



Eliminating Sports Blackout Rules

MB Docket No. 12-3

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Federal Communications Commission
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INTRODUCTION

I appreciate the opportunity to comment on the Federal Communication Commission's proposed rulemaking to eliminate the Sports Blackout Rule.¹

The Technology Policy Program of the Mercatus Center at George Mason University is dedicated to advancing knowledge about the effects of regulation on society. As part of its mission, the program conducts careful and independent analyses that employ contemporary economic scholarship to assess agency rulemakings and proposals from the perspective of the public interest. Therefore, this comment does not represent the views of any particular affected party or special interest group but is designed to assist the agency as it explores these issues.

SUMMARY

Experts view television regulations as “a Rube Goldberg regulatory structure,” a complex system that performs simple tasks in indirect, convoluted ways.² The sports blackout rules, which the Federal Communications Commission originally devised in 1975, are one piece of the machine, an expendable intervention into television markets. Sports blackouts, as the Copyright Office reported to Congress in 2008, are “best left to marketplace forces”³ since blackouts can be provided by contracts between leagues and cable and satellite (pay-TV) distributors. The existing rules have prevented a freer media market for forty years and should be repealed.

1. FCC, *In the Matter of Sports Blackout Rules, Notice of Proposed Rulemaking*, MB Dkt. No. 12-3 (Rel. Dec. 18, 2013), http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1218/FCC-13-162A1.pdf.

2. *Hearing on The Cable Act at 20, Before the Senate Committee on Commerce, Science and Transportation*, 112th Cong., 4 (July 24, 2012) (testimony of Preston Padden, senior fellow, Silicon Flatirons Center), <http://siliconflatirons.com/documents/publications/policy/PaddenTestimony.pdf>.

3. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* (Washington, DC: US Copyright Office, 2008), 143, <http://www.copyright.gov/reports/section109-final-report.pdf>.

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The Federal Communications Commission (FCC) has the legal authority to repeal the blackout rules, which are particularly unfair to consumers because blackouts ostensibly protect stadium-gate receipts. Sports leagues have it within their power to fill a stadium by simply lowering ticket prices. It is unsupported that sports leagues can summon the force of the United States government to blackout sports in local television markets because of attendance problems the leagues themselves have a hand in creating. The FCC should not be supporting this through market distortions.

Supporters of the blackout rules—like some sports leagues and broadcasters—argue that forcing blackouts on cable and satellite providers helps maintain free over-the-air broadcasts.⁴ That specious argument should be disregarded. Unlike the 1970s, few Americans now rely solely on broadcast television for their entertainment, so the FCC’s ill-advised attempt to shape markets only inhibits free competition. Whatever the impetus for the 1975 blackout rules, those justifications have surely diminished as the economics of television has changed dramatically. For these reasons the FCC should eliminate the sports blackout rules.

The FCC Has Ample Legal Authority to Repeal the Sports Blackout Rules for Cable, DBS, and OVS

No statutes codify the FCC’s sports blackout rules, leaving the FCC free to repeal the rules for all pay-TV distributors. The FCC can repeal its rules on cable distributors because there is no statute requiring it and the FCC has authority to modify and repeal its rules when such action is appropriate.⁵ Though Congress expressly mentioned applying the sports blackout rules to open video systems (OVS) and satellite carriers (DBS),⁶ the FCC still has the ability to repeal its blackout regulations. To maintain parity with cable and to remove regulatory detritus from the Rube Goldberg framework, the FCC should repeal sports blackout rules for OVS and DBS distributors, as well.

This is not the first time the FCC has contemplated removing regulations Congress has expressly approved of in a statute. As the DC Court of Appeals has explained, there is a significant difference between Congress ratifying agency rules and Congress codifying agency rules.⁷ The former, unlike the latter, can be waived or repealed as the agency sees fit. Since Congress only references the FCC’s existing sports blackout rules in the statutes concerning OVS and DBS and provides no separate mandate, Congress has merely ratified the sports blackout rules and the FCC is free to repeal them.

Commenters in support of the existing blackout rules will likely claim that Congress mandated the rules on OVS and DBS. Similarly, in the 1980s, some argued that Congress mandated the Fairness Doctrine when the FCC waived some Fairness Doctrine rules on certain news services. In both cases, the FCC has the authority to waive or repeal the rules because Congress never created a binding statutory obligation.

Like the sports blackout rules, the FCC had Fairness Doctrine policies prior to Congress’ express approval of the Fairness Doctrine. The FCC introduced the Fairness Doctrine in its 1949 report, which stated that broadcasters must “devote a reasonable percentage of time to the presentation of news and programs devoted to the

4. See The National Association of Broadcasters, *Reply Comments of the National Association of Broadcasters, Petition for Rulemaking Seeking Elimination of the Sports Blackout Rule* (February 27, 2012) 2, <http://apps.fcc.gov/ecfs/document/view?id=7021870473>.

