

TRANSCRIPT

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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 19

Federal Communications Commission
445 12th Street, SW

Washington, D.C. 20554

Hearing Room TW-A363



Monday, May 18, 2009
10:00 a.m.

BEFORE:

RICHARD L. SIPPEL,
Chief Administrative Law Judge

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

2 10:06 A.M.

3 JUDGE SIPPEL: We're going to
4 proceed this morning with document admission
5 and I'm -- as you can see, as you can have
6 seen from my order of May 14th, I'm hoping
7 that we can perhaps get that completed in
8 enough time to have a witness today.

9 I am asking Mr. Frederick, is that
10 doable?

11 MR. FREDERICK: Your Honor, we
12 think it's not only doable, but we're
13 expecting that if we have a very short
14 document session, we spent a lot of time with
15 the Comcast lawyers, we think virtually all of
16 the issues are resolved. There are a few that
17 are still to be worked out. And that we are
18 hoping that we might have brief opening
19 arguments and start putting on witnesses. And
20 we may get to more than one witness today.

21 JUDGE SIPPEL: I don't want to say
22 overkill, but --

1 (Laughter.)

2 -- that would be very much
3 appreciated.

4 My schedule is -- I'd like to stop
5 this afternoon no later than 5:30 if that's
6 okay with everybody.

7 MR. FREDERICK: Sure, yes.

8 JUDGE SIPPEL: But other than
9 that. And I think what we should do is go
10 until 1 o'clock. Break until 2:30, would that
11 be right? Or we can go to 1:30, if we can get
12 all the documents in if it takes that time.

13 I do want to give you plenty of
14 time, enough time, substantial time for lunch,
15 for a lunch break.

16 Does anybody have any --

17 MR. KIM: Your Honor, if I might.
18 My name is Wan Kim.

19 JUDGE SIPPEL: Yes, sir. Good
20 morning.

21 MR. KIM: Would you prefer that I
22 stand, Your Honor.

1 JUDGE SIPPEL: That's all right.
2 We're using the seated position. It saves
3 time, but thank you very much, sir.

4 MR. KIM: If I stand up, it's an
5 emphatic, Your Honor.

6 JUDGE SIPPEL: Well --

7 MR. KIM: We've worked very hard
8 with counsel for Comcast to resolve virtually
9 all of the objections. I'm hopeful we can get
10 through this in 15 minutes.

11 And Your Honor, don't hold me to
12 it, but I'm hopeful. With regard to all of
13 Comcast exhibits, MASN believes that we've
14 resolved those objections and we'll put that
15 on the record when we need to put it on the
16 record, but we don't think we have any
17 problems with the Comcast exhibits that are
18 being offered. I just note for the record,
19 this is an expedited proceeding. We believe
20 that other documents are admissible for some
21 legitimate purpose. We're just going to
22 reserve the right later on if we need to, to

1 object to a specific use that we think may be
2 inappropriate to a specific document.

3 JUDGE SIPPEL: That's music to my
4 ears. I'll say no more.

5 MR. KIM: I'll keep going, Your
6 Honor, and try to play more music.

7 JUDGE SIPPEL: Well, before I do
8 that, let me take appearances on the record
9 today.

10 MR. KIM: Sure.

11 JUDGE SIPPEL: Starting with Mr.
12 Frederick.

13 MR. FREDERICK: Yes. David
14 Frederick from Kellogg, Huber for Mid-Atlantic
15 Sports Network, TCR Sports Broadcasting
16 Holding.

17 JUDGE SIPPEL: Thank you.

18 MR. KIM: Your Honor, Wan Kim for
19 Mid-Atlantic Sports Network.

20 JUDGE SIPPEL: Okay. And?

21 MR. DUNBAR: Kelly Dunbar from
22 Mid-Atlantic Sports Network.

1 JUDGE SIPPEL: Yes.

2 MR. LEO: Evan Leo for Mid-
3 Atlantic Sports Network.

4 JUDGE SIPPEL: Okay.

5 MR. SINGER: Hal Singer for Mid-
6 Atlantic Sports Network.

7 JUDGE SIPPEL: Mr. Singer, you
8 look familiar.

9 MR. SINGER: As do you.

10 JUDGE SIPPEL: All right. Was
11 that a test?

12 Okay, and on behalf of Comcast?

13 MR. TOLLIN: Andy Tollin,
14 Wilkinson Barker Knauer.

15 JUDGE SIPPEL: Good morning, Mr.
16 Tollin.

17 MR. GILMORE: Craig Gilmore,
18 Comcast, Wilkinson Barker Knauer.

19 JUDGE SIPPEL: Okay.

20 MR. SOLOMON: David Solomon,
21 Comcast.

22 MR. KIRK: Bob Kirk, Wilkinson

1 Barker, Comcast.

2 JUDGE SIPPEL: Okay.

3 MR. LAYTON: Billy Layton,
4 Wilkinson Barker, Comcast.

5 JUDGE SIPPEL: Okay. All right.

6 And will Mr. Carroll be joining us later?

7 MR. SOLOMON: No, Mr. Carroll
8 won't be here.

9 (Laughter.)

