

February 7, 2011

**SUBMITTED VIA FCC ELECTRONIC
COMMENT FILING SYSTEM ("ECFS")**

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, District of Columbia 20554

Re: *In the Matter of Joint Petition for Declaratory Ruling that the "Liberty Order"
Does Not Authorize Third-Party Subpoenas*, FCC MB Docket No. 11-14

Dear Ms. Dortch:

Armstrong Utilities, Inc. ("Armstrong") is the Claimant in the AAA arbitration, *Armstrong Utilities, Inc. v. Directv Sports Net Pittsburgh, LLC*, Case No. 55 472 E 00247 10. Armstrong writes to comment on and oppose the above-captioned Joint Petition.¹

The Joint Petition is an extraordinary, unauthorized, and meritless joint effort by the three dominant players in Regional Sports Network ("RSN") programming² to circumvent – and ultimately undermine – the Fair Market Value arbitration process provided for under the Commission's Memorandum and Order in *In the Matter of New Corporation, DIRECTV Group, and Liberty Media Corporation*, 23 FCC Rcd. 3265 (2008) (the "*Liberty Order*"), as well as other "merger orders." (Jt. Pet. at 1). As explained more fully below, there is no basis in the *Liberty Order* for Petitioners to ask the Commission to interfere with the discretion of a duly-appointed AAA arbitrator as to how to run her hearing – let alone to limit the arbitrator's ability to require presentation at hearing of core Fair Market Value evidence, such as that called for by the subpoenas issued in the *Armstrong* arbitration. The Commission's sole role under the *Liberty Order* is to conduct a *de novo* review if a party requests such review after the AAA arbitrator issues her award. Here, no award has been issued and no *de novo* review has been sought.

Fortunately, the Commission need not expend valuable time and resources in considering Petitioners' arguments. Under the Administrative Procedure Act, the Commission's authority to issuing declaratory rulings is limited "by the same basic principles that govern declaratory judgments in the courts." S. Rep. No. 79-752, at p. 18 (1945); H.R. Rep. No. 79-1980, at p. 31 (1945). It is well-established that declaratory rulings shall not issue where there is no imminent threat and the "issue" presented is contingent on a future event, such that the requested relief would be purely advisory and would not actually impact the rights of those seeking the relief. See, e.g., *Step-Saver Data Sys., Inc. v. WYSE Tech.*, 912 F.3d 643, 647-49 (3d Cir. 1990)

¹ Proskauer Rose LLP is counsel to Armstrong in the AAA arbitration. For purposes of this filing, Proskauer appears for Armstrong on all issues other than with respect to News Corporation. David Jamieson, General Counsel, Armstrong Holdings, Inc., appears for Armstrong as to all issues, including with respect to News Corporation.

² Comcast Corporation ("Comcast"), DIRECTV, Inc. ("DIRECTV") and News Corporation ("News Corp.") (collectively, "Petitioners").

(holding that declaratory judgment action was unripe where: (i) the alleged potential harm was contingent on the occurrence of a future event; (ii) a determination of the issue presented would amount to no more than an advisory opinion based upon hypothetical facts; and (iii) no useful purpose would be served by awarding declaratory relief).

Here, even if 47 CFR 1.2 (cited by Petitioners) gave the Commission authority to issue rulings concerning a pending AAA arbitration under the *Liberty Order*, there is no current “controversy” or “uncertainty” to be addressed. The hearing for which the subpoenas were issued ended on January 28, 2011. The parties are in the process of preparing their post-hearing Findings of Fact for submission on February 11, 2011. Neither the arbitrator nor any party to the arbitration is currently seeking information from the Petitioners under the subpoenas. In short, there is no imminent threat that Petitioners could – or should – be required to produce the requested information.

Moreover, there might never be a ripe controversy.

If Armstrong prevails in the arbitration, Petitioners’ requested relief may be mooted in its entirety. If Respondent DirecTV Sports Network Pittsburgh does not seek FCC review of the award to Armstrong, the issue will be moot. If Respondent seeks *de novo* FCC review, Armstrong may, but need not, raise Petitioners’ non-compliance with the subpoenas in response to the appeal.³

If the arbitrator rules against Armstrong – and if Armstrong chooses to seek *de novo* review of that award before the Commission – Armstrong may raise Petitioners’ non-compliance with the subpoenas as a ground for reversal. If Armstrong raises Petitioner’s non-compliance with the subpoenas during an FCC review, the Commission may address the issue at that time, and in the proper context of the actual facts at issue in the Armstrong arbitration.