5. See Federal Communications Commission, 47 U.S.C. § 154(i) (2011) (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”); Powers and Duties of Commission, 47 U.S.C. § 303(r) (2011) (providing that the Commission may “make such rules and regulations . . . not inconsistent with this law, as may be necessary to carry out the provisions of this Act . . .”).

6. See Establishment of Open Video Systems, 47 U.S.C. § 573(b)(1)(D) (2011) (requiring the FCC to apply the FCC’s sports blackout regulations to open video systems); Carriage of Distant Television Stations by Satellite Carriers, 47 U.S.C. § 339(b)(1) (2011) (requiring the FCC to apply the FCC’s sports blackout regulations to satellite television providers).

7. *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986).

consideration and discussion of public issues of interest.”⁸ In 1959, Congress amended the 1934 Communications Act to and largely reproduced the FCC’s Fairness Doctrine obligations in Section 315(a).⁹

In the 1980s, the FCC omitted a particular broadcast service—teletext—from, *inter alia*, Fairness Doctrine obligations. Petitioners sued in federal court, contending that the FCC must enforce the Fairness Doctrine against teletext companies because Section 315(a) was a “statutory obligation.”¹⁰ The DC Circuit Court of Appeals disagreed.¹¹ The Court stated that 315(a) was not a “binding statutory obligation; rather it ratified the Commission’s longstanding position that the public interest standard authorizes the fairness doctrine.”¹² Accordingly, a statute that expressly accepts existing FCC rules, absent a binding statutory obligation to enforce those rules, can be waived or repealed by the agency.¹³

Likewise, the statutes referencing the sports blackout regulations for OVS and DBS cite the FCC’s existing regulations, yet the statutes provide no independent obligation and do not codify the FCC’s rules.¹⁴ As long as the FCC acknowledges and justifies its change of view of what the public interest requires, eliminating the sports blackout rules is permissible.¹⁵

Favoring the Availability of Free Over-the-Air Broadcasts through the Sports Blackout Rules Is Not in the Public Interest Because of Industry Changes Since the 1970s

The availability of free broadcasts was a primary consideration for the original sports blackout rules,¹⁶ but the weight of that factor is significantly diminished. Market circumstances have changed substantially and undermine this purpose of the sports blackout rules. Supporters of the rules argue that removing the rules will make pay-TV platforms more attractive to sports leagues and threaten over-the-air broadcasts of sports content.¹⁷ Marketplace dynamics frustrate reliable predictions, so we cannot predict the likelihood of sports content migrating to pay-TV. Nevertheless, pay-TV is already attractive to sports leagues because the vast majority of Americans subscribe to cable, satellite, or telco-video service.

Television’s competitive dynamics have changed—Americans have almost completely fled “free” over-the-air television—and forty-year-old regulations should as well. As former FCC chief economist Thomas Hazlett has stated, “Tens of millions of households have been willing to pay \$50, \$100, or even \$150 a month to opt out of ‘free TV,’” and traditionally broadcasted content “can be efficiently delivered to consumers by alternative systems.”¹⁸

8. FCC, Report on Editorializing by Broadcast Licensees, 13 FCC 1246, 1249 (1949). See Fairness Doctrine, 47 C.F.R. § 73.1910 (1978).

9. Candidates for Public Office, 47 U.S.C. § 315(a) (2011).

10. Telecommunications Research and Action Center v. FCC, 801 F.2d 501, 517 (DC Circuit 1986).

11. *Ibid.*

12. *Ibid.*

13. *Ibid.*, 15–19.

14. See Establishment of Open Video Systems, 47 § U.S.C. 573(b)(1)(D) (2011); Carriage of Distant Television Stations by Satellite Carriers, 47 § USC 339(b)(1) (2011).

15. See Greater Boston Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (footnote omitted), cert. denied, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971); International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972) (“It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them.”).

16. FCC, *In the matter of 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*, Dkt. No. 19417, FCC 75-819, 54 FCC 2d 265, 281–82 (1975) (“Our concern is with the availability of television broadcast programming to the general public, which is of vital importance to the larger and more effective use of the airwaves.”) (citation omitted).

17. See the National Association of Broadcasters, *Reply Comments*, 1, <http://apps.fcc.gov/ecfs/document/view?id=7021870473>.

18. Thomas W. Hazlett, “If a TV Station Broadcasts in the Forest . . .,” (working paper, Arlington Economics, Arlington, VA, May 19, 2011), 42, 59, <http://www.americantelevisionalliance.org/wp-content/uploads/2011/05/TV-Future-TWH-5-19-111.pdf>.

In 1975 the vast majority of Americans watched broadcast television via rabbit ears or similar antennas while only around 3 million homes paid for cable television. Today, tens of millions of homes, some 86 percent of TV households, subscribe to pay-TV through a cable, satellite, or telephone companies.¹⁹ Further, many of those who do not subscribe are so-called cable cutters who rely on over-the-top services like Netflix and Hulu for their “television” needs. That means that, unlike in 1975 when the rules were created, only a small fraction of households rely on broadcast television.²⁰ Maintaining sports blackout rules to aid free over-the-air television simply hinders these economic and social trends.

