1 of its contract. Comcast holds MASN to higher
2 standards of carriage.
3 Instead of having penetration on
4 all of the systems, the documents and the
5 testimony will show that Comcast insists that
6 MASN apply -- have to have [redacted]
7 [redacted]
8 [redacted]
9 The evidence will also show that
10 with respect to such issues as advertising and
11 splitting the technology feed that goes into
12 one market and another market which is
13 valuable for advertising purposes, that
14 Comcast immediately allowed its own affiliated
15 RSN, see Comcast SportsNet Mid-Atlantic, to
16 split its feeds so that advertisers in
17 Baltimore could get Baltimore-centric
18 advertising. And advertisers in Washington
19 could get Washington-centric advertising.
20 But when MASN asked for that same
21 opportunity, the first reaction from Comcast
22 was no. You can't have that. It's not in the

1 contract. You're not allowed to do that. And
2 only after a lawsuit brought by MASN was
3 brought and finally resolved did MASN get that
4 opportunity to engage in split-feed
5 advertising.
6 Next, Comcast does not have any
7 good reason for treating MASN differently.
8 For legacy carriage, Comcast SportsNet Mid-
9 Atlantic carried Orioles programming
10 throughout Comcast Mid-Atlantic's footprint
11 prior to the expiration of the contract with
12 only a couple of exceptions that we'll get
13 into in the course of the testimony.
14 JUDGE SIPPEL: They carried the
15 Orioles games?
16 MR. FREDERICK: They carried the
17 Orioles --
18 JUDGE SIPPEL: But up to 2006
19 under a contract?
20 MR. FREDERICK: That's correct.
21 JUDGE SIPPEL: When did the
22 contract -- how long were they carried in

1 those games?

2 MR. FREDERICK: The contract was

3 originally signed in 1996, Your Honor. That

4 was signed between Home Team Sports which at

5 that time was a regional sports network with

6 TCR Sports Broadcasting Holding. In or around

7 2000, Comcast bought Home Team Sports and they

8 rebranded that RSN as Comcast SportsNet Mid-

9 Atlantic. And they operated under that same

10 contract. It was a ten-year contract that

11 expired at the end of the 2006 baseball

12 season.

13 So in terms of legacy carriage,

14 the Orioles programming had been on CSNMA for

15 many years prior to now the Comcast saying

16 that we're not going to distribute MASN's

17 programming in exactly the same markets where

18 CSNMA had carried MASN as well.

19 Their bandwidth argument, as I

20 alluded to, has no merit whatsoever, not only

21 because the facts show that there was

22 sufficient bandwidth at the time of the

1 contract for the vast bulk of the systems, but
2 Comcast is applying an inconsistent standard.
3 They launched MASN on certain low bandwidth
4 systems in 2006 and 2007, but they offer no
5 reason why those systems that are not launched
6 and have the same amount of power are not
7 being launched now.
8 And finally, with respect to low
9 demand, they never said in 2006 we are not
10 launching you on certain systems because of
11 low demand. It's inconsistent with Comcast's
12 own vigorous pursuit of the core of MASN's
13 programming. They went to war with MASN
14 because MASN got the rights to Nationals games
15 and MASN kept the rights to Orioles games.
16 And it is simply inconsistent for them to say
17 now after they said publicly in Court filings,
18 in public statements by the top officers and
19 executives at Comcast oh, there's not demand
20 for this programming after all, when what they
21 told the public and they told the Court system
22 was we intend, if we get those rights to

1 telecast them throughout the territory as
2 represented by MASN.
3 Finally, Comcast's discrimination
4 impairs MASN's ability to compete. It causes
5 MASN to lose millions of dollars every year
6 and it causes MASN to lose advertising revenue
7 that's associated with the substantial number
8 of subscribers. And the evidence will show
9 that even though that haircut is not complete,
10 it's not as though Comcast has lopped off
11 MASN's head and caused MASN to die. It still
12 is a significant amount of foreclosure that it
13 impairs MASN's ability to pursue rights such
14 as Washington Redskins rights when those
15 become available for pre-season games or D.C.
16 Untied rights or the other kinds of marquee
17 sports programming rights that are in this
18 marketplace.
19 Thank you, Your Honor.
20 JUDGE SIPPEL: I want to ask, how
21 does that happen that MASN is foreclosed from
22 those last observations you made, for example,