Unless and until Armstrong chooses to pursue the subpoenas (and Petitioners’ non-compliance), there simply is no “controversy” to be addressed “uncertainty” to be removed, and therefore no authority to issue a declaratory ruling under 47 CFR 1.2 or Section 5(d) of the APA (from which the Commission’s section 1.2 Declaratory Rulings authority derives).⁴

³ On January 14, 2011, Arbitrator Hubbard held a pre-hearing conference concerning the impact of the Joint Petition on the hearing scheduled to begin on January 24. During that conference, Armstrong and Arbitrator Hubbard agreed that it was unlikely that the Joint Petition would be resolved before the hearing date. Accordingly, Armstrong reserved all rights with respect to the subpoenas and Joint Petition (which it stated it would oppose).

⁴ Petitioners cite no other pending third-party hearing subpoenas. Petitioners suggest that a declaratory ruling is nonetheless needed because other subpoenas may issue in the future. Neither the Commission’s Rules nor the APA permit the issuance of declaratory rulings to address purely speculative concerns. Moreover, the propriety of hearing subpoenas should not be prematurely decided out-of-context of a particular arbitration. For example, an arbitrator may determine that, in a given proceeding, an affiliate or parent entity should be treated as a party subject to discovery requirements under the *Liberty Order*, yet nonetheless decide to issue a hearing subpoena to avoid any doubt or to comply with requirements of a confidentiality agreement that might otherwise prohibit voluntary disclosure of information. Whether and to

Petitioners also appear to seek a number of much broader rulings going beyond even the propriety of the hearing subpoenas issued in the Armstrong arbitration. For example, Petitioners appears to seek broad-brush rulings concerning (i) the general applicability of the FAA and state law to Fair Market Value arbitrations generally, not just under the *Liberty Order*, (ii) the extent to which an arbitrator in a Fair Market Value arbitration has authority to require “third-party participation” in an arbitration by any means at all, and (iii) the scope of party discovery in a Fair Market Value arbitration. (Jt. Pet. at 1). None of these supposed “issues” is necessary to determine the propriety of the third-party hearing subpoenas issued in the Armstrong arbitration. And each is even less ripe for adjudication than the subpoenas.

Adjudicating these overly broad issues, wholly out of context, is not only unnecessary and unauthorized, but dangerous. For example, a ruling that the FAA and state law do not apply to Fair Market Value arbitrations has consequences for, among other things, the review and enforceability of awards and for the ability of parties to produce confidential information within the arbitration. Likewise, a broad, generalized ruling that arbitrators cannot require “third-party participation” in arbitrations, “by hearing testimony, or otherwise” is an invitation for mischief and controversy. Within the Armstrong proceeding – and even in the Joint Petition itself – there have been a number of disputes over whether documents and information is in the possession and control of one entity or another.⁵ A ruling that “third-parties” are entirely immune from any “participation” in the arbitration will undoubtedly lead to more such arguments and claims that even straightforward discovery requests somehow seek to “compel” third-party “participation.” Finally, on a Joint Petition from supposed non-parties concerning third-party subpoenas, the Commission should not address the scope of party discovery at all, particularly where, as where, the Petitioners each are or likely will be “parties” to such arbitrations.

I. Even If the Commission Were to Consider the Petition Now, Petitioners Are Not Entitled to the Requested Relief

Although there is no authority for the requested declaratory ruling, we address why the relief that Petitioners request should not be granted, whether now or at any time.

First, contrary to Petitioners’ assertions, the FAA applies to the Arbitration and authorizes and empowers arbitrators to subpoena evidence to arbitral hearings. *Second*, neither the *Liberty Order*, nor any other relevant merger order, restricts that subpoena power. *Third*, the requested information is directly relevant to a full and fair assessment of “Fair Market Value” under the terms of the *Liberty Order*. *Finally*, appropriate and adequate safeguards exist to protect any

what extent such subpoenas are authorized are matters that can be decided properly and fairly only in the specific context of the particular arbitration at issue.

⁵ In the Armstrong proceeding, DirecTV took the position that, even though it is a party to the *Liberty Order* itself and ultimately owns Respondent DirecTV Sports Network Pittsburgh (which it touts as part of its “sports” presence in its annual reports to shareholders), DirecTV could not be required to produce documents as part of pre-hearing discovery under the *Liberty Order* because it was not the “Respondent.” It then raised jurisdictional objection to the third-party hearing subpoena. In the Joint Petition itself, News Corporation now takes the position that its relevant documents and information belong to a supposedly distinct entity, Fox Sports Net, Inc.. (Jt. Pet. at 7, n. 20)

legitimate confidentiality and/or burden concerns affecting subpoena recipients, including Petitioners.

