

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: December 17, 2013.

**W.C. Early,**

*Acting Regional Administrator, Region III.*

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 76

[MB Docket No. 12-3; FCC 13-162]

#### Sports Blackout Rules

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Commission seeks comment on its proposal to eliminate the sports blackout rules. Elimination of the sports blackout rules alone likely would not end sports blackouts, but it would leave sports carriage issues to private solutions negotiated by the interested parties in light of current market conditions and eliminate unnecessary regulation.

**DATES:** Comments for this proceeding are due on or before February 24, 2014; reply comments are due on or before March 25, 2014.

**ADDRESSES:** You may submit comments, identified by MB Docket No. 12-3, by any of the following methods:

- Federal Communications Commission's Web site: <http://www.fcc.gov/cgb/ecfs/>. Follow the instructions for submitting comments.
- Mail: Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or phone: (202) 418-0530 or TTY: (202) 418-0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** For additional information, contact Kathy Berthot, [Kathy.Berthot@fcc.gov](mailto:Kathy.Berthot@fcc.gov), of the

Media Bureau, Policy Division, (202) 418-7454.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Notice of Proposed Rulemaking*, FCC 13-162, adopted on December 17, 2013 and released on December 18, 2013. The full text is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW., CY-A257, Washington, DC 20554. This document will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat. The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY-B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

This document contains no proposed information collection requirements.

#### Summary of the Notice of Proposed Rulemaking

##### I. Introduction

1. In this *Notice of Proposed Rulemaking*, we propose to eliminate the Commission's sports blackout rules, which prohibit certain multichannel video programming distributors (MVPDs) 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>1</sup> The sports blackout rules were originally adopted nearly 40 years ago when game ticket sales were the main source of revenue for sports leagues. These rules were intended to address concerns that MVPDs' importation of a distant signal carrying a blacked-out sports event could result in lost revenue from ticket sales, which might cause sports leagues to expand the reach of blackouts by refusing to sell their rights to sports events to all distant stations. The rationale underpinning the rules was to ensure to the greatest extent possible the continued availability of sports telecasts to the public. Changes in the sports industry in the last four decades have called into question whether the sports blackout rules remain necessary to ensure the overall availability of sports programming to

the general public. In this proceeding, we will determine 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. We recognize that elimination of our sports blackout rules alone might not end sports blackouts, but it would leave sports carriage issues to private solutions negotiated by the interested parties in light of current market conditions and eliminate unnecessary regulation.

##### II. Background

###### A. History of the Sports Blackout Rules

2. Prior to 1953, National Football League (NFL) bylaws prohibited member teams from, among other things, (i) telecasting their games into the home territory of another team that was playing at home, and (ii) telecasting their games into the home territory of another team that was playing away from home and was telecasting its game into its home territory. In 1953, a federal court held that the NFL's prohibition on the telecast of outside games into the home territory of a team that was playing at home was a reasonable method of protecting the home team's gate receipts and was not illegal under the antitrust laws. The court found, however, that restricting the telecast of outside games into the home territory of a team not playing at home was an unreasonable restraint on trade because, when the home team was playing away, there was no gate to protect.

3. In 1961, the NFL entered into an agreement with the CBS television network under which the NFL's member teams pooled the television rights to their games and authorized the league to sell the rights to the network as a package, with the revenue from the league sales to be distributed equally among the member teams. Under this agreement, CBS was permitted to determine which games would be televised and where the games would be televised. The NFL then petitioned the court for a ruling on whether the terms of its contract with CBS violated the court's 1953 final judgment. The court concluded that the provision giving CBS the power to determine which games would be televised and where was contrary to the final judgment and that execution and performance of the contract was therefore prohibited. This ruling did not, however, apply to a similar contract between the newly formed American Football League (AFL) and the ABC television network, because the AFL was not a party to the court's 1953 final judgment. Concerned

<sup>1</sup> See 47 CFR 76.111 (cable operators), 76.127 (satellite providers), 76.128 (application of sports blackout rules), 76.1506(m) (open video systems).

that the court's ruling placed it at a disadvantage to the AFL, the NFL petitioned Congress for relief, arguing that packaged network contracts were desirable because they allowed the member teams to negotiate for the sale of television rights with a single voice and equalized revenue among the member teams.

4. Congress responded to the NFL's plea for relief with its passage of the Sports Broadcasting Act of 1961. The Sports Broadcasting Act 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. This statute also expressly permits these four professional sports leagues to black out television broadcasts of home games within the home territory of a member team. At the time the Sports Broadcasting Act was enacted, television blackouts were believed to be necessary to protect gate receipts, and the packaging of individual teams' television rights was thought to be necessary to enhance the financial stability of the leagues by assuring equal distribution of revenues among all teams. The NFL subsequently instituted a practice of blacking out the television broadcast of all home games of its member teams in their home territory, irrespective of whether the games were sold out.

5. In August 1971, the Commission sent a letter to Congress seeking guidance on the Commission's proposed regulatory scheme for the then-nascent cable television industry, which included several proposals relating to sports programming. The Commission noted the exemptions from the anti-trust laws granted to professional sports leagues under the Sports Broadcasting Act and stated that "cable systems should not be permitted to circumvent the purpose of th[is] law by importing the signal of a station carrying the home game of a professional team if that team has elected to black out the game in its home territory." The Commission indicated that it would follow the "spirit and letter" of the Sports Broadcasting Act "since it represents Congressional policy in this important area" and stated that it intended to initiate a rulemaking proceeding on this issue in the near future. The Commission commenced a rulemaking proceeding proposing a sports blackout rule for cable television systems in February 1972.

6. In 1973, during the pendency of the Commission's rulemaking proceeding, Congress enacted Public Law 93-107 in

response to complaints from dissatisfied football fans who were unable to view the sold out home games of their local teams on the public airwaves due to the NFL's blackout policy. Public Law 93-107 added new section 331 to the Communications Act of 1934, as amended (Communications Act), which prohibited professional sports leagues from blacking out the television broadcast of a home game in a team's home territory if the game was televised elsewhere pursuant to a league television contract and the game sold out 72 hours in advance of game time. Public Law 93-107 was intended as a limited experiment to allow all affected parties to assess the impact of the statute and expired by its own terms effective December 31, 1975. Although the statute was not renewed, the NFL subsequently continued to follow the practice of blacking out the television broadcast of home games in a team's home territory only if the game was not sold out 72 hours in advance of game time.

