Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
DIRECTV Sports Net Pittsburgh, LLC,	)	File No. CSR-8480-P
Petitioner,	)	
	)	
v.	)	
	)	
Armstrong Utilities, Inc.,	)	
Respondent	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 2014 **Released: July 16, 2014**

By the Commission: Commissioner O'Rielly concurring in part, dissenting in part and issuing a statement; Commissioner Pai dissenting and issuing a statement.

I. INTRODUCTION

1. By this *Memorandum Opinion and Order* ("*MO&O*"), we deny an Application for Review filed by DIRECTV Sports Net Pittsburgh, LLC ("DSNP") of the Media Bureau's *Order on Review* in the above-referenced proceeding.[1] In its *Order on Review*, the Media Bureau reviewed *de novo* an arbitrator's decision in favor of Armstrong Utilities, Inc. ("Armstrong") in a dispute concerning the fair market value of the right to carry Fox Sports Net Pittsburgh ("FSNP"), a Regional Sports Network ("RSN") owned by DSNP.[2] The Media Bureau concluded that of the two final offers, the Armstrong final offer most closely approximates the fair market value of carriage rights for FSNP.[3] For the reasons discussed below, we affirm the Media Bureau's *Order on Review* and deny DSNP's *Application for Review*. As an initial matter, we note that DSNP challenges the *Order on Review* with respect to the Media Bureau's findings on only two of twelve separate provisions of the final offers analyzed by the Arbitrator and the Media Bureau: the rates and the rate renewal increase. DSNP has not challenged the Media Bureau's finding that, on balance, these other provisions also favor the Armstrong final offer as being more consistent with fair market value. Even if we were to agree with one or both of DSNP's challenges to the rates and the rate renewal increase, DSNP has failed to put forth an explanation for why these two provisions would tip the scales in favor of the DSNP final offer in light of the unchallenged finding that many of the other provisions favor the Armstrong final offer. In any event, despite DSNP's claims to the contrary, we conclude that the Media Bureau properly found that the rates and the rate renewal increase in the Armstrong final offer most closely approximate fair market value.

II. BACKGROUND

2. In the *Liberty Media Order*, the Commission approved the transfer of control of

[1] *See DIRECTV Sports Net Pittsburgh, LLC v. Armstrong Utils. Inc.*, Order on Review, 26 FCC Rcd 12574 (MB 2011) ("*Order on Review*"); DIRECTV Sports Net Pittsburgh, LLC*,* Application for Review, File No. CSR-8480-P (filed Sept. 9, 2011) ("*DSNP Application for Review*").

[2] *See generally Order on Review*.

[3] *See id*., 26 FCC Rcd at 12621, ¶¶ 76-77.

DIRECTV Group, Inc. ("DIRECTV") from the News Corporation ("News Corp.") to Liberty Media Corporation ("Liberty Media").[4] Among other conditions adopted by the Commission in approving the transfer, the Commission accepted Liberty Media's offer to abide by the same arbitration conditions with respect to RSNs that the Commission adopted previously in approving News Corp.'s acquisition of a *de facto* controlling interest in DIRECTV.[5] These conditions provide that when negotiations fail to produce a mutually acceptable set of price, terms, and conditions for carriage of a non-broadcast RSN that is owned, managed, or controlled by Liberty Media, an MVPD may choose to submit the dispute to commercial arbitration.[6] The conditions require each party to submit a "final offer" for carriage of the RSN at issue[7] and require the arbitrator to issue a decision choosing the final offer that "most closely approximates the fair market value of the programming carriage rights at issue."[8]

3. Armstrong, a cable operator in Pittsburgh, failed to reach an agreement for renewal of its contract with DSNP for carriage of FSNP, one of the RSNs subject to the *Liberty Media Order* arbitration conditions.[9] Armstrong subsequently submitted a demand for arbitration.[10] Armstrong and DSNP each submitted a "final offer" for carriage of FSNP.[11] On March 14, 2011, the arbitrator appointed by the American Arbitration Association ("AAA") ruled that Armstrong's final offer most closely approximates fair market value.[12] On April 13, 2011, DSNP filed a Petition for *De Novo* Review of the ruling.[13]

4. On August 10, 2011, the Media Bureau adopted an *Order on Review* in accordance with the deadline adopted in the *Liberty Media Order*.[14] The Media Bureau explained that, pursuant to the terms of the *Liberty Media Order*, it was faced with a binary choice: it was required to select one final offer or the other and could not craft its own affiliation agreement by selecting some terms from one final offer and other terms from the other final offer or by imposing its own terms.[15] In addition, the Media

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[4] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, News Corporation and The DIRECTV Group, Inc., Transferors, to Liberty Media Corporation., Transferee,* Memorandum Opinion and Order, 23 FCC Rcd 3265, 3305-13, ¶¶ 87-103 (2008) ("*Liberty Media Order*"). A comprehensive discussion of the *Liberty Media Order* as well as the factual background and procedural history relating to the dispute is set forth in the *Order on Review*, and thus is not reiterated at length here. *See Order on Review*, 26 FCC Rcd at 12575-78, ¶¶ 2-7.

[5] *See Liberty Media Order*, 23 FCC Rcd at 3305-06, ¶ 88; *see also General Motors Corp. and Hughes Electronics Corp., Transferors, and the News Corporation, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 552-55, ¶¶ 172-77 and 677-79, Appendix F, Condition III (2004) ("*News/Hughes Order*").

[6] *See Liberty Media Order*, 23 FCC Rcd at 3346, Appendix B, Condition IV, ¶ 1.

[7] *See id*. at 3346-47, Appendix B, Condition IV, § A "Commercial Arbitration Remedy," ¶¶ 6, 8, 10.

[8] *See id*. at 3347, Appendix B, Condition IV, § B "Rules of Arbitration," ¶¶ 1, 3.

[9] *See Order on Review*, 26 FCC Rcd at 12577, ¶ 5.

[10] *See id*. at 12577, ¶ 6.

[11] *See id*.; *see also Liberty Media Order*, 23 FCC Rcd at 3346-47, Appendix B, Condition IV, § A "Commercial Arbitration Remedy," ¶¶ 6, 8, 10.

[12] *See Order on Review*, 26 FCC Rcd at 12578, ¶ 7; Award of Arbitrator (March 14, 2011) ("Award").

[13] *See Order on Review*, 26 FCC Rcd at 12578, ¶ 7.

[14] *See Order on Review*. Pursuant to the *Liberty Media Order* conditions, the Media Bureau was required to issue its decision not more than 60 days after receipt of the petition for *de novo* review, which may be extended for one period of 60 days. *See id.* at 12578-79, ¶ 8 (explaining that the Media Bureau complied with this deadline).

[15] *See Order on Review*, 26 FCC Rcd at 12578-79, ¶ 8. The Commission has explained that final offer arbitration, whereby each party submits a final offer and the arbitrator is required to choose the offer that most closely approximates fair market value, "has the attractive 'ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator.'" *See News/Hughes Order*, 19 FCC Rcd at 552, ¶ 174 (quoting Steven J. Brams, *Negotiation Games: Applying Game Theory to Negotiation and Arbitration*, Routledge, 2003 at 264).

Bureau noted that it was required to select the final offer that "'most closely approximates the fair market value of the programming carriage rights at issue.'"[16]

5. As an initial matter, the Media Bureau in its *Order on Review* found that:

> The record establishes that a fundamental principle of marketplace negotiations for RSN programming and, therefore, of determining fair market value is that an MVPD will receive better rates, terms, and conditions for carriage of an RSN based on: (i) the number of subscribers the MVPD serves (the more subscribers the MVPD serves, the lower the rate); and (ii) the revenue the MVPD generates for the RSN (the more revenue the MVPD generates, the lower the rate).[17]

The parties agreed that FSNP affiliates in Pittsburgh can be classified into one of three groups based on subscribers and revenues generated for DSNP: (i) Comcast (the largest MVPD in terms of subscribers and revenues); (ii) the Cohort Affiliates (including Armstrong); and (iii) small MVPDs.[18] Among the Cohort Affiliates, Armstrong is by far **[REDACTED]** in terms of revenues generated for DSNP, **[REDACTED]**.[19] In addition, Armstrong has approximately **[REDACTED]**.[20]

6. The Media Bureau examined the final offers with respect to three broad categories: (i) rates (*i.e.*, per-subscriber rates for the programming);[21] (ii) four "other rate terms";[22] and (iii) seven "non-rate terms."[23] With respect to each of these categories, the Media Bureau found that Armstrong's final offer most closely approximates the fair market value of FSNP.[24]

7. With respect to the rates, the Media Bureau first analyzed the rates in the DSNP final offer.[25] The Media Bureau examined the two methodologies put forth by DSNP in support of its proposed rates, concluding that neither was probative of fair market value: (i) the averaging methodology;[26] and (ii) the per subscriber per professional event ("PSPPE") analysis.[27] The Media Bureau analyzed DSNP's

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[16] *Order on Review*, 26 FCC Rcd at 12578-79, ¶ 8 (quoting *Liberty Media Order*, 23 FCC Rcd at 3348, Appendix B, Condition IV, § C "Review of Final Award by the Commission," ¶ 3).

[17] *Id.* at 12580, ¶ 11 (citing record evidence in support from both Armstrong and DSNP).

[18] *See id*. at 12580-81, ¶ 11.

[19] *See id*. at 12582, Table A.

[20] *See id*.

[21] *See id*. at 12583-602, ¶¶ 13-40.

[22] *See id*. at 12602-10, ¶¶ 41-53.

[23] *See id*. at 12610-20, ¶¶ 54-73.

[24] *See id*. at 12583, ¶ 13; *id*. at 12602, ¶ 40; *id*. at 12602-03, ¶ 41; *id*. at 12610-11, ¶ 54.

[25] The difference in the rates in the DSNP final offer and the Armstrong final offer amounted to a total of **[REDACTED]** over the course of the proposed five-year term (an average of **[REDACTED]** per year). *See id*. at 12583, ¶ 13.

[26] Pursuant to the averaging methodology, DSNP calculated its proposed rates by averaging the rates paid by three Cohort Affiliates **[REDACTED]**, two of which have fewer subscribers in Pittsburgh than Armstrong and all of which generate substantially less revenue for DSNP than Armstrong. *See id*. at 12583, ¶ 14; *see id*. at 12582, Table A and 12586, ¶ 18 ("[A]veraging the rates of three MVPDs that are smaller than Armstrong in terms of subscribers or revenue or both would be expected to result in rates that are higher than what fair market value would dictate for Armstrong.").