10 JUDGE SIPPEL: I was going to say,
11 I was sort of disappointed, I thought I was
12 going to have some proposed findings to read
13 this weekend and they weren't there. So I had
14 to go back to War and Peace.

15 (Laughter.)

16 There you go.

17 On behalf of the Bureau?

18 MR. SCHONMAN: Good morning, Your
19 Honor. Gary Schonman and Elizabeth Mumaw on
20 behalf of the Chief Enforcement Bureau.

21 JUDGE SIPPEL: Fine. Good morning
22 to you both.

1 All right, then, Mr. Kim, you may
2 proceed, sir.

3 MR. KIM: Thank you, Your Honor.
4 I think I'll just put on the record that we've
5 resolved all of MASN's objections or issues
6 with Comcast exhibits and why we basically
7 have been able to work those all out.

8 I would also commend Comcast.
9 They have been extremely collegial during the
10 course of this litigation and especially so
11 with regard to these exhibit issues. I just
12 want to make clear that we've worked hard in
13 a spirit of cooperation to get this done.

14 With respect to the Comcast
15 objections to MASN exhibits, Your Honor, I
16 believe that we're able to resolve almost all
17 of those. Let me tell you where we are.

18 They have objected to the
19 pleadings and the orders that we have put in
20 the case. And we put them in the case out of
21 an abundance of caution. We weren't sure,
22 exactly, what would be included for the record

1 for this hearing or not.

2 We are satisfied that if the Court
3 would agree to take judicial notice of those
4 documents, the Adelphia Order, the complaint,
5 all those pleadings, we'll withdraw those.
6 And I know that that's something that Comcast
7 would prefer us to do and we'll be happy to do
8 that.

9 JUDGE SIPPEL: That's fine.

10 MR. KIM: Okay.

11 JUDGE SIPPEL: That's fine.

12 You're absolutely right. They certainly can
13 be judicially noticed and they can be cited
14 for whatever purpose you see fit.

15 MR. KIM: Very good. Thank you,
16 Your Honor.

17 JUDGE SIPPEL: I must caution you,
18 however. I am not going to be -- I'm not
19 inclined to go along with the -- an earlier
20 argument in this case that the findings in the
21 hearing designation order that I'm bound by
22 those.

1 MR. KIM: Understood, Your Honor.
2 As long as we can appropriately cite to them
3 and argue the persuasive value that we believe
4 them to have before this Court, that's all
5 we're asking to do.

6 JUDGE SIPPEL: Absolutely.

7 MR. KIM: And with that thought,
8 Your Honor, we're also willing to withdraw
9 Exhibits 7 through 12 and 15 through 18 which
10 are also attached to the carriage complaint.
11 They objected to those, and we'll withdraw
12 those on the same grounds.

13 JUDGE SIPPEL: Those are exhibits
14 to the carriage -- were they called exhibits
15 to the carriage complaint?

16 MR. KIM: Yes, sir.

17 JUDGE SIPPEL: Okay, I understand.

18 MR. KIM: And then with respect to
19 the deposition transcripts, those are 72 to
20 79, we'll withdraw those.

21 JUDGE SIPPEL: Pages 72 --

22 MR. KIM: No, sir. They're our

1 exhibit numbers.

2 JUDGE SIPPEL: I'm sorry.

3 MR. KIM: 72 to 79. We withdraw
4 those.

5 JUDGE SIPPEL: Exhibit 72 to 79
6 are withdrawn.

7 (Whereupon, the above-referred to
8 documents were withdrawn.)

9 MR. KIM: With respect to MASN
10 124, that was a document that they objected
11 to. Again, we'll withdraw that one.

12 JUDGE SIPPEL: 124 is withdrawn.

13 (Whereupon, the above-referred to
14 document was withdrawn.)

15 MR. KIM: And just for the record,
16 Your Honor, I think I mentioned the pleadings
17 and orders, those are our exhibit numbers 218,
18 to 227, just so the record is clear.

19 JUDGE SIPPEL: Exhibits 218 to
20 227.

21 MR. KIM: Yes, sir. That was the
22 first category of pleadings and orders.

1 JUDGE SIPPEL: I hear you. Those
2 are pleadings and orders that are withdrawn.

3 (Whereupon, the above-referred to
4 documents were withdrawn.)

