

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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In the Matter of:

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TCR SPORTS BROADCASTING	:	MB Docket No.
HOLDING, L.L.P., D/B/A	:	08-214
MID-ATLANTIC SPORTS	:	
NETWORK,	:	File No.
	:	CSR-8001-P

Complainant,

v.

COMCAST CORPORATION,

Defendant.

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Volume 23

Federal Communications Commission
445 12th Street, SW

Washington, D.C. 20554
Hearing Room TW-A363

Tuesday, May 26, 2009
9:30 a.m.

BEFORE:

RICHARD L. SIPPEL,

Chief Administrative Law Judge

APPEARANCES:

On Behalf of TCR Sports Broadcasting
Holding, L.L.P., d/b/a Mid-Atlantic Sports
Network:

DAVID C. FREDERICK, ESQ.
WAN J. KIM, ESQ.
KELLY P. DUNBAR, ESQ.
EVAN LEO, ESQ.
Of: Kellogg, Huber, Hansen, Todd,
Evans & Figel, P.L.L.C.
Sumner Square

1615 M Street, NW
Suite 400 Washington, DC 20036
(202) 326-7900
FAX (202) 326-7999

On Behalf of Comcast Corporation:

L. ANDREW TOLLIN, ESQ.
ROBERT G. KIRK, ESQ.
DAVID H. SOLOMON, ESQ.
WILLIAM R. LAYTON, ESQ.
Wilkinson Barker Knauer, LLP
2300 N Street, NW Suite 700
Washington, DC 20037
(202) 783-4141

FAX (202) 783-5851

Of: MEGAN ANNE STULL, ESQ.
Wilkie Farr & Gallagher, LLP
1875 K Street, NW
Washington, DC 20006-1238
(202) 303-1189

FAX (202) 303-2000

Of: ARTHUR J. BURKE, ESQ.
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
(212) 450-4000 FAX (212) 450-3800

On Behalf of the Federal Communications
Commission:

ELIZABETH YOCKUS MUMAW, ESQ.

DIANA SOKOLOW, ESQ.

Of: Federal Communications Commission

Enforcement Bureau

445 12th Street, SW

Washington, DC 20554

(202) 418-1795

FAX (202) 418-5916

T-A-B-L-E O-F C-O-N-T-E-N-T-S

WITNESS DIRECT CROSS REDIRECT RECROSS

Jonathan Orszag

By Mr. Burke 6991
By Mr. Kim 7081

Larry Gerbrandt

By Mr. Kirk 7258 7453
By Mr. Kim 7310

EXHIBIT

MARK RECD

MASN

356		7377
351	7388	7388
352	7372	7372
99A	7407	7407
353	7446	7446
354	7446	7446

1 P-R-O-C-E-E-D-I-N-G-S

2 9:40 a.m.

3 JUDGE SIPPEL: Let's go on the
4 record, sir, please. We are prepared to take
5 testimony today. The expert witness is on
6 behalf of Comcast and, Mr. Kim.

7 MR. KIM: Yes, sir.

8 JUDGE SIPPEL: You're here for a
9 purpose I take it.

10 MR. KIM: Yes, sir. I represent
11 MASN.

12 (Laughter.)

13 JUDGE SIPPEL: Certainly, you're
14 in the first chair for a reason.

15 MR. KIM: Yes, sir.

16 JUDGE SIPPEL: You're going to be
17 conducting the examination, the direct
18 examination, today.

19 MR. KIM: The cross examinations,
20 Your Honor.

21 JUDGE SIPPEL: I'm sorry. The
22 cross examinations.

1 MR. BURKE: I'll be doing the
2 direct, Your Honor.

3 JUDGE SIPPEL: Sorry. I got my --
4 Go ahead. Let's get started.

5 MR. BURKE: I call Jon Orszag
6 please.

7 JUDGE SIPPEL: I would ask you to
8 raise your right hand again, sir.

9 WHEREUPON,

10 JONATHAN ORSZAG
11 was called as a witness for the Comcast and,
12 having been first duly sworn, assumed the
13 witness stand, was examined and testified as
14 follows:

15 JUDGE SIPPEL: Thank you.

16 DIRECT EXAMINATION

17 BY MR. BURKE:

18 Q Good morning, Mr. Orszag. Just to
19 get things started, could you introduce
20 yourself to the Court and provide a brief
21 background on your professional experiences.