[27] Pursuant to this analysis, DSNP's expert divided the average annual revenue per subscriber for each of 25 RSNs nationwide by the number of major professional events offered by each RSN. *See id*. at 12586-87, ¶ 19. DSNP's expert found that DSNP's PSPPE figure is equal to or below the median and the average PSPPE figure for all 25 RSNs and claimed that this provided support for DSNP's proposed rates. *See id*. The Media Bureau found that the

(continued….)

proposed rates based on assumptions advocated by and most favorable to DSNP[28] and found that, without any valid justification, the rates violate a principle of marketplace negotiations for RSN programming borne out by the record that an MVPD that has a greater number of subscribers and generates more revenue for an RSN will obtain better rates than an MVPD that has fewer subscribers and generates less revenue for the RSN.[29] Specifically, the Media Bureau noted that DSNP's final offer requires Armstrong to pay higher rates than **[REDACTED]** despite Armstrong having more subscribers in Pittsburgh than two of these three affiliates and generating substantially more revenue for DSNP than each of these three affiliates.[30] While DSNP argued that the rate differential between Armstrong and these affiliates would be *de minimis* under its final offer, the Media Bureau concluded that "there is no basis in the record to support the theory that fair market value would dictate that Armstrong pay similar rates – let alone higher rates – compared to these three Cohort Affiliates given Armstrong's greater number of subscribers and value to DSNP."[31]

8. The Media Bureau next analyzed the rates in the Armstrong final offer. The Media Bureau examined the historical benchmark analysis put forth by Armstrong in support of its proposed rates.[32] While the Media Bureau noted DSNP's criticisms of this analysis,[33] it held that "DSNP's criticisms notwithstanding, there is no dispute that Armstrong's analysis demonstrates at the very least that Armstrong has not historically paid the same or higher rates than all other Cohort Affiliates that have fewer subscribers and generate less revenue than Armstrong."[34] The Media Bureau analyzed the rates in the Armstrong final offer (based on assumptions advocated by DSNP[35]) and found that they are consistent with marketplace negotiations for RSNs because they require Armstrong to pay more than Comcast (the largest MVPD in terms of subscribers and revenues generated for DSNP), but provide Armstrong with lower rates than MVPDs that have fewer subscribers in Pittsburgh and that generate less revenue for

(Continued from previous page)
PSPPE analysis is not probative of fair market value. *See id*. at 12587, ¶ 20. While the Media Bureau noted that the parties agreed that assessing fair market value requires an analysis of comparable buyers of comparable products, it held that "comparing the PSPPE figure for FSNP to the PSPPE figure for various RSNs nationwide does not attempt to analyze comparable RSNs nor does it analyze the rates paid by comparable MVPDs." *Id*. (footnotes omitted).

[28] In analyzing the rates, the Media Bureau considered only the three Cohort Affiliates deemed comparable by DSNP and normalized the **[REDACTED]** rates, as suggested by DSNP. *See id*. at 12587, ¶ 21 n.101. The Media Bureau found that, "[e]ven with this conservative approach, the DSNP final offer would require Armstrong to pay higher rates than the other Cohort Affiliates" and that "if the lower actual rates paid by **[REDACTED]** were used, the disparity between Armstrong and these Cohort Affiliates under the DSNP final offer would be greater." *Id*.; *see also id*. at 12602, ¶ 40.

[29] *See id*. at 12588-89, ¶ 22 and 12602, ¶ 40.

[30] *See id.*; *see also id*. at 12582, Table A, 12587-88, ¶ 21, and 12622-23, Appendix A.

[31] *Id*. at 12588-89, ¶ 22.

[32] *See id*. at 12589-94, ¶¶ 23-28.

[33] *Id*. at 12594, ¶ 28. DSNP offered the following criticisms of Armstrong's historical benchmark analysis: (i) Armstrong did not attempt to calculate the current fair market value of the carriage rights for FSNP; rather, it measured the proximity of the final offers to its historical benchmarks; (ii) Armstrong's expert did not know whether he was analyzing "comparable buyers" because he was unaware of how many subscribers each affiliate had; (iii) Armstrong's expert did not analyze comparable buyers of "comparable products" because the programming carriage rights in each FSNP affiliation agreement differed; and (iv) Armstrong's expert compared the old rates in the 2005 Armstrong/FSNP Agreement with the new rates negotiated by the Cohort Affiliates in their recent renewal agreements, thereby resulting in a greater disparity between Armstrong's rates and the Cohort Affiliate's rates. *See id*. at 12591-93, ¶¶ 24-27.

[34] *Id*.; *see also id*. at 12602, ¶ 40.

[35] *See id*. at 12594, ¶ 29 n.136; *see also supra* n. 28.

DSNP.[36]

9. The Media Bureau also rejected DSNP's claims that Armstrong's proposed rates provide Armstrong with too high a discount relative to the Cohort Affiliates, concluding that DSNP failed to present data, standards, or benchmarks that would allow for an assessment of whether a discount is too high or to support its position that there should be little or no variation in rates among the Cohort Affiliates.[37] The Media Bureau also emphasized that, despite DSNP's concern that Armstrong's rates are too low, Armstrong will still generate the most revenue for DSNP by far among the Cohort Affiliates even with the allegedly low rates in the Armstrong final offer.[38] The Media Bureau also rejected DSNP's claim that Armstrong's proposed rates failed to provide **[REDACTED]**,[39] finding that (i) there was insufficient evidence in the record to determine what discount would be appropriate for Comcast given its size relative to Armstrong;[40] and (ii) it could not rely dispositively on the rates Comcast pays for FSNP because there was no firm evidence in the record establishing what impact the simultaneous negotiations between Comcast (as a programmer) and DIRECTV (a distributor) had on the rates negotiated between Comcast (as a distributor) and DSNP.[41]

10. With respect to the "other rate terms," the Media Bureau found that one of these terms (the annual escalator percentage) favors the DSNP final offer,[42] while the remaining three "other rate terms" (the renewal rate increase, the timing of the annual escalator, and the number of games provision) all favor the Armstrong final offer.[43] The Media Bureau concluded that, "on balance, these other rate terms favor the Armstrong final offer as being more consistent with fair market value."[44]

11. With respect to the "non-rate terms," the Media Bureau found that three "non-rate terms" favor the DSNP final offer,[45] while the remaining four "non-rate terms" all favor the Armstrong final offer.[46] The Media Bureau concluded that, "on balance, these non-rate terms favor the Armstrong final offer as being more consistent with fair market value."[47]

12. Finally, the Media Bureau explained that, pursuant to the *Liberty Media Order* conditions, an RSN's costs are relevant insofar as the conditions provide that an arbitrator may not select

[36] *See Order on Review*, 26 FCC Rcd at 12594, ¶ 29, 12601, ¶ 37, 12602, ¶ 40, and 12624-25, Appendix B.

[37] *See id*. at 12588-89, ¶ 22 and 12594-95, ¶ 30.

[38] *See id*.

[39] *See id*. at 12601-02, ¶¶ 37-39.

[40] *See id*. at 12601, ¶ 38.

[41] *See id*. at 12601-02, ¶ 39; *see also infra* ¶ 20.

[42] *See id*. at 12607-08, ¶¶ 47-48.

[43] *See id*. at 12603-07, ¶¶ 42-46 (renewal rate increase); *id*. at 12608-09, ¶¶ 49-50 (timing of the annual escalator); *id*. at 12609-10, ¶¶ 51-52 (the number of games provision).

[44] *Id*. at 12602-03, ¶ 41; *see also id.* at 12610, ¶ 53.

[45] The Media Bureau found that the following three "non-rate terms" favor the DSNP final offer: (i) the rebate for shortfalls in professional games (*see id*. at 12611-13, ¶¶ 57-59); (ii) **[REDACTED]** (*see id*. at 12614, ¶¶ 62-63); and (iii) advertising avails and advertising exclusivities (*see id*. at 12617-18, ¶¶ 69-70). *See id.* at 12619-20, ¶ 73 and Table C.

[46] The Media Bureau found that the following four "non-rate terms" favor the Armstrong final offer: (i) the use of **[REDACTED]** games to cure shortfalls (*see id*. at 12611, ¶¶ 55-56); (ii) **[REDACTED]** as a recoverable surcharge cost (*see id*. at 12613-14, ¶¶ 60-61); (iii) the Lifeline definition and Lifeline Tier exclusion (*see id*. at 12615-17, ¶¶ 64-68); and (iv) carriage of FSNP in the event of an NCTC agreement (*see id*. at 12618-19, ¶¶ 71-72). *See id.* at 12619-20, ¶ 73 and Table C.

[47] *Id*. at 12610-11, ¶ 54; *see also id.* at 12619-20, ¶ 73.

a final offer that does not permit the RSN "'to recover a reasonable share of the costs of acquiring the programming at issue.'"[48] While the Media Bureau recognized that the Armstrong final offer could reduce DSNP's expected profit margin, it held that "this alone provides no basis for rejecting the Armstrong final offer without a clear showing that the Armstrong final offer will deny DSNP the ability to recover a reasonable share of its costs of acquiring programming."[49] The Media Bureau found that DSNP failed to make this showing.[50]

III. DISCUSSION

13. For the reasons discussed below and stated in the Media Bureau's *Order on Review*, we deny DSNP's *Application for Review* and affirm the Media Bureau's *Order on Review.* Below, we address DSNP's challenges to the *Order on Review*.[51]

A. The Media Bureau's Conclusion that the Armstrong Final Offer Most Closely Approximates Fair Market Value Was Correct and Supported by the Record

14. For the reasons discussed below and stated in the Media Bureau's *Order on Review*, we affirm the Media Bureau's decision that the Armstrong final offer most closely approximates the fair market value of the programming carriage rights for FSNP. As an initial matter, we note that DSNP challenges the *Order on Review* with respect to the Media Bureau's findings on only two provisions of the final offers: the rates and the rate renewal increase. As discussed above, however, the *Order on Review* found that the Armstrong final offer most closely approximates fair market value with respect to each of three broad categories, which encompassed a total of twelve separate provisions of the final offers: (i) the rates; (ii) four "other rate terms"; and (iii) seven "non-rate terms."[52] DSNP is wrong when it alleges that the Media Bureau "made clear that its selection of Armstrong's Final Offer was based exclusively upon the rates in the Final Offers."[53] In the *Order on Review*, the Media Bureau concluded that the Armstrong final offer most closely approximates fair market value not only with respect to the rates, but also with respect to the "other rate terms" and the "non-rate terms."[54] As discussed above, of the four "other rate terms" analyzed, the Media Bureau found that only one (the annual escalator

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[48] *Id*. at 12620, ¶ 74 (quoting *Liberty Media Order*, 23 FCC Rcd at 3347, Appendix B, Condition IV, § B "Rules of Arbitration," ¶ 4).

[49] *Id*. at 12621, ¶ 75.

[50] *See id*.

