

November 16, 2010

VIA FEDERAL EXPRESS AND ELECTRONIC MAIL

Arbitrator Melissa Hubbard
American Arbitration Association
230 South Broad Street, 12th Floor
Philadelphia, PA 19102

**Re: Armstrong Utilities Inc. v. DIRECTV Sports Net Pittsburg, No.
55 472 E 00247 10.**

Dear Arbitrator Hubbard,

DIRECTV, a non-party to the arbitration between Armstrong Utilities Inc. ("Armstrong") and DIRECTV Sports Net Pittsburg ("SNP"), submits this letter by way of a special appearance to address jurisdictional issues raised by the November 12, 2010 letter submitted by Armstrong's counsel, which requested a ruling from you ordering DIRECTV to produce certain regional sports network ("RSN") agreements over the objections of the RSN counterparties. Because DIRECTV is not a party to the above referenced arbitration proceeding,¹ it confines its argument below to jurisdictional issues, and does not intend by way of this special appearance to subject itself to the jurisdiction of the arbitration.²

On October 28, 2010, DIRECTV was served with an arbitration subpoena by Armstrong requesting the production of eight categories of documents and information,

¹ Armstrong's counsel erroneously suggests that DIRECTV submitted "demands" by way of document requests to Armstrong. See Nov. 12, 2010 Letter from J. Scullion et al. to Arbitrator Hubbard at 2. It was SNP, a party to the arbitration, that submitted document requests to Armstrong. DIRECTV is a separate entity from SNP, is not a party to this arbitration, and thus has submitted no requests (or "demands") to Armstrong. Armstrong's attempt to mischaracterize SNP's requests as DIRECTV's is both factually incorrect and without legal basis. See Ex. 1 (Nov. 15, 2010 Letter from J. Sher to C. Kimmett at 3 n.2) (compiling case law holding that companies related to a party to an arbitration are not themselves parties by virtue of such corporate relationship).

² Because this filing is made for the limited purpose of addressing jurisdictional issues, DIRECTV does not address its other objections to Item 7 of Armstrong's subpoena.

including DIRECTV's RSN agreements with Fox, NESN, and Comcast (among others) and related documents, on or before November 22, 2010. See Armstrong's Oct. 28, 2010 Subpoena to DIRECTV at 4-5 (Items 3 & 4).³ Notwithstanding its objections to the subpoena, DIRECTV entered into good faith discussions with Armstrong in an effort to resolve the parties' dispute over the subpoena.

In those discussions, DIRECTV immediately indicated its willingness to produce RSN carriage agreements for use in this arbitration, but explained that each such agreement was subject to confidentiality provisions with the counterparties to those agreements. DIRECTV's counsel advised Armstrong's counsel that such production had in past arbitrations drawn objections from some RSN counterparties to those agreements, and that no agreements had been produced until the parties to those arbitrations had negotiated an accommodation in the form of a very comprehensive protective order with those objecting contractual counterparties. At that time, Armstrong's counsel stated her belief that the Confidentiality Agreement and Protective Order ("CAPO") already agreed to by the parties to the arbitration (Armstrong and SNP) and entered by the Arbitrator would be sufficient to address any confidentiality concerns of DIRECTV's RSN counterparties.

Although DIRECTV's counsel expressed skepticism that the CAPO would satisfy the contractual counterparties, it nonetheless proceeded in good faith to initiate the process for production of the RSN agreements. As is standard in the industry, such agreements are subject to confidentiality provisions which generally allow disclosure only to the extent necessary to comply with law, regulation, or a valid court order, and require notice in advance of production in any event. Accordingly, DIRECTV sent letters to each of the RSN counterparties informing them of its intention to produce copies of the RSN agreements and related materials to Armstrong. See Ex. 2 (Nov. 2, 2010 Letter from C. Kimmett to Fox Sports Direct).⁴ DIRECTV included a copy of Armstrong's subpoena and the CAPO with that correspondence.

Within a few days, DIRECTV received objections from Fox and NESN. DIRECTV recognized them as similar to the objections raised in other arbitration proceedings that had ultimately been resolved through the negotiation of a more stringent protective order. Indeed, NESN's letter specifically stated as a basis for its

³ Armstrong's October 28, 2010 subpoena to DIRECTV was included as an attachment to Armstrong's November 12, 2010 letter to Arbitrator Hubbard.

⁴ Although DIRECTV has attached hereto only its letter to Fox, DIRECTV sent the same form letter to each of the RSN counterparties identified in Armstrong's subpoena.

objection concerns about the sufficiency of the CAPO. See Ex. 3 (Nov. 5, 2010 Letter from M. Brecher to C. Kimmett) at 1. Accordingly, DIRECTV promptly forwarded these objections to Armstrong's counsel with the expectation that she would contact the objecting RSNs, just as DIRECTV had done under similar circumstances in previous arbitration proceedings in which it was the claimant. It was not until an e-mail exchange on November 10 that DIRECTV realized that Armstrong had no intention of contacting either of the objecting RSNs and expected DIRECTV to negotiate a resolution of their objections. Subsequently, DIRECTV received an objection letter from Comcast and a more developed explication of Fox's objections, both of which raise (among other things) fundamental jurisdictional issues related to the subpoena addressed to DIRECTV.