5 MR. KIM: Yes, sir. By a judicial
6 notice issue.

7 That leaves us with only nine
8 documents for which we'd ask this Court to
9 make a ruling. And so we've been able to pare
10 it down quite a bit.

11 And those are Exhibit Numbers 13
12 to 15, 25 to 28, 30, 62 and 114.

13 Did you get that, Your Honor?

14 JUDGE SIPPEL: I did; 13 to 15, 25
15 to 28, 30, 62 and 114.

16 MR. KIM: Yes, sir.

17 JUDGE SIPPEL: Those are MASN
18 exhibits?

19 MR. KIM: Correct. And let me
20 just tell you where we are on that. Those are
21 newspaper articles or website printouts. I
22 think one of them is actually an email

1 forwarding a newspaper article. But the
2 objection really has to do with the fact that
3 these are newspaper articles or printouts of
4 websites. Okay?

5 JUDGE SIPPEL: Let's take them one
6 at a time.

7 MR. KIM: Sure.

8 JUDGE SIPPEL: Which ones are the
9 newspaper articles?

10 MR. KIM: We can go through them
11 one by one, Your Honor.

12 JUDGE SIPPEL: Are they grouped
13 somewhat like that? I mean are the newspaper
14 articles one of these three groupings?

15 MR. KIM: No, sir. They're
16 interspersed, but we can go through them one
17 by one, but there are two general categories.

18 JUDGE SIPPEL: So newspaper
19 articles and what is the other category?

20 MR. KIM: Printouts of websites,
21 like websites of the --

22 JUDGE SIPPEL: Printouts of

1 websites.

2 MR. KIM: Like Harrisburg Senators
3 is a Minor League Baseball team. It's a
4 printout of their home page.

5 JUDGE SIPPEL: Oh, I see. I
6 understand what that is.

7 And those would be the only two
8 categories or is there another category?

9 MR. KIM: That's it. One of them
10 is an email. I think the objection is it's
11 forwarding a newspaper article.

12 MR. TOLLIN: It's all newspaper
13 and website material. This is material that
14 in the other case, in the Wealth case, I
15 believe you said that I don't pay any
16 attention to newspaper articles. They're
17 hearsay upon hearsay upon hearsay. And they
18 are rejected for the reasons of hearsay,
19 reliability, etcetera.

20 JUDGE SIPPEL: There's been a lot
21 of passage of time since that ruling.

22 (Laughter.)

1 MR. KIM: Your Honor, I would just
 2 ask the Court to adopt them under the same
 3 circumstances that Comcast asked them to be
 4 adopted in the NFL case, which is you take
 5 them for what they're worth. Everyone can
 6 raise objections to how you can use them, but
 7 this is an expedited proceeding. We're moving
 8 very fast.

9 They go to certain issues.
 10 They're newspaper articles. We're not going
 11 to argue too much out of them, but we do think
 12 that they're appropriately in the record.
 13 This is the kind of stuff the FCC cites in its
 14 decisions and we think that whatever way Your
 15 Honor chooses to make of those, we should make
 16 those arguments.

17 MR. TOLLIN: Why can't you
 18 stipulate that you're not going to offer them
 19 for the truth?

20 MR. KIM: Well, the truth of the
 21 matter is, we want exactly what you asked for
 22 and got in the NFL case which is the ability

1 to argue whatever purpose they might be used
 2 for, page 375 and 376 of that transcript.

3 MR. TOLLIN: I made no argument.

4 JUDGE SIPPEL: Probably the other
 5 side. It's probably the NFL counsel.

6 MR. KIM: No, sir. It was
 7 Comcast.

8 Comcast issued about 40 newspaper articles.
 9 Again, I wasn't there. I read the transcript.
 10 It was Mr. Schmidt who asked that they be
 11 excluded. It was Mr. Carroll who asked that
 12 they be included and Your Honor ruled on page
 13 375, "yes, well, I think by and large, if
 14 we're going to bring any in, I'm inclined to
 15 let them in for what they're worth, only
 16 because, believe me, I would normally exclude
 17 newspaper articles because of a variety of
 18 reasons. But since this is an expedited case,
 19 and this seems to be one of those things that
 20 is changing day by day", blah, blah, blah.

21 So you admitted them for what
 22 they're worth and nothing more than that. And

1 that's what Comcast asks you to do and for
2 nine articles out of all the ones we've been
3 able to go through, that's what we're asking
4 you to do here.

5 MR. TOLLIN: What does that mean,
6 what they're worth?

7 JUDGE SIPPEL: You should be
8 asking me that question.

9 (Laughter.)

10 It's exactly for what it says, for
11 what they're worth. They may be worth
12 absolutely nothing. It's hearsay. I mean
13 they are hearsay. They are hearsay and they
14 certainly are not entitled to the credibility
15 as ordinarily admissible evidence that is
16 reliable evidence. They're hearsay and
17 they're not per se reliable.

