

**ATTACHMENT B**

**DECLARATION OF ROBERT GESSNER**

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

In the Matter of	)	
	)	
Applications of Comcast Corporation,	)	
General Electric Company, and NBC	)	MB Docket No. 10-56
Universal, Inc. to Assign and Transfer	)	
Control of FCC Licenses	)	

**DECLARATION OF ROBERT GESSNER**

1. My name is Robert Gessner. I am President of Massillon Cable TV, Inc. (“Massillon”). My business address is 814 Cable Court NW, Massillon, OH 44647.

2. Massillon is a family-owned and operated telecommunications provider delivering advanced video, data, and voice services to more than 45,000 homes in Stark and Wayne Counties in Ohio.

3. As a cable television service provider, Massillon must contract with broadcast and cable programming providers to obtain the programming its subscribers desire.

4. In 2005, Massillon had an agreement with Fox Cable Networks, Inc. (“Fox”) to carry Fox Sports Net Ohio (“FSNO”).<sup>1</sup> The vast bulk of the “marquee” live sporting events carried on FSNO – more than two-thirds (2/3) of the professional sports content -- was Cleveland Indians baseball games. On December 26, 2005, the Cleveland Indians announced that it was creating its own regional sports network, SportsTime Ohio, and moving all of its games from FSNO.

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<sup>1</sup> Fox and FSNO refer to the same entity throughout this declaration.

5. The loss of the Cleveland Indians baseball games caused a significant reduction in the value of FSNO programming, so Massillon contacted Fox to seek a rate reduction for carriage of FSNO. In effect, Massillon viewed the loss of the Indians' games as a constructive rate increase, effectively changing the balance of equities in the carriage agreement, since FSNO's carriage fees remained constant at the same time that the value of the network's content markedly decreased. Fox refused. Over the next ten months, Massillon continued to seek a negotiated solution with Fox but to no avail.

6. With the carriage negotiations with Fox at a standstill, Massillon examined whether it should seek relief pursuant to the commercial arbitration process established by the Federal Communications Commission's ("FCC") in its 2004 News Corp.-Hughes Order. From Massillon's perspective, the process set forth in this order was intended to be relatively straightforward and to have the potential to be expeditious and low-cost. However, as described below, the process turned out to be significantly more unwieldy and costly than expected.

7. On September 27, 2006, Massillon requested the dispute be resolved by commercial arbitration. Fox refused to recognize the legitimacy of the arbitration process and instead filed procedural motions contesting Massillon's right to invoke arbitration pursuant to the FCC's order. The following paragraphs describe the tortured path of the proceeding and the resources Massillon had to expend to obtain relief.

8. From the outset, Fox tried to drag out the process through procedural tactics. Eventually, Fox refused to cooperate or participate in the arbitration. For example, Fox agreed to a Joint Stipulation of Facts on February 5, 2007, but it simultaneously filed a motion to dismiss the case. Defending against this motion required Massillon to research and fully brief its opposition to this motion and to prepare and participate in a lengthy oral hearing on the matter.

9. In April 2007, the arbitrator denied Fox's motion to dismiss, and Fox immediately sought a stay of her decision from both the arbitrator and the Commission. Massillon again had to oppose these further attempts by Fox to derail the arbitration. To further increase the delay and cost, Fox wrote numerous letters to the arbitrator to which Massillon had to respond. In further gamesmanship, Fox then withdrew its FCC stay request without any explanation. The arbitrator denied Fox's request for a stay.

10. With the matter of whether Massillon had properly invoked the arbitration remedy squarely resolved in Massillon's favor, the arbitrator ordered the parties to submit their final offers in June 2007. Massillon timely produced its offer. In addition, to accommodate Fox's purported concerns, Massillon agreed that by participating in the arbitration Fox would not forfeit or compromise any of its rights to challenge the legitimacy of the proceedings. Even so, while all of the rights it purported to defend would have been fully preserved, Fox refused to provide a final offer or participate in discovery. In the absence of Fox's offer, which would have enabled the arbitrator to choose which of the two final offers was more appropriate, as the arbitration procedure was designed to achieve, Massillon had no choice but to commission its expert witness to engage in significant additional work to estimate FSNO's costs and demonstrate that Massillon's offer was reasonable on that basis, all without supporting justification or discovery opportunity. This resulted in substantially increased costs for Massillon. Moreover, due to Fox's unwillingness to participate in the process, even at no risk to its ability to pursue further its claim that the dispute was not properly before the arbitrator, Massillon was burdened with paying the entire cost of the arbitration proceedings, rather than sharing that expense with Fox.