1 D.C. United? The Redskins games, pre-season.
2 MR. FREDERICK: Not to anticipate
3 Mr. Cuddihy's testimony too much, Your Honor,
4 but I believe that Mr. Cuddihy will testify
5 that he negotiated with the Redskins and the
6 Redskins raised the issue, you are not being
7 launched in the Roanoke-Lynchburg and Tri-
8 Cities area, that part of Southwestern
9 Virginia is Redskins territory and that's
10 meaningful to the Redskins because they want
11 as many possible fans to be watching those
12 games as they can. And that affects the
13 ability of a competing programmer when we are
14 foreclosed from a significant part of the
15 market in the eyes of a professional sports
16 team.
17 JUDGE SIPPEL: Now you're being
18 foreclosed why, because you can't strike an
19 agreement with Comcast?
20 MR. FREDERICK: Comcast has
21 refused to accept the rates that we have
22 offered to them that have been accepted by the

1 other major MVPDs in those very same markets.
2 In Roanoke-Lynchburg DIRECTV, Cox, Dish,
3 others, small MVPDs except MASN at the rate
4 card MASN has accepted. In the Tri-Cities
5 area, DIRECTV and Dish are telecasting those
6 games, distributing MASN's programming at the
7 same rates that MASN has offered to Comcast.
8 In Harrisburg, Verizon FiOS, Dish,
9 DIRECTV, Kuhn, other small cable operators are
10 distributing MASN's programming at the same
11 rates that MASN has offered to Comcast and
12 that Comcast has accepted those rates, a
13 matter of a mere handful of miles away from
14 the very systems where they're denying MASN
15 carriage now.
16 Comcast doesn't do that to its own
17 affiliated RSNs. In its own affiliated RSNs,
18 it carries them everywhere, but it applies a
19 double standard when it deals with MASN and in
20 MASN's effort to obtain programming in exactly
21 the same markets where historically Orioles
22 were telecast on Comcast SportsNet Mid-

1 Atlantic.

2 JUDGE SIPPEL: So your argument is

3 that they have an obligation. They have an

4 obligation to take you on, to take MASN on

5 under the same terms as all of these other

6 what would you cal them, networks that you're

7 talking about? They are affiliated networks

8 and other sports-related networks?

9 MR. FREDERICK: When they have --

10 JUDGE SIPPEL: Same prices, right?

11 MR. FREDERICK: The same price --

12 our position, Your Honor, just so that I'm

13 clear, is that federal law prohibits Comcast

14 from discriminating against an unaffiliated

15 programmer in favor of an affiliated

16 programmer. And that's what's happening here.

17 In the same markets where CSNMA

18 showed Orioles games, Comcast paid CSNMA and

19 put CSNMA on its distribution system. And now

20 that that contract expired and the programming

21 migrated over to MASN, Comcast is saying no,

22 no, there's low demand and there's not enough

1 bandwidth and they're making up excuses
2 essentially that they never used at the time
3 they made the original decision not to carry
4 MASN in those markets.
5 And that differential treatment is
6 a double standard and is a vertically
7 integrated monopoly with economic incentives
8 to discriminate. The evidence will show that
9 Comcast has an internal accounting system so
10 that it is cheaper when they own the
11 programming and they own the affiliated
12 programming network than when they contract
13 out for others unaffiliated.
14 JUDGE SIPPEL: But isn't that a
15 given with affiliated -- I mean just as a
16 general rule, affiliated, that's the whole
17 reason why companies are inclined to integrate
18 to the extent that they can because they cut
19 down on costs.
20 MR. FREDERICK: And Your Honor,
21 it's exactly what Congress was prohibiting and
22 legislating against when it enacted the 1992

1 Cable Act. What Congress said was that you
2 can't discriminate, you can't treat people
3 differently just because you don't own them.
4 Now leaving costs aside, leaving
5 costs aside, the point is do we have to be
6 subject to a system for vertically-integrated
7 monopolization where just because you won the
8 distribution conduit you get a leg up with
9 respect to competition over the programming
10 that goes into that distribution conduit. And
11 the point that Congress was attempting to
12 prohibit, Your Honor, and that the FCC made
13 very clear in the Adelphia order and in other
14 orders is that kind of vertically-integrated
15 monopolization creates incentives for
16 differential treatment.
17 There's absolutely no doubt that
18 if MASN's core programming were owned by
19 Comcast, it would be shown in every single
20 market in Comcast's footprint. They said so.
21 The president of their company said so. Their
22 Court filings in Maryland said so. So why