A. The FAA Applies to the Arbitration

Petitioners argue that “[t]he proceeding between Armstrong and DSN-P was not originated under a contract or agreement to arbitrate, but instead arises solely from an arbitration condition imposed by the Commission in approving a merger transaction in the *Liberty Order*.” This argument forms the basis for Petitioner’s assertion that neither the FAA, nor state laws favoring arbitration, apply here.

Although Petitioners correctly identify the *Liberty Order* as the source of the “arbitration condition” pursuant to which the Arbitration was commenced and conducted, Petitioners’ argument that “[t]he proceeding . . . was not originated under a contract or agreement to arbitrate” is wholly incorrect and misplaced. Indeed, at its core, arbitration – all arbitration, including arbitration related to the Commission’s merger orders – is a creature of contract. *See Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 474-75 (1989). Here, for purposes of the FAA, the *Liberty Order*’s arbitration condition consists of, and reflects, the parties’ agreement to arbitrate.

When Liberty Media and DirecTV approached the Commission in 2007 to request approval of their plan to transfer licenses, they voluntarily offered to agree to the arbitration condition in order to ensure that the Commission would approve the transaction. The Commission accepted that offer and, in turn, Liberty Media and DirecTV accepted the resulting order, including the agreed-upon arbitration condition. The record of the resulting agreement is clear and straightforward:

- On February 16, 2007, Liberty Media Corporation voluntarily “*offered to comply*” with the conditions for RSN arbitration that were included in the earlier *News Corp.-Hughes Order*. Exh. A (2/16/07 ltr. from Robert L. Hoegle to the Commission) at p.2 (emphasis added).
- On April 9, 2007, in responding to petitions that asked the Commission to deny approval for the transaction, The DirecTV Group, Inc. likewise confirmed that the incoming shareholder had “*agreed to be bound by all of the relevant conditions*” that then applied to News Corp. under the *News Corp.-Hughes Order*. Exh. B (excerpt from 4/9/07 Consolidated Opposition to Petitions to Deny and Response to Comments) at p. iii (emphasis added).
- The *Liberty Order* (at p. 43, ¶ 88 (emphasis added)) confirms that “[t]o address and eliminate concerns regarding access to RSNs owned now or in the future by Liberty Media or DirecTV, *Liberty Media and DirecTV have agreed to comply with the conditions*” in the *News Corp.-Hughes Order* regarding access to RSNs and also that Liberty Media had “*agreed to comply with the RSN arbitration condition*” of the *News Corp.-Hughes Order*. *See also* ¶¶ 90, 91 (confirming Liberty Media’s express agreement to the

conditions in order to convince the Commission to approve the transaction).

The Commission has twice confirmed that it regards arbitration conditions in orders granting approval of a transfer of an FCC licenses as consensual agreements. Applicants – such as Liberty Media and DirecTV – that request Commission approval to transfer licenses obviously are free to withdraw their applications if they deem any conditions – including any arbitration conditions – unacceptable. Of course, here, such a withdrawal would have been extraordinary because Liberty and DirecTV voluntarily offered to agree to the arbitration condition. Yet, as the Commission ruled in *In re TCR Sports Broadcasting Holding, L.L.P. D/B/A Mid-Atlantic Sports Network v. Time Warner Cable*, 2008 WL 4758773, at *19, ¶¶ 52-53 (F.C.C. Oct. 30, 2008) and in *In re Comcast Corp.*, 3, n.13, once the applicants *accept* the conditions under which the Commission’s permission is granted to transfer a license, the applicants cannot later challenge the agreed-upon and accepted conditions.

Courts have also recognized that agreed-upon agency conditions – including FCC tariffs – constitute or reflect agreements to arbitrate subject to the FAA. For example, in *Metro East Center for Conditioning and Health v. Qwest Comm. Int’l, Inc.*, 294 F.3d 924, 926-927 (7th Cir. 2002), the Seventh Circuit held that an arbitration provision in a Commission tariff was an agreement to arbitrate, governed and enforceable under the FAA. In doing so, after explaining that “an ‘agreement’ for purposes of [FAA] Section 3 means no more than an offer and acceptance that produces a legally binding document,” the Court held that the “offer” was the tariff and that the acceptance was the customer’s use of the product. *See id.*; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001) (“the FAA was a response to hostility of American courts to the enforcement of arbitration agreements. . . . To give effect to this purpose, the FAA compels judicial enforcement of a wide range of written arbitration agreements). Here, the analysis is even easier than was the case in *Metro East*. The offer to submit to Fair Market Value arbitration was express (*see supra*) and it was accepted: (i) by the Commission when it granted approval to transfer the licenses; and (ii) by all of the parties subject to the *Liberty Order* when they accepted the Commission’s conditional grant.⁶

