

**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

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.

consideration of evidence for the express purpose of “determin[ing] fair market value.”⁷

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 DSNP’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

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

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*).

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 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

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.

is for each party to make an offer that is more favorable to its interests than the fair market value.¹⁹ The 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

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-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 Analysis²³**

[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 Analysis²⁶**

[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

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 $y = a \cdot \ln(x) + b$, 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

And if we take the rates Armstrong was paying at the end of its expired contract 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 Year³¹**

[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

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).

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].

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 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

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.

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.