22 A Sure. Thank you. My name is

1 Jonathan Orszag. I'm a Senior Managing
 2 Director of Compass Lexicon, an economic
 3 consulting firm. I started my career, my
 4 professional career, in government. I served
 5 in the Office of the Chief Economist of the
 6 Department of Labor. I then served on
 7 President Clinton's National Economic Council
 8 and then I ran the Office of Policy and
 9 Strategic Planning at the Department of
 10 Commerce and in that role was deeply involved
 11 in telecommunication policy issues. Because
 12 as people may know, the Department of Commerce
 13 is representative of the Administration before
 14 the Commission.

15 When I left government, I started
 16 an economic consulting firm with my brother,
 17 Peter. I have been deeply involved in policy
 18 issues over the past eight years. I'm a
 19 senior fellow at a think-tank here in
 20 Washington, D.C. and I served on President
 21 Obama's pre-transition economic team. Very
 22 small group of us were involved.

1 I have been involved in
2 telecommunications policy issues in the last
3 eight years, both as a consultant and also as
4 a fellow at the University of Southern
5 California Center for Communication, Law and
6 Policy which was started by the former Chief
7 Economist at the FCC, Simon Wilkie and I've
8 been involved in sports economics issues over
9 the last eight years as well.

10 Q Thank you. And you've submitted
11 written direct testimony in this case, Mr.
12 Orszag.

13 A Yes, I did.

14 MR. BURKE: And if I may, Your
15 Honor, approach the witness. I would just
16 like to get this piece of evidence identified.

17 JUDGE SIPPEL: Please. This is
18 Comcast 4. Is this already in? Is this
19 already in evidence?

20 MR. BURKE: It is, Your Honor.

21 JUDGE SIPPEL: Excellent.

22 BY MR. BURKE:

1 Q Can you identify this document,
2 Comcast 4, Mr. Orszag?

3 A Sure. It is my direct testimony
4 in this case.

5 MR. BURKE: Again, this has
6 already been admitted, Your Honor.

7 JUDGE SIPPEL: Right. Thank you.

8 BY MR. BURKE:

9 Q So what were you asked to do in
10 this case, Mr. Orszag?

11 A I was asked to examine MASN's
12 complaint and in particular to assess whether
13 Comcast had discriminated based on affiliation
14 and whether Comcast had unreasonably
15 restrained MASN's ability to compete fairly.
16 I was also asked to critique the report of Dr.
17 Singer.

18 Q And can you give us a brief
19 overview of the conclusions you reached?

20 A Sure. I reached three primary
21 conclusions. The first was that Comcast from
22 an economic perspective had not discriminated

1 based on affiliation, that one could look at
 2 Comcast on actions and one could look at the
 3 actions of other MVPDs and from an economic
 4 perspective one could draw a conclusion that
 5 Comcast had not discriminated based on
 6 affiliation.

7 Second, that again from an
 8 economic perspective, Comcast had not
 9 unreasonably restrained MASN's ability to
 10 compete, that MASN is a very profitable entity
 11 and there's no question of whether it will
 12 survive and when one looks at the share of
 13 revenues at stake it's too small to affect
 14 their ability to compete.

15 And finally I critiqued Dr.
 16 Singer's fair market value analysis and I
 17 found that to be unreliable.

18 MR. BURKE: Thank you. Your
 19 Honor, I would like to turn now to go into a
 20 little more detail on each of those three
 21 conclusions. I believe it's going to involve
 22 highly confidential information of both MASN

1 and Comcast. I know that there is a MASN
2 representative in the courtroom.

3 JUDGE SIPPEL: Thank you very
4 much. Thank you.

5 BY MR. BURKE:

6 Q So, Mr. Orszag, let's turn to your
7 first conclusion which concerns whether
8 Comcast had discriminated against MASN based
9 upon affiliation. Can you again just
10 summarize your conclusion and summarize for us
11 what the bases for that conclusion are?