⁶ By contrast, there is no support for Petitioner’s claim (Petition at 9) that the Commission purportedly has ruled that “the federal policy favoring arbitration, as codified in the FAA, [does not] appl[y] to the merger order conditions.” In the *Massillon Order*, the Commission ruled that the arbitration does not violate the Administrative Procedures Act or the Alternative Dispute Resolution Act, which are federal laws separate from the FAA. The Commission made no ruling with respect to whether arbitration conditions in Commission merger orders are subject to the FAA. In fact, the agreed-upon conditions (at IV.B.9) expressly contemplate that “[j]udgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter. . . ,” a clear indication that the Commission – as well as the parties that agreed to the conditions – contemplated that any arbitration would be subject to the FAA, including the judicial review and enforcement of any arbitral award.

Similarly, the mere fact that the *Liberty Order*’s arbitration condition permits post-award *de novo* review by the Commission does not indicate that the FAA does not apply. It merely means that the parties agreed upon a two-stage process that includes arbitral review, a procedure that is common in many industries, including professional and amateur sports. Indeed, to the extent

B. The FAA Authorizes Hearing Subpoenas

The Joint Petition also rests on the fundamental and false premise that Arbitrator Hubbard issued subpoenas seeking “third party *discovery*.” (Jt. Pet. at 1; *see also id.* at 2-3, 5-7, 9-10, 11 n.33, 12 n.37). In her November 19, 2010 Order (Jt. Pet., Exh. C), Arbitrator Hubbard expressly ruled that she was not authorizing “discovery subpoenas.” (11/19/10 Order at 1). Arbitrator Hubbard ruled that she would only issue “hearing subpoenas” as permitted under Section 7 of the FAA. *Id.* Section 7 of the FAA expressly provides that “arbitrators . . . may summon in writing any person to attend before 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.” 9 U.S.C. § 7. Indeed, the case that Petitioners cite, *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 218 (2d Cir. 2008), confirms the same. (Section 7 permits arbitrators to subpoena evidence to an evidentiary hearing); *see also Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 411, 413 (3rd Cir. 2004) (Section 7 permits arbitrators to subpoena evidence to hearing.)

Here, there is no dispute that the subpoenas in the Armstrong arbitration were, in fact, “hearing subpoenas,” not pre-hearing discovery subpoenas. The witnesses and documents were to be produced at the hearing, on January 24, 2011. As such, all of Petitioners’ arguments concerning the supposed limitations on “discovery” in Fair Market Value arbitrations are irrelevant.

C. The Agreed-Upon Arbitration Condition Does Not Restrict the Arbitrator’s Subpoena Power

Despite Petitioners’ assertions to the contrary, the *Liberty Order*’s arbitration condition does not limit or restrict the arbitrator’s subpoena power pursuant to Section 7 of the FAA.

First, because Section 7 subpoenas are a means to call forth non-party evidence at an arbitral hearing – whether preliminary or otherwise – the provisions in the *Liberty Order*’s conditions concerning pre-hearing discovery are irrelevant. In any event, the discovery conditions merely confirm what can be included in discovery. They do not “limit” anything – and certainly do not address, let alone preclude, third-party hearing subpoenas.

Second, the agreed conditions expressly authorized the arbitration to proceed under the AAA’s Expedited Procedures of the Commercial Arbitration Rules, except as expressly modified by the conditions, Part F. AAA Commercial Rule 31(d) provides that an arbitrator may “subpoena witnesses or documents . . . upon the request of any party or independently.” Again, Rule 31 concerns the power to subpoena evidence at hearing and is distinct from Rule 21, which concerns pre-hearing production of documents and information (*i.e.* discovery). The parties to the *Liberty Order* were and are extremely sophisticated organization represented by top law firms; when they proposed AAA arbitration, they must be presumed to have known that the arbitrator would have discretion and authority to issue third-party hearing subpoenas under the AAA Rules. In other words, Armstrong’s request for such subpoenas was fully within the AAA Rules to which the *Liberty Order* parties agreed as a condition to obtain FCC approval for their transaction.

that a party does seek second-level review by the Commission, the condition (at IV.C.5) treats the resulting award as an “award entered by the arbitrator [that] may be entered by any court having competent jurisdiction over the matter.”