The objections submitted by Fox, NESN, and Comcast each raise (in varying degree of detail) objections to the jurisdiction of this arbitration over non-parties to the arbitration. Although the confidentiality provisions of DIRECTV's RSN agreements with the counterparties include exceptions for disclosure pursuant to a "valid court order," the counterparties have made plain their position that the arbitration subpoena submitted to DIRECTV, a non-party, does not fit within that exception. See, e.g., Ex. 1 (Nov. 15, 2010 Letter from J. Sher to C. Kimmett) at 2-5; Ex. 3 (Nov. 5, 2010 Letter from M. Brecher to C. Kimmett) at 1; Ex. 4 (Nov. 12, 2010 Letter from D. Murray to C. Kimmett) at 2. Indeed, in a letter submitted yesterday evening, counsel for Fox stated its position that DIRECTV "is obligated . . . in the event that the Arbitrator purports to order production of the Agreement or the Documents, to challenge such order in a court of competent jurisdiction; [and] to decline to comply with facially invalid orders of the Arbitrator unless or until otherwise ordered by a court of competent jurisdiction (after exhaustion of any appeals). . . ." Ex. 1 (Letter from J. Sher to C. Kimmett) at 4.

As a non-party to this proceeding, DIRECTV has the same jurisdictional bases for challenging Armstrong's subpoena as do Fox, Comcast, and NESN. Nonetheless, DIRECTV has made clear that it will not stand on those objections and will instead produce the RSN agreements in its possession requested by Armstrong if accommodation can be reached between the parties to the arbitration (Armstrong and SNP) and the objecting RSN counterparties.⁵ Far from taking a "hands-off position" (see Nov. 12, 2010 Letter from Armstrong's Counsel at 3), DIRECTV began taking steps (notwithstanding its objections) toward the production of those agreements in advance of the response date, forwarded the CAPO to its contractual counterparties, immediately forwarded any objections received from those counterparties to

⁵ Indeed, DIRECTV's letter to its RSN agreement counterparties stated that DIRECTV "intends to produce" those agreements. See Ex. 2 (Nov. 2, 2010 Letter from C. Kimmett to Fox Sports Direct).

Arbitrator Melissa Hubbard
November 16, 2010
Page 4 of 4

Armstrong's counsel on receipt, and agreed to produce the RSN agreements once the parties to the arbitration reach agreement with DIRECTV's RSN counterparties addressing their concerns.

As a non-party, DIRECTV has no ability to alter the terms of the CAPO in place in this arbitration and cannot speak on behalf of the parties to the arbitration regarding any revisions that may be proposed by DIRECTV's RSN counterparties. Moreover, as a non-party, DIRECTV will be placed in an untenable legal position should the arbitrator grant Armstrong's request for an order compelling DIRECTV's production of its RSN agreements over the objections of its counterparties. Indeed, as noted, three of those counterparties dispute the jurisdiction of this arbitration over non-party DIRECTV, and at least one is demanding that DIRECTV challenge any such order in a court.

In conclusion, because of the jurisdictional issues that have been raised with respect to Armstrong's subpoena, DIRECTV respectfully requests that the Arbitrator reject Armstrong's invitation to issue an order to DIRECTV compelling production of the RSN agreements and related information over the objections of the RSN counterparties. Instead, Armstrong and SNP should be directed – consistent with the practice in other RSN arbitration proceedings – to enter into direct negotiations with the objecting RSNs in an effort to resolve their objections. DIRECTV stands ready to produce the requested RSN agreements once its counterparties' objections have been resolved to their satisfaction.

Very truly yours,

A handwritten signature in black ink, appearing to read "C. T. Kimmett", with a long horizontal flourish extending to the right.

Charles T. Kimmett
Counsel for non-party DIRECTV

encl.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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November 15, 2010

**VIA ELECTRONIC MAIL AND FEDERAL
EXPRESS**

Charles T. Kimmitt, Esq.
Wiltshire & Grannis LLP
1200 18th Street, N.W.
Suite 1200
Washington, D.C. 20036

RE: Notice of Production of Affiliation Agreement in
Armstrong Utilities, Inc. v. DIRECTV Sports Net
Pittsburgh, LLC, AAA Case No. 55-472-E-00247-10

Dear Charles:

Further to my letter dated November 4, 2010, I am writing in relation to the above-referenced arbitration between Armstrong Utilities, Inc. ("Armstrong") and DIRECTV Sports Net Pittsburgh, LLC ("DSN Pittsburgh").

We understand that Armstrong has purported to request that the Arbitrator make an order that DIRECTV, Inc. produce the affiliation agreement ("Agreement") entered into by and between DIRECTV, Inc. and Fox Sports Direct, Fox Cable Networks Services, LLC, Sports Access, Fox Broadcasting Company and Fox Entertainment Group, Inc. (collectively, "FOX"), together with certain related materials (the "Documents"). We understand further that DSN Pittsburgh has thus far objected to such an order and that, for its part, DIRECTV, Inc. has indicated to Armstrong that it considers that any such order would be improper and invalid.

