

**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.