Third, Rule 31 applies in expedited proceedings. The AAA Commercial Arbitration Rules provide that, where the Expedited Procedures apply, Sections E-1 through E-10 apply “in addition to” the other Commercial Arbitration Rules (R-1 through R-54, L-1 through L-4, and O-1 through O-8) unless there is an actual “conflict” with Sections E-1 through E-10. Nothing in Sections E-1 through E-10 even addresses – let alone conflicts with – Rule 31’s hearing subpoena powers. Thus, Rule 31’s powers fully applied to the subpoenas here.⁷

Finally, there is no inconsistency between the fact that the arbitration was a somewhat expedited proceeding and the need to subpoena evidence from non-parties. Again, the arbitrator has broad discretion to control her hearing schedule, and to determine whether and when hearing subpoenas are consistent with that schedule. Here, after consulting with the parties as to their pre-hearing needs, Arbitrator Hubbard set a hearing date of January 24, 2011. She then also issued the hearing subpoenas and arranged the hearing days to allow for presentation of the subpoenaed information. Petitioners cite no authority for the Commission to interfere with, let alone overturn, an AAA arbitrator’s discretion as to how and when to configure her hearing schedule. The “expedited” nature of Fair Market Value arbitration is to the benefit of the parties. Petitioners – who claim to be non-parties – have no standing to contest whether the proceeding is or is not sufficiently expedited. Any objections that Petitioners had to the scope of the subpoenas should have been addressed to the Arbitrator and do not, in themselves, demonstrate that third-party hearing subpoenas are *de facto* inconsistent with an expedited proceeding. Had Petitioners responded to the subpoenas, Armstrong could and would have made use of the information within the time limits set by the arbitrator.

D. The Subpoenas Sought Information Directly Relevant to a Full and Fair Determination of “Fair Market Value”

The central question in the Armstrong arbitration is which of the two Final Offers is closest to Fair Market Value for the programming rights at issue. Because the Final Offers are in the form of full contracts, and because the value of programming rights is determined by the per-subscriber rates, as well as by the overall terms and conditions under which those rights are granted (*e.g.*, the tier on which the programming will be carried, the definition and guaranteed number of major events, most favored nation rights, advertising avails, etc.), ascertaining the actual range of rates, terms, and conditions for carriage in the RSN market is critical.

Unlike DirecTV, Comcast, News Corporation, or other very large “players,” a regional operator such as Armstrong only contracts with a handful of RSNs. In Armstrong’s case, it contracts with just four RSNs other than DirecTV Sports Network Pittsburgh. Without the ability to obtain evidence through third-party subpoenas, operators like Armstrong would be left arbitrating Fair Market Value based, almost exclusively, on the rates, terms, and conditions being offered by the RSN at issue. If that were the case, the Arbitration would be nearly pointless because the Final

⁷ The *Liberty Order*’s conditions acknowledge that Sections E-1 through E-10 are not the only rules applicable here. Because the AAA’s Commercial Rules apply unless there is an actual conflict with E-1 through E-10, in agreeing to the conditions, the parties: (i) went out of their way to exclude application of the rules (L-1 through L-4) for “large, complex cases” (at IV.B.1); and (ii) acknowledged the application of R-4, albeit modified to facilitate the commencement of the arbitration (at IV.F.2).

Offers would be tested against only the RSN's own pricing strategies and goals as reflected in what the RSN has been able to charge to other operators.

Here, DirecTV – with its vertical integration – already has set the “market” price for its own RSN programming. The central purpose of the agreed-upon arbitration conditions is to try to assess the actual fair market value of the rights from some objective benchmark that is not skewed by DirecTV's vertical integration and resulting market power in selling RSN programming. The best – and potentially only – way to do that is to issue third party subpoenas to find out what other programmers actually are charging for their RSN programming (and on what terms and conditions) and to then allow experts to testify to which of the other RSNs are “comparable” to the RSN at issue and how the rates, terms, and conditions for those RSNs compare to the Final Offers at issue in the arbitration. The subpoenas that were issued here sought exactly such information.⁸

E. The Confidentiality Agreement and Protective Order in the Arbitration Provides Ample Protection for the Information at Issue

Petitioners also argue (Jt. Pet. at 10-12) that third parties need to be protected from the “harms and burdens” of responding to the subpoenas. Again, the need for and extent of any such protections is a matter left to the discretion of the arbitrator. And it is best addressed on a case by case basis, not in the broad-brush rulings that Petitioners seek.