In this connection, please take note that:

1. FOX adheres to the position expressed in my November 4, 2010 letter that:
 - (a) FOX does not consent to DIRECTV, Inc.'s production of the Agreement or the Documents, nor does FOX consent to your disclosure to any third party of any of the terms or conditions set forth in the Agreement or the Documents;
 - (b) Any disclosure by DIRECTV, Inc. of all or part of the Agreement, the Documents or any of their terms and conditions would constitute a material breach of the confidentiality provisions of the Agreement, including without limitation Section 18 thereof; and
 - (c) Any production by DIRECTV, Inc. of the Agreement or the Documents, or any disclosure of their terms and conditions, would result in material and irreparable harm to FOX.
2. Section 18 of the Agreement specifically obligates the parties to keep the Agreement strictly confidential, with only limited and narrow exceptions. Although those exceptions include disclosure pursuant to "valid court order," they do *not* include orders of arbitral panels, much less arbitral panels that lack jurisdiction over DIRECTV, Inc.
3. Even if the provisions of Section 18 allowing disclosure pursuant to a "valid court order" could be construed as permitting disclosure pursuant to a direction or order of an arbitral panel (and they do not), this exception could not possibly apply in the event that the Arbitrator were to order production of the Agreement or the Documents in the above-referenced proceeding. Among other reasons, this is because:
 - (a) DIRECTV, Inc. is not the respondent to or a party in the arbitration between Armstrong and DSN Pittsburgh, which is taking place under the authority of an order of the Federal Communications Commission ("FCC") (the

“Order”),¹ and therefore DIRECTV, Inc. not subject to the jurisdiction of the Arbitrator;² and

- (b) The *Order* strictly limits the extent to which parties may engage in discovery in the course of an arbitration. It provides that the parties may “submit such evidence to the extent it is in their possession.”³ The FCC further clarified that, by “‘possession,’ we mean actual possession or control.”⁴ Moreover, the *Order* modified AAA Commercial Arbitration Rule 31 (relating to discovery) by strictly limiting the parties’ rights to an “[e]xchange of information.”⁵ By its plain terms, this provision contemplates the limited and reciprocal exchange of information between the parties – not discovery from non-parties over whom the Arbitrator has no jurisdiction or control. Indeed, the provision governing an “[e]xchange of information” – when read together with the provision permitting an arbitrator to require submission of evidence by the parties only if “such evidence . . . is in their [actual] possession” –

¹ *In re News Corp. and The DirecTV Group, Inc., Transferors, and Liberty Media Corp., Transferee*, FCC 08-66, MB Docket No. 07-18 (rel. Feb. 26, 2008).

² The mere fact that DSN Pittsburgh and DIRECTV, Inc. happen to be members of the same group of companies does not (and cannot) make DIRECTV, Inc. a party to the arbitration or subject to the Arbitrator’s jurisdiction. *See, e.g., CTF Hotel Holdings, Inc. v. Marriott Int’l, Inc.*, 381 F.3d 131, 138 (3d Cir. 2004) (refusing to hold that CTF, a Delaware subsidiary of an international hotel group, was bound by an arbitration clause entered into by its affiliate, despite claims that the companies had “an identity of interests that [made] them functionally the same corporation”); *Zurich Am. Ins. v. Watts Indus., Inc.*, 417 F.3d 682, 688 (7th Cir. 2005) (mere corporate relationship with a party to an arbitration did not make nonsignatory a party to that proceeding); *see also Masefield AG v. Colonial Oil Indus., Inc.*, 05 Civ. 2231 (PKL), 2005 U.S. Dist. LEXIS 6737, at *17-19 (S.D.N.Y. Apr. 17, 2005) (enjoining ICC arbitration against affiliates of Swiss entity that had signed arbitration clause; nonsignatory affiliates’ avowed membership of the same “‘group’ of companies” was immaterial); *Hartford Accident & Indem. Co. v. Columbia Cas. Co.*, 98 F. Supp. 2d 251, 256-57 (D. Conn. 2000) (insurer sued on two reinsurance policies against two separate corporate affiliates; policy against the first affiliate was covered by arbitration, policy against the second required litigation; held that an arbitral award adverse to first affiliate did not bind second affiliate); *Murray v. Dominick Corp. of Canada, Ltd.*, 631 F. Supp. 534, 537 (S.D.N.Y. 1986) (“independent corporate affiliates” were not bound by arbitration award because they “were beyond the jurisdiction of the arbitration proceeding” and they bore “no master/servant or principal/agent relationship to each other as a matter of law since they [were] independent corporate affiliates”) (emphasis supplied).

³ *Order*, at Section IV.B.5.

⁴ *Id.* at n.15.

⁵ *Id.* at Section IV.F.4. (Modifications to Rules for Arbitration Involving Regional Sports Networks).

necessarily precludes third-party discovery. The issuance of an order purporting to require DIRECTV Inc., a third party, to produce documents is thus antithetical to the procedures specified by the FCC in the *Order*.⁶

4. We also do not consider that the Arbitrator has power to order DSN Pittsburgh to produce copies of the Agreement or the Documents in circumstances where DSN Pittsburgh is not (and has never been) permitted to receive copies of the Agreement or the Documents. To our knowledge, the Agreement and Documents are not in the possession or control of DSN Pittsburgh.
5. Accordingly, and in furtherance of its obligation to keep the Agreement and the Documents strictly confidential, we consider that DIRECTV, Inc. is obligated:
 - (a) to refrain from taking any steps which could be construed as a submission to the Arbitrator's jurisdiction;
 - (b) in the event that the Arbitrator purports to order production of the Agreement or the Documents, to challenge such order in a court of competent jurisdiction;
 - (c) to decline to comply with facially invalid orders of the Arbitrator unless or until otherwise ordered by a court of competent jurisdiction (after exhaustion of any appeals); and

