

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

In the Matter of)	
)	
General Motors Corporation)	
Hughes Electronics Corp., Transferors)	MB Docket No. 03-124
)	
And)	
)	
The News Corporation Limited, Transferee)	
)	
For Authority to Transfer Control)	

**NEWS CORPORATION RESPONSE
TO MASSILLON CABLE TV, INC.**

News Corporation (“News Corp.”) hereby respectfully submits its response to the pleading filed by Massillon Cable TV, Inc. (“Massillon”) as part of the above-captioned proceeding.¹ While styling its submission as “reply comments,” Massillon, apart from briefly referencing the earlier-filed comments of others, devotes virtually all of its filing to rehashing a collateral dispute between it and a subsidiary of News Corp. that is currently pending before the Commission.² Because the issues related to that dispute have been fully briefed and await Commission action, Massillon’s submission is entirely irrelevant to this proceeding and should be dismissed. Out of an abundance of caution, however, News Corp. hereby responds to the

¹ *In re General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Reply Comments of Massillon Cable TV, Inc., MB Docket No. 03-124, filed May 16, 2008 (the “Massillon Comments”).

² *See Fox Sports Net Ohio, LLC, Petitioner, v. Massillon Cable TV, Inc., Respondent*, Fox Sports Net Ohio, LLC’s Petition for *De Novo* Review of Arbitration Award, filed at the Commission Sept. 21, 2007 (appealing Award, American Arbitration Association (AAA) Case No. 71 472 E 00656 06 (issued Sept. 12, 2007) (“*Fox Sports Net Ohio, LLC Petition*”). Fox Sports Net Ohio, LLC (“Fox Sports Ohio”) operates a regional sports network (“RSN”) in Ohio. Fox Sports Ohio is a subsidiary of News Corp.

Massillon Comments. Those comments, because they entirely mischaracterize the collateral dispute and otherwise are riddled with inaccuracies and inconsistencies, should have no bearing on the Commission's evaluation of the petition for modification of conditions filed by News Corp. in this proceeding.³

The Commission Should Reject Massillon's Continuing Efforts to Misapply the RSN Condition to Controversies Which, If Appropriate for Litigation at All, Belong in the Courts

Arguing in support of keeping in place the RSN Condition,⁴ Massillon claims that it has experienced difficulties in pursuing an arbitration proceeding against Fox Sports Ohio.⁵ Not only is Massillon's argument with respect to the condition a mere pretext to launch its reargument of the Fox Sports Ohio dispute, its assertions represent both a misreading of the RSN Condition and a complete mischaracterization of the record in the collateral proceeding. Massillon *never* had the right under the RSN Condition to commence arbitration in the first place. As Fox Sports Ohio has explained in its pleadings in connection with the arbitration proceeding, the RSN Condition applies only in two limited situations: (i) following the expiration of an existing contract for RSN carriage; or (ii) after a first time request for such carriage.⁶ Massillon's demand for arbitration does not arise from either of these two situations, as an *existing, unexpired* carriage agreement with Fox Sports Ohio remains in effect.

³ See *In re General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Petition for Modification of Conditions, MB Docket No. 03-124, filed March 11, 2008 (the "Petition").

⁴ See *In re General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, 19 FCC Rcd 473 (2004) (the "News/Hughes Order"), at Appendix F, Section III (the "RSN Condition").

⁵ See Massillon Comments, at 2-4.

⁶ See *Fox Sports Net Ohio, LLC Petition*, at 11-15; see also *News/Hughes Order*, at Appendix F.

Rather, Massillon is in essence asking for a reformation of the current contract – a remedy to which it simply is not entitled. If Massillon believes it is entitled to redress in a dispute with Fox Sports Ohio, it should seek relief in the courts. This Massillon has never done, apparently believing that through arbitration it will be able to garner benefits that it could not hope to achieve through either negotiations or even litigation in a court of law.⁷

Massillon in fact admits that Fox Sports Ohio did bargain for a mutually acceptable set of new terms and conditions – even though it had no legal obligation to do so – when Massillon expressed concern about provisions in the existing contract.⁸ Massillon complains about the terms that it agreed to and attempts to lay the responsibility for those terms on Fox Sports Ohio.⁹ But as it has done throughout its dispute with Fox Sports Ohio, Massillon fails to acknowledge that the relevant carriage agreement was entered into between Massillon and a *prior owner* of the RSN; neither News Corp. nor its subsidiaries played any role in setting the prices, terms or conditions of that agreement. Because Fox Sports Ohio assumed an existing, unexpired contract with Massillon, it was under no obligation whatsoever to negotiate changes to the prices, terms or conditions of carriage. That it voluntarily engaged in discussions with Massillon is a credit to Fox Sports Ohio’s willingness to act in good faith in an effort to address the MVPD’s concerns. Massillon’s pursuit of arbitration under these circumstances perversely serves only as a disincentive for a programmer to engage in voluntary discussions to address an MVPD’s questions during the term of an existing contract.