[51] Our action here renders moot DSNP's claim that the Media Bureau did not have delegated authority to act on its Petition for *De Novo* Review. *See SM Radio, Inc.,* 23 FCC Rcd 2429, 2433 n.32 (2008); *see also DSNP Application for Review* at 3-4. Nevertheless, we note that the Bureau has authority, pursuant to Section 0.61(f)(7) of the Commission's rules, to "[a]dminister and enforce rules and policies regarding . . . program access," *see* 47 C.F.R. § 0.61(f)(7), subject to the limitations on the Bureau's delegated functions set forth in Section 0.283 of the Commission's rules. *See* 47 C.F.R. § 0.283. While DSNP notes that the Chief, Media Bureau does not have delegated authority to act on "matters that present novel questions of law, fact or policy," DSNP's Petition did not present such "novel" issues because the *Liberty Media Order* sets forth guidelines for the Media Bureau to consider when acting on a petition for *de novo* review, which it followed here. 47 C.F.R. § 0.283(c); *see DSNP Application for Review* at 3-4; *see also Order on Review*, 26 FCC Rcd at 12578-79, ¶ 8. While DSNP further notes that the Chief, Media Bureau does not have authority to act on an "application for review of actions taken pursuant to delegated authority," the decision of the AAA arbitrator in this case was initiated pursuant to the *Liberty Media Order* conditions and is not an action on "delegated authority." *See DSNP Application for Review* at 3-4 (citing 47 C.F.R. § 0.283(b)).

[52] *See supra* ¶¶ 6-11.

[53] *DSNP Application for Review* at 5.

[54] *See Order on Review*, 26 FCC Rcd at 12583, ¶ 13; *id*. at 12602-03, ¶ 41; *id*. at 12610-11, ¶ 54; *see also supra* ¶¶ 10-11.

percentage) favors the DSNP final offer.[55] With the exception of the rate renewal increase, DSNP does not challenge the Media Bureau's findings with respect to the "other rate terms." DSNP is also wrong when it claims that the "non-rate terms" favor the DSNP final offer.[56] As discussed above, while the Media Bureau found that three "non-rate terms" favor the DSNP final offer, it found that the other four "non-rate terms" favor the Armstrong final offer and concluded that, on balance, the "non-rate terms" favor the Armstrong final offer.[57] Although one "other rate term" and three "non-rate terms" favor the DSNP final offer, the Media Bureau concluded that this was not sufficient to tip the scales in favor of the DSNP final offer given that the rates, "other rate terms," and "non-rate terms" all favor the Armstrong final offer on balance.[58] Thus, even if we were to agree with one or both of DSNP's challenges, DSNP has failed to offer any explanation in its *Application for Review* for why these two challenged provisions would tip the scales in favor of the DSNP final offer in light of the unchallenged finding that many of the other provisions favor the Armstrong final offer. In any event, we reject DSNP's challenges to the *Order on Review*.

1. The Rates in the Armstrong Final Offer Most Closely Approximate Fair Market Value

15. The Media Bureau properly held that the rates in the Armstrong final offer most closely approximate fair market value notwithstanding DSNP's claims that the arbitrator did not make a precise determination of the actual fair market value of the carriage rights for FSNP.[59] Here, the record, including Armstrong's analysis, established a principle of marketplace negotiations for RSN programming, supported by both parties, that an MVPD that has a greater number of subscribers and generates more revenue for an RSN will obtain better rates than an MVPD that has fewer subscribers and generates less revenue for the RSN.[60] Without any valid justification, DSNP's final offer violates this principle, requiring Armstrong to pay similar, and in most cases higher, rates than MVPDs that are substantially smaller than Armstrong in terms of subscribers or revenue or both.[61] Armstrong proposed rates that maintain the ranking of MVPDs according to their value.[62] DSNP failed to provide reliable evidence that its proposed rates most closely approximate fair market value despite inverting the ranking of MVPDs according to their value.[63]

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[55] *See supra* ¶ 10.

[56] *See DSNP Application for Review* at 5.

[57] *See supra* ¶ 11.

[58] *See Order on Review*, 26 FCC Rcd at 12578, ¶ 8, 12610, ¶ 53, 12619-20, ¶ 73.

[59] *See DSNP Application for Review* at i, 1, 4, 7; DIRECTV Sports Net Pittsburgh, LLC, Reply, File No. CSR-8480-P (filed Oct. 6, 2011), at 1-2 ("*DSNP Reply*").

[60] *See Order on Review*, 26 FCC Rcd at 12580, ¶ 11; *see also id*. at 12602, ¶ 40.

[61] *See supra* ¶ 7; *see also Order on Review*, 26 FCC Rcd at 12588, ¶ 22 ("[T]here is no basis in the record to support the theory that fair market value would dictate that Armstrong pay similar rates – let alone higher rates – compared to these three Cohort Affiliates given Armstrong's greater number of subscribers and value to DSNP."); Armstrong Utilities, Inc., Opposition, File No. CSR-8480-P (filed Sept. 26, 2011), at 8 ("DSNP offered no data or testable benchmark to support its claim that a distributor of Armstrong's size and value to DSNP should be paying substantially the same rates as smaller and less valuable DSNP distributors like **[REDACTED]**.") ("*Armstrong Opposition*").

[62] *See Order on Review*, 26 FCC Rcd at 12588-89, ¶ 22 and 12594, ¶ 28.

[63] *See infra* ¶¶ 18-20; *see also infra* n.73 (affirming the Media Bureau's conclusion that DSNP presented no standards or benchmarks that would allow for an assessment of whether a discount is too high), n.79 (affirming Media Bureau's conclusion there was insufficient information in the record to determine what discount would be appropriate for Comcast given its size relative to Armstrong, and that it could not rely dispositively on the rates

(continued….)

16. DSNP claims that the Media Bureau engaged in a "Price Is Right" analysis with respect to the proposed rates in the final offers.[64] Under DSNP's theory, the Media Bureau calculated a fair market value for FSNP and proceeded to reject DSNP's rates because they exceeded this value without considering the extent to which Armstrong's rates fell below this value.[65] We reject this claim. As discussed in further detail below, the Media Bureau specifically addressed DSNP's claims that Armstrong's proposed rates were too low and found insufficient record evidence to conclude that Armstrong's proposed rates provide Armstrong with too high a discount relative to the smaller and less valuable Cohort Affiliates or that **[REDACTED]**.[66]

17. DSNP notes the Media Bureau's holding that "'there may be circumstances in individual cases where fair market value would dictate that an MVPD with a greater number of subscribers and revenue generated than another MVPD should pay a higher rate,'" but "'DSNP has alleged no facts here that would justify such treatment of Armstrong.'"[67] DSNP claims that it provided such facts, arguing that the Media Bureau ignored evidence that the rights fees for professional sports are increasing at a rate of **[REDACTED]** and that the staggered terms of affiliation agreements means that the rates in recently renewed agreements (in the case of Armstrong) may be higher than the rates in older agreements (in the case of the smaller and less valuable Cohort Affiliates) in order to reflect these rising costs.[68] As the Media Bureau explained, however, an RSN's costs under the *Liberty Media Order* conditions are relevant insofar as the conditions provide that an arbitrator may not select a final offer that does not permit the RSN "'to recover a reasonable share of the costs of acquiring the programming at issue.'"[69] As the Media Bureau found, there is no basis to conclude that the rates in either final offer would prevent DSNP from recovering a reasonable share of these costs.[70] DSNP does not challenge this finding. Moreover, DSNP offers no evidence demonstrating how this increase in professional rights fees and the staggered terms of the applicable affiliation agreements would justify, as proposed under DSNP's final offer, an inversion of the ranking of MVPDs according to their value to DSNP, whereby Armstrong would pay similar or higher rates than MVPDs that generate **[REDACTED]** less revenue for DSNP than Armstrong.[71]

18. DSNP argues that Armstrong's proposed rates provide Armstrong with too high a discount relative to the other Cohort Affiliates.[72] The Media Bureau, however, squarely addressed and

(Continued from previous page)
Comcast pays for FSNP), and n.99 (affirming the Media Bureau's conclusion that neither DSNP's averaging methodology nor its per subscriber per professional event ("PSPPE") analysis were probative of fair market value).

[64] *See DSNP Application for Review* at 8-9*; DSNP Reply* at 4.

[65] *See DSNP Application for Review* at 8-9.

[66] *See supra* ¶ 9 and *infra* ¶¶ 19-20.

[67] *DSNP Application for Review* at 8 (quoting *Order on Review*, 26 FCC Rcd at 12580, ¶ 11).

[68] *See id.* at 7-8; *see also id*. at 2, 6 n.10, 18 n.17.

[69] *Order on Review*, 26 FCC Rcd at 12620, ¶ 74 (quoting *Liberty Media Order*, 23 FCC Rcd at 3347, Appendix B, Condition IV, § B "Rules of Arbitration," ¶ 4).

[70] *See supra* ¶ 12; *see Armstrong Opposition* at 20. While the Media Bureau found that there was no basis to conclude that the rates in the Armstrong final offer would prevent DSNP from recovering a reasonable share of these costs, the same conclusion applies to the DSNP final offer, which would require Armstrong to pay **[REDACTED]** more over the course of the proposed five-year term than under Armstrong's final offer. *See supra* n.25.

[71] *See supra* ¶ 5.

[72] *See DSNP Application for Review* at 12-14. The *Order on Review* clearly sets forth the discounts Armstrong receives relative to the other Cohort Affiliates pursuant to the rates in Armstrong's final offer. *See Order on Review*, 26 FCC Rcd at 12624-25, Appendix B. DSNP does not dispute these figures, but claims these discounts will increase after **[REDACTED]** renew their agreements, assuming that these MVPDs negotiate a typical renewal rate increase of **[REDACTED]** and an annual escalator of **[REDACTED]**. *See DSNP Application for Review* at 12, 14

(continued….)

appropriately rejected this claim.[73] As initial matter, we note that the record evidence establishes that Armstrong is by far **[REDACTED]** in terms of revenues generated for DSNP among the Cohort Affiliates, **[REDACTED]**.[74] DSNP contends, however, that the Media Bureau rejected, without explanation, the testimony from DSNP's experts opining that Armstrong's contribution to DSNP's subscriber base and revenues did not justify a substantial volume discount relative to the other Cohort Affiliates.[75] This testimony, however, cannot overcome DSNP's failure to present data, standards, or benchmarks to support its position that there should be little or no variation in rates among the Cohort Affiliates.[76] Such data were critical given that DSNP's position is inconsistent with the record evidence of marketplace negotiations for RSN programming, which establishes that larger and more valuable MVPDs will receive better rates. Unlike DSNP, Armstrong presented an analysis demonstrating that Armstrong has not historically paid the same or higher rates than all other Cohort Affiliates that have fewer subscribers and generate substantially less revenue than Armstrong.[77]

19. DSNP argues that Armstrong's proposed rates "restructure the market" by **[REDACTED]**.[78] As with DSNP's previous claim, however, the Media Bureau squarely addressed and appropriately rejected this argument.[79] DSNP attempts to characterize the rate differential between Armstrong and DSNP as providing Armstrong with **[REDACTED]**.[80] In the *Order on Review*, the Media Bureau explained that the Armstrong final offer in fact does provide Armstrong with **[REDACTED]**.[81] Despite this rate variation in **[REDACTED]**, however, the Media Bureau properly found that the rates in the Armstrong final offer provide Comcast with an overall discount relative to Armstrong, as DSNP

(Continued from previous page)
and Exhibit 3. We find that DSNP's assumptions about what these Cohort Affiliates will agree to in future negotiations to be speculative. *See Armstrong Opposition* at 10 n.6.