7. In the meantime, the Commission adopted the cable sports blackout rule in 1975 to address concerns that cable systems could frustrate sports leagues' blackout policies by importing the distant signal of a television station carrying the home game of a sports team that has elected to black out the game in its home territory. Specifically, the Commission found that

[g]ate receipts are the primary source of revenue for sports clubs, and 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. If cable television carriage of the same game that is being played locally is allowed to take place, the local team's need to protect its gate receipts might require that it prohibit the telecasting of its games on [distant] television stations which might be carried on local cable systems. If this were to result, the overall availability of sports telecasts would be significantly reduced.

The Commission emphasized that its concern was not in ensuring the profitability of organized sports, but rather in ensuring the overall availability of sports telecasts to the general public, which it found was "of vital importance to the larger and more effective use of the airwaves." The cable sports blackout rule adopted by the Commission, which was originally codified in § 76.67 and later renamed, slightly revised, and renumbered as § 76.111, is designed to allow the holder of the exclusive distribution rights to the sports event (*i.e.*, a sports team, league, promoter, or other agent, rather than a broadcaster) to control, through

contractual agreements, the display of that event on local cable systems. Under this rule, the rights holder may demand that a cable system located within the specified zone of protection of a television broadcast station licensed to a community in which a sports event is taking place black out the distant importation of the sports event if the event is not being carried live by a television broadcast station in that community. The zone of protection afforded by the cable sports blackout rule is generally 35 miles surrounding the reference point of the broadcast station's community of license in which the live sporting event is taking place. The cable sports blackout rule applies to all sports telecasts in which the event is not exhibited on a local television station, including telecasts of high school, college, and professional sports, and individual as well as team sports.

8. The Telecommunications Act of 1996 (1996 Act) added a new section 653 to the Communications Act, which established a new framework for entry into the video programming distribution market, the open video system. Congress's intent in establishing the open video system framework was "to encourage telephone companies to enter the video programming distribution market and to deploy open video systems in order to 'introduce vigorous competition in entertainment and information markets' by providing a competitive alternative to the incumbent cable operator." As an incentive for telephone company entry into the video programming distribution market, section 653 provides for reduced regulatory burdens for open video systems subject to the systems' compliance with certain non-discrimination and other requirements set forth in Section 653(b)(1). Section 653(b)(1)(D) directed the Commission to extend to the distribution of video programming over open video systems the Commission's rules on sports blackouts, network nonduplication, and syndicated exclusivity. The Commission amended its rules in 1996 to directly apply the existing cable sports blackout rule to open video systems.<sup>2</sup>

9. In November 1999, Congress enacted the Satellite Home Viewer Improvement Act of 1999 (SHVIA), which provides statutory copyright licenses for satellite carriers to provide additional local and national broadcast programming to subscribers. In enacting

<sup>2</sup> We note that the sports blackout rule for OVS, which is codified at 47 CFR 76.1506(m), references 47 CFR 76.67, which has been renumbered as 47 CFR 76.111. If the sports blackout rule for OVS is retained, we propose to update 47 CFR 76.1506(m) to cite the appropriate rule section, 47 CFR 76.111.

SHVIA, Congress sought to place satellite carriers on an equal footing with cable operators with respect to the availability of broadcast programming. Section 1008 of SHVIA added a new Section 339 to the Communications Act. Section 339(b) directed the Commission to apply the cable network nonduplication, syndicated exclusivity, and sports blackout rules to satellite carriers' retransmission of nationally distributed superstations and, to the extent technically feasible and not economically prohibitive, to extend the cable sports blackout rule to satellite carriers' retransmission of network stations to subscribers.

10. The Commission adopted a sports blackout rule for satellite carriers in November 2000. This rule provides that, on the request of the holder of the rights to a sports event, a satellite carrier may not retransmit a nationally distributed superstation or a network station carrying the live television broadcast of the sports event to subscribers if the event is not being carried live by a local television broadcast station. This rule applies within the same 35-mile zone of protection that applies to cable systems applies to satellite carriers; that is, 35 miles surrounding the reference point of the broadcast station's community of license in which the live sporting event is taking place.

11. The Commission last examined the sports blackout rules more than seven years ago, in a 2005 report to Congress required by the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA). 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 nonduplication, syndicated exclusivity, and sports blackout rules, including the impact of those rules on the ability of rural cable operators to compete with direct broadcast satellite ('DBS') industry in the provision of digital broadcast television signals to consumers." SHVERA also directed the Commission to "include such recommendations for changes in any statutory provisions relating to such rules as the Commission deems appropriate." The Commission concluded in its report that the sports blackout rules do not affect competition among MVPDs, that commenters failed to advance any link between the blackout rules and competition among MVPDs, and that no commenter pressed the case for repeal or modification of the sports blackout rules. The Commission therefore declined to recommend any

regulatory or statutory revisions to modify the protections afforded to the holders of sports programming rights.

12. Today, sports leagues' blackout policies determine which games are blacked out locally. These policies are given effect primarily through 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 MVPDs. The Commission's rules, described above, supplement these contractual relationships by requiring MVPDs to black out games that are required by the sports leagues or individual teams to be blacked out on local television stations.

#### *B. Petition for Rulemaking*

13. In November 2011, the Sports Fan Coalition, Inc., National Consumers League, Public Knowledge, League of Fans, and Media Access Project (collectively, Petitioners or SFC) filed a joint Petition for Rulemaking urging the Commission to eliminate the sports blackout rules. The Petitioners assert that, at a time when ticket prices for sports events are at historic highs and high unemployment rates persist, making it difficult for many consumers to afford attending local sports events, the Commission should not support the "anti-consumer" blackout policies of professional sports leagues. The Petitioners also argue that the sports leagues' blackout policies are no longer needed to protect gate receipts and therefore should not be facilitated by the Commission's sports blackout rules. The Petitioners maintain that, "without a regulatory subsidy from the federal government in the form of the [sports blackout rules], sports leagues would be forced to confront the obsolescence of their blackout policies and could voluntarily curtail blackouts." On January 12, 2012, the Media Bureau issued a Public Notice seeking comment on the Petition. Comments in support of the petition were filed by SFC, a group of nine sports economists, several members of Congress, and thousands of individual consumers. The NFL, the Office of the Commissioner of Baseball (Baseball Commissioner), the National Association of Broadcasters, and a group of network television affiliates filed comments opposing the Petition.