⁷ It would be highly disingenuous for Massillon to claim that litigation is too costly, since it laments its “expensive, frustrating and time-consuming” experience with arbitration, which it says is *not* a “quick, efficient and . . . inexpensive procedure . . .”. Massillon Comments, at 4, 5.

⁸ *See id.* at 2-3.

⁹ *See id.*

Massillon, moreover, uses its pleading in this proceeding to perpetuate a slew of misleading and contradictory claims about the nature of its dispute with Fox Sports Ohio. For instance, Massillon notes that Fox Sports Ohio lost the right to distribute Cleveland Indians baseball games during the time when the RSN Condition was in place, and alleges that Fox “refused to reduce the affiliation fee being paid by Massillon under its existing carriage agreement . . . which, ironically, had been renewed at a substantially higher cost the very month following” the Commission’s decision to impose the RSN Condition.¹⁰ But, as noted above, Fox Sports Ohio played no role in negotiating the agreement about which Massillon complains, and Massillon admits that Fox Sports Ohio *did* voluntarily engage in negotiations in an attempt to address Massillon’s concerns. The negotiations failed only when Massillon resorted to pursuing arbitration, apparently with the hope of achieving more favorable terms than market-based negotiations would bear.¹¹ Indeed, the Massillon Comments essentially acknowledge that the arbitration was instituted so that Massillon could attempt to reduce the license fee paid to Fox Sports Ohio by the amount that Massillon was paying a competitor RSN for access to the Indians games.¹²

Massillon further claims that the Indians’ games “comprised the vast bulk of all the ‘marquee’ programming [Fox Sports Ohio] had to offer,”¹³ but then just a few pages later alleges

¹⁰ *Id.* at 2.

¹¹ *Id.* at 3.

¹² *See id.* News Corp. submits that the inability of the parties to reach agreement largely was a consequence of Massillon’s intent from the outset to misuse the RSN Condition and the arbitration remedy to renegotiate an existing contract. In the absence of regulatory interference, News Corp. believes that the negotiations could have lead to an agreement beneficial to both sides, especially given that, even after termination of the Indians coverage, Fox Sports Ohio continued to offer a panoply of other attractive programming (including, as discussed herein, highly popular Cleveland Cavaliers games).

¹³ *Id.* at 2.

that the network remains the “sole source of Cleveland Cavaliers basketball, which Massillon’s customers also demand.”¹⁴ It is quite apparent that Massillon’s double speak and efforts to misuse the RSN Condition have one goal – to obtain programming that it admits is valuable to its customers, but without paying fair, market-rate compensation to Fox Sports Ohio. Massillon cannot have it both ways.

Moreover, to the extent that it claims to be disturbed by the expense or time commitment required by the arbitration,¹⁵ Massillon has only itself to blame. Fox Sports Ohio repeatedly argued that, in order to save both parties’ time and resources, the arbitration should be held in abeyance at least until there was a final ruling on the question of jurisdiction under the RSN Condition.¹⁶ Massillon fought strenuously to have the costly arbitration proceeding go forward,¹⁷ even though its pursuit of the arbitral remedy is without basis under either of the limited circumstances contemplated by the RSN Condition.

For that matter, Massillon’s strange supposition that the arbitration was *more expensive* as a result of Fox Sports Ohio’s decision *not to* participate in defending itself on the merits at the

¹⁴ *Id.* at 5, n.4.

¹⁵ *See id.* at 4.

