

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of:)
)
General Motors Corporation,)
Hughes Electronics Corp., Transferors)
)
and)
)
The News Corporation Ltd., Transferee)
)
For authority to transfer control)

MB Docket No. 03-124

FILED/ACCEPTED

MAY 16 2008

Federal Communications Commission
Office of the Secretary

TO: The Commission

REPLY COMMENTS
OF
MASSILLON CABLE TV, INC.

Massillon Cable TV, Inc. ("Massillon") submits herewith its reply comments in the captioned matter. Specifically, Massillon respectfully submits that its own experience, as recounted herein, fully supports the position taken by the National Cable Television Cooperative ("NCTC") in its May 1 comments in which it predicted that News Corp. might "walk away from or otherwise fail to comply with the terms of the conditions with respect to any arbitration proceeding or negotiation commenced prior to [the] divestiture [of News Corp.'s interest in DirecTV]." *Id.* at 5. NCTC's concern is no mere abstract fear. Massillon's own recent experience, in which Fox Sports Net Ohio, LLC ("Fox"), a wholly-owned subsidiary of News Corp., did everything within its power to evade and frustrate legitimate arbitration, fully validates NCTC's concern.

No. of Copies rec'd 044
List ABCDE

Background – The Commission’s *Memorandum Opinion and Order in General Motors Corporation and Hughes Electronics Corporation, Transferor and the News Corporation Limited, Transferee*, 19 FCC Rcd 473 (2004) (the “*Fox Hughes Order*”) conditioned approval of a merger upon an arbitration remedy to prevent News Corp. from exercising its increased market power over the distribution of a preponderance of professional sports programming. *Id.* at ¶ 173. The clear intent of the arbitration condition was to provide cable operators with a relatively quick and efficient means for relief, rather than be forced to pursue full-blown litigation. *Id.* at ¶¶ 173-175.

Following implementation of the *Fox Hughes Order*, Fox lost the right to distribute Cleveland Indians baseball games, which comprised the vast bulk of all the “marquee” programming it had to offer. Yet, Fox refused to reduce the affiliation fee being paid by Massillon under its existing carriage agreement with Fox (which, ironically, had been renewed at a substantially higher cost the very month following release of the *Fox Hughes Order*). After negotiations failed to produce a mutually acceptable set of price terms and conditions for the remainder of the programming Fox still was able to provide, Massillon commenced arbitration. That arbitration ultimately resulted in an award on October 12, 2007 that fully vindicated Massillon’s position. However, as recounted below, Fox ensured that the path to that award was unduly long, expensive and difficult.

Fox now has requested that it be relieved of any further need to abide by the arbitration condition which was a key component of the *Fox Hughes Order*. Yet, as the American Cable Association pointed out in its own May 1 comments, Fox had quite recently agreed to accept the very same conditions in a related proceeding.¹

¹ See *News Corporation and the DirecTV Group, Inc., Transferors and Liberty Media Corporation, Transferee, for Authority to Transfer Control, Memorandum Opinion and Order*, FCC 08-66 (2008) at ¶ 126.

In its comments opposing the subject request, NCTC asserted, albeit abstractly, the continued need for arbitration. As a buying cooperative representing the interests of a wide membership, NCTC understandably was hesitant to details of specific pending matters involving its members in the public record of this proceeding. Massillon, as an independent cable operator, and having sought individual relief, is in a position to provide that input.

It must be emphasized that Massillon's experience is not merely of historical interest. Its existing contract with Fox is due to expire on December 31, 2008. Based on its past experience recounted below, Massillon has a legitimate fear that the arbitration remedy is the only practical means by which Fox can be discouraged from recouping through inflated future affiliation fees the amounts it has been directed to pay Massillon in the award.

Massillon's Arbitration² – When negotiations failed to achieve a suitable adjustment in Massillon's affiliation agreement with Fox to reflect the loss of the entire Cleveland Indians baseball games (which Massillon had to acquire from a substitute source to satisfy its customers), Massillon submitted a timely demand for arbitration pursuant to the *Fox Hughes Order*. Although Fox stipulated to an extensive set of facts and agreed to the submission of twenty-eight documentary exhibits, on the very same day it moved to dismiss the arbitration for lack of jurisdiction. After thorough briefing and oral argument, the arbitrator denied Fox's motion to dismiss with prejudice and directed the parties to proceed to arbitration. Even though Fox had agreed to allow the arbitrator to determine the issue of arbitrability, it filed further pleadings with the arbitrator and with the full Commission seeking to stay or overturn her decision. Although it eventually withdrew its FCC appeal, Fox nonetheless refused to submit its