#### **III. Notice of Proposed Rulemaking**

14. We propose to eliminate the sports blackout rules. The sports blackout rules were first adopted nearly four decades ago 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 the public. The rules were extended to open video systems and then to satellite carriers to provide parity between cable and newer video distributors. The sports industry has changed dramatically in the last 40 years, however, and the Petitioners argue that the economic rationale underlying the sports blackout rules may no longer be valid. Below we seek comment on whether we have authority to repeal the sports blackout rules. Next, we examine whether the economic considerations that led to adoption of the sports blackout rules continue to justify our intervention in this area. Finally, we propose to eliminate the sports blackout rules and seek comment on the potential benefits and harms of that proposed action on interested parties, including sports leagues, broadcasters, and consumers.

#### *A. Legal Authority*

15. We seek comment on whether we have the authority to repeal the sports blackout rules. As discussed above, Congress did not explicitly mandate that the Commission adopt the cable sports blackout rule. Rather, the Commission adopted the cable sports blackout rule as a regulatory measure premised on the policy established by Congress in the Sports Broadcasting Act, 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. 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 CFR 76.67)." Similarly, Section 339(b) of the Communications 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." Reflecting the language used in these

statutory provisions, the legislative history of Section 339(b) states that Congress's intent was to place satellite carriers on an equal footing with cable operators with respect to the availability of television programming. Petitioners argue that the Commission has the authority to repeal the sports blackout rules for both cable and DBS because Congress never directed the Commission to issue the sports blackout rules in the first instance and only directed the Commission to establish parity between the cable and DBS regimes. Senators Blumenthal and McCain likewise assert that "[i]t is important to note that Congress never instructed the Commission to promulgate the Sports Blackout Rule in the first place. The Commission therefore possesses ample authority to amend the Sports Blackout Rule sua sponte, without any action by Congress." Several commenters opposing elimination of the sports blackout rules assert that Congress mandated the sports blackout rule for DBS. These commenters do not, however, expressly argue that the Commission does not have authority to eliminate the sports blackout rules, either for cable or for DBS and OVS. We tentatively conclude that repeal of the cable sports blackout rule is authorized by the Communications Act, which grants the Commission general rulemaking power, including the authority to revisit its rules and modify or repeal them where it concludes such action is appropriate. We seek comment on this tentative conclusion. We also seek comment on whether we have the authority to repeal the sports blackout rules for DBS and OVS. We observe that when Congress enacted the sports blackout provisions in Sections 339(b) and 653(b)(1)(D) of the Act, Congress directed the Commission to apply to DBS and OVS the sports blackout protection applied to cable, set forth in 47 CFR 76.67, rather than simply directing the adoption of sports blackout rules for those services. The statute does not withdraw the Commission's authority to modify its cable rule at some point in the future, nor is there any indication in the legislative history that Congress intended to withdraw this authority. Given that the DBS and OVS provisions are expressly tied to the cable sports blackout rule, does this evince an intent on the part of Congress that the Commission should accord the same regulatory treatment to DBS and OVS as cable, *i.e.*, if the Commission modifies or repeals the cable rule it should also modify or repeal the DBS and OVS rules? Would Congress's intent

to subject open video systems to reduced regulatory burdens as an incentive for their entry into the video market support an assertion of authority to eliminate the sports blackout rule for OVS if we determine that the cable sports blackout rule is no longer needed? Alternatively, are Congress's directives to the Commission regarding application of sports blackout protection to open video systems and to satellite carriers more appropriately interpreted to mean that the Commission does not have the authority to repeal the sports blackout rules for these types of entities, even if it does so for cable? If we determine that we do not have the authority to repeal the satellite sports blackout rule and/or the OVS sports blackout rule, would it nevertheless be appropriate to repeal the cable sports blackout rule? Would eliminating the sports blackout rule for cable but not for DBS and/or OVS create undue disparities or unintended consequences for any of these entities?

#### *B. Assessing the Continued Need for Sports Blackout Rules*

16. We request comment on whether the economic rationale underlying the sports blackout rules remains valid in today's marketplace. Specifically, we invite commenters to submit information, and to comment on information currently in the record, regarding (i) the extent to which sports events continue to be blacked out locally as a result of the failure of the events to sell out, (ii) the relative importance of gate receipts vis-à-vis other revenues in organized sports today, and (iii) whether local blackouts of sports events significantly affect gate receipts. We invite commenters also to submit any other information that may be relevant in assessing whether the sports blackout rules are still needed to ensure the overall availability of sports telecasts to the public. We ask commenters to assess whether this information, as updated and supplemented, supports retaining or eliminating the sports blackout rules.

##### 1. Blackouts of Sports Events

17. We seek comment on the extent to which sports events are blacked out locally today due to the failure of the events to sell out. The record indicates that professional football continues to be the sport most affected by blackouts. Under the NFL's longstanding blackout policy, the television broadcast of home games in a team's home territory has been blacked out if the game was not sold out 72 hours in advance of game time. In 1974, just prior to the Commission's adoption of the cable

sports blackout rule, 59 percent of regular season NFL games were blacked out due to failure of the games to sell out. During the 2011 NFL season, only 16 out of 256 regular season games, or six percent of games, were blacked out. These 16 blackouts occurred in just four cities: Buffalo, Cincinnati, San Diego, and Tampa Bay. Thus, the percentage of NFL games that are blacked out today has dropped substantially since the sports blackout rules were adopted, and blackouts of NFL games are relatively rare. Does this substantial reduction in the number of blacked out NFL games suggest that the sports blackout rules are no longer needed? Conversely, does the relatively small number of blackouts of NFL games argue against the need to eliminate the sports blackout rules? To what extent are blackouts of NFL games averted when teams and local businesses work together to "sell" outstanding tickets, thereby allowing local coverage of games? Has the cable sports blackout rule had any impact on the number of NFL blackouts? How should this affect our analysis?