11. In preparation for the arbitration hearing in support of its final offer, Massillon worked with its expert witness to quantify the reduction in the fair market value to carry FSNO and to prove that its proposed value was not below the cost of producing the programming. Much of this extensive economic analysis and research regarding program costs would normally have been an obligation of Fox.

12. On August 9, 2007, the arbitration hearing began. Fox did not participate in the hearing. The hearing consisted of testimony by Massillon's expert witness who delivered a prepared statement and responded to questions from the arbitrator during the two-day proceeding.

13. On September 12, 2007, the arbitrator issued a final award in favor of Massillon. The award required Fox to pay Massillon for the overpayment in carriage fees from the time the Cleveland Indians games were longer carried plus interest on this amount. The award also required Fox to pay Massillon for attorneys' fees, the fees of its expert witness, and the fees it paid to the arbitrator.

14. On September 21, 2007, Fox filed with the FCC for de novo review. In response, Massillon had to again research and file an extensive opposition to Fox's contentions. Expenses related to the de novo review of this arbitration proceeding continue to be incurred. The FCC has yet to reach a decision on review.

15. When all costs of the arbitration are considered, Massillon spent approximately \$1,000,000 from the date of the arbitration request (October 2006) through the present day. This amount does not include the considerable out-of-pocket costs (including travel expenses) incurred by Massillon and substantial time and resources spent by Massillon management and employees to participate in the dispute and arbitration process.

16. Massillon continued to carry FSNO while the dispute was pending and after the arbitrator's decision. After the arbitrator's decision, Fox continued to invoice Massillon at the pre-arbitration carriage fee. In light of the arbitrator's decision in favor of Massillon, the company deducted the amount of the award from the amount due Fox for carriage of FSNO. Due to the size of the award, the agreement instituted by the arbitrator expired before the full amount of the award was exhausted. As a result, Massillon was forced to forfeit a portion of the arbitrator's award.

17. On January 1, 2010, Massillon and Fox entered into a new agreement to carry Fox Sports Net Ohio. As a result of these actions, Massillon has asked the FCC to dismiss the case and not undertake the de novo review. Massillon's request remains pending.

18. On its face, the arbitration process proposed in the News Corp.-Hughes Order looked straightforward and seemed to anticipate an efficient procedure and an expeditious decision, but, the reality was very different. Massillon's experience shows that a large, well-funded party in an arbitration proceeding can essentially raise any issue, force filings, and compel delay. All of these actions "stop the clock" and force parties in need of relief to expend resources, above and beyond the already significant cost of arbitration on the fair market value of the programming. The "no jurisdiction" argument pursued by Fox and the resources and time taken to deal with it provides just one example. When all of Fox's procedural tactics ultimately were rejected by the arbitrator (to whose determination of jurisdiction, it must be reemphasized, Fox had agreed to submit), Fox simply refused to appear or to submit the required materials. From Massillon's viewpoint, Fox was intent on employing any argument and using its "deep pockets" to make a small cable operator "cry uncle" by using the very process the FCC had created with the intent of preventing such behavior by the vertically integrated programmer.

19. Finally, even if Fox had chosen to offer no procedural arguments and simply argue about the fair market value of the programming, Massillon is convinced that the arbitration process would still have been very costly. Fox would almost certainly have employed an extensive and expensive discovery process to drag out the proceeding and add to Massillon's costs.

20. In the final analysis, the arbitration process was far different than my expectations. It was not a relatively straightforward process. It did not live up to its potential as an expeditious and low-cost dispute resolution mechanism. Rather, it proved that one party can frustrate the process to the point where it is not feasible for a smaller entity to remain engaged either for lack of financial resources or personal time. Large program entities may say Massillon has "learned its lesson" because it would not be inclined to commit to binding arbitration again.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Executed on August 6, 2010.

  
Robert Gessner