² All of the following is based upon the redacted version of the award rendered by the arbitrator in American Arbitration Association Case No. 71 472 E 00656 06. Most of the record, and certain portions of the award, are subject to a confidentiality requirement and have not been made public. However, Commission staff has access to the entire record as well as the unredacted version of the award, which contain additional substantiation for the contents of the redacted award, to which these comments are limited.

final offer, as required by the *Fox Hughes Order*, and refused to participate any further in the arbitration. As a result, Massillon was required to construct its case from scratch rather than, as the *Fox Hughes Order* anticipated, merely enabling the arbitrator to choose which of the two final offers better reflected fair market value.³ In addition to awarding Massillon the relief it had requested, the arbitrator found that Fox had violated the express requirement of the *Fox Hughes Order* that the parties could not modify the FCC's requirement that they engage in final-offer arbitration. She further found that Fox's refusal to participate was itself an express violation of the *Fox Hughes Order* and constituted unreasonable conduct. Fox's reaction, predictably, was to file a petition with the FCC for *de novo* review of the very arbitration award in which it had refused to participate. That petition remains pending before the Commission.

While the precise amounts in issue are redacted from public copies of the award, Massillon can say with confidence that, even though it "won" the arbitration, the magnitude of legal, expert and related fees it was forced to incur through Fox's defiant tactics is a heavy burden for a small independent cable system and certainly does not represent the quick, efficient and relatively inexpensive procedure the Commission envisioned when imposing the arbitration condition in the first place. As difficult as the arbitration process may have proven, Massillon would have been in no position to obtain any reasonable relief at all had the arbitration provisions not been available.

³ As an example of the additional costs incurred by Massillon due to Fox's refusal to participate in the arbitration, one of the findings the arbitrator was required to make was to ensure that Fox recovered a reasonable share of its costs of acquiring the programming at issue. Had Fox submitted information concerning its costs, as it was required to do, then that determination would have been relatively simple. However, in the absence of any information proffered by Fox, Massillon had no choice but to commission expensive studies and to present the written and oral testimony of an expert who had to surmise Fox's program acquisition costs from a wide variety of indirect and secondary data. A substantial portion of Massillon's costs of assuming (by default) the burden of going forward on this issue could have been saved were it not for Fox's unjustified refusal to present information within its sole knowledge. That, of course, only added to the expense Massillon already had incurred of defending all of Fox's gratuitous attempts to contest jurisdiction, seek stays and otherwise delay and collaterally attack the arbitration proceeding.

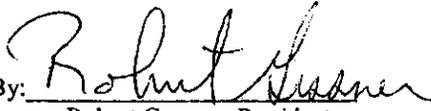
Massillon's need for arbitration may not yet be over. Its current affiliation agreement with Fox is due to expire at the end of this year. In every negotiation that Massillon has had with Fox prior to the protections in the *Fox Hughes Order*, Fox has used its excess market power to extract monopoly rents and non-market driven terms and conditions. If Fox were to be relieved of its current obligations under the *Fox Hughes Order*, Massillon has every reason to believe that Fox will attempt to take unfair advantage of Massillon in upcoming negotiations for renewal.⁴ In that regard, NCTC specifically requests that rejection of News Corp.'s request for relief from arbitration not only apply to pending arbitrations or negotiations, but also to any future bargaining with respect to all agreements already in existence during the period when News Corp and DirecTV were vertically-integrated. Massillon agrees. Massillon submits that without this further degree of protection, Fox will simply be able to recoup through a future contract those very benefits which the arbitrator found Fox had improperly sought to retain and which her award was intended to redress. Any other result (that is, by denying parties previously victimized by Fox an ability to obtain relief through arbitration) would merely defer, rather than defeat, Fox's ability to exercise its market power in a predatory manner.

Conclusion – In view of the foregoing, Massillon respectfully submits that its own expensive, frustrating and time-consuming experience with a wholly-owned News Corp. subsidiary fully supports the position taken by NCTC that News Corp. must continue to be held to the arbitration provisions of the *Fox Hughes Order*. This is not a mere abstract fear. Rather, Massillon's unfortunate experience serves as a highly reliable and dire prediction of the consequences of granting the relief News Corp. has sought.

⁴ Even though Fox no longer has the rights to distribute the Cleveland Indians games, it still is the sole source of Cleveland Cavaliers basketball, which Massillon's customers also demand. Therefore, due to Fox's continued monopoly position with respect to the Cavaliers games, Massillon has little choice but to negotiate a renewal of its expiring agreement with Fox.

Respectfully submitted,

MASSILLON CABLE TV, INC.

By: 
Robert Gessner, President

Of Counsel:

Mark Palchick, Esq.
Peter Gutmann, Esq.

Womble Carlyle Sandridge & Rice, PLLC
1401 I Street, NW
Seventh Floor
Washington, DC 20005
(202) 857-4411

May 16, 2008