Here, (1) the Hearing Subpoenas expressly provided that the identities of individual distributors need not be provided (alleviating any purported “competition” concerns, even though, in fact, most cable operators do not compete head to head except in the case of “overbuilders”) and (2) the Confidentiality Agreement and Protective Order (“CAPO”) provides more than enough protection against misuse of the Confidential and Highly Confidential information to which it applies. In particular, pursuant to the CAPO (at ¶ 9(a)), Highly Confidential information – including, automatically, all RSN agreements – can be disclosed only to outside counsel, outside experts, and the arbitrator. And even those individuals are required to use the information solely in connection with the Arbitration and to destroy all such information following the conclusion of the Arbitration. (CAPO ¶¶ 13, 17.) Therefore, Petitioners' apparent concern that Highly Confidential RSN agreement information could somehow be misused for competitive business

⁸ Petitioners' suggest that Armstrong could have pursued a program access complaint instead of arbitration. (Jt. Pet. at 6.) The suggestion is not realistic. The whole point of the *Liberty Order* arbitration conditions was to allow an operator like Armstrong to challenge the rates, terms, and conditions being demanded by a vertically integrated entity – like DirecTV – without risking loss of the programming while the dispute was being heard. The *Liberty Order* emphasizes that a vertically integrated entity has more inclination than an ordinary RSN programmer to pull programming in the event of a dispute – because dissatisfied customers of the operator may switch to the vertically integrated distributor. Unlike a program access proceeding, the arbitration conditions – to which the parties agreed – are specifically designed to allow operators like Armstrong to have a full and fair determination of Fair Market Value while being protected from the power of the vertically integrated entity to stop delivering the “must have” RSN programming.

reasons by Armstrong personnel or anyone else is misplaced and based upon mere supposition.⁹ (Also, for the avoidance of doubt, the CAPO expressly permits that any third party may invoke the CAPO protections and enforce them (CAPO ¶¶ 1 and 2(n).)

Moreover, in two Commission decisions cited by Petitioners (at 11 n.35) ostensibly for the proposition that “[t]he Commission’s Media Bureau has given [programming] contracts enhanced confidential treatment due to their ‘highly sensitive’ nature,” the Commission actually entered Protective Orders that provided the *very same* level of protections as the CAPO here – namely, restricting Highly Confidential information to outside counsel, outside experts, the arbitrator, and the Commission. See *Echostar Satellite L.L.C. v. Home Box Office, Inc.*, 21 FCC Rcd. 14197, Appendix A (Protective Order) Section 4; *Adelphia Comm. Corp.*, 20 FCC Rcd. 20073, ¶ 7 (2006) (cited by Comcast) (referring to Second Protective Order).

Like the current CAPO, the Protective Orders that Petitioners cite require any individual reviewing the Highly Confidential information to affirm and agree that they will not use the Highly Confidential information for “competitive commercial or business purposes, including competitive decision-making.” (CAPO, Declaration.) Neither of the cited Protective Orders in the *Echostar* or *Adelphia* matters went beyond the above, standard stipulation to also restrict outside experts, prospectively, from working in connection with RSN programming rights. To impose such prospective employment restrictions – especially in the context of Comcast, News Corp. and NESN (and potentially others) all raising objections – would unduly and unnecessarily – as shown by the above-referenced Commission Protective Orders – impede the ability of Armstrong – if not others as well – to retain suitable, experienced expert advice and testimony in these proceedings.

Finally, any concerns about the sufficiency of confidentiality protections can and should be addressed to the arbitrator in the context of the specific proceeding. The arbitrator is best situated to ascertain the reasonableness of any such request, as well as to balance third party “competition” concerns against other legitimate interests (*e.g.*, the need to fully and fairly assess “fair market value”).

III. Conclusion

There is no basis or need to grant any of the relief requested in the Joint Petition. Any issues arising from the subpoenas issued in the Armstrong arbitration are not ripe to be heard – since no one is seeking to enforce the subpoenas at the moment – and potentially will be moot. If and when there is any *de novo* review by the Commission of an award in the Armstrong arbitration, and if and when Armstrong determines to raise Petitioners’ non-compliance with the subpoenas as part of that review, the Commission can consider and rule on the propriety of the subpoenas at that time.

If the Commission does consider the propriety of the subpoenas in the future, Armstrong has shown that Petitioners’ arguments have no merit because they: (i) ignore the parties’ agreement

⁹ Armstrong’s reliance on the CAPO is hardly an extreme, outlier position. DSN agreed to the CAPO even though it – like the other entities – produced RSN affiliation agreements that contain certain potentially sensitive business information.

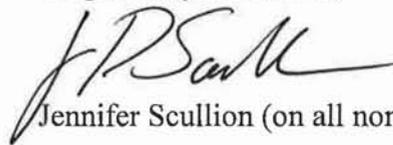
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to arbitrate, as set forth and reflected in arbitration condition of the *Liberty Order*; (ii) disavow the well-settled and longstanding principle that arbitration is fundamentally a matter of contract; (iii) undermine the clear congressional mandate favoring and governing arbitrations under the FAA; and/or (iv) disempower arbitrators whose overarching mandate includes taking appropriate measures to ensure that the arbitral process results in a full and fair assessment and adjudication of the parties' dispute.