1 does MASN get treated differently, simply
2 because we're not owned by Comcast. Well,
3 they make up a bunch of reasons why that's not
4 so.
5 And their main competitors in the
6 market which are DIRECTV, Dish, and FiOS,
7 Verizon FiOS, all carry MASN at exactly the
8 same rates.
9 JUDGE SIPPEL: But they might not
10 have the market power to do it any
11 differently. DIRECTV may not have the market
12 power that Comcast has, right?
13 MR. FREDERICK: Your Honor, the
14 case is about abusive market power.
15 JUDGE SIPPEL: I know, but market
16 power per se, if you've got market power as
17 opposed to somebody that has a lesser market
18 power, you're probably going to be getting
19 better deals with companies you're dealing
20 with.
21 MR. FREDERICK: And that raises a
22 very interesting point, Your Honor. Because

1 Comcast did not come to MASN and say you know,
2 we've been looking at this, we've got market
3 power in Roanoke-Lynchburg, Tri-Cities,
4 Harrisburg, cut us a better deal. They never
5 raised price. They simply refused to carry
6 us.
7 JUDGE SIPPEL: Do you have to be
8 that -- in those negotiations, do you have to
9 be that blunt about it?
10 MR. FREDERICK: They are. And
11 you'll hear testimony that these distributors
12 will negotiate, hammer and tong over rates.
13 In fact, Comcast asked for a volume discount
14 over the entirety of the territory for the
15 entirety of the rate card and they got a
16 discount when the original deal was struck in
17 July.
18 JUDGE SIPPEL: You mean MASN gave
19 them a discount?
20 MR. FREDERICK: That's correct.
21 And that was because of Comcast's market
22 power. And the question here, Your Honor, is

1 whether or not Comcast will be permitted by
2 this tribunal to abuse its market power simply
3 because it doesn't own the programming. And
4 I would say that for that kind of proposition
5 to be accepted is completely offensive to the
6 purposes that Congress had in enacting the
7 1992 Cable Act and that this Commission in
8 announcing its rules and regulations to
9 promote the idea that unaffiliated programmers
10 get to be treated the same as similarly
11 situated programming and a double standard is
12 one that harms the marketplace. It decreases
13 competition. You'll be hearing from Dr.
14 Singer who will talk about the economic
15 effects of this kind of abusive market power
16 in the marketplace.
17 JUDGE SIPPEL: All right, well,
18 I'll wait to hear further on it. I'm not
19 arguing with the policy that is being advanced
20 by Congress. I'm certainly not arguing with
21 the Commission's policy, but I just have to --
22 I want a better understanding and I'm assuming

1 I will get it from one side or the other, or
2 both, as to how an -- you are an efficiently
3 run operation. I don't know whether it's --
4 there have been instances where very
5 efficiently run organizations and
6 corporations, producers, get the leg up
7 because they move fast, they move first, they
8 spent all the money, they made the preliminary
9 investments and so that they do get a --
10 they're in a better bargaining position. No
11 question about it.
12 MR. FREDERICK: And the question,
13 Your Honor, is is it believable that instead
14 of the rate that DIRECTV which only has a few
15 hundred thousand subscribers throughout MASN's
16 television territory than Comcast, is what it
17 is, and Comcast is entitled to a zero rate
18 because their position is even though they
19 wanted the same programming to put on their
20 system, and they would, in fact, charge more
21 money than what MASN is charging, if they were
22 carried through their affiliated regional

1 sports network, that somehow it's entitled to
2 zero economic value when it's owned by MASN
3 and that, Your Honor, is an absurd
4 proposition. But that is their argument.
5 Because they didn't come back and say we're
6 the big guy in town. We're entitled to a
7 discount in these markets where we're not
8 carrying you. They never said that during the
9 course of the negotiations in 2006 or in the
10 spring of 2007.
11 Their position now is we're not
12 going to carry you in those markets and
13 they've ticked off reasons that we will prove
14 are not sustainable under the evidence.
15 JUDGE SIPPEL: Well, maybe the
16 first argument that you referred to, maybe
17 there were public relations reasons why they
18 didn't want to do that. It could be a number
19 of reasons why they didn't want to outwardly
20 give that as the reason, but most situations
21 can get taken care of if parties agree on a
22 price. And basically you've got a product,