18. We note that in 2012, after the petition for rulemaking in this proceeding was put out for comment, the NFL modified its blackout policy to allow its member teams the option of avoiding a blackout in their local television market if the team sold at least 85 percent of game tickets at least 72 hours prior to the game. Specifically, under this new policy, individual teams are required to determine their own blackout threshold—anywhere from 85 percent to 100 percent—at the beginning of the season and adhere to that number throughout that season. If ticket sales exceed the threshold set by the team, the team must share a higher percentage of the revenue from those ticket sales than usual with the visiting team. We seek comment on the extent to which this new policy has impacted blackouts of NFL games. According to SFC, there were 15 NFL games blacked out affecting five NFL franchises during the 2012 season. Which teams opted to take advantage of the NFL's new blackout policy and what effect, if any, did the NFL's relaxation of its blackout policy have on ticket sales for the home games of these teams? Does the NFL's recent relaxation of its sports blackout policy weigh in favor of or against elimination of the Commission's sports blackout rules?

19. We note that the record is largely silent on the prevalence of blackouts affecting sports other than the NFL; thus we invite comment on the extent to which these sports events are blacked out locally today. As noted above, the sports blackout rules apply to all sports

telecasts in which the event is not available live on a local television station, including telecasts of high school, college, and professional sports, and individual as well as team sports. The Sports Economists assert, however, that “major professional sports leagues in the U.S. [other than the NFL] generally do not use blackout rules to prevent a game from being televised in the locality in which it is being played” because they “sell television rights to only some games through national broadcast agreements.” The Sports Economists explain that

[t]he FCC’s rules currently have little relevance with respect to television rights that are sold by a team rather than the league. The FCC’s rules apply only to games in the local area where they are being played. Thus, the FCC’s blackout rules bear no relation to league policies that prevent telecasts in a team’s home market of a game being played elsewhere. For games that are played locally, the vast majority of teams choose to sell television rights to all or most of their games.  
\* \* \*

To what extent are the sports blackout rules still relevant for sports other than professional football, where individual teams, rather than the league, hold and sell the distribution rights for all or most of the games? In this regard, we seek comment on the importance of retaining the sports blackout rules to protect the viability of any nascent sports leagues that may emerge in the future.

20. Professional baseball is the only other sport for which commenters provided any information on blackouts. Commenters indicate that the number of MLB games blacked out is relatively small because individual MLB teams, rather than the league, negotiate with local broadcast television flagship stations or RSNs for exclusive rights to televise most of the teams’ games, both home and away games, in the teams’ home territories. According to the Baseball Commissioner, in 2011, 151 of 162 regular season games of each MLB team, on average, were televised on the team’s local broadcast television station or RSN. Therefore, the Baseball Commissioner asserts, at most eleven of 162 regular season games of each MLB team were affected by the sports blackout rules. To the extent that more specific data are available regarding the number of home games of MLB teams blacked out pursuant to the Commission’s sports blackout rules, as opposed to MLB’s blackout policies, we request that commenters provide those data. Specifically, for each MLB team, we seek current data on whether exclusive rights to televise most of the teams’ games have been granted to local broadcast television stations or RSNs and

the number of home games that are blacked out pursuant to the Commission’s rules. Does the number of games blacked out argue in favor of or weigh against repeal of the sports blackout rules? In addition, for home games that are blacked out under our rules, we seek information as to why they are blacked out. In this regard, the Baseball Commissioner states that “[t]he vast majority of MLB games are not sold out. While there are specific instances in which MLB clubs do take account of gate attendance in making decisions about telecasting patterns (and invoking the [Commission’s sports blackout rules]), MLB clubs do not routinely black out games that are not sold out.” Accordingly, what factors other than attendance are taken into account in determining which MLB games are blacked out locally? How many MLB games were blacked out due to failure to sell out and how many were blacked out for other reasons? If, as reported, few MLB games are blacked out due to failure to sell out, does this support the conclusion that the sports blackout rules are not needed to promote attendance at sports events?

21. We likewise request specific data detailing the extent to which any other sports events, including games of other major professional sports leagues (*e.g.*, the NBA and NHL), and any other professional, collegiate, or high school sports events, are blacked out locally. To the extent that these other sports events are blacked out, are they blacked out due to failure of the event to sell out or for some other reason?

## 2. Gate Receipts and Other Revenues

22. We seek comment on the relative importance of gate receipts vis-à-vis other revenues in sports today. As discussed above, 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.” The record before us indicates, however, that the importance of gate receipts has diminished dramatically for NFL clubs in the past four decades, particularly in relation to television revenues. The Sports Economists state that in 1970 the estimated average revenue of an NFL team was approximately \$5 million and the estimated average operating income was less than \$1 million, whereas in 2009 the estimated average revenue of an NFL team was about \$250 million and the estimated average operating income was \$33 million. The Sports Economists further state that ticket sales today account for around 20 percent of NFL revenues, while television revenues account for around 60 percent.

According to SFC, television revenues, which are shared equally among teams, are 80 times what they were in 1970 and now account for 50 percent of the NFL’s total revenues. SFC asserts that gate receipts, which are split 60/40 between the home team and visiting team, account for only 21.6 percent of the NFL’s total revenues. These figures indicate that television revenues have replaced gate receipts as the most significant source of revenue for NFL clubs. Does this shift in the source of revenue for NFL clubs undermine the economic rationale for the sports blackout rules? We invite commenters to supplement the record with more current data on NFL revenues, including total revenues, gate receipts, and television revenues, to the extent that such data are available. If gate receipts are no longer the primary or most significant source of revenue for NFL clubs, are the sports blackout rules still necessary to promote attendance at games and to ensure the overall availability of telecasts of these sports to the public? If so, why?