[73] The Media Bureau properly found that (i) DSNP presented no standards or benchmarks that would allow for an assessment of whether a discount is too high; (ii) while Armstrong proposed rates that maintain the ranking of MVPDs according to their value to the RSN, DSNP proposed rates that would invert this ranking without justification; and (iii) in any event, even with the allegedly low rates in the Armstrong final offer, Armstrong will still generate the most revenue for DSNP by far among the Cohort Affiliates. *See Order on Review*, 26 FCC Rcd at 12594-95, ¶ 30.

[74] *See id*. at 12582, Table A.

[75] *See DSNP Application for Review* at 13 n.16 (citing Expert Report of Mark C. Wyche, RX-50 (Jan. 10, 2011) ("Wyche Expert Report"), at 12-13; Rebuttal Report of Mark C. Wyche, RX-64 (Jan. 15, 2011) ("Wyche Rebuttal Expert Report"), at ¶ 14; Testimony of Mark C. Wyche, Hr'g Tr. at 896-97 ("Wyche Test."); Expert Report of Robert L. Thompson, RX-74 (Jan. 8, 2011), at 4, 6 ("Thompson Expert Report"); Testimony of Robert Thompson, Hr'g Tr. at 1346-47 ("Thompson Test.")).

[76] *See Order on Review*, 26 FCC Rcd at 12588-89, ¶ 22 and 12594-95, ¶ 30; *Armstrong Opposition* at 8-9.

[77] *See Order on Review*, 26 FCC Rcd at 12588-89, ¶ 22 and 12594, ¶ 28.

[78] *See DSNP Application for Review* at 9-11; *DSNP Reply* at 4-5.

[79] The Media Bureau properly found that there is no dispute that Armstrong's final offer provides Comcast with a discount relative to Armstrong. *See Order on Review*, 26 FCC Rcd at 12601, ¶ 37. Moreover, while DSNP argued that **[REDACTED]**, the Media Bureau properly held that (i) there was insufficient information in the record to determine what discount would be appropriate for Comcast given its size relative to Armstrong (*see id*. at 12601, ¶ 38); and (ii) it could not rely dispositively on the rates Comcast pays for FSNP because there was no firm evidence in the record establishing what impact the simultaneous negotiations between Comcast (as a programmer) and DIRECTV (a distributor) had on the rates negotiated between Comcast (as a distributor) and DSNP (*see id*. at 12601-02, ¶ 39; *see also infra* ¶ 20).

[80] *See DSNP Application for Review* at 9-10.

[81] *See Order on Review*, 26 FCC Rcd at 12595-96, ¶ 31; *see also* Armstrong Opposition at 15.

concedes.[82] While DSNP contends **[REDACTED]**,[83] the Media Bureau properly held that there was not sufficient information in the record to quantify the appropriate amount for this discount.[84] Moreover, while the Armstrong final offer may have contained rate variations in **[REDACTED]**, there was sufficient benchmark evidence submitted by Armstrong for the Media Bureau to find that, on balance, the Armstrong final offer most closely approximates fair market value.

20. DSNP takes issue with the Media Bureau's conclusion that, even if there was evidence establishing that **[REDACTED]**, it could not rely dispositively on the rates Comcast pays for FSNP because there was no firm evidence in the record establishing what impact the simultaneous negotiations between Comcast (as a programmer) and DIRECTV (a distributor) had on the rates negotiated between Comcast (as a distributor) and DSNP.[85] As the Media Bureau properly held:

> To the extent that a vertically integrated RSN (in this case, DSNP) puts forth its affiliation agreement with a vertically integrated MVPD (in this case, Comcast) as a comparable affiliation agreement for purposes of a fair market value analysis, we would expect the vertically integrated RSN to produce credible evidence that other simultaneous programming negotiations between the parties did not impact the rates in the agreement put forth as comparable.[86]

DSNP claims, however, that it produced sufficient credible evidence in the form of **[REDACTED]**.[87] As

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[82] *See Order on Review*, 26 FCC Rcd at 12601, ¶ 37; *DSNP Application for Review* at ii, 9-10; *see also Armstrong Opposition* at 15. The Media Bureau noted that Comcast receives a **[REDACTED]** discount relative to Armstrong (depending on how the discount is calculated). *See Order on Review*, 26 FCC Rcd at 12595-96, ¶ 31. Despite rate variations **[REDACTED]**, the Armstrong final offer provides Comcast with an overall discount relative to Armstrong. In contrast, the DSNP final offer would require Armstrong to pay higher rates than the smaller and less valuable **[REDACTED]**. *See Order on Review*, 26 FCC Rcd at 12587-88, ¶ 21 and 12622-23, Appendix A; *see also DSNP Application for Review* at 10 n.14.

[83] *See DSNP Application for Review* at 10-11 (citing Expert Analyses and Opinions of Lindsay Gardner, CX-44 (Jan. 3, 2011) ("Gardner Expert Report"), at 6, 19-20; Wyche Expert Report, RX-50 at ¶ 36; Thompson Expert Report, RX-74 at 9); *see also DSNP Reply* at 5 n.7.

[84] *See Order on Review*, 26 FCC Rcd at 12601, ¶ 38 ("There is no reliable evidence as to what discount Comcast received in prior years relative to Armstrong or what an 'industry standard' discount would be for Comcast relative to Armstrong."); *see also Armstrong Opposition* at 16. In the evidence cited by DSNP, the experts opine that Comcast should receive a "very substantial" discount and the lowest rates in the market, but they do not quantify what discount would be appropriate for Comcast given its size relative to Armstrong. *See supra* n. 75.

[85] *See Order on Review*, 26 FCC Rcd at 12601-02, ¶ 39. The record indicates that Comcast (as a programmer) and DSNP's parent, DIRECTV (a distributor), were negotiating deals pertaining to DIRECTV's carriage of Comcast RSNs and Comcast's Versus network at the same time that Comcast (as a distributor) and DSNP were negotiating deals pertaining to Comcast's carriage of FSNP and other DIRECTV-owned RSNs. *See id*. at 12599-600, ¶ 36. Moreover, Armstrong's experts opined that these simultaneous deals may have caused Comcast to agree to pay higher rates for FSNP than it otherwise would in order to obtain favorable terms for DIRECTV's carriage of Comcast's networks. *See id*. (citing Gardner Expert Report, CX-44 at 20-21; Rebuttal Report of Stephen E. Siwek, CX-47 (Jan. 14, 2011), at 7). DSNP notes that Armstrong's historical benchmark analysis considered rates negotiated by **[REDACTED]**, a vertically integrated MVPD, yet the Media Bureau did not require Armstrong to produce evidence that simultaneous programming negotiations did not impact these rates. *See DSNP Application for Review* at 23-24. Unlike with the case of Comcast and DIRECTV, however, DSNP does not cite evidence indicating any simultaneous programming negotiations involving **[REDACTED]** that would have impacted these rates. *See Armstrong Opposition* at 17; *see also Order on Review*, 26 FCC Rcd at 12599-600, ¶ 36 n.184 (citing record evidence that DIRECTV announced publicly that it had reached an agreement to resume carriage of Comcast's Versus network on the same day that DSNP's carriage agreement with Comcast was executed).

[86] *Order on Review*, 26 FCC Rcd at 12601-02, ¶ 39.

[87] **[REDACTED]**.

the Media Bureau correctly noted, however, this **[REDACTED]**.[88] While DSNP notes that Armstrong's counsel cross-examined **[REDACTED]** and could have asked questions about **[REDACTED]**,[89] DSNP, not Armstrong, was the proponent of the Comcast/DSNP agreement as a comparable affiliation agreement for purposes of the fair market value analysis.[90] Accordingly, DSNP had the burden to establish that the Comcast/DSNP agreement was comparable, which would require credible evidence that other simultaneous programming negotiations between the parties did not impact the rates in the Comcast/DSNP agreement.[91] Moreover, as the Media Bureau explained, even if Armstrong had cross-examined **[REDACTED]**, this would not have revealed what DIRECTV's representatives discussed with Comcast regarding the interrelatedness of the deals.[92] Despite the fact that DIRECTV is the parent company of DSNP, DSNP offered no DIRECTV representatives to testify regarding the impact of the simultaneous negotiations between DIRECTV and Comcast on the rates in the Comcast/DSNP agreement.[93] Accordingly, we affirm the Media Bureau's finding that it could not rely dispositively on the rates Comcast pays for FSNP because DSNP failed to produce credible evidence that other simultaneous programming negotiations did not impact these rates.

21. DSNP renews its attacks on Armstrong's historical benchmark analysis.[94] We find that the Media Bureau properly held that none of these criticisms called into question the key finding that Armstrong's analysis, at the very least, supported the principle of marketplace negotiations for RSNs by demonstrating that Armstrong has not historically paid the same or higher rates than all other Cohort Affiliates that have fewer subscribers and generate substantially less revenue than Armstrong.[95] DSNP does not dispute this finding nor has it provided any basis to believe that its criticisms of Armstrong's analysis would subvert this principle of marketplace negotiations.

22. DSNP criticizes Armstrong's historical benchmark analysis because it was developed after Armstrong submitted its final offer and did not serve as the basis for the rates Armstrong proposed.[96] We find no basis for this criticism. As an initial matter, an MVPD pursuing arbitration under the *Liberty Media Order* conditions does not have access to the RSN's contracts with other MVPDs until after it submits its final offer, thus preventing it from using the rates in these contracts to devise its proposed rates.[97] The *Liberty Media Order* requires the arbitrator (and the Media Bureau on review) to select the final offer that "most closely approximates the fair market value of the programming carriage rights at issue."[98] To be sure, based on the facts presented in a particular arbitration, the methodology used to

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88 *See id*.

89 *See DSNP Application for Review* at 21.

90 *See Order on Review*, 26 FCC Rcd at 12601-02, ¶ 39.

91 *See id*.; *see also Armstrong Opposition* at 15.

92 *See Order on Review*, 26 FCC Rcd at 12601-02, ¶ 39.

93 *See id*. (explaining that although Armstrong did not name DIRECTV as a party to the arbitration, and DIRECTV declined to participate in discovery, the "salient issue here . . . is not whether DIRECTV should be compelled to come forward with evidence. Rather, the salient issue is whether DSNP has provided sufficient evidence to establish that the 2010 Comcast/DSNP Agreement is a comparable affiliation agreement for purposes of this arbitration . . . ."); *see also Armstrong Opposition* at 17.