¹⁶ *See, e.g.*, Letter from Anthony Basich to Cynthia Rumney, AAA Case No. 71 472 E 656 06 (dated Nov. 14, 2006); *Fox Sports Net Ohio, LLC, Petitioner, v. Massillon Cable TV, Inc., Respondent*, Motion to Dismiss Arbitration for Lack of Jurisdiction, filed with AAA Feb. 5, 2007; *Fox Sports Net Ohio, LLC, Petitioner, v. Massillon Cable TV, Inc., Respondent*, Petition for *De Novo* Review of Interim Arbitration Award of Fox Sports Net Ohio, LLC, filed with the Commission May 4, 2007 (seeking review of arbitrator’s interim ruling and a stay of the arbitral proceeding); Letter from Anthony Basich to Patricia J. Murphy, Esq., AAA Case No. 71 472 E 656 06 (dated May 2, 2007); Letter from Anthony Basich to Patricia J. Murphy, Esq., AAA Case No. 71 472 E 656 06 (dated June 1, 2007); Letter from Anthony Basich to Patricia J. Murphy, Esq., AAA Case No. 71 472 E 656 06 (dated June 13, 2007).

¹⁷ *See, e.g.*, *Fox Sports Net Ohio, LLC, Petitioner, v. Massillon Cable TV, Inc., Respondent*, Opposition of Massillon Cable TV, Inc. to Request of Fox Sports Net Ohio, LLC for Stay of Arbitration Pending *De Novo* Commission Review, filed at the Commission May 11, 2007, at 1-11.

at the arbitration hearing cannot be reconciled with either logic or reality.¹⁸ It is difficult to comprehend how an unopposed arbitration cost Massillon more than it would have had to pay if the arbitration was fully litigated by both sides. Massillon claims that it was required to “construct its case from scratch,” and that it therefore had to spend more than it expected on expert testimony.¹⁹ Yet under the plain terms of the RSN Condition, regardless of whether Fox Sports Ohio participated, Massillon was obligated to demonstrate that its “final offer” most closely approximated fair market value.²⁰ In addition, if Fox Sports Ohio had participated, at a minimum the proceeding itself would have taken far longer and inevitably been more expensive (as Fox Sports Ohio would have had a right to cross-examine Massillon’s witnesses and present its own testimony, subject to cross-examination).²¹

Finally, even if jurisdiction had been proper, the Massillon-Fox Sports Ohio arbitration was never going to be an inexpensive or simple process, as Massillon apparently hoped.²² Rather, in News Corp.’s experience, arbitrations generally entail full-blown litigation, with motions, discovery, the retention of expert witnesses and consultants and several days of live hearings – a process that costs both sides hundreds of thousands of dollars. Indeed, it is for this

¹⁸ See Massillon Comments, at 4.

¹⁹ *Id.*

²⁰ See *News/Hughes Order*, at Appendix F. Massillon nonsensically posits that its expert witness cost more due to Fox Sports Ohio’s refusal to participate in the arbitral proceeding. See Massillon Comments, at 4, n.3. As noted above, Massillon has an obligation to demonstrate that its “final offer” most closely approximated fair market value. It defies logic for Massillon to assert that its expert would have cost *less* had Fox Sports Ohio had the opportunity to cross-examine him and put forth its own expert testimony. If anything, Fox Sports Ohio’s participation would have required Massillon’s expert not only to present an affirmative case for Massillon, but also to rebut any contradictory evidence introduced by Fox Sports Ohio.

²¹ Massillon also strangely asserts, at 3, that its current contract with Fox Sports Ohio is set to expire at the end of December 2008, even though an arbitrator has established December 31, 2009 as the “new” expiration date (a decision that Fox Sports Ohio is appealing). To the degree that Massillon appears to be acknowledging that the arbitration was *ultra vires*, and that the current contract therefore expires at the end of this year, Fox Sports Ohio fully agrees.

²² See *id.* at 4.

very reason that News Corp. filed the Petition, as it believes that an independent programmer and an MVPD are far better served by relying upon market forces – not costly government mandates – to ensure that carriage negotiations result in mutually agreeable terms and conditions.

In Any Event, to the Limited Extent that Massillon Addresses the Petition, It Misconstrues News Corp.’s Request and Misapprehends the Purpose of the RSN Condition, Which Has Been Rendered Moot by News Corp.’s Sale of Its Interest in DIRECTV

As demonstrated above, the Massillon Comments reference the Petition merely as a pretext to reargue its case against Fox Sports Ohio. Massillon’s limited discussion of the Petition and RSN Condition is as inaccurate and flawed as its treatment of the Fox Sports Ohio dispute.