18 Now they sometimes are helpful in
19 terms of focusing on the event or for cross
20 examination of a witness who is quoted in the
21 newspaper article. But again, I got back to
22 what I said in the NFL case. Look, we're

1 trying to move the case along. I don't want
2 to get hung up on arguing item by item by item
3 objections to something as a generality. I'm
4 not going to make findings. I do not expect
5 to make any findings.

6 And I mean that in a very strong
7 way. I'm not trying to hedge that at all. I
8 couldn't make a finding on a newspaper
9 article. I couldn't. Except for the finding
10 of the fact that it appears in the newspaper.

11 That's all I can do.

12 MR. TOLLIN: We will withdraw our
13 objection on that representation.

14 JUDGE SIPPEL: All right.

15 MR. KIM: Then, Your Honor, I
16 think we're frankly done. I mean that --

17 JUDGE SIPPEL: Thank you. Thank
18 you for that, Mr. Tollin.

19 MR. TOLLIN: I think except for
20 Exhibit 215 --

21 MR. KIM: I sent you an email
22 yesterday about that. And I stand by that

1 email. If you want me to put it on the
2 record, I will.

3 MR. TOLLIN: Yes, would you?

4 MR. KIM: Sure. 215 was an email.
5 I think there was a hearsay objection to the
6 email. We are not offering it for a hearsay
7 purpose.

8 MR. TOLLIN: Not offering it for?

9 MR. KIM: A hearsay purpose.
10 We're offering it for another purpose, not for
11 the fact that it was made? I'm sorry, not for
12 the truth of the matter asserted. Correct.

13 JUDGE SIPPPEL: Okay. That's an
14 email and it will not be used for truth.

15 MR. KIM: Correct.

16 MR. TOLLIN: And then I think just
17 number 1, you were going to make some
18 representations about Mr. Wyche?

19 MR. KIM: Sure. Again, we had
20 conversations about this. My conversations
21 stand. I think I wrote you about this in an
22 email. That was a document that was prepared

1 by the direction of Mr. Wyche.

2 MR. TOLLIN: Okay, we have no
3 objections.

4 JUDGE SIPPEL: Is that anything I
5 need to know about?

6 MR. KIM: No, I think Mr. Tollin
7 just wants me to put it on the record, but I'm
8 happy to do that. Whatever I said to them,
9 the context applies.

10 MR. TOLLIN: We had a problem of
11 not understanding where some numbers came
12 from. And he's now clarified that.

13 JUDGE SIPPEL: Okay.

14 MR. KIM: May I raise two
15 housekeeping points, Your Honor?

16 JUDGE SIPPEL: Please do.

17 MR. KIM: Okay. And I think we're
18 done, basically. We need to swap out a couple
19 of exhibits which I've identified for Comcast
20 which are just incorrectly printed in the
21 binders that got produced. I think we can do
22 that off the record.

1 JUDGE SIPPEL: Good.

2 MR. KIM: Everything can just be
3 swapped in correctly.

4 JUDGE SIPPEL: When you say
5 swapped, you mean taken from the record and
6 substitute, basically substitute the
7 documents?

8 MR. KIM: That's exactly right,
9 Your Honor.

10 Your Honor received, and all
11 counsel received, actual physical copies of
12 these exhibits. A couple of them were printed
13 incorrectly and so we just want to take them
14 out and replace them with the correct printed
15 versions and when I say printed incorrectly,
16 just so you're clear, it usually means the
17 wrong Bates number appeared, some different
18 number appeared on there, than the correct
19 Bates number.

20 JUDGE SIPPEL: I'll take that in
21 the context of a motion and the motion is
22 granted. You can substitute pages in the

1 exhibits that you tendered for purposes of
2 clarification.

3 MR. KIM: Thank you, Your Honor.

4 JUDGE SIPPEL: With Mr. Tollin's
5 agreement.

6 MR. KIM: Absolutely. If there's
7 a problem, we'll bring it back to the Court,
8 but I think that there won't be a problem,
9 Your Honor.

10 JUDGE SIPPEL: No problem.

11 MR. KIM: And lastly, Your Honor,
12 I note that we submitted the witnesses that we
13 have written testimony for.

14 JUDGE SIPPEL: Yes.

15 MR. KIM: It's an attachment to
16 our pre-hearing submission, not as an
17 individual number trial exhibit. And so they
18 appear in the record now as Exhibits A, B, C,
19 and D. I'd be happy to renumber those if
20 you'd like.

21 JUDGE SIPPEL: Yes, do.

22 MR. KIM: So what we'll do, Your