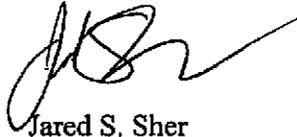
⁶ Third party discovery would be especially inappropriate given that the Arbitrator plainly lacks subpoena power in the present circumstances. Subpoenas are not authorized by the FCC in the *Order*, nor could they possibly be authorized by statute, because (1) the proceeding arises purely as a result of the *Order* and is therefore not governed either by the Federal Arbitration Act ("FAA") or state arbitral law; and (2) even if the FAA applied to the proceeding (and it does not), the FAA's subpoena provisions do not authorize pre-hearing arbitral subpoenas. See *Hay Group, Inc. v. E.B.S. Acquisition Corp., et al.*, 360 F.3d 404, 406 (3d Cir. 2004) (holding that Section 7 of the FAA "unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear" at an arbitral hearing "as a witness"); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216-17 (2d Cir. 2008) (FAA "does not authorize arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings").

Charles T. Kimmett, Esq.
November 15, 2010
Page 5

- (d) to continue to refrain from disclosing the Agreement or the Documents to persons that are not authorized to receive such materials, including DSN Pittsburgh.

Finally, we understand that DIRECTV, Inc. has sought to make a "special appearance" before the Arbitrator for the purpose of explaining its position with respect to, among other things, the Agreement and the Documents. Whatever action is taken in this regard, we request that DIRECTV, Inc. refrain from making any representations or "special appearance" in the Arbitration unless it receives assurances from both parties (and the Arbitrator) that doing so will not constitute a submission to the Arbitrator's jurisdiction for any purpose.

Very truly yours,



Jared S. Sher
Counsel to Fox Cable Networks Services, LLC

cc: Mike Hopkins, Fox Cable Networks Services, LLC
Matt Bensen, Esq.
William Wiltshire, Esq.

November 02, 2010

BY FEDERAL EXPRESS

Fox Sports Direct
Fox Cable Networks Services, LLC
10201 W. Pico Boulevard
Los Angeles, California 90035
Attention: Mike Hopkins

Re: *Notice of Production of Affiliation Agreement in Armstrong Utilities, Inc. v. DIRECTV Sports Net Pittsburgh, LLC, AAA Case No. 55-472-E-00247-10*

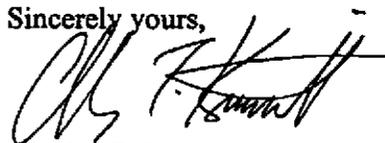
Dear Sir/Madam:

Pursuant to Section 18 of the affiliation agreement between DIRECTV, Inc. and Fox Sports Direct, Fox Cable Networks Services, LLC, Sports Access, Fox Broadcasting Company, and Fox Entertainment Group, Inc., this is to notify you that DIRECTV intends to produce that agreement, along with all term sheets, amendments, extensions, modifications, addenda, surcharge notices, and other agreements related thereto ("Affiliation Agreement"), in response to a subpoena issued by the American Arbitration Association arbitrator presiding over the above-referenced proceeding between Armstrong Utilities, Inc. and DIRECTV Sports Net Pittsburgh, LLC.

In accord with Section 18 of the Affiliation Agreement, the production will be subject to a Confidentiality Agreement and Protective Order ("CAPO") already in place, a copy of which is attached hereto. DIRECTV will designate the Affiliation Agreement as Highly Confidential Information subject to the provisions, protections, and limitations on use set forth in the CAPO.

Please contact me if you have any questions regarding this matter.

Sincerely yours,



Charles T. Kimmett

Attachment

November 5, 2010

VIA ELECTRONIC MAIL AND OVERNIGHT MAIL

Charles T. Kimmett, Esq.
1200 18th Street, NW
Suite 1200
Washington, DC 20036

Re: *Notice of Production of Affiliation Agreement in Armstrong Utilities, Inc. v. DIRECTV Sports Net Pittsburgh, LLC.*
AAA Case No. 55-472-E-00247-10

Dear Mr. Kimmett:

By this letter, you are hereby advised that this firm has been engaged to represent New England Sports Network, L.P. (NESN) with regard to the above-captioned matter. Your letter of November 2, 2010 notifying NESN of your intent to produce the Affiliation Agreement and related materials (described as "all term sheets, amendments, extensions, modifications, addenda, surcharge notices, and other agreements related thereto") has been provided to me by NESN.

NESN objects strenuously to the production of any of the materials which comprise the "Affiliation Agreement" referenced in your letter. Section 17(b)(2) of the Affiliation Agreement permits production only to the extent necessary to "comply with law or a valid court order." We are not aware of any such court order directing DirecTV to produce the Affiliation Agreement. NESN's objection to production of the Affiliation Agreement is necessary to protect NESN's business interests by preventing improper disclosure of the Affiliation Agreement which contains highly confidential and competitively sensitive business information. Disclosure of the Affiliation Agreement to persons affiliated with other multichannel video programming distributors, including Armstrong Utilities, Inc., as well as their outside consultants, would adversely impact NESN's business interests.