94 *See DSNP Application for Review* at i-ii, 23; *DSNP Reply* at 2-3; *see also supra* n. 33; *Order on Review*, 26 FCC Rcd at 12589-93, ¶¶ 23-27; *Armstrong Opposition* at ii, 4-6, 13-14.

95 *See Order on Review*, 26 FCC Rcd at 12594, ¶ 28.

96 *See DSNP Application for Review* at 22.

97 *See Armstrong Opposition* at 2.

98 *Liberty Media Order*, 23 FCC Rcd at 3347-48, Appendix B, Condition IV, § B "Rules of Arbitration," ¶ 3 and § C "Review of Final Award by the Commission," ¶ 3.

devise the proposed rates may be useful in assessing whether the rates approximate fair market value. Here, DSNP's methodology in developing its proposed rates added further support for the Media Bureau's finding: "averaging the rates of three MVPDs that are smaller than Armstrong in terms of subscribers or revenue or both would be expected to result in rates that are higher than what fair market value would dictate for Armstrong."[99] While DSNP claims that the Media Bureau did not scrutinize Armstrong's methodology in devising its proposed rates,[100] the Media Bureau found that these rates most closely approximate fair market value[101] because they were consistent with established and uncontroverted market benchmarks derived from arms'-length contract rates between RSNs and MVPDs that were not simultaneously engaged in reciprocal negotiations. As a result, there was no basis in the record to question Armstrong's methodology in devising its proposed rates.[102]

2. The Renewal Rate Increase in the Armstrong Final Offer Most Closely Approximates Fair Market Value

23. We reject DSNP's contention that the Media Bureau erred in concluding that the renewal rate increase in Armstrong's final offer most closely approximates fair market value.[103] The Media Bureau relied on record evidence, including testimony from Armstrong's expert, Mr. Gardner, that renewal rate increases are intended to reflect improvements in the RSN, which Armstrong paid for in the form of a **[REDACTED]** rate increase **[REDACTED]** prior to the expiration of its agreement with DSNP as well as a **[REDACTED]** increase **[REDACTED]** prior to expiration.[104] The Media Bureau

[99] *See Order on Review*, 26 FCC Rcd at 12587, ¶ 20; *see also Armstrong Opposition* at 3, 8-9, 13 (noting that DSNP ignored size and value differentials among the Cohort Affiliates while "Armstrong actually examined where the rates for Armstrong should fall within the market structure – *i.e.* the relative market positions of Armstrong's rates and the rates for the other Cohorts given their size and value differences"). DSNP claims that the Media Bureau's finding that DSNP's averaging methodology was not probative of fair market value conflicts with the Media Bureau's previous conclusion that "'the best and most persuasive evidence of fair market value is the objective price that RSN programming yields in the marketplace.'" *DSNP Application for Review* at 6 (quoting *TCR Sports Broadcasting Holding, L.L.P. v. Time Warner Cable Inc.,* Order on Review, 23 FCC Rcd 15783, 15808-10, ¶ 46 (MB 2008) ("*MASN Order on Review*"), *reversed on other grounds by* Memorandum Opinion and Order, 25 FCC Rcd 18099 (2010), *aff'd, TCR Sports Broad. Holding v. FCC,* 679 F.3d 269 (4th Cir. 2012)). DSNP also claims that the Media Bureau erred in finding that its PSPPE analysis was not probative of fair market value because the *Liberty Media Order* arbitration conditions list contracts "'between MVPDs and RSNs in which Liberty Media does not have an interest'" as among the examples of relevant evidence in determining fair market value. *Id*. at 25 (quoting *Liberty Media Order*, 23 FCC Rcd at 3347, Appendix B, Condition IV, § B "Rules of Arbitration," ¶ 5(a)). While these previous decisions discuss certain relevant evidence in determining fair market value, they do not endorse a specific type of methodology or analysis for making use of this evidence. Here, we find that the Media Bureau properly concluded that neither the averaging methodology nor the PSPPE analysis was probative of fair market value. *See supra* nn. 26-27; *see also Order on Review*, 26 FCC Rcd at 12586, ¶ 18 and 12587, ¶ 20. Moreover, while DSNP claims that the Media Bureau's rejection of these analyses was inconsistent with its actions in the *MASN Order on Review*, staff-level decisions are not binding on the Commission. *See DSNP Application for Review* at 6, 25 (citing *MASN Order on Review*, 23 FCC Rcd at 15808-10, ¶ 46); *see also Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008).

[100] *See DSNP Application for Review* at 22.

[101] *Order on Review*, 26 FCC Rcd at 12602, ¶ 40.

[102] Armstrong notes that its proposed rates were based in large part on the existing rates it was paying at the end of its previous contract term. *See Armstrong Opposition* at 2-3. As the Media Bureau found, such an approach was reasonable considering the rate increases Armstrong incurred during the 15 months prior to the expiration of its previous contract. *See Order on Review*, 26 FCC Rcd at 12603-07, ¶¶ 42-46; *see also infra* ¶ 23.

[103] *See DSNP Application for Review* at 15-19; *Order on Review*, 26 FCC Rcd at 12606-07, ¶ 46; *see also id.* at 12603, ¶ 42 (explaining that a "renewal rate increase" or "rate reset" is an increase in rates that an RSN tries to obtain at renewal from what the MVPD was paying at the end of the previous affiliation agreement).

[104] *See Order on Review*, 26 FCC Rcd at 12606-07, ¶ 46.

held that an additional standard renewal rate increase on top of these recent surcharges would effectively charge Armstrong twice for these improvements.[105] DSNP claims, however, that Mr. Gardner's testimony cannot support the Media Bureau's decision because Mr. Gardner testified that (i) "'all other things being equal,'" the renewal rate increase is typically in the range of **[REDACTED]**;[106] and (ii) renewal is "'the only time during the relationship between the programmer and the distributor, where the whole channel can be withdrawn, if there isn't an agreement. So typically, the rate increase at the time of a renewal is the largest in percentage terms of any time during the relationship.'"[107] As the Media Bureau explained, however, Mr. Gardner also testified that the typical renewal rate increase is premised on the RSN offering an "'improved and enhanced channel'" that is not reflected in the expired rates,[108] but the Armstrong renewal presented an atypical situation because Armstrong had already incurred significant rate increases shortly before its agreement expired which already accounted for any improvements in FSNP's program schedule.[109] We thus affirm the Media Bureau's conclusion that there was no basis to require Armstrong to pay a standard renewal rate increase of **[REDACTED]** because it had already paid for improvements in FSNP in the form of an **[REDACTED]** shortly before its agreement expired.[110]

24. For further support that the renewal rate increase in Armstrong's final offer most closely approximates fair market value, the Media Bureau noted that **[REDACTED]** was not required to pay both a surcharge for additional games and a renewal rate increase when it renewed its agreement with DSNP

[105] *See id*.

[106] *DSNP Application for Review* at 16 (quoting Gardner Test., Hr'g Tr. at 493).

[107] *Id*. (quoting Gardner Test., Hr'g Tr. at 349-50).

[108] *See Order on Review*, 26 FCC Rcd at 12603-04, ¶ 43 and 12606-07, ¶ 46 (citing Gardner Test., Hr'g Tr. at 492-93).

[109] *See id*. at 12606-07, ¶ 46 (citing Gardner Test., Hr'g Tr. at 492-93); *see also Armstrong Opposition* at 2-3, 18-19 (citing Gardner Test., Hr'g Tr. at 475-77, 487-89, 492-94, 496). DSNP also claims that Mr. Gardner's testimony (i) supports the position that improvements are relevant only insofar as they may be used to justify a renewal rate increase towards the top of the typical **[REDACTED]** range (*see DSNP Application for Review* at 17 (citing Gardner Test., Hr'g Tr. at 494)); and (ii) recognizes the distinction between a renewal rate increase and a surcharge during the term of the agreement that accounts for new programming or features (*see DSNP Application for Review* at 17-18 (citing Gardner Expert Report at 24 and Gardner Test., Hr'g Tr. at 348-49)). In the evidence cited, however, Mr. Gardner was discussing a typical renewal scenario, not the atypical facts presented here where a rate increase shortly before renewal accounted for any improvements in the RSN.

[110] *See Order on Review*, 26 FCC Rcd at 12606-07, ¶ 46. DSNP also notes, as clearly set forth in the *Order on Review*, that Armstrong's renewal rate increase, even with the surcharges included, is still below the range deemed typical by Mr. Gardner in **[REDACTED]**. *See DSNP Application for Review* at 19 (citing *Order on Review*, 26 FCC Rcd at 12605, Table B). DSNP's renewal rate increase, with the surcharges included, however, exceeds this typical range in **[REDACTED]**. *See Order on Review*, 26 FCC Rcd at 12605, Table B. Moreover, the data provided in Table B of the *Order on Review* indicate that the average renewal rate increase (surcharges included) in the DSNP final offer is **[REDACTED]**, which is outside of this typical range, whereas the average renewal rate increase (surcharges included) in the Armstrong final offer is **[REDACTED]**, which falls within this typical range. *See Order on Review*, 26 FCC Rcd at 12605, Table B.

While DSNP attempts to associate the renewal rate increase with the increasing rights fees for professional sports (*see DSNP Application for Review* at 18 n.17), the Media Bureau properly found that there is no basis to conclude that the Armstrong final offer would prevent DSNP from recovering a reasonable share of its programming costs. *See supra* ¶ 12. DSNP does not challenge this finding. In addition, DSNP claims that it would be "better off" continuing the rates that Armstrong was paying at the expiration of its agreement and applying the **[REDACTED]** annual escalator that the Media Bureau determined most closely approximates fair market value. *See DSNP Application for Review* at 19 and Exhibit 4 (citing *Order on Review*, 26 FCC Rcd at 12608, ¶ 48). As with DSNP's proposed renewal rate increase, this suggestion would effectively charge Armstrong twice for improvements it had already paid for prior to the expiration of its agreement.

[REDACTED].[111] While DSNP claimed that **[REDACTED]** paid for the additional programming **[REDACTED]**, the Media Bureau found that the only support DSNP provided for this assertion was to cite to the **[REDACTED]** agreement without any testimony or other evidence supporting this assertion.[112] DSNP repeats this claim in its *Application for Review*, noting that the **[REDACTED]** agreement is part of the record and arguing that it is not required to provide additional evidence to support its position.[113] DSNP's mere citation of the **[REDACTED]** agreement, however, provides no basis for presuming why **[REDACTED]** agreed to the annual escalators in this agreement.[114] As the Media Bureau held, there is no support in the record for DSNP's assertion that **[REDACTED]** paid for the additional programming **[REDACTED]**.

