shall not grant consent to the retransmission of its broadcast signal by any cable television system, or, except as provided in Section 16(b)(ii) below, to any other MVPD whose carriage of broadcast signals requires retransmission consent, if such cable system or MVPD is located outside the DMA to which Station is assigned, unless Station's signal was actually carried by such cable system or MVPD as of April 1, 1993, or, with respect to such cable system, is "significantly viewed" (as determined by the FCC) as of April 1, 1993.

(ii) Station shall not grant consent to the retransmission of its broadcast signal by any MVPD that provides such signal to any home satellite dish user, unless such user is located with Station's own DMA.

(c) If Station violates any of the provisions set forth in this Section 16, NBC may, in addition to any other of its rights or remedies at law or in equity under this Agreement or any amendment thereto, terminate this Agreement, with respect to the violating Station by written notice to Station at least ninety (90) days prior to the effective date of such termination.

Affiliation Agreement between NBC Television Network and Nexstar Broadcasting, Inc., Licensee of KAMR-TV, Amarillo, TX; WHAG-TV, Hagerstown, MD; KARK-TV, Little Rock, Arkansas; and KTAL-TV, Shreveport, LA, Jan. 1, 2005, ¶ 16, available at [https://stations.fcc.gov/station-profile/kamr-tv/ownership-reports/documents/browse-%3Econtracts\\_and\\_agreements](https://stations.fcc.gov/station-profile/kamr-tv/ownership-reports/documents/browse-%3Econtracts_and_agreements).

Similar provisions are included in the network affiliation agreements for the following NBC affiliates, which are available at <https://stations.fcc.gov/> or in the station files in the FCC's Reference Information Center:

1. KARE-TV, Minneapolis, MN
2. KBJR-TV, Superior, WI
3. KBMT-TV, Beaumont, TX
4. KCBD-TV, Lubbock, TX

5. KCEN-TV, Temple, TX
6. KCFW-TV, Kalispell, MT
7. KCRA-TV, Sacramento, CA
8. KECI-TV, Missoula, MT
9. KGNS-TV, Laredo, TX
10. KGW-TV, Portland, OR
11. KNBC-TV, Los Angeles, CA
12. KSNF-TV, Joplin, MO/Pittsburg, KS; KFDX-TV, Wichita Falls, TX; WTWO-TV, Terre Haute, IN;  
and WBRE-TV, Wilkes Barre, PA
13. WCAU-TV, Philadelphia, PA
14. WJAC-TV, Johnstown, PA; and WTOV-TV, Steubenville, OH
15. WNBC-TV, New York, NY
16. WVIT-TV, New Britain, CT

**APPENDIX B****Final Rules**

The Federal Communications Commission amends 47 CFR part 76 as follows:

**PART 76 – Multichannel Video and Cable Television Service**

1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Remove §§ 76.111, 76.127 and 76.128.

3. Amend § 76.110 by revising the first sentence to read as follows:

**§ 76.110 Substitutions.**

Whenever, pursuant to the requirements of the syndicated exclusivity rules, a community unit is required to delete a television program on a broadcast signal that is permitted to be carried under the Commission's rules, such community unit may, consistent with these rules, substitute a program from any other television broadcast station. \* \* \*

4. Amend § 76.120 by removing paragraph (e)(3) and revising the heading of § 76.120 to read as follows:

**§ 76.120 Network non-duplication protection and syndicated exclusivity rules for satellite carriers: Definitions.**

5. Amend § 76.130 by revising the first sentence to read as follows:

**§ 76.130 Substitutions.**

Whenever, pursuant to the requirements of the network program non-duplication or syndicated program exclusivity rules, a satellite carrier is required to delete a television program from retransmission to satellite subscribers within a zip code area, such satellite carrier may, consistent with this Subpart, substitute a program from any other television broadcast station for which the satellite carrier has obtained the necessary legal rights and permissions, including but not limited to copyright and retransmission consent. \* \* \*

6. Amend § 76.1506 by removing paragraph (m) and redesignating paragraphs (n) and (o) as paragraphs (m) and (n).

## APPENDIX C

## Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”)<sup>1</sup> the Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated into the Notice of Proposed Rulemaking (“NPRM”) in this proceeding.<sup>2</sup> The Federal Communications Commission (“Commission”) sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission received no comments on the IRFA. This Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.<sup>3</sup>

**A. Need for, and Objectives of, the Report and Order**

2. The Commission’s sports blackout rules prohibit cable operators, satellite carriers, and open video systems (“OVS”) from retransmitting, within a protected local blackout zone, the signal of a distant broadcast station carrying a live sporting event if the event is not available live on a local television broadcast station.<sup>4</sup> The Commission first adopted a sports blackout rule for cable operators in 1975, when game ticket sales were the primary source of revenue for sports leagues.<sup>5</sup> This rule was intended to ensure that the potential loss of gate receipts resulting from cable system importation of distant stations did not lead sports clubs to refuse to sell their rights to sports events to distant stations, which would reduce the overall availability of sports programming to television viewers.<sup>6</sup> At the direction of Congress, the Commission later applied the cable sports blackout rule to open video systems and then to satellite carriers to provide parity between cable and newer video distributors.<sup>7</sup>

3. Sports leagues’ blackout policies, rather than the Commission’s rules, determine which sports events are blacked out on local television stations. These policies are given effect through

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (“CWAAA”).