12 A Sure. In my direct testimony,
13 there is a much more detailed discussion of
14 these issues. First, I examined the behavior
15 of other MVPDs, MVPDs that are not very
16 clearly in agreement, and the majority of
17 MVPDs in the relevant areas here do not carry
18 MASN's programming. I also examined various
19 actions by Comcast.

20 Q So with respect to the conduct of
21 other MVPDs, what did you find with respect to
22 that?

1 A Sure. In all three areas,
 2 DirectTV and Dish which are satellite
 3 providers, carry the MASN programming. If we
 4 then turn to Harrisburg and this is again the
 5 Region 4 part of Harrisburg. It's important
 6 not to look at the whole Harrisburg DMA, but
 7 rather just the area at question here which is
 8 the far end of the Harrisburg DMA which is
 9 Region 4. One observes that Verizon carries
 10 it. Comcast actually carries it in parts of
 11 the Region 4 of Harrisburg and an entity
 12 called Kuhn. Every other cable MVPD, eight
 13 other cable MVPDS, in Harrisburg Region 4 do
 14 not carry MASN's programming.

15 That's relevant because they are
 16 not vertically integrated. So their incentive
 17 isn't to not carry it because of some
 18 vertically integrated sub-programming arm.
 19 They don't carry it because they have decided
 20 that either because of price or cost reasons
 21 or viewer interest reasons it's not worth it.

22 Q Mr. Orszag, could you turn to

1 paragraph 34 of your expert report?

2 A Sure.

3 Q Page 17.

4 A It's my direct testimony just so
5 we're clear there.

6 Q Right.

7 JUDGE SIPPEL: Thank you.

8 BY MR. BURKE:

9 Q And you've got a table, Table 1,
10 on that page.

11 A Yes, I do.

12 Q Is that what you were just
13 referring to?

14 A Yes, it was.

15 Q So there are three areas that are
16 contested here. There is the Harrisburg area.
17 There is the Roanoke-Lynchburg and the Tri-
18 Cities area. You've spoken to us about the
19 Harrisburg area. What did you find with
20 respect to the other two contested areas?

21 A Sure. It's a very similar
22 pattern. Again, as I noted, DirectTV and Dish

1 carry the programming in Roanoke and Tri-
2 Cities.

3 In the Roanoke area, Cox carries
4 MASN and an entity called nTelos, but no other
5 MVPD in the Roanoke area, that's 11 other
6 MVPDS, carry the MASN programming. They all
7 have decided that it is not worth it to carry.

8 In the Tri-Cities area, other than
9 DirectTV and Dish there is not a single MVPD
10 that carries the MASN programming. Not a
11 single one.

12 Q Now do you consider though the
13 conduct of the satellite providers in your
14 analysis here?

15 A Yes, I do.

16 Q And why don't you weight the
17 satellite providers' decisions by the number
18 of subscribers that they have as Dr. Singer
19 did?

20 A Because if we did, then whatever
21 the -- because of the nature of these local
22 markets, DirectTV and Dish will almost always

1 be the second and third biggest providers
 2 other than becoming a cable company. The
 3 decisions of the DBS providers would govern.
 4 They are such a big share of the non say
 5 Comcast subscribers that they will drive the
 6 decision. You will have no ability for a
 7 vertically integrated cable company to have
 8 any product differentiation with regard to the
 9 satellite providers. That's number one.

10 Number two is that the technology
 11 is different. When a satellite provider
 12 decides to carry the programming, it is up on
 13 their satellite and it is like a spot beam
 14 going across this entire room and they can't
 15 shut that off. So there is no additional
 16 opportunity cost of carriage for them in terms
 17 of providing the programming to the outer
 18 regions of the area.

19 And that affects their decision.
 20 Their economics are different. They also face
 21 different competitive pressures. And as we
 22 know from the testimony from the MASN

1 representatives from last week, DirectTV in
 2 particular was not interested in carrying the
 3 programming from the outer regions, but it was
 4 part of the negotiation, part of the
 5 settlement, part of the agreement that they
 6 decided to do so.