IV. CONCLUSION

25. For the foregoing reasons, we conclude that the Media Bureau properly found that the rates and the rate renewal increase in the Armstrong final offer most closely approximate fair market value. We also reiterate that the rates and the rate renewal increase are just two of twelve separate provisions of the final offers analyzed by the Arbitrator and the Media Bureau. DSNP has not challenged the Media Bureau's finding that, on balance, these other provisions also favor the Armstrong final offer as being more consistent with fair market value. Even if we were to agree with one or both of DSNP's challenges to the rates and the rate renewal increase, DSNP has failed to put forth an explanation for why these two provisions would tip the scales in favor of the DSNP final offer in light of the unchallenged finding that many of the other provisions favor the Armstrong final offer.[115]

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[111] *See Order on Review*, 26 FCC Rcd at 12606-07, ¶ 46.

[112] *See id*.

[113] *See DSNP Application for Review* at 18.

[114] *See Armstrong Opposition* at 19 n.14 (noting that the annual escalator may be tied to other negotiation points).

[115] We disagree with Commissioner Pai that the Liberty arbitration condition requires the Commission to precisely calculate an exact "fair market value" in every case before it can affirm an arbitration award. Fair market value by definition is a subjective estimation of what a willing buyer and a willing seller will agree to in an arm's-length transaction and is not necessarily subject to precise formulaic calculation. Instead, the Liberty arbitration condition, agreed to by DSNP and invoked by Armstrong, mandates selection of the final offer that "most closely approximates" fair market value, but nowhere mandates a precise calculation. Nothing in the provision cited by Commissioner Pai imposes an affirmative obligation to make a precise calculation of fair market value. *See Liberty Media Order*, 23 FCC Rcd at 3347, Appendix B, Condition IV, § B "Rules of Arbitration," ¶ 5; *see also Armstrong Opposition* at 12 n.10. Rather, the arbitration condition requires consideration of the record evidence put forth by the parties and their experts during the course of the arbitration. Here, the record includes evidence of comparable transactions and historical benchmarks establishing a fundamental principle of marketplace negotiations for RSN programming, agreed to by both DSNP and Armstrong, that an MVPD that has a greater number of subscribers and generates more revenue for an RSN will obtain better rates, terms, and conditions. *See supra* ¶ 15. Only Armstrong's offer comports with this principle. While agreeing with this principle of fair market value, however, DSNP relied upon an averaging methodology that is inconsistent with this principle and has no basis in industry practice. While Commissioner Pai contends that "the record offers plausible ways to determine" fair market value, neither party chose to present these methods at any stage of the proceeding as a way to calculate fair market value. Accordingly, there was no opportunity to review the efficacy of these methodologies or the data relied upon at the *de novo* review stage. Even if one of the parties had advocated such analyses, it appears that there would have been ample grounds to question their validity. For example, the regression analysis assumes a linear relationship between the rates charged to the Pittsburgh area MVPDs and the revenue they generate, yet there is insufficient explanation as to why a simple linear relationship is appropriate. Moreover, there is no basis to assume that the regression analyses could yield reasonably precise estimates given the small sample sizes used (four or five observations per regression). In addition, the analyses appear to assess rates versus aggregate annual revenue (based on a single year of aggregate revenue data) instead of rates as a function of subscribers per zone, ignoring that revenue is a function of rates per subscriber per zone. Commissioner Pai's other analysis relies on a **[REDACTED]** rate renewal increase that was not proposed in either party's final offer. In fact, if the analysis used the rate renewal increases that the

(continued….)

V. ORDERING CLAUSE

26. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Application for Review filed by DIRECTV Sports Net Pittsburgh, LLC **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

(Continued from previous page)
Arbitrator and the Media Bureau found, and we find here, to most closely approximate fair market value (*see Order on Review*, 26 FCC Rcd at 12605, Table B; *see also supra* ¶¶ 23-24), Armstrong's proposed rates are closer than DSNP's proposed rates to these purported estimates of fair market value in fifteen of eighteen instances. For all these reasons, we do not find Commissioner Pai's analysis to be relevant to the conclusions we reach in this Order.

DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI

Re: *DIRECTV Sports Net Pittsburgh, LLC, Petitioner v. Armstrong Utilities, Inc., Respondent*, File No. CSR08480-P.

Most Americans are familiar with how *The Price Is Right* begins. Four audience members are asked to "come on down" to contestants' row.[1] They are shown a product, and Drew Carey requests their bids. The contestant that guesses the closest to the actual retail price *without going over* wins the item and is invited onstage to play a pricing game.

What does *The Price Is Right* have to do with the 2010 failure of DIRECTV Sports Net Pittsburgh (DSNP) and cable operator Armstrong Utilities (Armstrong) to negotiate a mutually acceptable deal for carriage of Fox Sports Net Pittsburgh (FSNP), a regional sports network owned by DSNP and controlled by Liberty Media?[2] The answer is simple. Had the Commission's *Liberty Media Order*[3] mandated *The Price Is Right*-style arbitration to resolve such disputes, I would agree with the Commission's decision in this case because DSNP's offer was almost certainly too high.

But that's not what the Commission did. Instead, it required baseball-style arbitration and directed the arbitrator to choose the final offer that "most closely approximates the fair market value of the programming carriage rights at issue."[4] So the key question was whether DSNP's offer or Armstrong's offer was closer to the fair market value. Because the arbitrator, the Media Bureau, and the Commission have not made a reasonable effort to figure out the answer to that question, I respectfully dissent.

I.

The appropriate method for resolving this case seems obvious. The *Liberty Media Order* requires us to pick the final offer that "most closely approximates the fair market value of the programming carriage rights at issue."[5] Accordingly, we should start by estimating the fair market value of Armstrong's carriage of FSNP. We should then compare that estimated fair market value to the actual offers submitted to the arbitrator by DSNP and Armstrong. Finally, we should choose whichever party's offer is closer to our estimated fair market value.

Unfortunately, the decisions of the arbitrator, the Bureau, and the Commission all suffer from the same methodological flaw: They never attempt to estimate the fair market value of the programming carriage rights at issue. Indeed, while Commission claims that "fair market value by definition is a subjective estimation of what a willing buyer and a willing seller will agree to in an arm's-length transaction,"[6] it never bothers to make any subjective or objective estimate of fair market value here. This cannot be reconciled with the plain terms of the *Liberty Media Order*, which require the consideration of evidence for the express purpose of "determin[ing] fair market value."[7]

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[1] *See, e.g.*, http://www.youtube.com/watch?v=CuQ7ilMtKvg.

[2] In 2011, Fox Sports Net Pittsburgh was renamed Root Sports Pittsburgh.

[3] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, News Corporation and The DIRECTV Group, Inc., Transferors, to Liberty Media Corporation, Transferee*, Memorandum Opinion and Order, 23 FCC Rcd 3265 (2008).

[4] *Id.* at 3347, Appendix B, Condition IV, § B "Rules of Arbitration," paras. 1, 3.

[5] *Id*. at 3348, Appendix B, Condition IV, § C "Review of Final Award by the Commission," paras. 1, 3.

[6] *See Order* at note 117.

[7] *Liberty Media Order*, at 3347, Appendix B, Condition IV, para. 3.

Instead, like the Bureau, the Commission simply bases its decision on the "principle of marketplace negotiations for RSN programming . . . that an MVPD that has a greater number of subscribers and generates more revenue for an RSN will obtain better rates than an MVPD that has fewer subscribers and generates less revenue for the RSN."[8] But this principle is not tailored to select the offer that most closely approximates fair market value. In fact, it may result in the selection of the offer that *least* corresponds to the fair market value.

Consider, for example, the 2011 rates that cable operators pay for FSNP in what is known as Zone **[REDACTED]**, the area closest to Pittsburgh. Comcast, the largest cable operator in the market, paid a rate of **[REDACTED]** per month.[9] **[REDACTED]**, by contrast, had much smaller presences in the Pittsburgh market, and paid rates of **[REDACTED]** per month, respectively.[10] For its part, Armstrong has considerably fewer subscribers in Pittsburgh than Comcast but generates more annual revenues for DSNP than **[REDACTED]**.[11]

Applying the Commission's principle, one might expect Armstrong's rate to be somewhere between **[REDACTED]** and **[REDACTED]** (the lowest of the rates paid by **[REDACTED]**). Armstrong's offer **[REDACTED]** was within that range while DSNP's was not **[REDACTED]**.[12] Although this suggests that DSNP's offer was likely too high, and thus would have been disqualified on *The Price Is Right*, does it mean that Armstrong's offer was closer to fair market value than DSNP's? Not necessarily.

If the fair market value for Armstrong's carriage were in fact **[REDACTED]** a month (a rate consistent with the Commission's principle), then the Commission should choose DSNP's offer since it "most closely approximates the fair market value" (deviating by only **[REDACTED]** rather than **[REDACTED]**). That is true even though DSNP's offer does not fall within the **[REDACTED]** range consistent with the Commission's principle, while Armstrong's offer does.

Similarly problematic was the Bureau's treatment of several "other rate terms," such as the renewal rate increase and annual escalator. The "renewal rate increase" is the rate increase in the first year of the new contract (compared to the old contract). The "annual escalator" is the percentage rate increase in subsequent years of the new contract. The Bureau concluded that Armstrong's proposed renewal rate increase and DNSP's proposed annual escalator were closer to fair market value—in other words, one point for Armstrong, one point for DSNP.[13] And the Commission accepts this treatment here.

But these factors have no relevance apart from how they influence rates! If Armstrong's offered rates better approximate the fair market value, then what does it matter that DSNP's annual escalator was more accurate? Or if DSNP's offered rates better approximate the fair market value, what does it matter if DSNP's proposed increase for the first year was too high? Analyzing these pieces of each company's rate offer as if they were stand-alone offers may seem to add precision to the process. But all it does is add arbitrary factors that do not help us figure out whose final offer "most closely approximates the fair

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[8] *Order* at para. 7. It is worth noting that the Commission and the Bureau fail to apply this principle consistently. Even though **[REDACTED]** has more customers that subscribe to FSNP than does Armstrong, the Commission and the Bureau conclude that Armstrong should receive better rates than **[REDACTED]**. I presume they make this determination because Armstrong generates more revenue for FSNP than does **[REDACTED]**.

[9] *See* DIRECTV Sports Net Pittsburgh, LLC, Application for Review, File No. CSR-8480-P, Exh. 3, at 2 (filed Sept. 9, 2011) (*DSNP Application for Review*).

[10] *See id*.

[11] *See id.*, Exh. 3, at 1.

[12] *See id.*, Exh. 3, at 2.

[13] *See DIRECTV Sports Net Pittsburgh, LLC v. Armstrong Utilities Inc.*, Order on Review 26 FCC Rcd 12574, 12606–08, paras. 46, 48 (Media Bur. 2011) (*Order on Review*).

market value of the programming carriage rights at issue."[14] The Commission should have corrected the Bureau's mistake and analyzed these rate terms as part of, not independent from, its determination of whose rates better reflect the fair market value. This, however, was not done.

II.

So what was the fair market value for Armstrong's carriage of FSNP? It is hard to say for sure, but the record offers plausible ways to determine it. Each favors DSNP's offer.