23. There is scant information in the record regarding the significance of gate receipts in relation to other sources of revenue for sports other than professional football. The Baseball Commissioner states only that, “in any given year, ticket sales and television revenues account for roughly the same portion of [MLB’s] revenues and both are critically important to an MLB club’s economic health.” To the extent that commenters assert that the sports blackout rules remain necessary to ensure the overall availability of telecasts of particular sports to the public, we request that they provide current revenue data for such sports, including total revenues, television revenues, and gate receipts. We note that, during recent years, MLB has entered into other revenue-generating ventures, such as the MLB Channel, a baseball-related programming channel available to MVPD subscribers, and Extra Innings, which offers regular season game premium (pay) packages through MVPDs to their subscribers. MLB also offers regular season game packages directly to customers through MLB.tv. Such programming is streamed over the Internet and can be viewed on computers and mobile devices, as well as on televisions using devices such as Apple TV. Moreover, many teams either own the RSNs that carry their game telecasts or have obtained ownership interests in RSNs. Does the emergence of these additional revenue sources impact the relative importance of gate receipts and, accordingly, the continued

need for the sports blackout rules? If gate receipts are not the primary or most significant source of revenue for these sports, why are the sports blackout rules necessary to ensure the overall availability of telecasts of these sports to the public?

### 3. Effect of Blackouts on Gate Receipts

24. We seek comment on the extent to which local blackouts of sports events affect attendance and gate receipts at those events and the extent to which the cable sports blackout rule itself affects attendance and gate receipts at sports events. As discussed above, the sports blackout rules are intended to address concerns that MVPDs' importation of a distant signal carrying a blacked-out sports event could lead to lost revenue from ticket sales, which might cause sports leagues to expand the reach of blackouts by refusing to sell their rights to sports events to all distant stations. The objective of the sports blackout rules is not to ensure the profitability or financial viability of sports leagues, but rather to ensure the overall availability of sports programming to the general public. Thus, we are interested in gate receipts and other revenues of sports leagues only to the extent that such revenues are relevant to this objective. 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, the Sports Economists conclude that there is no evidence that local blackouts of NFL games significantly affect either ticket sales or no-shows at those games. We seek comment on the Sports Economists' conclusion and the underlying studies on which it relies. Do these studies support the conclusion that our sports blackout rules are no longer needed? For example, if local blackouts of NFL games do not significantly affect either ticket sales or no-shows at those games, does it follow that the cable sports blackout rule has no significant effect on attendance? Additionally, we invite commenters to submit any additional studies or evidence showing the extent to which local blackouts of NFL games impact gate receipts at those games and the extent to which the cable sports blackout rule itself impacts gate receipts. In particular, we note that the NFL asserts that its blackout policy, as supported by the Commission's sports blackout rules, is designed to promote high attendance at games. We invite the NFL and other interested commenters to submit any available data or evidence indicating that the NFL's blackout policy in fact has the intended effect of promoting attendance at games. As

noted above, only four cities were affected by local blackouts of NFL games in 2011: Buffalo, Cincinnati, San Diego, and Tampa Bay; in 2012, local blackouts of NFL games were limited to Buffalo, Cincinnati, Oakland, San Diego, and Tampa Bay. We seek comment on whether certain teams or cities are routinely disproportionately affected by local blackouts of NFL games and, if so, why. For example, some commenters suggest that certain cities are more severely impacted by blackouts because of conditions in the local economy (e.g., locally high unemployment) or a large stadium capacity in a city with a relatively small population. If these are the factors that lead to failure to sell out games, does blacking out a game promote attendance at future games in those cities? Are any cities affected by these factors able to sellout games on a regular basis? If so, why? To what extent does a team's performance lead to poor attendance and blackouts? For example, are blackouts more common when a team is not in playoff contention? Should this affect our analysis? If so, how?

25. Are the sports blackout rules necessary to sustain gate receipts and other revenues for NFL clubs? Commenters who assert that eliminating the sports blackout rules would result in a significant reduction in gate receipts or other revenues for NFL clubs should quantify or estimate the anticipated reduction and explain the basis for their estimates. We also seek comment on the connection between any such lost revenues and the willingness of teams to enter into agreements allowing broadcast coverage of their games, maximizing the availability of such broadcasts to the public.

26. There is no specific information in the record regarding the effect of blackouts on gate receipts for any other sports events. We seek comment on whether blackouts have any significant effect on gate receipts for any sports events other than NFL games. Commenters should provide any available data or evidence to support their positions. What impact, if any, would elimination of the sports blackout rules be expected to have on gate receipts and other revenues for these sports? To the extent that commenters argue that eliminating the sports blackout rules would result in a significant reduction in gate receipts or other revenues for these sports, we request that they quantify or estimate the anticipated reduction and explain the basis for their estimates.

27. Some commenters suggest that blacking out games may actually harm, rather than support, ticket sales. We

seek comment on whether blacking out sports events may have the unintended effect of alienating sports fans and discouraging their attendance at home games. According to the Petitioners, recent empirical studies suggest that televising professional sports may actually have a positive effect on attendance at home games. Does televising sports events serve to generate interest among sports fans and thereby promote higher attendance at home games in the long run? If this is the case, then why would a professional sports league, such as the NFL, ever seek to black out games? For example, do commenters believe that the NFL is operating pursuant to a mistaken understanding of the relationship between blackouts and attendance? Or do commenters believe that the NFL has reason for maintaining its blackout policy other than attendance? Commenters are invited to submit any studies or evidence supporting the view that televising sports events encourages attendance at home games.

### 4. Other Relevant Data

28. We invite commenters to submit any other information or data that they believe is relevant to our assessment of whether the sports blackout rules remain necessary to ensure the overall availability of sports telecasts to the public. For example, are changes in the video distribution market in the 40 years since the sports blackout rules were originally adopted, such as those described above, relevant to our assessment? To what extent do sports leagues distribute games via such premium services today and what impact do such premium services have on the leagues' revenues and blackout policies? Commenters should explain how any such information supports or undercuts the economic basis for the sports blackout rules.

### C. Elimination of the Sports Blackout Rules

29. We propose to eliminate the sports blackout rules. With respect to professional football, the sport most affected by the sports blackout rules, it appears from the existing record that television revenues have replaced gate receipts as the most significant source of revenue for NFL clubs in the 40 years since the rules were first adopted. Moreover, the record received thus far indicates no direct link between blackouts and increased attendance at NFL games. The record also suggests that the sports blackout rules have little relevance for sports other than professional football, because the distribution rights for most of the games

in these sports are sold by individual teams, rather than the leagues. Finally, it appears that the sports blackout rules are unnecessary because sports leagues can pursue local blackout protection through private contractual negotiations. Thus, it appears that the sports blackout rules have become obsolete. Accordingly, if the record in this proceeding, as updated and supplemented by commenters, confirms that the sports blackout rules are no longer necessary to ensure the overall availability to the public of sports telecasts, we propose to repeal these rules. We seek comment on this proposal.