<sup>2</sup> See *Sports Blackout Rules*, Notice of Proposed Rulemaking, 28 FCC Rcd 17214, 17240, App. D (2013).

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> See 47 C.F.R. §§ 76.111 (cable operators), 76.127 (satellite providers), 76.1506(m) (open video systems).

<sup>5</sup> 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*, Report and Order, 54 FCC 2d 265, 274, ¶ 31 (1975) (“*Cable Sports Blackout Order*”), *recon. granted in part, denied in part*, 56 FCC 2d 561 (1975).

<sup>6</sup> See *Cable Sports Blackout Order*, 54 FCC 2d at 282, ¶ 57.

<sup>7</sup> Section 653(b)(1)(D) of the Communications Act (“Act”), which was added by the Telecommunications Act of 1996 (“1996 Act”), Pub. L. No. 104-104, 110 Stat. 56 (1996), directed the Commission to extend to open video systems “the Commission’s regulations concerning sports exclusivity (47 C.F.R. 76.67).” See 47 U.S.C. § 573(b)(1)(D); *see also Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 18223, 18226-7, ¶ 1 (1996) (“*OVS Second Report and Order*”), *recon. granted in part, denied in part*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227 (1996). Section 339(b) of the Act, which was added by the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”), P.L. No. 106-113, 113 Stat. 1501, Appendix I (1999), directed the Commission to “apply ... sports blackout protection (47 CFR 76.67) to the retransmission of the signals of nationally distributed superstations by satellite carriers” and, “to the extent technically feasible and not economically prohibitive, apply sports blackout protection (47 CFR 76.67) to the retransmission of the signals of network stations by satellite carriers.” See 47 U.S.C. § 339(b); *see also Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals*, Report and Order, 15 FCC Rcd 21688, 21689, ¶ 1 (2000), *recon. granted in part, denied in part*, Order on Reconsideration, 17 FCC Rcd 27875 (2002).

contractual arrangements negotiated between the leagues or individual teams that hold the rights to the games and the entities to which they grant distribution rights, including television networks, local television broadcast stations, Regional Sports Networks (“RSNs”), and multichannel video programming distributors (“MVPDs”).<sup>8</sup> The Commission’s rules merely supplement these contractual relationships by barring MVPDs from retransmitting, within the local blackout zone, games that the sports leagues or individual teams require local television stations to black out.

4. In 2012, the Media Bureau issued a Public Notice to request comment on a Petition for Rulemaking seeking elimination of the sports blackout rules.<sup>9</sup> The record amassed in response to the Public Notice suggested that, given the substantial changes in the sports industry in the 40 years since the sports blackout rules were originally adopted, the sports blackout rules may no longer be necessary to ensure the overall availability of sports programming to the general public.<sup>10</sup> The Commission subsequently released an *NPRM* seeking comment whether the sports blackout rules have become outdated due to marketplace changes since their adoption and whether modification or elimination of those rules is appropriate.<sup>11</sup>

5. Based on the record before us, we conclude that the sports blackout rules are no longer necessary to ensure that sports programming is widely available to the public. The sports industry has evolved dramatically in the four decades since the cable sports blackout rule was adopted. The record confirms that the sports blackout rules are no longer relevant for sports other than professional football.<sup>12</sup> With respect to NFL football, television revenues have become the dominant source of NFL revenues with a corresponding decrease in gate receipts.<sup>13</sup> Moreover, the number of sell-outs and total attendance at NFL games has increased substantially since 1975, reflecting an increase in the quality and popularity of NFL games.<sup>14</sup> These trends undermine the notion that the NFL would find it profitable to significantly restrict television broadcasts of its games to protect gate receipts and in-stadium revenues. Additionally, the loss to consumers of their ability to view the game on television when an NFL game is blacked out exceeds any gain in gate receipts and other revenue that may accrue to the NFL as a result of a blackout, and the record indicates that the NFL is unlikely to migrate its games to pay TV following elimination of sports blackout rules because it would not be profitable for it to do so.<sup>15</sup> Accordingly, based on all of these factors, we conclude that the economic considerations underlying the sports blackout rules are no longer valid and the sports blackout rules therefore are no longer needed to ensure that NFL games are widely available to television viewers.<sup>16</sup>

6. We recognize that eliminating our sports blackout rules is unlikely to end all sports blackouts. The NFL has stated that it most likely will continue its underlying blackout policy.<sup>17</sup> Thus, consumers may still be unable to view locally blacked out NFL games despite repeal of our rules. Nevertheless, we conclude that it will serve the public interest to eliminate regulations that are no longer needed to serve their original purpose of ensuring that sports telecasts are widely available to the viewing

<sup>8</sup> See *NPRM*, 28 FCC Rcd at 17221, ¶ 12.

<sup>9</sup> See *Commission Seeks Comment on Petition for Rulemaking Seeking Elimination of the Sports Blackout Rule*, Public Notice, 27 FCC Rcd 260 (MB 2012).

<sup>10</sup> See *NPRM*, 28 FCC Rcd at 17215, ¶ 1.

<sup>11</sup> See *id.*

<sup>12</sup> See *Report and Order* at ¶ 13.

<sup>13</sup> See *id.* at ¶ 14.

<sup>14</sup> See *id.* at ¶ 16.

<sup>15</sup> See *id.* at ¶¶ 21-25.

<sup>16</sup> See *id.* at ¶ 26.