First, we could apply a more sophisticated variant of the Commission's principle to the Pittsburgh market by comparing the parties' offered rates to those paid by others in that market. At the time of the negotiations (2010), Comcast generated **[REDACTED]** for DSNP, Armstrong generated **[REDACTED]**, and **[REDACTED]** generated **[REDACTED]**, respectively.[15] Accordingly, the fair market value for Armstrong's carriage of DSNP should be somewhere in between the rates paid by **[REDACTED]**, on one hand, and those paid by **[REDACTED]**, on the other.

Those figures also indicate, however, that Armstrong's rates should be closer to the rates paid by **[REDACTED]** than the rates paid by **[REDACTED]**. This is because Armstrong's generated revenue is far closer to the amount of revenue generated for DSNP by **[REDACTED]** than the amount produced for DSNP by **[REDACTED]**. Breaking down the numbers, in 2010 Comcast generated **[REDACTED]** more for DSNP than did Armstrong, while Armstrong in 2010 only generated **[REDACTED]** more than **[REDACTED]**, **[REDACTED]** more than **[REDACTED]**, and **[REDACTED]** than **[REDACTED]**.[16]

It is therefore notable that Armstrong's offer contained rates that were far closer to **[REDACTED]** than to **[REDACTED]**. Specifically, while **[REDACTED]** rates were **[REDACTED]** Armstrong's proposed rates, Armstrong's proposed rates were **[REDACTED]**.[17] So if DSNP's offer was likely too high because it exceeded **[REDACTED]**, Armstrong's offer was almost surely too low.[18]

This is utterly unsurprising. After all, the optimal strategy for parties to baseball-style arbitration is for each party to make an offer that is more favorable to its interests than the fair market value.[19] The

[14] *See Liberty Media Order*, 23 FCC Rcd at 3347, Appendix B, Condition IV, § B "Rules of Arbitration," paras. 1, 3.

[15] *See DSNP Application for Review*, Exh. 3, at 1.

[16] Or looking at it another way, **[REDACTED]** generated **[REDACTED]** of Armstrong's revenues, whereas Armstrong generated only **[REDACTED]** more than **[REDACTED]**, **[REDACTED]** more than **[REDACTED]**, and **[REDACTED]** more than **[REDACTED]**.

[17] *See Order on Review*, 26 FCC Rcd at 12595–96, para. 31; *DSNP Application for Review* at 13–14.

[18] The Commission seeks to cast doubt on this analysis by speculating that the rates paid by Comcast to DSNP may not reflect fair market value. Rather, it contends that those rates may have been artificially inflated by other carriage negotiations being conducted between Comcast and DIRECTV at the same time that Comcast was negotiating its carriage agreement with DSNP. *See Order* at para. 20. I suppose that is possible. It is also possible that DSNP executives bribed Comcast executives into agreeing to above-market rates. But there is the same amount of evidence in the record to support each theory: None. **[REDACTED]**. *See DSNP Application for Review* at 20–21. And there is no evidence in the record that contradicts this testimony. To be sure, the Commission suggests that DIRECTV and Comcast executives could have linked negotiations involving DSNP to other carriage negotiations without the knowledge of the DSNP executives in charge of negotiating the Comcast-DSNP agreement. *See Order* at para. 20. But there is no evidence in the record to support this theory, and I find it difficult to believe that **[REDACTED]**. Alternatively, the Commission implies that the **[REDACTED]**. *See id*. But at the risk of sounding like a broken record, there is no evidence to support this speculation either. And when Armstrong had the chance to cross-examine DSNP executives at the arbitration hearing, **[REDACTED]**. *See DSNP Application for Review* at 21.

[19] *See, e.g.*, Cary Deck, Amy Farmer & Dao-Zhi Zeng, Amended Final-Offer Arbitration is Improved Arbitration: Evidence from the Laboratory (2005), *available at* http://comp.uark.edu/~cdeck/Amended%20Final-Offer%20Arbitration%20working%20paper.pdf; Steven J. Brames & Samuel Merrill, III, *Binding Versus Final-*

(continued….)

relevant question for the arbitrator, then, is which party's offer is closer to the fair market value.

For example, one could use a linear regression based on the Commission's principle to approximate fair market value using rates paid to DSNP by other MVPDs and the revenues generated by those MVPDs for DSNP.[20] Taking the rate information for six years (2010–2015) and three geographical zones **[REDACTED]** contained in the record,[21] I conducted eighteen separate regression analyses to estimate the fair market value for Armstrong's carriage in each zone for each year. I then compared the estimated fair market value rate with the rates submitted to the arbitrator by Armstrong and DSNP. As shown in the tables below, in seventeen of eighteen instances, DSNP's proposed rate was closer to the estimated fair market value than was Armstrong's. In other words, had the Bureau (and the Commission) used a linear regression analysis to estimate the fair market value based on its own principle, it would have found that DSNP's proposed rates were closer to fair market value than Armstrong's. Indeed, the total value of the rates generated by the linear regression analysis was **[REDACTED]**, which is much closer to the value of DSNP's offer **[REDACTED]** than Armstrong's offer **[REDACTED]**.[22]

(Continued from previous page)
Offer Arbitration: A Combination Is Best, Management Science, Vol. 32, No. 10, at 1346–55 (1986); Steven J. Brames & Samuel Merrill, III, *Equilibrium Strategies for Final-Offer Arbitration: There Is No Median Convergence*, Management Science, Vol. 29, No. 8, at 927–41 (1983).

[20] The Commission criticizes me for analyzing rates on the basis of revenues generated for DSNP by MVPDs. *See Order* at note 117. Instead, it asserts that rates should be analyzed as a "function of subscribers per zone." *Id*. This criticism is curious, to say the least, given that the Commission itself solely analyzes MVPDs' rates based on aggregate revenues. For example, **[REDACTED]** has six times as many subscribers as Armstrong in Zone **[REDACTED]**. Yet, the Commission never faults Armstrong's offer for proposing Zone **[REDACTED]** rates that are lower than **[REDACTED]**. Indeed, as noted above, *see supra* note 8, **[REDACTED]** has more subscribers overall than Armstrong, yet the Commission concludes that Armstrong should pay lower rates than **[REDACTED]** *solely because* **[REDACTED]** *generates less overall revenue for DSNP than does Armstrong*. Moreover, there is no evidence whatsoever in the record that rates are a function of subscribers per zone. **[REDACTED]**, for instance, has about five times as many Zone **[REDACTED]** customers as does **[REDACTED]**, yet **[REDACTED]** pays substantially lower Zone **[REDACTED]** rates than does **[REDACTED]**. Or, to take another example, **[REDACTED]** has over twenty-five times as many Zone **[REDACTED]** customers as **[REDACTED]**, yet **[REDACTED]** pays lower Zone **[REDACTED]** rates than does **[REDACTED]**.

[21] *See DSNP Application for Review*, Exh. 3, at 2–5.

[22] The monetary values of DSNP's offer and Armstrong's offer may be found in Exhibit C of the Expert Report of Mark C. Wyche. The value of the rates produced by the regression analyses was calculated using the number of Armstrong subscribers, by Zone, set forth in Armstrong's offer.

Comparing Armstrong and DSNP Offers to Fair Market Value
Using a Linear Regression Analysis[23]

[REDACTED]	2010	2011	2012	2013	2014	2015
Armstrong	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
DSNP	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
FMV	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]	2010	2011	2012	2013	2014	2015
Armstrong	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
DSNP	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
FMV	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]	2010	2011	2012	2013	2014	2015
Armstrong	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
DSNP	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
FMV	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

To be sure, the Commission suggests that there may not be a simple linear relationship between rates and the revenues generated for DSNP by an MVPD.[24] However, the r-squared statistic, which measures how well data fits the linear regression, is very strong here. A perfect r-squared is 1, and of the 18 regressions described above, 6 of them have an r-squared of at least 0.99, 10 have an r-squared of at least 0.98, 15 have an r-squared of at least 0.95, and the lowest r-squared is still 0.82. In short, there is strong evidence that as revenues generated increase, rates rise with them.

But let's say for the sake of argument that the relationship between rates and revenues generated is not a linear one. Rather, let's make an assumption that is *extremely favorable to Armstrong's position*: that the relationship between rates and revenues is logarithmic. This would mean that volume discounts are initially steep but then taper off as revenues continue to grow. If Armstrong cannot prevail under a logarithmic regression analysis, then it is difficult to conceive of a reasonable statistical relationship between rates and revenues that would result in Armstrong's offer ending up closer to fair market value.

So what are the results under this hypothesis? As shown in the tables below, in the substantial majority of cases (13 of 18), DSNP's proposed rate is closer to the estimated fair market value than is Armstrong's. In other words, even had the Bureau (and the Commission) used a logarithmic regression analysis to estimate the fair market value, it would have found that DSNP's proposed rates were closer to fair market value than Armstrong's. That is because the total value of the rates generated by the logarithmic regression analysis was **[REDACTED]**, which is significantly closer to the value of DSNP's offer **[REDACTED]** than Armstrong's offer **[REDACTED]**.[25]

[23] Rates are expressed in dollars per subscriber per month. Emboldened and underlined rates are closer to the fair market value for each zone each year. I calculated these values using a linear regression of the equation $y = a - bx$, where a and b are constants, x is the revenue generated for DSNP by a cable operator, and y is the rate paid to DSNP by the cable operator. *See* 26 FCC Rcd at 12582, tbl. A &12595, n.142 (providing data for variable x); *DSNP Application for Review*, Exh. 3, at 1 (same); *id.* at 2–5 (providing data for variable y).

[24] *Order* at note 117.

[25] *See supra* note 21.

Comparing Armstrong and DSNP Offers to Fair Market Value Using a Logarithmic Regression Analysis[26]

[REDACTED]	2010	2011	2012	2013	2014	2015
Armstrong	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
DSNP	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
FMV	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]	2010	2011	2012	2013	2014	2015
Armstrong	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
DSNP	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
FMV	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]	2010	2011	2012	2013	2014	2015
Armstrong	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
DSNP	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
FMV	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Moving on from regression analysis, another way to estimate fair market value would be to start with the rates paid by Armstrong to DSNP at the end of the prior contract in **[REDACTED]** and adjust those rates over the course of the new contract with fair-market-value increases. What should those rate increases be? Unsurprisingly, DSNP proposed a large rate renewal increase **[REDACTED]** followed by a **[REDACTED]** annual escalator, while Armstrong proposed a negligible rate renewal increase **[REDACTED]** followed by an average annual escalator of only **[REDACTED]**.