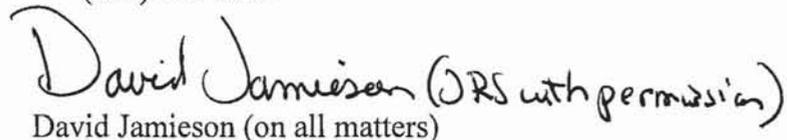
For all the foregoing reasons, therefore, Armstrong respectfully requests that the Commission deny the Joint Petition.

Respectfully submitted,



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EXHIBIT A

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February 16, 2007

By Hand

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FILED/ACCEPTED

FEB 16 2007

Federal Communications Commission
Office of the Secretary

Re: Consolidated Application of News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control, MB Docket No. 07-18

Dear Ms. Dortch:

On January 29, 2007, News Corporation ("News Corp."), The DIRECTV Group, Inc. ("DTV"), and Liberty Media Corporation ("Liberty Media") filed applications with the FCC seeking the FCC's consent to the transfer of *de facto* control of DTV from News Corp. to Liberty Media. See File No. SAT-T/C-20070129-00021; MB Docket No. 07-18 ("Consolidated Application"). This is to inform the FCC of a transaction that Liberty Media has entered into to acquire a television station in Green Bay, Wisconsin, and its satellite station in Escanaba, Michigan.

As a result of this transaction, Liberty Media will no longer have even its non-attributable ownership interest in CBS Corporation ("CBS") which was reported on page 10 of the Consolidated Application. To the extent that Liberty Media's acquisition of WFRV-TV, in the Green Bay-Appleton, Wisconsin, designated market area ("DMA") and its satellite station WJMN-TV in the Marquette, Michigan, DMA introduces a *de minimis* level of vertical integration with broadcast television, Liberty Media proposes to adopt each of the broadcast-related conditions imposed on News Corp. with respect to the two broadcast television stations it seeks to acquire.

* * *

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On February 12, 2007, Liberty Media and CBS entered into a share exchange agreement whereby Liberty Media will exchange its shares of CBS common stock for the shares of a subsidiary of CBS which will hold CBS' ownership interest in television station WFRV-TV and its satellite station WJMN-TV and cash. Liberty Media and CBS have filed an

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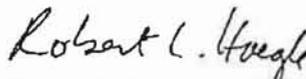
application seeking the FCC's consent to the transfer of control of the CBS subsidiary, and of the WFRV-TV and WJMN-TV broadcast licenses, to LMC BET Holdings, LLC, a wholly-owned subsidiary of Liberty Media. See BTCCT-20070212BBC; BTCCT-20070212BBD, filed Feb. 12, 2007.

In the Consolidated Application, Liberty Media proposes to comply with the relevant conditions regarding program discrimination, carriage and access, including regional reports network programming, adopted by the FCC in its order approving News Corp.'s acquisition of a *de facto* controlling interest in DTV. See *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, 19 FCC Rcd. 473 (2004) ("News Corp.-Hughes Order"), at Appendix F. Liberty Media has offered to comply with such conditions in order to address and eliminate any concerns regarding these matters in the context of Liberty Media's proposed acquisition of *de facto* control of DTV.

In light of Liberty Media's proposed acquisition of a controlling interest in WFRV-TV and WJMN-TV, Liberty Media offers to abide by conditions with respect to WFRV-TV and WJMN-TV similar to those regarding access to local broadcast television programming that the FCC established in the News Corp.-Hughes Order (*see* News Corp.-Hughes Order, Appendix F. IV). These conditions include the provisions for commercial arbitration in the case of a negotiating impasse with other multichannel video programming distributors regarding retransmission consent for WFRV-TV and WJMN-TV.

Please associate this letter with the Consolidated Application in MB Docket No. 07-18.

Sincerely,



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RLH:gt

EXHIBIT B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Application of)
)
)

NEWS CORPORATION AND)
THE DIRECTV GROUP, INC.,)

Transferors,)

MB Docket No. 07-18

and)
)

LIBERTY MEDIA CORPORATION,)
)

Transferee,)
)

For Authority to Transfer Control.)
)

**CONSOLIDATED OPPOSITION TO
PETITIONS TO DENY AND RESPONSE TO COMMENTS**

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SUMMARY

News Corporation now holds a *de facto* controlling interest in The DIRECTV Group, Inc. It proposes to transfer this interest to one of its largest shareholders, Liberty Media Corporation. DIRECTV, as the entity being transferred, would not typically need to submit its own responsive pleading in such circumstances. Yet a number of parties – chief among them EchoStar, RCN, and HITN – suggest that the Commission should condition this transaction to change how *DIRECTV* conducts its day-to-day business. Most of these suggestions are both transparently self-serving and unwise as a matter of public policy, and some have even been proposed for DIRECTV and rejected in the recent past. But just as importantly for purposes of this proceeding, none of them has even the slightest thing to do with the identity of DIRECTV's *de facto* controlling shareholder. This lack of transaction specificity alone is a sufficient basis to reject these proposals.