30. We seek comment on how elimination of the sports blackout rules would affect sports leagues and teams and their ability, as holders of the exclusive distribution rights to their games, to control the distribution of home games in the teams' home territories. As discussed above, the sports leagues, not the Commission, are the source of sports blackouts. And the Commission's rules supplement the contractual relationships between the leagues or individual teams that hold the rights to the games and the entities to which they grant distribution rights by requiring MVPDs to black out games that are required by the sports leagues or individual teams to be blacked out on local television stations. To the extent that the Commission's rules are no longer needed to assure the continued availability of sports programming to the public, does the Commission have any continued interest in supplementing these contractual relationships? Should it instead be left to the sports leagues and individual teams to negotiate in the private marketplace whatever local blackout protection they believe they need?

31. Several commenters argue that the compulsory copyright licenses granted to MVPDs under Sections 111 and 119 of the Copyright Act would make it difficult or impossible for sports leagues or teams to negotiate the protection provided by the sports blackout rules through private contracts. The compulsory licenses permit cable systems and, to a more limited extent, satellite carriers to retransmit the signals of distant broadcast stations without obtaining the consent of the sports leagues whose games are carried on those stations, when the carriage of such stations is permitted under FCC rules. Absent the sports blackout rules, these commenters argue, an MVPD would be able to take advantage of the compulsory license to retransmit the signal of a distant station carrying a

game that has been blacked out locally by a sports league or team.

32. We seek comment on how the compulsory licenses would affect the ability of sports leagues and sports teams to obtain through market-based negotiations the same protection that is currently provided by the sports blackout rules. The NFL contends that, since it contracts with the CBS, NBC, and FOX networks for broadcast distribution of its games, it lacks privity with the local network affiliates that carry the games and with the MVPDs that retransmit the broadcast signals. Thus, it claims that ensuring that all of the other parties involved in the distribution of its games are contractually bound to honor the NFL's sports blackout policy would require rewriting hundreds of contracts, including contracts between the NFL and the CBS, NBC, and FOX networks, contracts between the networks and their affiliates, and contracts between the network affiliates and the MVPDs. The Petitioners assert that this argument ignores the direct privity of contract the sports leagues have with the MVPDs themselves, noting that virtually all MVPDs carry networks or game packages owned directly by the sports leagues, such as the NFL Network, MLB Network, NBA TV, NHL Network, and NFL Sunday Ticket (DIRECTV). We seek comment on the extent to which the sports leagues contract directly with MVPDs for carriage of networks or game packages owned directly by the sports leagues. Do such contracts already include some form of blackout protection and, if so, what protection do these contracts provide? In this connection, the Commission has previously found that sports leagues routinely negotiate with MVPDs greater blackout protection than that afforded by the sports blackout rules, and the comments in the record support this finding. For example, sports leagues and teams contractually negotiate with MVPDs blackouts of games throughout the teams' home territories, which generally extend well beyond the limited 35-mile zone of protection afforded by our sports blackout rules. In addition, the sports blackout rules afford blackout protection only to the home teams, whereas sports leagues or teams often negotiate blackout protection for both the home and away teams. Accordingly, if sports leagues and teams are able to obtain greater protection than that afforded under the sports blackout rules in arm's length marketplace negotiations, why do they need the sports blackout rules to avoid the impact of the compulsory licenses?

33. Moreover, the Commission has found that "[s]ports leagues control both broadcast carriage and MVPD retransmission of their programming." It observed that a broadcaster cannot carry a sports event without the permission of the sports leagues or clubs that hold the rights to the event and, under the retransmission consent rules, MVPDs, with limited exceptions, cannot carry a broadcaster's signal without the permission of the broadcaster. Thus, the Commission reasoned that a sports league could prevent unwanted MVPD retransmission through its contracts with broadcasters by requiring, as a term of carriage, the deletion of specific sports events. Because the sports leagues could obtain local blackout protection through their contracts with broadcast stations, the Commission suggested that the sports leagues may not need the sports blackout rules to prevent MVPDs from using the compulsory licenses to carry blacked-out games. Instead, it stated that the sports blackout rules may serve primarily as an enforcement mechanism for existing contracts between broadcasters and sports leagues. We seek comment on this analysis. Could sports leagues or teams prevent MVPDs from retransmitting certain sports events through their contracts with broadcasters? If so, especially given the popularity of certain sports programming, would leagues such as the NFL be well positioned to secure blackout protection through private contractual negotiations? Would leagues need to renegotiate existing contracts with broadcasters to secure such protection? If so, should that affect our analysis? What effect, if any, would the NFL's lack of direct privity with the local network affiliates that carry the games have on its ability to control MVPD retransmission? What are the costs and benefits to sports leagues and teams of our elimination of the sports blackout rules? To the extent possible, we encourage commenters to quantify any costs and benefits and to submit supporting data.

34. We seek comment also on whether and how repeal of the sports blackout rules would affect consumers. We received more than 7,500 comments on the Petition from individual consumers who support elimination of the sports blackout rules. These comments indicate that sports blackouts, while less frequent now than when the sport blackout rules were first adopted, are still a significant source of frustration for consumers. Some of these consumers are disabled or elderly sports fans who are physically unable to attend games in

person and rely on television (either broadcast or pay TV) to watch their favorite teams. Others complain that they can no longer afford to attend games due to high ticket prices, the economy, or reduced income following retirement; that they already subsidize professional sports through publicly funded stadiums and should be able to watch the games at home; or that they pay a substantial premium to watch their favorite NFL team on DIRECTV's NFL Sunday Ticket but are sometimes unable to watch due to a blackout, even though they may live 150 miles or more from the team's stadium. We seek comment on what impact, if any, repeal of the Commission's sports blackout rules would have on these and other consumers.