<sup>17</sup> See *id.* at ¶ 30.

public.<sup>18</sup> We also find that the public interest will be served by removing regulatory reinforcement (and the Commission's implicit endorsement) of the NFL's blackout policy.<sup>19</sup> Although the NFL is the most lucrative sports league in the world with annual revenues totaling around \$10 billion and most NFL teams are heavily subsidized by consumers through publicly funded stadiums and other tax benefits, consumers are sometimes unable to watch their favorite teams on television simply because a game is not completely sold out.<sup>20</sup> While repeal of our sports blackout rules may not provide an immediate, direct benefit to these consumers, rather than fulfilling their intended goal of ensuring the widespread availability of sports programming to the general public, our sports blackout rules may be having the opposite effect by reinforcing a private policy that deprives many consumers of the ability to watch on television the teams that they have subsidized through their tax dollars.<sup>21</sup>

7. To the extent that the NFL or any other sports league decides to continue their blackout policies following elimination of the sports blackout rules, it will no longer be entitled to additional protections under our sports blackout rules, but instead must rely on the same processes available to any other entities that wish to protect their distribution rights in the private marketplace. While the NFL argues that the sports blackout rules provide protections that cannot be achieved through other regulatory means or by private contract, we find that the NFL will be able to protect its distribution rights following elimination of the sports blackout rules through other existing regulations and through private contractual arrangements. First, the limited nature of the satellite compulsory license will largely preclude satellite carriers from retransmitting distant stations carrying locally blacked out NFL games.<sup>22</sup> In addition, the retransmission consent requirement and the NFL's contractual arrangements with broadcasters will provide the NFL with the means to control the distribution of its programming.<sup>23</sup> Specifically, we note that many existing network affiliation agreements already include provisions prohibiting the affiliate from allowing its signal to be retransmitted by an MVPD in a distant market and some network affiliation agreements also include provisions giving the NFL broad discretion to limit or condition an affiliate's distribution rights to NFL games.<sup>24</sup> To the extent that any network affiliation agreements do not include such provisions, the record indicates that the NFL can obtain blackout protection through negotiations with the broadcast networks in the private marketplace.<sup>25</sup> The NFL also has the ability to obtain blackout protection through private contractual negotiations with MVPDs.<sup>26</sup> Moreover, we note that MVPDs currently comply with the NFL's policy of blacking out games that are not sold out throughout the NFL clubs' "home territories," which generally extend well beyond the 35-mile zone of protection afforded by the Commission's sports blackout rules.<sup>27</sup> This indicates that the NFL has the ability to obtain greater protection than that provided by the Commission's sports blackout rules in the private marketplace, should it choose to do so.<sup>28</sup> We further observe that retransmission consent fees and compulsory

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<sup>18</sup> See *id.* at ¶ 27.

<sup>19</sup> See *id.* at ¶ 28.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> See *id.* at ¶ 31.

<sup>23</sup> See *id.* at ¶¶ 32-34.

<sup>24</sup> See *id.* at ¶ 33.

<sup>25</sup> See *id.* at ¶ 34.

<sup>26</sup> See *id.* at ¶ 35.

<sup>27</sup> See *id.* at ¶ 36.

<sup>28</sup> See *id.*

copyright license fees may, to some extent, make it unprofitable for cable operators to take advantage of the compulsory copyright licenses to retransmit distant stations carrying locally blacked out NFL games.<sup>29</sup>

8. Finally, we conclude that elimination of the sports blackout rules will not adversely affect broadcasters, consumers, or local businesses. Localism is unlikely to be adversely affected by repeal of the sports blackout rules.<sup>30</sup> In addition, elimination of the sports blackout rules will not harm consumers by forcing the NFL to migrate its games to pay TV or by causing the NFL to raise its ticket prices.<sup>31</sup> Moreover, eliminating the sports blackout rules will not harm local businesses and local economies in areas surrounding NFL stadiums by removing incentives to fill the stadiums.<sup>32</sup>

#### **B. Summary of Significant Issues Raised in Response to the IRFA**

9. No comments were filed in response to the IRFA. Additionally, pursuant to the Small Business Jobs Act of 2010, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration, and to provide a detailed statement of any change made to the proposed rules as a result of those comments.<sup>33</sup> The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

#### **C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply**

10. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted in the *Order*.<sup>34</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>35</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>36</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>37</sup> Below are descriptions of the small entities that are directly affected by the rules adopted in the *Order*, including, where feasible, an estimate of the number of such small entities.

11. *Wired Telecommunications Carriers*. The 2007 North American Industry Classification System (“NAICS”) defines “Wired Telecommunications Carriers” as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including

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<sup>29</sup> See *id.* at ¶¶ 37-38.

<sup>30</sup> See *id.* at ¶ 40.

<sup>31</sup> See *id.* at ¶¶ 41-42.

<sup>32</sup> See *id.* at ¶ 44.

<sup>33</sup> Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504, § 1601.

<sup>34</sup> 5 U.S.C. § 603(b)(3).

<sup>35</sup> *Id.* § 601(6).

<sup>36</sup> *Id.* § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>37</sup> 15 U.S.C. § 632.

VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”<sup>38</sup> The SBA has developed a small business size standard for wireline firms within the broad economic census category, “Wired Telecommunications Carriers.”<sup>39</sup> Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>40</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>41</sup> Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

12. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.”<sup>42</sup> The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.<sup>43</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>44</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>45</sup> Therefore, under this size standard, we estimate that the majority of such businesses can be considered small entities.

13. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers nationwide.<sup>46</sup> Industry data shows that there

<sup>38</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>39</sup> 13 C.F.R. § 121.201 (NAICS code 517110).

<sup>40</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>41</sup> *Id.*

<sup>42</sup> U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition), at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television (CCTV) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (DTH) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (MMDS).

<sup>43</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>44</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>45</sup> *Id.*

<sup>46</sup> 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer*

(continued...)

were 1,100 cable companies at the end of December 2012.<sup>47</sup> Of this total, all but ten cable operators nationwide are small under this size standard.<sup>48</sup> In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>49</sup> Current Commission records show 4,945 cable systems nationwide.<sup>50</sup> Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 or more subscribers, based on the same records. Thus, under this standard, we estimate that most cable systems are small entities.

14. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>51</sup> There are approximately 56.4 million incumbent cable video subscribers in the United States today.<sup>52</sup> Accordingly, an operator serving fewer than 564,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>53</sup> Based on available data, we find that all but ten incumbent cable operators are small entities under this size standard.<sup>54</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.<sup>55</sup> Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at

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*Protection And Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, MM Docket No. 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408, ¶ 28 (1995).

<sup>47</sup> NCTA, Industry Data, Number of Cable Operating Companies (December 2012), <http://www.ncta.com/Statistics.aspx> (visited Feb. 21, 2014). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-6, ¶ 24 (2013) ("*2013 Competition Report*").

<sup>48</sup> See SNL Kagan, "Top Cable MSOs – 09/13 Q"; available at <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2013Q3&sortcol=subscribersbasic&sortorder=desc>. We note that, when applied to an MVPD operator, under this size standard (*i.e.*, 400,000 or fewer subscribers) all but 14 MVPD operators would be considered small. See NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (visited Feb. 21, 2014). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. See *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37 (2011) ("*CALM Act Report and Order*") (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

<sup>49</sup> 47 C.F.R. § 76.901(c).

<sup>50</sup> The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on Aug. 28, 2013. A cable system is a physical system integrated to a principal headend.

<sup>51</sup> 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

<sup>52</sup> See NCTA, Industry Data, Cable Video Customers (2012), <http://www.ncta.com/industry-data> (visited Feb. 21, 2014).

<sup>53</sup> 47 C.F.R. § 76.901(f); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

<sup>54</sup> See NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (visited Feb. 21, 2014).

<sup>55</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.901(f).

this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

15. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.”<sup>56</sup> The SBA has created the following small business size standard for such businesses: those having \$35.5 million or less in annual receipts.<sup>57</sup> The 2007 U.S. Census indicates that 2,076 television stations operated in that year. Of that number, 1,515 had annual receipts of \$10,000,000 dollars or less, and 561 had annual receipts of more than \$10,000,000. Since the Census has no additional classifications on the basis of which to identify the number of stations whose receipts exceeded \$35.5 million in that year, the Commission concludes that the majority of television stations were small under the applicable SBA size standard.

16. Apart from the U.S. Census, the Commission has estimated the number of licensed commercial television stations to be 1,387.<sup>58</sup> In addition, according to Commission staff review of the BIA Advisory Services, LLC’s *Media Access Pro Television Database* on March 28, 2012, about 950 of an estimated 1,300 commercial television stations (or approximately 73 percent) had revenues of \$14 million or less.<sup>59</sup> We therefore estimate that the majority of commercial television broadcasters are small entities.

17. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations<sup>60</sup> must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

18. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 395.<sup>61</sup> These stations are non-profit, and therefore considered to be small entities.<sup>62</sup>

19. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. DBS, by exception, is now included in the SBA’s broad economic census category, Wired Telecommunications Carriers,<sup>63</sup> which was developed for small wireline

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<sup>56</sup> U.S. Census Bureau, 2012 NAICS Definitions, “515120 Television Broadcasting,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>57</sup> 13 C.F.R. § 121.201; 2012 NAICS code 515120.

<sup>58</sup> See *Broadcast Station Totals as of June 30, 2014*, Press Release (MB rel. July 9, 2014) (“July 9, 2014 Broadcast Station Totals Press Release”), at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-328096A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-328096A1.pdf).

<sup>59</sup> We recognize that BIA’s estimate differs slightly from the FCC total given *supra*.

<sup>60</sup> “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 21.103(a)(1).

<sup>61</sup> See *July 9, 2014 Broadcast Station Totals Press Release*.

<sup>62</sup> See generally 5 U.S.C. §§ 601(4), (6).

<sup>63</sup> See 13 C.F.R. § 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access

businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>64</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>65</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>66</sup> Therefore, under this size standard, the majority of such businesses can be considered small entities. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” The definition of Cable and Other Program Distribution provided that a small entity is one with \$12.5 million or less in annual receipts.<sup>67</sup> Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.<sup>68</sup> Each currently offer subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined under the superseded SBA size standard would have the financial wherewithal to become a DBS service provider.

20. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA’s broad economic census category, Wired Telecommunications Carriers,<sup>69</sup> which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>70</sup> Census data for 2007 show that there were 31,996 establishments that operated that year.<sup>71</sup> Of this total, 30,178 establishments

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to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.” (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>64</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>65</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>66</sup> *Id.*

<sup>67</sup> See 13 C.F.R. § 121.201, NAICS code 517510 (2002).

<sup>68</sup> See *2013 Competition Report*, 28 FCC Rcd at 10507, ¶ 27. As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id.* at 10507, 10546, ¶¶ 27, 110-11.