For example, EchoStar and RCN contend that DIRECTV should be the only MVPD in the United States prohibited from entering into exclusive carriage arrangements with unaffiliated programmers. This precise argument was made – and summarily rejected by the Commission – just over three years ago when News Corp. acquired its interest in DIRECTV. The same reasoning should apply today: conditions related to exclusive arrangements are inappropriate here because the proposed transaction neither creates any additional exclusives nor increases DIRECTV's incentive or ability to obtain such exclusives. DIRECTV sought the exclusive rights to premium, niche programming from unaffiliated providers long before its affiliation with News Corp., and continued to do so while affiliated with News Corp. No commenter has provided a plausible reason to conclude that *de facto* control by Liberty Media would make DIRECTV even *more* likely to obtain exclusives. Absent such a finding, the Commission has no

basis upon which to address unaffiliated exclusives in this proceeding. Moreover, as the Commission has recognized on numerous occasions, exclusive arrangements between a distributor without market power and an unaffiliated programmer are pro-competitive, so there is also no policy rationale to justify the requested condition.

DIRECTV's provision of local-into-local service has also long been the subject of public discussion. DIRECTV has spent, and will continue to spend, billions of dollars in providing local-into-local service to as many Americans as economically possible. Currently, it retransmits local signals by satellite in 142 markets – a dozen more than required under the *News/Hughes* order – covering over 94% of the nation's television households. And it will meet the commitments made in the *News/Hughes* transaction to provide seamless, integrated local service in all 210 markets nationwide by 2008. As the Commission recognized in that proceeding, however, the number of markets it will serve *by satellite* depends on a number of economic and technical variables. In any event, the replacement of News Corp. with Liberty Media in DIRECTV's ownership structure has nothing to do with this effort. No commenter provides even a plausible argument as to why DIRECTV would provide satellite-delivered local service in fewer markets under its new ownership structure than under its old one. Once again, absent such a finding, the Commission has no basis upon which to impose conditions in this area.

HITN – which was recently informed that it will no longer be carried by DIRECTV using the capacity set aside for noncommercial programmers – asserts that the Application is defective because it fails to demonstrate DIRECTV's current compliance with the Commission's noncommercial programming carriage requirements and to discuss DIRECTV's plans for compliance in the future. First, HITN's vague and unsupported allegations are in no way related to the proposed transfer of *de facto* control at issue here. Moreover, the FCC has never required

transfer applicants to demonstrate their current compliance with all of the myriad regulatory obligations applicable to them. If HITN believes it has a valid claim, it should file a complaint – not raise a totally extraneous issue in the context of this transfer proceeding.

The comments and petitions also seek to impose additional limitations on DIRECTV's operations based on unsupported supposition, vague conspiracy theories, and fuzzy logic. All are merely attempts to use the regulatory process to gain an improper advantage in the marketplace. They are not justified, and should be rejected.

* * *

This transaction involves replacing one *de facto* controlling shareholder in DIRECTV with another. Nothing more, nothing less. The new shareholder, Liberty Media, is substantially less vertically integrated than the existing one, News Corp. Liberty Media has agreed to be bound by all of the relevant conditions that now apply to News Corp. And as a result of the transaction, News Corp. will no longer be affiliated with either DIRECTV or Liberty Media. This, it seems to DIRECTV, should fully answer the relatively few commenters and petitioners who argue either that Liberty Media should be subject to *more stringent* conditions than News Corp. is today or that News Corp. should be subject to existing conditions even after it divests its interest in DIRECTV. DIRECTV thus fully supports Liberty Media's and News Corp.'s separate Oppositions and Replies, in which they respectively address these arguments in more detail.

But as applied to DIRECTV, concerns expressed in this proceeding are especially unjustified. DIRECTV has for years pursued exclusive carriage arrangements for unaffiliated niche programming, has steadily increased its local broadcast offerings, and has complied with its obligations to carry noncommercial programming. The proposed transaction will not change

those facts. Nor is there any reason to believe that it would make DIRECTV any more likely to pursue exclusive programming, limit the availability of local channels, or reduce its carriage of noncommercial programming below required levels. The Commission should not allow DIRECTV's competitors and suppliers to hijack this proceeding as a vehicle to advance agendas and impose burdens on DIRECTV wholly unrelated to the transfer of *de facto* control at issue.