35. The Petitioners acknowledge that eliminating the Commission's sports blackout rules alone likely would not end local sports blackouts as sports fans may wish. We note that the leagues' underlying blackout policies would remain, and, as discussed above, the leagues may be able to obtain the same blackout protection provided under our rules through free market negotiations. The leagues could still require local television stations to black out games; thus, consumers that rely on over-the-air television would still be unable to view blacked-out games. Moreover, repeal of our sports blackout rules alone would not provide relief to consumers that are subject to blackouts resulting from the leagues' use of expansive home territories. Nevertheless, the Petitioners assert that, "unless and until the Commission eliminates the [sports blackout rules], the sports leagues will be under no pressure to contractually negotiate for the protection that they claim is necessary." The Petitioners suggest that, if the leagues find that such negotiations would be too daunting, eliminating the sports blackout rules may compel the leagues to lower ticket prices until all seats are sold out or perhaps to end blackouts altogether. We seek comment on whether there is any benefit to consumers of repealing the sports blackout rules if the sports leagues' underlying blackout policies remain. Is removing unnecessary or obsolete regulations in itself a sufficient justification for eliminating the sports blackout rules, even if there is no direct or immediate benefit to consumers? If the evidence in this proceeding, including any data or studies submitted by commenters, suggests that there are no tangible benefits to retaining the sports blackout rules but that these rules also do not cause any tangible harms, should the Commission repeal the

sports blackout rules? Would removing the Commission's tacit endorsement of the leagues' blackout policies serve the public interest? Are the leagues more likely to relax or reconsider their blackout policies if the Commission's sports blackout rules are repealed? How does our analysis of the issues differ between professional sports leagues which have been granted exemptions from the antitrust laws and sports leagues which have not been granted antitrust protections?

36. Further, we invite comment on any potential harm to consumers of eliminating the sports blackout rules. Some commenters express concern that eliminating the sports blackout rules could accelerate the migration of sports from free over-the-air television to pay TV, which would be harmful to consumers who cannot afford pay TV. As noted above, the compulsory copyright licenses granted to MVPDs apply to the retransmission of broadcast signals, not to pay TV content. According to NAB, if the sports blackout rules are eliminated, "sports leagues wishing to retain control over distribution of their content would have an incentive to move to pay platforms where the compulsory license would not undermine their private agreements." Similarly, the NFL asserts that eliminating the sports blackout rules "would make broadcast television distribution more difficult, expensive and uncertain and accordingly would make cable network distribution a more appealing prospect." What percentage of consumers watch the sports programming they view on broadcast television channels rather than pay TV or via the Internet using premium services such as MLB.tv? Would repeal of the sports blackout rules hasten the migration of NFL games from broadcast television channels to pay TV? If so, is it appropriate for the Commission to have the objective of preventing such a migration? We note that the NFL recently extended its contracts with the CBS, FOX, and NBC television networks, ensuring that many NFL games will remain on broadcast television channels at least through the 2022 season. In view of these contract extensions, it appears unlikely that NFL games would migrate further from broadcast television channels to pay TV in the near future. We nevertheless seek comment on whether repeal of the sports blackout rules would likely encourage migration of NFL games to pay TV in the immediate future or in the longer term. What effect, if any, would repeal of the sports blackout rules have on migration to pay TV of sports other

than professional football? In this regard, the record suggests that other professional sports teams already distribute a majority of their regular season games via RSNs and other cable networks. Is elimination of the sports blackout rules likely to result in any further migration of these sports from broadcast television channels to pay TV? Are there any other potential harms to consumers from repealing the sports blackout rules? We encourage commenters to quantify, to the extent possible, any benefits and costs to consumers of eliminating the sports blackout rules and to submit supporting data.

37. Some commenters argue that eliminating the sports blackout rules would undermine broadcasters' local program exclusivity and harm localism. These commenters assert that the sports blackout rules, together with the network non-duplication and syndicated exclusivity rules, support local broadcasters' investments in high quality, diverse informational and entertainment programming. By hindering the ability of local broadcast stations to obtain and enforce exclusive local program rights, they assert, elimination of the sports blackout rules would make it more difficult for the stations to attract advertising, which in turn would reduce their ability to invest in local information programming and popular programming. Would elimination of the sports blackout rules have a negative impact on localism? What, if any, costs and benefits would repeal of the sports blackout rules have on broadcasters? To the extent possible, we encourage commenters to quantify any costs and benefits and to submit data supporting their positions.

38. We seek comment also on whether and how elimination of the sports blackout rules would affect any other entities. Some commenters assert that under the Copyright Act any change in the sports blackout rules will trigger a proceeding before the Copyright Royalty Tribunal to adjust the compulsory licensing rates that cable systems pay. Would such a rate adjustment proceeding be mandatory or discretionary on the part of the Copyright Royalty Tribunal? In this regard, we note that the Copyright Act provides that, if the sports blackout rules are changed, the compulsory licensing rates "may be adjusted to assure that such rates are reasonable in light of the changes." What burdens and costs would a rate adjustment proceeding impose on the Copyright Royalty Tribunal and any other entities? Are there any other entities that would be impacted by elimination of the sports

blackout rules? If so, what are the benefits and costs of elimination for those entities? We request that commenters quantify any benefits and costs to the extent possible and submit supporting data.

39. Finally, we seek comment on whether, as an alternative to outright repeal of the sports blackout rules, we should make modifications to these rules. If so, what modifications should we make, and why would such modifications be preferable to repeal of the sports blackout rules? Commenters that propose any such modifications should quantify the benefits and costs of their proposals and provide supporting data.

#### IV. Procedural Matters

##### A. Initial Regulatory Flexibility Act Analysis

40. As required by the Regulatory Flexibility Act, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules considered in the attached *Notice of Proposed Rulemaking (NPRM)*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* as indicated on the first page of the *NPRM*. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *NPRM* and the IRFA (or summaries thereof) will be published in the **Federal Register**.