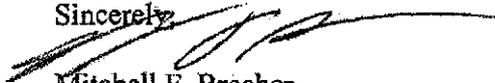
While NESN appreciates DirecTV's commitment to designate the Affiliation Agreement as "Highly Confidential," there are no assurances that the arbitrator would honor such a designation if the designation was challenged in a document production request as part of the discovery process during the arbitration proceeding.

Further, NESN is not satisfied that the limitations on disclosure of Highly Confidential Information set forth in the Confidentiality Agreement and Protective Order ("CAPO") in this proceeding would be sufficient to protect NESN's competitive interests. For example, the CAPO contains no provisions which establish any rights, protections, or procedures for third parties (such as NESN) to protect the confidentiality of their information.

Finally, NESN fails to see any possible relevancy of the Affiliation Agreement to the instant arbitration. As you are aware, NESN programming is limited to transmission of sports programming in the New England region. We understand the Armstrong-DirecTV arbitration to involve pricing of sports programming in the Pittsburgh, PA SMSA -- a completely separate market.

For all of the foregoing reasons, NESN has concluded that it cannot consent to DirecTV's planned production of the Affiliation Agreement. Accordingly, you are hereby placed on notice that NESN objects to production by DirecTV of the Affiliation Agreement.

Sincerely,



Mitchell F. Brecher

Counsel for New England Sports Network, L.P.

Cc: Mr. Sean McGrail, President and CEO, New England Sports Network, L.P.

November 5, 2010

VIA ELECTRONIC MAIL AND OVERNIGHT MAIL

Charles T. Kimmett, Esq.
1200 18th Street, NW
Suite 1200
Washington, DC 20036

Re: *Notice of Production of Affiliation Agreement in Armstrong
Utilities, Inc. v. DIRECTV Sports Net Pittsburgh, LLC.*
AAA Case No. 55-472-E-00247-10

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NESN objects strenuously to the production of any of the materials which comprise the "Affiliation Agreement" referenced in your letter. Section 17(b)(2) of the Affiliation Agreement permits production only to the extent necessary to "comply with law or a valid court order." We are not aware of any such court order directing DirecTV to produce the Affiliation Agreement. NESN's objection to production of the Affiliation Agreement is necessary to protect NESN's business interests by preventing improper disclosure of the Affiliation Agreement which contains highly confidential and competitively sensitive business information. Disclosure of the Affiliation Agreement to persons affiliated with other multichannel video programming distributors, including Armstrong Utilities, Inc., as well as their outside consultants, would adversely impact NESN's business interests.

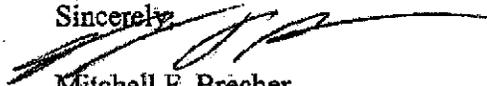
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Sincerely,



Mitchell F. Brecher

Counsel for New England Sports Network, L.P.

Cc: Mr. Sean McGrail, President and CEO, New England Sports Network, L.P.

WILLKIE FARR & GALLAGHER LLP

DAVID P. MURRAY
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dmurray@willkie.com

1875 K Street, NW
Washington, DC 20006-1238
Tel: 202 303 1000
Fax: 202 303 2000

November 12, 2010

BY ELECTRONIC DELIVERY

Charles T. Kimmett
WILTSHIRE & GRANNIS LLP
1200 18th Street, NW
Washington, DC 20036

Re: Objection to Production of Affiliation Agreements in Armstrong Utilities, Inc. v. DIRECTV Sports Net Pittsburgh, LLC, AAA Case No. 55-472-E-00247-10

Dear Mr. Kimmett:

This letter responds to your November 2, 2010 notices of proposed disclosure of affiliation agreements and related information for Comcast SportsNet Bay Area, Comcast SportsNet Chicago, LLC, Comcast SportsNet Mid-Atlantic, L.P., Comcast SportsNet New England, and Comcast SportsNet West, Inc. (d/b/a Comcast SportsNet California) (collectively with Comcast SportsNet Philadelphia, "Comcast RSNs"). The disclosure of this highly confidential information has been sought by Armstrong Utilities, Inc. ("Armstrong") pursuant to a subpoena issued in connection with an ongoing arbitration between Armstrong and FSN-Pittsburgh, a regional sports network.

For the reasons shown below, the Comcast RSNs object to any disclosure of their agreements as requested in Request 3 of Armstrong's subpoena. The FCC has acknowledged that these agreements are among the most sensitive, highly confidential information that multichannel video programming distributors and networks possess.¹ In addition, the Comcast RSNs object to the disclosure of the related information and documents sought in Request 4 of the Armstrong subpoena, which are likewise highly confidential.²

¹ See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Report and Order*, 13 FCC Rcd. 24816, ¶ 61 (1998) (stating that the FCC has "consistently recognized that disclosure of programming contracts between [MVPDs] and programmers can result in substantial competitive harm to the information provider"). The FCC's Media Bureau has given such contracts enhanced confidential treatment due to their "highly sensitive" nature. *EchoStar Satellite L.L.C. v. Home Box Office, Inc.*, 21 FCC Rcd. 14197, ¶ 9 (2006); *Adelphia Communications Corp.*, 20 FCC Rcd. 20073, ¶ 7 (2006). FCC rules likewise provide that affiliation agreements between programmers and MVPDs are generally exempt from disclosure under the Trade Secrets exemption of the Freedom of Information Act. See 47 C.F.R. § 0.457(d)(iv).