First and foremost, Massillon appears to have filed its pleading out of fear that, in asking for the elimination of the RSN Condition, News Corp. also is seeking to “walk away” from the pending arbitration proceeding between Massillon and Fox Sports Ohio.²³ As it made clear in its own reply comments in this proceeding, however, News Corp. has not proposed termination of any arbitration proceedings that were commenced prior to News Corp.’s divestiture of its interest in DIRECTV.²⁴ Accordingly, the Commission’s grant of the relief sought in the Petition would have no impact whatsoever on the Massillon-Fox Sports Ohio arbitration.

The Massillon Comments also suggest that the Commission should deny the Petition because News Corp. allegedly will “attempt to take unfair advantage of Massillon in upcoming negotiations for renewal” of Fox Sports Ohio’s carriage agreement.²⁵ Nowhere in its pleading, however, does Massillon even attempt to explain how News Corp. possibly could take “unfair

²³ *Id.* at 1.

²⁴ *See In re General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Reply Comments of News Corporation, MB Docket No. 03-124, filed May 16, 2008 (“News Corp. Reply Comments”), at 5 & n.15.

²⁵ Massillon Comments, at 5.

advantage” of Massillon (or any other cable operator) now that News Corp. no longer holds an interest in any multichannel video programming distributor (“MVPD”).

The Commission imposed the RSN Condition only to address the theoretical possibility that the combination of News Corp.’s programming assets with DIRECTV’s national distribution platform would encourage News Corp. to temporarily withhold access to its RSN programming in the event of a bargaining impasse.²⁶ The Commission emphasized that the RSN Condition was merely designed to “maintain the balance of bargaining power between News Corp. and other MVPDs at *roughly pre-transaction levels*” and was never intended as “an opportunity to correct any and all perceived imbalances in the industry.”²⁷ Moreover, as News Corp. made perfectly clear in the Petition and in its reply comments, absent vertical integration with an MVPD, News Corp. today has neither the ability nor the incentive to engage in anticompetitive behavior.²⁸ On the contrary, News Corp. has every economic motivation to rely upon market-based negotiations to reach mutually agreeable carriage contracts with cable operators, just as it did prior to the DIRECTV transaction.

Massillon utterly ignores the underpinnings of the RSN Condition and asserts, without support, that lacking a right to arbitrate to resolve future contract disputes, MVPDs will have no “protection” against News Corp.’s putative “excess market power.”²⁹ Of course, as the Commission has explained, an independent News Corp., like every other independent programmer, has “no incentive to favor one MVPD over another in order to achieve particular

²⁶ See News Corp. Reply Comments, at 2-3.

²⁷ See *id.* at 3, 6 (citing *News/Hughes Order*, at ¶¶ 131, 147, 153, 159, 172, 220) (emphasis supplied).

²⁸ See *id.* at 2; see also Petition, at 6.

²⁹ Massillon Comments, at 5.

competitive outcomes in the market for sale of MVPD service to consumers.”³⁰ An independent News Corp. must negotiate for carriage of its RSNs based on the competitive free market. Massillon’s assertion that News Corp. might seek to “recoup” in a future carriage negotiation benefits “improperly sought” when News Corp. owned DIRECTV is without merit.³¹ News Corp. would risk the prospect of severe economic losses if it were to insist on prices, terms or conditions without regard to market conditions.

* * *

For all of these reasons, News Corp. respectfully requests that the Commission disregard the Massillon Comments as it reviews the merits of the Petition. Massillon should not be permitted to drag a collateral, pending Commission proceeding into consideration of the issues presented here. As set forth in the Petition, there is ample justification for the Commission to eliminate the RSN Condition (as well as a similar condition applicable to News Corp.’s broadcast programming). None of the comments or reply comments submitted in opposition to

³⁰ *In re News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, MB Docket No. 07-18, FCC 08-66 (rel. February 26, 2008), at ¶ 117.

³¹ Massillon Comments, at 5.

the Petition has provided any basis for the Commission to retain these restrictions against an independent News Corp.

Respectfully submitted,

NEWS CORPORATION

Ellen S. Agress
Senior Vice President, Deputy General
Counsel
News Corporation
1211 Avenue of the Americas
New York, NY 10036
(212) 852-7204

Maureen A. O'Connell
Senior Vice President, Regulatory
and Government Affairs
News Corporation
444 N. Capitol Street, N.W.
Washington, DC 20001
(202) 824-6500

By: /s/ John C. Quale
John C. Quale
Jared S. Sher
of
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000

Its Attorneys

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