Looking at the evidence as a whole, I believe that a reasonable annual rate increase would be **[REDACTED]** (and at least **[REDACTED]** for the first six months of the contract). After all, in each of the contracts involving DSNP and other MVPDs, the annual escalator during a contract was between **[REDACTED]** and **[REDACTED]** a year.[27] So if other MVPDs are paying annual increases during a contract in the neighborhood of **[REDACTED]** in exchange for no required service improvements, it then seems quite fair for Armstrong to pay at least a **[REDACTED]** renewal rate increase for the last six months of 2010 followed by a **[REDACTED]** renewal rate increase each year thereafter.[28]

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[26] Rates are expressed in dollars per subscriber per month. Emboldened and underlined rates are closer to the fair market value for each zone each year. I calculated these values using a regression of the equation $y = a*\ln(x) + b$, where a and b are constants, x is the revenue generated for DSNP by a cable operator, and y is the rate paid to DSNP by the cable operator. *See* 26 FCC Rcd at 12582, tbl. A &12595, n.142 (providing data for variable x); *DSNP Application for Review*, Exh. 3, at 1 (same); *id.* at 2–5 (providing data for variable y).

[27] *See Order on Review*, 26 FCC Rcd at 12607, para. 47.

[28] My assessment of a fair-market-value rate renewal increase is also based, in part, on the fact that Armstrong had recently agreed to an **[REDACTED]** increase in rates over the prior eighteen months in exchange for receiving a full-time HD feed and 36 additional Pittsburgh Pirates games. *See Order* at para. 23. On one hand, given that Armstrong had recently agreed to an **[REDACTED]** increase in rates, I find it difficult to believe that DSNP could have reasonably expected to receive here a typical renewal rate increase **[REDACTED]**. On the other hand, I also have trouble concluding that DSNP should have received a negligible renewal rate increase. After all, the recent **[REDACTED]** increase in Armstrong's rates had been in exchange for additional programming services. But the record indicates that renewal rate increases are not based solely on service improvements. Rather, they are also based on the fact that a programmer's leverage is maximized when a contract expires. *See DSNP Application for Review* at 17 (summarizing testimony of Armstrong's expert, Dr. Lindsay Gardner).

And if we take the rates Armstrong was paying at the end of its expired contact and adjust them in that manner, what is the result? As shown below, in twelve of eighteen instances, DSNP's proposed rates are closer to these estimates of fair market value than are Armstrong's proposed rates. Armstrong's proposed rates are closer to the mark only for **[REDACTED]** in the **[REDACTED]** and for **[REDACTED]** between **[REDACTED]**. And the total value of the rates generated by this mode of analysis is **[REDACTED]**, which is closer to the value of DSNP's offer **[REDACTED]** than Armstrong's offer **[REDACTED]**.[29] Once again, had the Bureau (and the Commission) estimated the fair market value, rather than simply applying its principle, it probably would have found that DSNP's proposed rates were closer to fair market value than Armstrong's.[30]

Comparing Armstrong and DSNP Offers to Fair Market Value
Escalating Prior Contract Rates at [REDACTED] per Year[31]

[REDACTED]	2010	2011	2012	2013	2014	2015
Armstrong	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
DSNP	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
FMV	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]	2010	2011	2012	2013	2014	2015
Armstrong	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
DSNP	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
FMV	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]	2010	2011	2012	2013	2014	2015
Armstrong	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
DSNP	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
FMV	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

To be clear, I am not claiming that the figures produced by regressions or annual rate adjustments definitely reflect the fair market value of Armstrong's carriage of FSNP. Nor am I claiming that my analysis of regressions or annual rate adjustments constitutes conclusive proof that DSNP's proposed rates were closer to fair market value than were Armstrong's. I do believe, however, that these analyses indicate that had the Commission hewed to the *Liberty Media Order* standard (picked the offer that "most closely approximates the fair market value of the programming carriage rights at issue") and ascertained

[29] *See supra* note 21.

[30] The Commission complains that a **[REDACTED]** renewal rate increase "was not proposed in either party's final offer." *Order* at note 117. Such an objection, however, simply underscores the fundamental problem with the Commission's analysis. In attempting to figure out which party's offer most closely approximates fair market value, one should estimate fair market value. That generally will be a figure somewhere in between each party's offer. The next step is to then see which party's offer is closest to the estimated fair market value. The Commission entirely skips that first step here. Moreover, a **[REDACTED]** renewal rate increase is entirely consistent with the Commission's conclusion that Armstrong's proposal renewal rate increase was closer to fair market value than was DSNP's. After all, **[REDACTED]** is closer to **[REDACTED]** than **[REDACTED]**. And it is notable that even using a renewal rate increase that is closer to Armstrong's proposal, the rates contained in DSNP's offer turn out to be closer to estimated fair market value.

[31] Rates are expressed in dollars per subscriber. Emboldened and underlined rates are closer to the fair market value for each zone each year. The rate increase for the last six months of 2010 is **[REDACTED]**.

fair market value, it likely would have concluded that DSNP's offer was superior to Armstrong's.[32]

III.

Finally, the Commission claims that even were it to conclude that the rates proposed by DSNP were closer to the fair market value than those proposed by Armstrong, it would still rule in favor of Armstrong because "other provisions also favor the Armstrong offer as being more consistent with fair market value."[33]

As a matter of rote arithmetic, I won't dispute that four is greater than three; that is, the Bureau looked at seven "non-rate" terms of the contract and found that four terms favored Armstrong's offer while three favored DSNP's. But it is difficult to see how any narrow advantage for Armstrong with respect to non-rate terms could outweigh an advantage for DSNP with respect to rates. Indeed, as compared to the question of rates, some of the non-rate terms have an "Other than that, Mrs. Lincoln, how did you like the play?" flavor to them.

Consider, for example, the question of whether DSNP would be allowed to substitute a local **[REDACTED]** games to cure any shortfall in Penguins or Pirates games. The Bureau ruled that such a contract provision would not "most closely approximate fair market value" and thus, ruled for Armstrong on this point. But how much does this issue really matter? At the time, Pittsburgh did not even have an **[REDACTED]** team. There was no evidence in the record of any plans to create one.[34] And four years later, Pittsburgh *still* does not have an **[REDACTED]** team. As such, the dispute over this issue was, and is, academic. It's strange to suggest that Armstrong's victory on this issue should be weighed on par with DSNP prevailing on the issue of rates.

* * *

After reviewing the record as a whole, I believe it is unlikely that Armstrong's offer was closer to the fair market value than was DSNP's. The Commission's finding on that score, however, is not my major problem with this item. What troubles me more is the flawed methodology used to resolve this case, particularly because it will set a precedent for resolving future disputes between RSNs and MVPDs.

My preference would have been for the Commission to remand this case back to the Bureau with simple instructions: (1) based on a comprehensive review of the record, estimate the fair market value of Armstrong's carriage of FSNP; and (2) calculate which party's offer was closest to that estimated fair market value. Had the Bureau then concluded that Armstrong's offer was closer to the fair market value, I would have reviewed that determination with an open mind. But at this point, the reasoning contained in this item and in the Bureau's decision below does not support a finding that Armstrong's price was right. Therefore, I must respectfully dissent.

[32] Given that the Bureau is tasked with reviewing the arbitrator's award *de novo* and the Commission is not obliged to defer to the Bureau, I am perplexed by the Commission's claim that my analysis is not "relevant" because we are no longer at the "*de novo* review stage." *See Order* at note 117. My analysis is based solely on evidence that was contained in the record compiled by the arbitrator and that was in front of the Bureau. And once DSNP squarely placed in front of the Commission the question of which party's proposed rates were closer to fair market value, we have every right, and indeed the obligation, to evaluate and analyze the evidence in the record to resolve that question. Indeed, it is the Commission's and the Bureau's analyses that are not "relevant" here because they do not apply the governing standard set forth in the *Liberty Media Order*. And that basic methodological flaw with the Commission's decision, which is detailed in Section I above, provides more than sufficient justification, by itself, to vacate the decision below and remand the case to the Bureau with the instructions set forth *infra*.

[33] *Order* at para. 1.

[34] *See Order on Review*, 26 FCC Rcd at 12611, para. 55.

STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY
CONCURRING IN PART, DISSENTING IN PART

Re: *DIRECTV Sports Net Pittsburgh, LLC, Petitioner v. Armstrong Utilities, Inc., Respondent*, File No. CSR08480-P.

In this item, the Commission is faced with the task of reviewing the implementation of a complex merger condition. At issue is a dispute resolution condition originally imposed in 2003, when News Corporation acquired effective control over DIRECTV's parent company, Hughes Electronics Corporation. The condition required arbitration if negotiations between a DIRECTV-owned regional sports network and a multichannel video programming distributor (MVPD) failed to produce mutually agreed upon prices and terms. Liberty Media Corporation agreed to extend this condition for six years when it acquired effective control of DIRECTV from News Corporation in 2008, and the condition continued to apply after Liberty Media spun off DIRECTV in 2009.

As required by this condition, a commercial arbitrator, agreed to by both DIRECTV and Armstrong Utilities, Inc., had to decide which entity's offer most closely represented fair market value for the programming carriage rights of DIRECTV Sports Net Pittsburgh (now marketed as Root Sports Pittsburgh). The arbitrator, using so-called "baseball-style" or final offer arbitration, selected Armstrong's proposal. In an *Order on Review*, the Media Bureau affirmed the arbitrator's decision. In the *Application for Review* before us, DIRECTV Sports Net Pittsburgh asks the Commission to review just two of the twelve separate provisions of the parties' offers: the rates and the renewal rate increase.

I was not at the Commission when this dispute resolution condition was adopted, and I may not have supported it had I been. Generally, I have serious reservations about the Commission setting "fair" rates for video programming. Therefore, I am concerned that the Commission established an arbitration mechanism that requires the Commission to resolve a dispute by selecting the offer that is closest to fair market value. I believe that marketplace negotiations—or some other private sector arrangement agreed to by the negotiating entities—is the superior mechanism for determining fair market value for such content.

In his dissent, Commissioner Pai makes a compelling case that the Commission did not properly effectuate its role under this condition. Specifically, he outlines that the Commission has the obligation to independently estimate the fair market value of the programming carriage rights at issue to determine which offer was closest to that number, and that was not sufficiently done in this instance. I associate myself with his concerns over the Commission's methodology, and I dissent on this aspect of the item.

In the end, I am willing to let the Media Bureau's decision stand for the following reasons. First, DIRECTV failed to challenge the other portions of the arbitrator's decision and did not, as far as I am aware, provide an explanation as to why the two provisions it challenged would ultimately tip the scales in their favor. Second, Liberty Media Corporation agreed to this process, however flawed, as part of its DIRECTV purchase. And finally, DIRECTV knew of this condition when it was spun-off. Whether agreeing to this condition ultimately was a wise decision, is something for the company's leadership to evaluate in hindsight.

The item maintains that even if DIRECTV Sports Net Pittsburgh had convinced the Commission to reverse the Media Bureau's decision on the two challenged portions, it still would not outweigh the unchallenged portions of the arbitrator's decision. If that is accurate, and it appears to be based on the Bureau's determination notwithstanding the questionable approach, then this should conclude the case. As such, I will concur with the overall decision of the Bureau and hope the Commission does not find itself in similar circumstances in the future.