² Request 4 seeks the following highly confidential information: "With respect to the services listed in Request 3, offers, counteroffers, proposals, terms sheets and similar documents, and any accompanying emails or

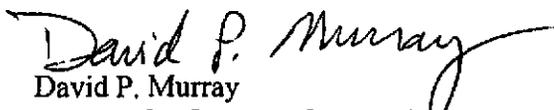
We understand that (1) the arbitration at issue arises under the arbitration condition imposed by the Federal Communications Commission in the *Liberty Order*; and (2) DirecTV is not a party to the arbitration. The *Liberty Order* only authorizes the exchange of potentially relevant information in the actual possession or custody of the parties. Specifically, Section IV.B.5 of the *Liberty Order* expressly limits the arbitrator's authority to order discovery to documents and information in the possession of the parties to the arbitration, stating, in pertinent part, that the arbitrator "may consider any relevant evidence (*and may require the parties to submit such evidence to the extent that it is in their possession*)" The provision further specifies that "'possession' . . . mean[s] *actual possession or control*." Similarly, Part F, which modifies certain of the expedited procedures of the commercial arbitration rules, only allows for a limited "[e]xchange of [i]nformation" among the *parties* consistent with the limitations imposed in Section IV.B.5. (Emphases added).

Based on these express limitations, any disclosure by DirecTV, as a non-party to the arbitration, of the Comcast RSNs' highly confidential and proprietary documents and business information sought under the Armstrong subpoena would contravene the confidentiality obligations in the Comcast RSN affiliation agreements with DirecTV. The affiliation agreement confidentiality provisions allow for disclosure where it is required by any court of competent jurisdiction, governmental agency, law or regulation. As there is no authorization in the *Liberty Order* for third-party discovery, there is no valid ground under these agreements for disclosure of such highly confidential materials by DirecTV pursuant to the Armstrong subpoena. (The Comcast RSNs would also have the right to require the redaction of highly confidential information that is not germane to a particular dispute, prior to any authorized disclosure.)

In addition, the Comcast RSNs object to the disclosure of their information and agreements as the parties' proposed protective order lacks important safeguards contained in confidentiality and protective orders entered in other similar arbitrations.

For all of these reasons, the Comcast RSNs do not consent to the production of any information or documents, and object to any such disclosure under the subpoena requests, for all of the reasons stated.

Very truly yours,


David P. Murray
Counsel for Comcast Corporation

cc: William Wiltshire

cover letters, that have actually been exchanged concerning the rates, fees, advertising, or number of events to be provided, including with respect to any surcharge during the period October 1, 2010 to the present."

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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November 16, 2010

Melissa Hubbard, Esq.
Arbitrator
American Arbitration Association
230 South Broad Street, 12th Floor
Philadelphia, PA 19102

RE: Purported Subpoenas to News Corporation in
Armstrong Utilities, Inc. v. DIRECTV Sports Net
Pittsburgh, LLC, AAA Case No. 55-472-E-00247-10

Dear Ms. Hubbard:

By and through its undersigned counsel, News Corporation ("News Corp") hereby responds to the purported subpoenas, dated October 28 and November 1, 2010, issued to News Corp in connection with the above-referenced arbitration (the "Proceeding").¹ For the reasons explained below, News Corp respectfully believes that the Arbitrator has no power or jurisdiction over News Corp, which is not a party to this dispute. As such, the Arbitrator lacks authority to order or command News Corp to participate in this proceeding, and News Corp is not bound by the purported subpoenas.

As set forth below, the Arbitrator's jurisdiction in the instant Proceeding derives not from Pennsylvania state arbitration law or the Federal Arbitration Act ("FAA"), but instead from an order (the "Order") of the Federal

¹ See *In re Armstrong Utilities, Inc., Claimant vs. DIRECTV Sports Net Pittsburgh, LLC, Respondent*, Case No. 55-472-E-00247-10, Subpoena to News Corporation (dated Oct. 28, 2010) and Supplement Subpoena to News Corporation (dated Nov. 1, 2010).

Communications Commission (“FCC” or “Commission”).² Because the *Order* does not provide any authority for the Arbitrator to permit discovery from third parties, the purported subpoenas issued to News Corp are invalid on their face. Even if the FAA were applicable, it does not authorize pre-hearing document discovery from non-parties such as News Corp. Moreover, even assuming the purported subpoenas to be valid, they are contrary to public policy, facially overbroad in scope and unduly burdensome in terms of the information sought to be produced.

1. The FCC Order Establishing the Arbitration Does Not Permit Third-Party Subpoenas

As we understand it, the Proceeding was commenced not on the basis of any contract or other agreement between and among Armstrong Utilities, Inc. (“Armstrong”) and DIRECTV Sports Net Pittsburgh, LLC (“Sports Net”), but rather on the basis of the *Order* issued by the Commission. The *Order* provides that a multichannel video programming distributor (such as Armstrong) can commence an arbitration against Sports Net “in accordance with” specific procedures set forth in the *Order*, so that an arbitrator can determine “the fair market value of the programming carriage rights at issue.”³ In particular, the FCC mandated that an arbitration brought under auspices of the *Order* be governed by the commercial arbitration rules of the American Arbitration Association (“AAA”), excluding the rules for large, complex cases, “but including the modifications to the Rules” as detailed in the *Order*.⁴

Among other things, the *Order* provided that the determination of fair market value be based on “relevant evidence,” but only authorizes the Arbitrator to require parties to “submit such evidence to the extent it is in their possession.”⁵ The FCC clarified that, by “‘possession,’ we mean actual possession or control.”⁶ Moreover, the *Order* modified AAA Commercial Arbitration Rule 31 (relating to

² *In re News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corp., Transferee*, FCC 08-66, MB Docket No. 07-18 (rel. Feb. 26, 2008).