<sup>69</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>70</sup> See *id.*

<sup>71</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>72</sup> Therefore, under this size standard, the majority of such businesses can be considered small entities.

21. *Home Satellite Dish (HSD) Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.<sup>73</sup> The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.<sup>74</sup> Census data for 2007 show that there were 31,996 establishments that operated that year.<sup>75</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>76</sup> Therefore, under this size standard, the majority of such businesses can be considered small entities.

22. *Open Video Systems.* The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.<sup>77</sup> The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>78</sup> OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."<sup>79</sup> The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.<sup>80</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>81</sup> Of this total, 30,178 establishments had

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<sup>72</sup> *Id.*

<sup>73</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>74</sup> *See id.*

<sup>75</sup> U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>76</sup> *Id.*

<sup>77</sup> 47 U.S.C. § 571(a)(3)-(4); *see Implementation of Section 19 of the 1992 Cable Act and Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Report, 24 FCC Rcd 542, 606, ¶ 135 (2009) ("13<sup>th</sup> Annual Competition Report").

<sup>78</sup> *See* 47 U.S.C. § 573.

<sup>79</sup> *See* 13 C.F.R. § 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined in part as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services." U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>80</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>81</sup> U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>82</sup> Therefore, under this size standard, we estimate that the majority of these businesses can be considered small entities. In addition, we note that the Commission has certified some OVS operators, with some now providing service.<sup>83</sup> Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises.<sup>84</sup> The Commission does not have financial or employment information regarding the other entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

23. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.”<sup>85</sup> The SBA has developed a small business size standard for this category, which is: all such businesses having \$35.5 million dollars or less in annual revenues.<sup>86</sup> Census data for 2007 show that there were 659 establishments that operated that year.<sup>87</sup> Of that number, 462 operated with annual revenues of \$9,999,999 dollars or less.<sup>88</sup> One hundred ninety-seven (197) operated with annual revenues of between \$10 million and \$100 million or more.<sup>89</sup> Thus, under this size standard, the majority of such businesses can be considered small entities.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

24. The *Report and Order* eliminates the sports blackout rules for cable operators, satellite carriers, and open video systems. The *Report and Order* does not adopt any new reporting, recordkeeping, or compliance requirements for small entities.

#### **E. Steps Taken to Minimize Economic Impact on Small Entities and Significant Alternatives Considered**

25. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small

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<sup>82</sup> *Id.*

<sup>83</sup> A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsцер.html>.

<sup>84</sup> See *13<sup>th</sup> Annual Competition Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer businesses that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

<sup>85</sup> U.S. Census Bureau, 2012 NAICS Definitions, “515210 Cable and Other Subscription Programming,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>86</sup> 13 C.F.R. § 121.201; 2012 NAICS code 515210.

<sup>87</sup> See U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Receipts Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 515210, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

entities.<sup>90</sup> The *IRFA* invited comment on issues that had the potential to have a significant impact on some small entities.<sup>91</sup>

26. To the extent that the NFL or any other sports league decides to continue its blackout policy following elimination of the sports blackout rules, it can protect its distribution rights through other existing regulations and through private contractual arrangements.<sup>92</sup> Because the NFL can protect its distribution rights through other existing regulations and through private contractual arrangements, repeal of the sports blackout rules will not adversely impact broadcasters or other affected entities as identified above, including small entities, by decreasing advertising revenues for local stations in markets prone to NFL blackouts or leading the NFL to migrate its games from broadcast television to pay TV.<sup>93</sup>

#### **F. Report to Congress**

27. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.<sup>94</sup> In addition, the Commission will send a copy of the *Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>95</sup>

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<sup>90</sup> *Id.* § 603(a)(6).

<sup>91</sup> *IRFA*, 28 FCC Rcd at 17244, ¶ 1.

<sup>92</sup> *See Report and Order* at ¶¶ 31-38.

<sup>93</sup> *See id.* at ¶ 40.

<sup>94</sup> *See* 5 U.S.C. § 801(a)(1)(A).

<sup>95</sup> *See id.* § 604(b).

**STATEMENT OF  
CHAIRMAN TOM WHEELER**

Re: *Sports Blackout Rules*, Report and Order, MB Docket No. 12-3 (September 30, 2014)

Football is the most popular sport in America.

Accordingly, the NFL is the most powerful sports league and arguably the most powerful organization in American entertainment.

One of the ways that NFL flexes its muscle is its TV blackout policy, which is effectively a tool for blackmailing fans to go to games – at a cost of roughly \$500 for a family of four.

Today, I'm pleased to say that the FCC is standing up for football fans and common sense. Completing the work the Commission began last December, we are eliminating the FCC's sports blackout rule, which punishes fans and has outlived its usefulness.

In 1975, the Commission enacted rules barring cable television systems from airing a game that has been blacked out on the local television station because it was not sold out. The league's contract with the broadcast networks already contained this provision. But for some reason, it was necessary for the federal government to pile on.

These rules make no sense at all.

The sports blackout rules are a bad hangover from the days when gate receipts were the league's principal source of revenue and most games didn't sell out. Today, sell-outs are the norm. More significantly, pro football is now the most popular content on television. With the NFL's incredible popularity, it's not surprising that last year the League made \$10 billion in revenue and only two games were blacked-out.

But the NFL's blackout policy remains a real concern for fans. During last year's playoffs, Cincinnati, Green Bay, and Indianapolis hadn't sold out their games 72 hours before kickoff. The only way those games weren't denied to fans was that local businesses bought blocks of tickets just so the game could be officially "sold out."