7 Q So in your review of the evidence
 8 in this case, did you reach any conclusions as
 9 to why the MVPDs who are not carrying MASN
 10 have made that decision?

11 A Well, I haven't had personal
 12 conversations with each of these MVPDs, but
 13 they have made various public statements and
 14 also in MASN's documents there is a variety of
 15 explanations that they give and they all
 16 revolve around three reasons.

17 The first is viewer interest. A
 18 number of MVPDs note that there's just not
 19 viewer interest in the areas that they serve
 20 for the MASN programming. That's number one.
 21 Number two a number note that it's a very high
 22 price given the viewer interest. And, third,

1 a number note that there are opportunity costs
 2 of carriage. [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED] So it's one of those three

7 reasons that appears in the documents that

8 I've observed in the public statements or some

9 combination of those three that underlie the

10 reason why these MVPDs do not carry the MASN

11 programming.

12 Q We've heard these other MVPDs

13 referred to sometimes as "Mom and Pop MVPDs."

14 Is it your view that these are all Mom and Pop

15 MVPDs?

16 A I don't know if I would term a

17 Suddenlink as a Mom and Pop MVPD. It's one of

18 the largest MVPDs in the entire country and

19 it's hard because in Dr. Singer's report, he

20 cites other "significant MVPDs" and lists

21 nTelos and Kuhn. Not nTelos has seven

22 subscribers. Kuhn has about [REDACTED].

1 So we have to have a consistent definition
2 here.

3 I think it's appropriate -- In the
4 NFL case, I looked at the top ten MVPDs in the
5 national market. I think it would be
6 appropriate in each of these markets to
7 consider something like the top ten to examine
8 and each case a majority of the top ten are
9 not carrying MASN's programming.

10 Q Turning aside now from the conduct
11 of other MVPDs, the decisions, the carriage
12 decisions, of other MVPDs, are there any other
13 factors that had influenced your decision or
14 your analysis with respect to the
15 nondiscrimination or the discrimination
16 conclusion?

17 A Well, yes. It's Comcast on
18 conduct. If you look at the MASN footprint,
19 Comcast actually carries MASN to more
20 subscribers than it carries its own Comcast
21 Sports Net Mid-Atlantic. Within MASN's
22 footprint, there are more Comcast subscribers

1 receiving MASN than receiving Comcast's own
2 Comcast Sports Net Mid-Atlantic. So the
3 coverage gaps that we heard about within the
4 MASN footprint are equally, actually more
5 applicable to Comcast's own Comcast Sports Net
6 Mid-Atlantic.

7 But there is also a variety of
8 other conduct by Comcast.

9 MR. BURKE: Actually, we'll come
10 up to that. But just to keep the record
11 clear, if I may approach the witness, Your
12 Honor.

13 JUDGE SIPPEL: Please do. Thank
14 you.

15 MR. BURKE: This is an exhibit
16 marked MASN-70 which has been previously
17 admitted. Was it moved into evidence?

18 MR. KIM: It was. Thank you.

19 MR. BURKE: So it's been
20 previously admitted, Your Honor.

21 BY MR. BURKE:

22 Q Can you identify this document for

1 us, Mr. Orszag?

2 A Sure. It's the number of Comcast
 3 subscribers that offer MASN or that receive
 4 MASN, Comcast Sports Net Philadelphia and
 5 Comcast Sports Net Mid-Atlantic by system for
 6 July of 2008. This was actually an attachment
 7 to my expert report and it is now an exhibit
 8 for MASN.

9 Q And could you just -- I think you
 10 just said in your testimony that MASN is
 11 delivered to more Comcast subscribers than
 12 Comcast Sports Net Mid-Atlantic. Can you just
 13 point to where that's demonstrated in this
 14 document?

15 A Sure. It's actually on the final
 16 page, page five, and if one looks at the left
 17 most column with the number, [REDACTED]
 18 number relates to the number of Comcast
 19 subscribers receiving MASN and if you look at
 20 the right most column, the one that says
 21 [REDACTED], that is the number of Comcast
 22 subscribers receiving Comcast Sports Net Mid-

1 Atlantic.

2 Q And why do you think that's
3 significant?

4 A Well, we heard a lot about
5 coverage gaps and we heard a lot about whether
6 in terms of acquiring programming and
7 acquiring advertising the inability or the
8 difficulty MASN had because it lacks
9 subscribers. Well, Comcast Sports Net Mid-
10 Atlantic lacks those same number of
11 subscribers. They have holes in their
12 coverage as well.