³ *Id.* at Appendix B, Section IV.B.3. (Additional Conditions Concerning Access to Regional Sports Networks: Rule of Arbitration).

⁴ *Id.* at Section IV.B.1. (Rules of Arbitration) (emphasis supplied).

⁵ *Id.* at Section IV.B.5.

⁶ *Id.* at n.15.

discovery) by strictly limiting the parties' rights to an "[e]xchange of information."⁷ By its plain terms, this provision contemplates the limited and reciprocal exchange of information between the parties – not discovery from non-parties over whom the Commission (and thus the Arbitrator) have no jurisdiction or control. Indeed, the provision governing an "[e]xchange of information" – when read together with the provision permitting an arbitrator to require submission of evidence by the parties only if "such evidence . . . is in their [actual] possession" – necessarily precludes third-party discovery. The issuance of third party subpoenas or any other compelled response from a non-party is thus antithetical to the procedures specified by the Commission in the *Order*.

In short, because the instant proceeding exists only under the authority of the *Order*, the rules and procedures established by the Commission govern the scope of the Arbitrator's authority here. By its terms, the *Order* aims to achieve an expedited mechanism for resolving a program carriage dispute, and severely restricts the scope of disclosure that might otherwise have been available under the AAA's Commercial Arbitration Rules. And since the *Order* contains no authority for the Arbitrator to subpoena documents or information from non-parties – indeed, it explicitly restricts discovery to an exchange between the parties of documents within their *actual* possession or control – the purported October 28 and November 1 subpoenas issued to New Corp in this proceeding are invalid.⁸

2. Neither the FAA Nor State Arbitral Law Apply to the Proceeding

Moreover, although the purported subpoenas refer to "the laws of the State of Pennsylvania and the Federal Arbitration Act" as a source of authority, neither statute is applicable here. As Section 2 of the FAA makes clear, the purpose of the FAA is to give effect to "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter

⁷ *Id.* at Section IV.F.4. (Modifications to Rules for Arbitration Involving Regional Sports Networks).

⁸ Even if AAA Rule 31 were applicable in its unmodified form, courts have made clear that an arbitrator's authority under this AAA rule "is best seen . . . as nothing more than authorization by the parties – *binding only upon the parties* – for an arbitrator to order non-party discovery, *subject to the willingness of the non-party voluntarily to comply with such order.*" *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 218 (2d Cir. 2008) (emphasis supplied). Thus, "when a non-party refuses to comply voluntarily . . . the party seeking discovery is limited to" the FAA, if applicable, as the only "vehicle to enforce the subpoena." *Id.* For the reasons explained herein, the FAA is *not* applicable to the instant proceeding.

arising out of such contract or transaction”⁹ No such agreement exists here. Likewise, Section 7302 of Title 42 of the Pennsylvania Consolidated Statutes applies to “agreement[s] to arbitrate a controversy”; the law states that statutory arbitration applies only if an “agreement to arbitrate is in writing and expressly provides for arbitration pursuant to this subchapter or any other similar statute,”¹⁰ which again is absent here. Indeed, the FCC issued the *Order* precisely because parties such as Armstrong and Sports Net have *not* entered into any arbitration agreement with respect to program carriage disputes. The *Order* plainly states that an aggrieved party “shall not be required to submit copies of the arbitration provisions of the contract, but shall instead refer to [the *Order*, which] . . . shall be sufficient for the AAA to take jurisdiction.”¹¹ Because the Proceeding derives exclusively from the *Order*, not from any agreement or understanding between Armstrong and Sports Net, News Corp respectfully declines to recognize the Arbitrator’s invocation of Pennsylvania state arbitration law and the FAA as a basis for issuing the purported subpoenas.¹²

3. Even if Applicable, the FAA Does Not Authorize the Purported Subpoenas

Even if the FAA were applicable to the Proceeding, the purported subpoenas issued to News Corp still would be defective and invalid. It is well settled that “the authority of arbitrators with respect to non-parties who have never agreed to be involved in arbitration *is severely limited*.”¹³ When the FAA applies to an

⁹ 9 U.S.C. § 2; *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (Act intended to give effect to agreements of the parties); *Hay Group, Inc. v. E.B.S. Acquisition Corp., et al.*, 360 F.3d 404, 410 (3d Cir. 2004) (noting that “the central purpose of the [Act] is to give effect to private agreements” and that the Act’s purpose is “to ensure judicial enforcement of privately made agreements to arbitrate”).