We at the FCC shouldn't be complicit in preventing sports fans from watching their favorite teams on TV. It's time to sack the sports blackout rule.

Not surprisingly, the NFL loudly opposes this effort. They claim that the system is "working" and the FCC shouldn't disrupt America's most popular sports league.

I find it hard to believe the league's representation that it's fighting to preserve the FCC's sports blackout rules for the sake of the fans! In a perverse, "stop me before I shoot," they argue that removing the Commission's rules could mean the end of pro football on free over-the-air television because the league would move its games to pay services like cable and satellite. But look who controls that decision in the first place – certainly not the FCC.

To hear the NFL describe it, you would think that putting a game on CBS, NBC, or Fox was a money-losing proposition instead of a highly profitable multi-billion dollar business. But the fact is that the NFL currently distributes most of its games through broadcast television because it is more profitable for it to do so. NFL games are the most highly rated programming on broadcast television, which allows

broadcasters to charge the highest advertising rates for spots during NFL games and, in turn, to pay the NFL multi-billion dollar/year television revenues.

Unfortunately, eliminating the FCC's sports blackout rules may not end all sports blackouts. The NFL and other sports leagues may choose to continue their private blackout policies. But if they decide to continue to their blackout policies, they will have to do so without being able to hide behind the federal eagle.

NFL has told us they might have to start blacking out more games and the FCC will, somehow, be to blame. Let's be clear, it is the league that makes the blackout decision. Today, we withdraw from a bad policy that protected this anti-fan conspiracy. These anti-fan regulations need to go, and today, they finally will.

**STATEMENT OF  
COMMISSIONER MIGNON L. CLYBURN**

Re: *Sports Blackout Rules*, Report and Order, MB Docket No. 12-3 (September 30, 2014)

Few issues can unite or divide a city as professional sports, and few sports have the power to evoke deeply held emotions as American football.

At the risk of some heresy, I must say that football has long eclipsed baseball as America's national pastime. Even here in D.C., as the amazing Washington Nationals have clinched their division, earned the best record in baseball, and ended the season with an historic no-hitter a few days ago, it remains a fact.

This is true even considering the current fate of Washington's football team, which is saddled with injuries, wrestling with quarterback challenges, and resisting calls to change the team's name for being offensive to Native Americans. And it is true even with a league heavily criticized for its repeated fumbles for insensitivity to spouses and girlfriends, and for not incorporating the principles of The Rooney Rule to hiring advisers to address those headline-grabbing issues which have occurred off the field.

Every year for the seventeen-week period from Labor Day through Christmas Day, 32 teams in the National Football League (NFL), strap up to do battle on the field. Week-in-and-week-out, Americans from every walk of life gather in living rooms, restaurants, sports bars and venues large and small to cheer on their favorite team and players. From Romo to RG III — from Megatron to Manning — from Rogers to Richard Sherman — and from J.J. Watt to Russell Wilson, Americans love this game. Make no mistake about it, football is our national pastime.

We re-arrange our personal lives: weekend errands, Sunday worship schedules... in order to catch those weekly NFL games — a schedule that now extends to both Monday and Thursday nights as well. The reward of regular season success is a ticket to the Super Bowl and the chance to raise the coveted Lombardi Trophy, the pinnacle of football achievement.

Super Bowl weekend has become an unofficial American holiday. In fact, the Super Bowl has become so enshrined in, and essential to, our economy that major corporations build their annual advertising budgets around the commercials, paying hundreds of millions of dollars for 30 and 60 second spots. Of course, these commercials also have a life and culture of their own, but that is another story, with many of the world's top entertainers pegging their career high points — or low points—to half-time performances. In fact, some performances have even become FCC folklore... one in particular, for sure.

Professional football has grown so much in popularity that venues have become pantheons, not only to the sport, but also to those corporate brands seeking the rewards of official sponsorship and team affinity. With the bright lights, jumbotrons, and decibel-bending crowd noise, there is nothing like being in a stadium.

Add to that an expanded array of food, entertainment and retail choices, and it is plain to see that attending an NFL game is quite an experience. Although ticket prices are quite high, most NFL games still sell out, and for those fans, it is an expense well worth the price. But let's be clear — the vast majority of fans cannot afford to even park at a game, let alone attend these extravaganzas.

What is also abundantly clear is that the sports industry has changed significantly since the Sports Blackout Rules were first adopted by the FCC in 1975. Our record finds today that these rules are no longer relevant for any sport other than professional football, which has seen a decline in the number of NFL games blacked out due to failure to sell out. Television revenues have replaced gate receipts as the primary source of revenue for NFL teams, and the FCC believes there is scant chance that teams will choose to move their games to pay TV if the sports blackout rules are abolished, as some charge.

So rightly before us this morning, is an item that eliminates the Sports Blackout Rules for cable operators, satellite carriers and open video systems, and concludes that the Commission has the authority to do so. When I originally circulated this item in November of 2013, I believed the time had come to review FCC regulatory involvement in what is essentially a private set of relationships between the NFL, broadcasters and cable operators. I maintain that belief.

What I especially appreciate about the item before us today is that it furthers the public interest in two key ways. First, by removing unnecessary and outdated regulations, and second, by abandoning regulatory enforcement of the NFL's private blackout policy. While nothing we do can guarantee fans that there will never be another blackout, our decision will take the public policy finger off the scale of being a party to any future blackout. The resolution of future blackout will be left to the parties through their private contractual arrangements, not the FCC.