Need for, and Objectives of, the Proposed Rules

41. The *NPRM* proposes to eliminate the sports blackout rules, which prohibit certain multichannel video programming distributors (MVPDs) (cable, satellite, and open video systems (OVS)) from retransmitting, within a protected local blackout zone, the signal of a distant broadcast station carrying a live sports event if the event is not available live on a local television broadcast station. The sports blackout rules were originally adopted nearly 40 years ago, when the primary source of revenue for sports leagues was game ticket sales. The sports blackout rules were intended to ensure that the potential loss of ticket sales resulting from MVPD retransmission of distant stations did not cause sports leagues to refuse to sell their rights to sports events to the distant stations, thereby reducing the overall availability of sports

telecasts to the public. The sports industry has changed dramatically in the past four decades, however, and it appears that the sports blackout rules may no longer be necessary to assure the overall availability of sports programming.

42. The *NPRM* tentatively concludes that the Commission has the authority to eliminate the cable sports blackout rule under its general rulemaking power, given that Congress did not explicitly mandate that the Commission adopt the cable sports blackout rule. Because Congress directed the Commission to extend the sports blackout protection applied to cable to satellite and OVS, the *NPRM* seeks comment on whether the Commission also has the authority to repeal the sports blackout rules for satellite and OVS. In addition, the *NPRM* seeks comment on whether there is a continued need for the sports blackout rules. In particular, the *NPRM* seeks comment on whether the economic rationale underlying the sports blackout rules is still valid. Finally, the *NPRM* proposes to repeal the sports blackout rules and seeks comment on the benefits and costs of such repeal on interested parties, including the sports leagues, broadcasters, and consumers.

##### Legal Basis

43. This *NPRM* is adopted pursuant to the authority found in Sections 1, 4(i), 4(j), 303(r), 339(b), 653(b) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 303(r), 339(b), and 573(b).

##### Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

44. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. 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.

45. *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 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." All establishments listed above are included in the SBA's broad economic census category, Wired Telecommunications Carriers, 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. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. Therefore, under this size standard, the majority of such businesses can be considered small entities.

46. *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." The SBA has developed a small business size standard for this category, which is: All such businesses having 1,500 or fewer

employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. Therefore, under this size standard, we estimate that the majority of such businesses can be considered small entities.

47. *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. Industry data shows that there were 1,141 cable companies at the end of June 2012. Of this total, all but ten cable operators nationwide are small under this size standard. In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Current Commission records show 4,945 cable systems nationwide. 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.

48. *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." There are approximately 56.4 million incumbent cable video subscribers in the United States today. 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. Based on available data, we find that all but ten incumbent cable operators are small entities under this size standard. 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. 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 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.

49. *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." The SBA has created the following small business size standard for such businesses: Those having \$14 million or less in annual receipts. The Commission has estimated the number of licensed commercial television stations to be 1,386. 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. We therefore estimate that the majority of commercial television broadcasters are small entities.

50. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations 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.

51. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396. These stations are non-profit, and therefore considered to be small entities.

52. *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, 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. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. 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. Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network. 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.

53. *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, 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. Census data for 2007 show that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. Therefore, under this size standard, the majority of such businesses can be considered small entities.

54. *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. The SBA has developed a small business size standard for this category, which is: All such businesses having 1,500 or fewer employees. Census data for 2007 show that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. Therefore, under this size standard, the majority of such businesses can be considered small entities.

55. *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. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers." The SBA has developed a small business size standard for this category, which is: All such businesses having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. 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. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises. 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.

56. *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." The SBA has developed a small business size standard for this category, which is: all such businesses having \$15 million dollars or less in annual revenues. Census data for 2007 show that there were 659 establishments that operated that year. Of that number, 462 operated with annual revenues of \$9,999,999 dollars or less. One hundred ninety-seven (197) operated with annual revenues of between \$10 million and \$100 million or more. Thus, under this size standard, the majority of such businesses can be considered small entities.

#### Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

57. The proposed rule changes discussed in the *NPRM* would affect compliance requirements. The proposed rule changes would eliminate the sports blackout rules, which prohibit certain MVPDs from televising the home game of a sports team within a specified geographic area surrounding a television broadcast station licensed to the community in which the game is being played if the game is not available live on a television broadcast station in that community.

#### Steps Taken To Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

58. The RFA requires an agency to describe any significant alternatives that might minimize any significant economic impact on small entities. Such alternatives 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 entities.

59. As discussed in the *NPRM*, repeal of the sports blackout rules would not eliminate the sports leagues' underlying blackout policies. Rather, it would

simply remove Commission support for these policies. Sports leagues would still be able to require local television broadcast stations to black out games. In addition, sports leagues would likely be able to obtain the same protection afforded under the sports blackout rules either through market-based negotiations with MVPDs or through their contracts with broadcasters by requiring, as a term of carriage, the deletion of specific sports events. Accordingly, we believe that repeal of the sports blackout rules would impose only minimal burdens on any affected entities. For this reason, an analysis of alternatives to the proposed rule changes is unnecessary. We invite comment on whether there are any alternatives we should consider that would minimize any adverse impact on small entities, but which maintain the benefits of our proposal.

#### Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

60. None.

#### B. Paperwork Reduction Act

61. This *Notice of Proposed Rulemaking* proposes no new or modified information collection requirements. In addition, therefore, it does not propose 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.

#### C. Ex Parte Rules

62. *Permit-But-Disclose.* The proceeding this *NPRM* initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules. Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments,

memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with rule § 1.1206(b). In proceedings governed by rule § 1.49(f) or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

#### D. Filing Requirements

63. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).

■ *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/>.

■ *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

1. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445

12th St. SW., Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.

2. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

3. U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street SW., Washington, DC 20554.

64. *People With Disabilities:* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

65. For additional information on this proceeding, contact Kathy Berthot, [Kathy.Berthot@fcc.gov](mailto:Kathy.Berthot@fcc.gov), of the Media Bureau, Policy Division, (202) 418-2120.

#### V. Ordering Clauses

66. 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), and 573(b) this *Notice of Proposed Rulemaking is adopted*.

67. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Notice of Proposed Rulemaking* in MB Docket No. 12-3, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

#### List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

#### Proposed Rules

For the reasons discussed in the preamble, the Federal Communications

Commission proposes to amend 47 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 and 573.

#### § 76.111 [Removed]

■ 2. Remove § 76.111.

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

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

\* \* \* \* \*

#### §§ 76.127 and 76.128 [Removed]

■ 4. Remove §§ 76.127 and 76.128.

■ 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. \* \* \*

#### § 76.1506 [Amended]

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

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