¹⁰ 42 Pa. C.S.A. § 7302(a). Pennsylvania state law also provides for compulsory arbitration, but only *when ordered by a state court* in a case properly falling within its jurisdiction, and only then where the value of the claim is less than \$160,000 or involves title to real property. *See* 42 Pa. C.S.A. § 7361. *See also Brown v. D.P. Willo, Inc.*, 454 Pa. Super. 539 (1996) (court lacked authority to direct a civil dispute to binding arbitration absent agreement by the parties); *Kardon v. Portare*, 353 A.2d 368, 369 (Pa. 1976) (“a party who can establish that he did not agree to arbitrate, or that the agreement to arbitrate, limited in scope, did not embrace the disputes in issue, may be entitled to enjoin an arbitration proceeding”).

¹¹ *Order*, at Section IV.F (Modifications to Rules for Arbitration Involving Regional Sports Networks).

¹² News Corp further reserves each and all objections it may have to the application of Pennsylvania state arbitration statutes in these circumstances, including as to subject-matter and personal jurisdiction, as well as any objections arising under the Supremacy Clause.

¹³ *Hay Group*, 360 F.3d at 409 (internal citation omitted) (emphasis supplied).

arbitration, Section 7 of that act serves as an arbitrator's "only source of the authority" to validly issue a subpoena to a non-party.¹⁴ Section 7, however, is narrowly circumscribed, and provides no basis for requesting the issue of *pre-hearing* document subpoenas to a non-party.¹⁵ The U.S. Court of Appeals for the Third Circuit has stated unequivocally that "Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear" at an arbitral hearing "as a witness."¹⁶ The Second Circuit likewise "join[ed] the Third Circuit" in emphatically holding that Section 7 "does not authorize arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings."¹⁷ The purported subpoenas run afoul of these principles and therefore are invalid on their face.

4. In All Events, the Purported Subpoenas Conflict with Public Policy and Are Facially Overbroad and Unduly Burdensome

Wholly apart from the arbitrator's lack of legal authority to compel or command News Corp to produce documents, the purported subpoenas are facially overbroad, unduly burdensome and improperly seek confidential information in a manner likely to contravene public policy.

News Corp is a stranger to this dispute. The purported subpoenas seek from News Corp not only confidential agreements that contain proprietary business information, but also a vast array of commercially sensitive documents on a range of issues. In addition, News Corp and its affiliates are competitors (or potential competitors) with both parties to this Proceeding. If a competitor (such as Armstrong, which sits across the table from News Corp subsidiaries as a distributor in negotiations for carriage of programming networks) gains access to proprietary information, News Corp would face a significant competitive disadvantage. To the extent that the information sought in the purported subpoenas also would be available to Sports Net, the danger would be compounded because owners of regional sports networks compete vigorously with one another for access to a limited pool of professional and major college sports programming rights valued by consumers.

¹⁴ *Id.* at 406 (internal citation omitted).

¹⁵ See 9 U.S.C. § 7 (permitting arbitrators to "summon in writing any person *to attend before them or any of them as a witness* and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case") (emphasis supplied).

¹⁶ *Hay Group*, 360 F.3d 407.

¹⁷ *Life Receivables*, 549 F.3d at 216-17.

The harms ultimately would redound to consumers, who could face higher rates for multichannel video programming in the event that a competitor – whether a programming distributor or another network – were in a position to use strategic insights gleaned from this information either in future carriage negotiations or future negotiations for sports programming rights.

These concerns are not new; indeed, they should be familiar to everyone in the communications industry. The Commission itself consistently has recognized that “disclosure of programming contracts between multichannel video program distributors and programmers can result in substantial competitive harm to the information provider”¹⁸ No doubt for that reason the FCC in the *Order* strictly limited discovery to an exchange of documents under the parties’ actual control. The stark reality is that, if the information and agreements sought in the purported subpoenas fall into the hands of a competitor, the harm would be drastic and irreversible.¹⁹

Moreover, the prejudice and burden associated with disclosing this information (to the extent that it is actually in News Corp’s possession, custody or control) far outweighs any possible utility in disclosing it. The purported subpoenas seek access to information and agreements covering more than a dozen programming networks nationwide, in terms vastly exceeding any possible relevance to this Proceeding. In fact, the substantial differentiation between geographically distinct markets in which regional sports networks operate indicates that information and contracts about widely dispersed channels would be of no value as points for comparison in a dispute about a single network located in a single market. Equally important, it is hard to fathom how News Corp’s internal business strategies and confidential planning information possibly could be relevant to the question of the appropriate value for a programming network, which should be determined by actual marketplace considerations – not an intrusive examination of a non-party’s private strategic deliberations. Courts have cautioned that arbitral subpoenas should not be used “to engage in fishing expeditions that undermine some of the advantages of the

¹⁸ See, e.g., *In re Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24852 (1998).

¹⁹ Furthermore, and with due respect to both parties to the Proceeding (and their legal representatives), no protective order or confidentiality measure, no matter how stringent, would be sufficient to protect against the risks inherent in making disclosure in these circumstances. Cf. *Gioia v. Texas Air Corp.*, 1988 Del. Ch. LEXIS 30, at *10 (Del. Ch. Mar. 3, 1988) (“I do not regard confidentiality orders as providing absolute protection. If they did, . . . the words written on a page would afford the protection of a guarded vault. We must operate, however, in a world more closely aligned with a reality in which mistakes occur and in which trust is sometimes abused for advantage.”).