In sum, the goal of these rules was never to protect the profitability of sports leagues, but to ensure that America's favorite pastime was widely available to television viewers. Keeping the rules no longer make sense. I applaud the Chairman for a sustained drive to take the ball over the goal line by abolishing an outdated rule whose time has expired.

**STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Sports Blackout Rules*, Report and Order, MB Docket No. 12-3 (September 30, 2014)

The Commission's sports blackout rules were adopted the same year that the Baltimore Colts, St. Louis Cardinals, and Los Angeles Rams clinched their respective NFL division titles. These teams are no longer with us. We bid adieu to them years ago. It is time also to say goodbye to this agency's archaic sports blackout policies.

Our rules were put in place to help ensure that stadiums were filled with fans. This prevented cable operators and satellite carriers from carrying a game in a market where it was not otherwise available on a local broadcast channel. By protecting the gate receipts of professional teams—the primary source of team revenue at the time—the sports blackout rules helped support a community institution.

But revenues today for professional sports teams are a multibillion dollar mix of television rights, stadium naming rights, merchandise, licensing, corporate sponsorships, and luxury suites. For the life of me, I do not understand why this Commission still has rules in the middle of this mix. They are a vestige from a bygone era. It is time for us to retire them.

So I am pleased we do that today. I think this is good for sports fans. This agency should not support policies that prevent fans from watching their hometown teams on television. To be clear, even as we remove our rules, we cannot guarantee an end to sports blackouts. That is because blackouts can still be enforced by privately-negotiated contracts. But I would hope that leagues that rely on this rule—namely the NFL—find a solution to avoid blackouts. If not, I think they will risk alienating existing fans and turning off would-be fans at a time when they cannot afford to do so.

I commend my colleague, then-Chairwoman Clyburn, for initiating this proceeding and Chairman Wheeler for carrying the ball across the goal line. This has my full support.

**STATEMENT OF  
COMMISSIONER AJIT PAI**

Re: *Sports Blackout Rules*, Report and Order, MB Docket No. 12-3 (September 30, 2014)

Denis Steinmiller of North Tonawanda, New York has been a Buffalo Bills fan for as long as he can remember. But as a disabled Vietnam veteran with Post-Traumatic Stress Disorder (PTSD) and limited mobility, he is unable to attend the team's games at Ralph Wilson Stadium. These days, watching the Bills on television is one of the things that Mr. Steinmiller looks forward to every year. He also says that it helps him deal with his PTSD. Unfortunately for him and other Bills fans, nine games have been blacked out in Western New York over the last four seasons.

Mr. Steinmiller is one of the thousands of sports fans who have written to the Commission asking us to eliminate this forty-year-old, hopelessly outdated rule. And ever since I announced my support for eliminating the sports blackout rule at Buffalo's Anchor Bar, the birthplace of Buffalo wings, I have heard words of encouragement from hundreds of people just like him. This morning, we show them that we are listening.

As one who believes in limited government, my position on this issue is simple: The FCC shouldn't be involved in the sports blackout business. It is not the place of the federal government to intervene in the private marketplace and help sports leagues enforce their blackout policies. It is the Commission's job to serve the public interest, not the private interests of team owners.

Make no mistake about it. With this decision, the FCC is officially out of the sports blackout business. No longer will we be on the side of those willing to keep fans in the dark. Instead, we will stand with Denis Steinmiller and the millions of other fans who love their teams, but aren't able to make it to the stadium due to the cost of tickets, age, disability, family obligations, or one of many other reasons.

To be sure, our vote today may not end all blackouts. We are eliminating our blackout rule, but the professional sports leagues like the NFL can still choose to maintain their own blackout policies. But if the NFL in particular chooses that path, it will do so without the FCC's endorsement and will have to enforce its policy without our help.

That begs the question of what happens next. For my part, I hope that the NFL will not respond to today's vote by digging in its heels. Instead, it should view this decision as an opportunity to revisit the blackout policy with fans like Mr. Steinmiller in mind, and to adopt a more fan-friendly approach.

In the weeks leading up to today's vote, some have tried to scare sports fans by arguing that football games will move from broadcast television to cable or satellite TV if the FCC eliminates the sports blackout rule. Let me address that argument head on.

To begin with, there is no way that this can happen anytime soon. The NFL's contracts with over-the-air broadcasters extend until 2022.

But more importantly, by moving games to pay TV, the NFL would be cutting off its nose to spite its face. Television contracts—not gate receipts—make up a substantial majority of the NFL's revenues nowadays. And professional football is, by far, America's most popular sport in part because it is the only major sport that makes most games available on free, over-the-air television.

This year, for example, the NFL started airing its Thursday night football games on CBS as well as the NFL Network. And what are the results? For CBS's first broadcast, the audience was up 89% over last year. In the second week, the audience was up 7% over the prior year. That's remarkable, considering that the game was a blowout with the Atlanta Falcons leading the Tampa Bay Buccaneers 35-0 at halftime and going on to win 56-14. And in the third week, last Thursday, the audience was up an

astounding 96% over last year. The meaning of these numbers is clear. It will continue to be in the NFL's interest to air games on broadcast television after today's decision.