13 Q So I interrupted you, Mr. Orszag.
14 You were going to offer some other
15 observations.

16 A Yes. If you look at the decision
17 of Comcast in Harrisburg when it had, when
18 Comcast Sports Net Mid-Atlantic had, the
19 Orioles, the Comcast carried Comcast Sports
20 Net Mid-Atlantic on a sports tier. It did not
21 carry it on expanded basic which is what MASN
22 has required. That's number one.

1 Number two, when Comcast Sports
 2 Net Mid-Atlantic, its own programming, wanted
 3 to get expanded basic coverage Comcast as a
 4 cable company said, "No, your programming's
 5 not worth the cost and we are not going to
 6 carry you."

7 And so this is significant because
 8 it reveals the value of the programming in the
 9 part of the Harrisburg DMA at issue in this
 10 case. And it shows that from the perspective
 11 of Comcast as a cable company that it was a
 12 profitably decision not to carry it.

13 Q Are there any other factors that
 14 went into your decision or your analysis with
 15 respect to the first prong of your
 16 discrimination?

17 A Yes. If you look at -- Again, we
 18 heard all these stories about how Comcast had
 19 the interest to harm MASN. But yet Comcast
 20 has taken a significant number of steps to
 21 help MASN. They launched areas in Franklin
 22 County and Madison County, Virginia where they

1 were not required to do so per the contract.
 2 They decided in those areas that the viewer
 3 interest justified the cost of carriage. If
 4 they were interested in just harming MASN, why
 5 would they do that? That's number one.

6 Number two, they launched a number
 7 of areas early. They decided that it was
 8 worth launching the MASN programming prior
 9 when they were required by contract. If they
 10 were interested in just harming MASN, why
 11 would they do that? And, for example, in
 12 York, Pennsylvania when they acquired a system
 13 they launched MASN's programming well before
 14 they launched their own programming in that
 15 area.

16 Q And what's the significance of
 17 those actions?

18 A Again, it goes to the heart of the
 19 question of is the story that all they're
 20 interested in doing is harming MASN. Is it
 21 true? But they've taken all these steps to
 22 help MASN. So it's entirely inconsistent with

1 the theory of the case put forward by MASN.

2 Q As part of your analysis, Mr.
3 Orszag, did you look at whether MASN competes
4 with Comcast Sports Net Philadelphia?

5 A Yes, I did.

6 Q And what conclusions did you
7 reach?

8 A I have not seen any evidence
9 whatsoever that Comcast Sports Net
10 Philadelphia and MASN have competed for
11 programming content, have competed for
12 advertisers, or competed for viewers. In
13 fact, in previous testimony from the expert
14 from MASN, he suggested that people in
15 Harrisburg DMA were more likely to be Philly
16 fans than they were to be Nationals fans.

17 Q Based upon that, would you say
18 that MASN and Comcast Sports Net Philadelphia
19 are similarly situated?

20 A Similarly situated is not an
21 economic term. From an economic perspective,
22 we think about competition. So I'll leave it

1 to the lawyers to draw a conclusion about
2 whether it's similarly situated. All I can
3 assess is whether they compete and there's no
4 evidence that they have competed.

5 Q Now how about with respect to
6 Comcast Sports Net Mid-Atlantic? Did you
7 analyze whether that competes with MASN?

8 A Again, you have to think about the
9 different products and there is evidence that
10 they have competed for programming content.
11 I have not seen any evidence that they've
12 competed for advertisers or for viewers.

13 Q So I think I'd like to now turn to
14 the second element of your testimony, Mr.
15 Orszag, which is the question of whether
16 Comcast's conduct has unreasonably restrained
17 MASN's ability to compete. Have you reached
18 any conclusions on that issue?

19 A Yes, I have.

20 Q And could you just summarize them
21 for us briefly?

22 A There is no reliable evidence that