Further, the FCC already agrees with the fundamentals of this analysis, as the Commission will soon auction off broadcast spectrum for mobile broadband and permit stations to cease broadcasts altogether.²¹ The FCC’s Incentive Auction Task Force recently described its efforts to impress on station owners the idea that exiting the broadcast business in 2015 is “a once-in-a-lifetime financial opportunity.”²² Since Congress and the FCC are indifferent—to say the least—to broadcasters *remaining on the air at all*, favoring over-the-air television through the sports blackout rules is unjustified.

Finally, as commenters have pointed out, the FCC blackout rules²³ almost exclusively apply to NFL games.²⁴ The NFL, for its part, supports the blackout rules and also cites the rules as benefiting viewers who watch over-the-air TV broadcasts.²⁵ Aside from the market changes explained previously, that line of reasoning is unpersuasive since the NFL has increasingly moved its games to pay-TV platforms. (This makes financial sense since most television viewers have pay-TV today.) Notably, the NFL switched its popular Monday Night Football program from free over-the-air ABC broadcasts to ESPN in 2006. That same year, the NFL introduced Thursday Night Football games not on free broadcast television but on the NFL Network—a channel that in most markets is only available on premium pay-TV tiers. As the NFL shows through these business decisions, sports viewers’ access to sports is not appreciably harmed when sports are on pay-TV platforms. The FCC should permit leagues to freely negotiate with distributors according to preferred business models. The blackout rules confound those attempts.

19. Leightman Research Group, “86% of TV Households Subscribe to a Multi-Channel Video Service,” news release, August 8, 2013, <http://www.leichtmanresearch.com/press/080813release.html>.

20. *Ibid.*

21. FCC, “Incentive Auctions,” accessed February 19, 2014, <http://www.fcc.gov/incentiveauctions>.

22. FCC Incentive Auction Task Force, “The Path to a Successful Incentive Auction,” (open meeting presentation, January 30, 2014), Slide 2, http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0130/DOC-325343A1.pdf. See also Phil Kurz, “FCC task force reports on TV spectrum repack,” *Broadcast Engineering*, August 15, 2013, <http://broadcastengineering.com/regulation/fcc-task-force-reports-tv-spectrum-repack> (“The auction is intended to incentivize some TV broadcasters to go dark . . .”).

23. Cable Sports Blackout, 47 § C.F.R. 76.111; Network Non-Duplication Protection, Syndicated Exclusivity and Sports Blackout Rules for Satellite Carriers: Definitions, 47 § C.F.R. 76.120; and Satellite Sports Blackout, 47 C.F.R. § 76.127–30.

24. Robert Baade et al., *Comments of Sports Economists on the FCC’s Sports Blackout Rules, Petition for Rulemaking Seeking Elimination of the Sports Blackout Rule*, 11, <http://apps.fcc.gov/ecfs/document/view?id=7021860132>. Repeal of the rules would have practically no effect on MLB blackouts, for instance. The Office of the Commissioner of Baseball, *Comments of the Office of the Commissioner of Baseball, In the Matter of Petition of Rulemaking to Eliminate the Sports Blackout Rule* (February 13, 2012), 6, <http://apps.fcc.gov/ecfs/document/view?id=7021860023>. Even NFL blackouts have become less common as a trend. In 1974, 59 percent of NFL home games were blacked out locally. The National Football League, *Opposition of the National Football League, Petition for Rulemaking to Eliminate the Sports Blackout Rule* (February 13, 2012), 4, <http://apps.fcc.gov/ecfs/document/view?id=7021860097>. In 2011, only 16 out of 256 regular season games were blacked out. NFL spokesman Greg Aiello bragged recently that “there have been no local TV blackouts of NFL home games through the first 133 games of the 2013 season.” Mike Florio, “FCC Launches Effort to End Blackout Rule,” *NBC Sports*, November 2, 2013, <http://profootballtalk.nbcsports.com/2013/11/02/fcc-launches-effort-to-end-blackout-rule/>.

25. The National Football League, *Opposition*, 2, <http://apps.fcc.gov/ecfs/document/view?id=7021860097>. The National Association of Broadcasters also cites the benefit of broadcast-only households. National Association of Broadcasters, *Comments of the National Association of Broadcasters, Petition for Rulemaking Seeking Elimination of the Sports Blackout Rule*, February 13, 2012, 1, <http://apps.fcc.gov/ecfs/document/view?id=7021859916>.

CONCLUSION

For the reasons above, the Commission should eliminate the sports blackout rules. Congress never made sports blackouts a binding statutory obligation, and thus the FCC has the authority to modify its rules. Market circumstances have changed substantially since the 1970s and it is no longer in the public interest to protect free over-the-air television through the sports blackout rules. If the sports leagues find it is in their interest to continue local blackouts of games in home markets, the leagues can contract with pay-TV distributors to accomplish that. The FCC should not intervene in an attempt to lower the contract costs of profitable and financially savvy sports leagues. Removing the sports blackout rules would inject market forces into the media industry and eliminate one more damaging convulsion in television's Rube Goldberg regulatory system.