Finally, I would like to recognize some valuable players whose efforts led to today's vote. I would like to thank Congressman Brian Higgins of New York for his leadership on this issue. It was an honor to stand beside him in Buffalo as he called on the FCC to eliminate the sports blackout rule. I would also like to thank Senators John McCain and Richard Blumenthal for their efforts on this issue as well as the Sports Fan Coalition, National Consumers League, and Public Knowledge for filing the Petition for Rulemaking that launched this proceeding. And last but not least, my thanks to Chairman Wheeler for bringing this matter to a vote and the staff of the Media Bureau for all of their hard work drafting this order.

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Sports Blackout Rules*, Report and Order, MB Docket No. 12-3 (September 30, 2014)

Let me start by acknowledging that I am a huge fan of American football, the National Football League (NFL), and in particular, the Buffalo Bills. Growing up just outside of Buffalo, I learned many life lessons by watching my team struggle and succeed over the years. The Bills have always played a significant role in the lives of the people of Western New York and their fans nationwide. Walk into any bar in the area and there is little doubt that the patrons can name every starting player on the team and probably the backups too.

To live in Buffalo also means that you face months upon months of cold and nasty weather. In exchange, you are surrounded by good-natured, hard-working, under-appreciated, America-loving, family-oriented people. And a major component of most weekends in the fall and winter for many families is the Bills game. The people love their team. This is why it was so important that the new owner agree to keep the team in Buffalo for the long term. No thanks, Mr. Jon Bon Jovi.

As a fan, I have experienced the near highest of highs and the lowest of low moments from my team. I still wonder...*what if* a wandering kick did not go "Wide Right" in a Super Bowl years ago. A fan's highs and lows with their team can be overcome, but what was downright infuriating growing up was the weekly concern that the NFL's blackout policy—bolstered by the FCC's rules—would force us to radio instead of watching the Bills on television. When many fans don't have the means or the opportunity to attend a game, one of the only hopes is that local businesses would purchase tickets, like my former employer, the local grocery chain, did on multiple occasions.

To put this in perspective, let me share with you one of the greatest NFL games ever that almost no one in Buffalo saw. Known simply in NFL parlance as "The Comeback," the Bills spotted the then-Houston Oilers a lead of 35-3 in the 1992-93 AFC Wild Card Game. I will spare you the stories of backup quarterback Frank Reich's heroics that turned that game around, but the Bills won the game in overtime 41-38 and propelled the team to their third straight Super Bowl appearance (and loss). Forgotten in the discussion is the simple fact that the game was blacked out in Western New York. I happened to see parts of the game from my part-time job in a local restaurant under a satellite retransmission exemption, but my family and friends did not see the game live.

As I have previously discussed publicly, this issue is not all that difficult for me to consider. Today's item does a good job explaining the arguments presented to maintain the rules and then adequately shoots them down one by one with fairly strong responses. To me, the only issues that really matter is whether the FCC's rules are providing unnecessary protections to the NFL and does that harm consumers. Upon review, the answer to these questions is "yes," and therefore I am pleased to approve this item.

I do not agree with the supposition that absent the FCC's Sports Blackout Rules the NFL would be unable to enforce its copyrights for NFL games. To the contrary, the NFL is in a prime position, with sufficient leverage, to convince broadcasters and MVPDs to agree to certain contractual provisions, including adhering to its misguided blackout policy, or risk losing access to the highest rated programming on television. Simply put, the NFL does not need the FCC's rules to do what it can do for itself.

In terms of impact on American consumers, the FCC's rules promote a policy that limits access to NFL games. Just last year, Buffalo Bills and San Diego Charger fans experienced blackouts. Moreover, three NFL playoff games (Colts, Packers and Bengals) faced blackouts until being saved by last minute ticket purchases. To argue that the number of blackouts is decreasing under the NFL's newly constructed policy is irrelevant. The policy serves to punish entire communities for the fact that the collective citizens in those areas are unable or unwilling for legitimate reasons to sell-out the game that week. It is not the role of the Commission to ensure the NFL gets every last nickel out of each NFL game being played.

I also disagree with the argument that the elimination of the FCC's Sports Blackout Rules would somehow drive NFL games away from free over-the-air television and towards pay television. The NFL maintains games on ad-sponsored broadcast television because, at this time, it is in the NFL's best financial interest. Football games on over-the-air broadcast stations still receive higher ratings and ad revenues than those on pay TV.

Ultimately, however, whether the majority of football games remain on broadcast television, or move to cable networks, will be a decision made by the NFL on how best to distribute its programming, as opposed to whether or not there is a blackout rule or maybe even the number of fans reached. Case in point is the 2005 decision to move its Monday Night Game from ABC, which had carried the games previously for 35 years, to ESPN despite the existence of the blackout rules and the undisputed fact that more Americans have access to ABC than ESPN. Similarly, the choice was made to broadcast only half of the Thursday night games this year on CBS, which has far more viewers than the NFL Network, which has rights to the other games.

We should acknowledge what our actions here will do and not do. The Commission has the ability to repeal the FCC's rules enforcing the NFL's blackout policy but that will do nothing to change the ability of the NFL to impose and enforce its own existing policy on broadcasters or MVPDs. The NFL has the right to maintain its current blackout policy, and I suspect that they will do so. That means, consumers in small sports markets should continue to expect the threat of future blackouts. Today's item just means that the FCC will no longer be complicit in helping continue such a flawed policy.

I thank the Chairman and the Media Bureau staff for preparing the item before us and moving it expeditiously. The Commission should look for more opportunities to remove or repeal rules that can be addressed by legal remedies or other methods available to the private sector.