1 right? You want Comcast to sell the product
2 for you or carry the product for you.
3 Granted, they do have the carriage, but it's
4 just a question of working out the details.
5 If you come up with the right price for
6 Comcast, obviously, that's where the tough
7 negotiation comes in, but you know, I don't
8 think that Congress meant, discrimination
9 meant that you -- let me put it another way.
10 Let's say you got DIRECTV, you got Dish TV and
11 there was something else.
12 MR. FREDERICK: Verizon FiOS.
13 JUDGE SIPPEL: Yes, and they're
14 all taking the same prices. They're all
15 paying the same. I don't think you want price
16 setting in this. I mean should the Commission
17 order that you take -- that Comcast take the
18 same price as all these others?
19 MR. FREDERICK: Your Honor, you
20 have under the Adelphia order --
21 JUDGE SIPPEL: For that reason
22 alone. I'm just saying for that reason alone.

1 MR. FREDERICK: The question is
2 what is a commercially-reasonable rate? Is it
3 what the other major players are paying or is
4 it zero?
5 JUDGE SIPPEL: Wait a minute. Is
6 that the only choice?
7 MR. FREDERICK: Yes.
8 JUDGE SIPPEL: Zero?
9 MR. FREDERICK: They are refusing
10 carriage.
11 JUDGE SIPPEL: All right.
12 MR. FREDERICK: Refusing carriage
13 by definition as an economist is that they
14 attach zero value, okay? And the question is
15 is it a double standard when they attach a
16 zero value of MASN as the programming than
17 when they said publicly we want those telecast
18 rights and we're willing to go to Court to
19 fight for them so that we can charge money on
20 our own affiliated regional sports
21 programming.
22 Your Honor, if you accept that

1 proposition you are accepting the notion that
2 a monopolist can abuse its power and I would
3 submit to you that that is contrary to what
4 Congress intended. It's contrary to the FCC's
5 rules and it's contrary to good, economic
6 practice and we will prove that in this trial.
7 JUDGE SIPPEL: That was not my
8 question. My question wasn't whether someone
9 could, a company could, anybody dealing in
10 this industry could unreasonably exercise
11 monopoly power to discriminate or to harm
12 another competitor. No, I'm not saying that
13 at all. I'm simply saying when you get behind
14 the broad statement of what -- there will be
15 no discrimination, no harm out of
16 discrimination, you know what does that
17 exactly mean? That's all this case is about?
18 MR. FREDERICK: Well, this case
19 will also be about what reasons they've
20 offered.
21 JUDGE SIPPEL: Exactly.
22 MR. FREDERICK: And whether or not

1 those reasons are justifiable.

2 JUDGE SIPPEL: Absolutely.

3 MR. FREDERICK: And our submission

4 is when you peel back what the layers and you

5 look at what their reasons are, first, they

6 gave no reasons. They secretly carved up MASN

7 in the dark of the night.

8 When they finally got caught on

9 that, they offered reasons that do not stand

10 up to sunshine.

11 JUDGE SIPPEL: Sham reasons or

12 bogus reasons?

13 MR. FREDERICK: Reasons that do

14 not stand up. When their witness says a lack

15 of bandwidth and the evidence will come in

16 that they had sufficient bandwidth when they

17 made the decision not to launch MASN.

18 JUDGE SIPPEL: Do you think

19 they're trying to put something over on the

20 Commission by making those arguments?

21 MR. FREDERICK: Your Honor, the

22 Commission has found in other circumstances

1 that Comcast has pulled the wool over the
2 Commission's eyes.
3 JUDGE SIPPEL: Other
4 circumstances.
5 MR. FREDERICK: Other
6 circumstances that are analogous.
7 JUDGE SIPPEL: Other Commissions,
8 other circumstances.
9 MR. FREDERICK: This Commission
10 JUDGE SIPPEL: This Commission.
11 MR. FREDERICK: Other
12 circumstances.
13 JUDGE SIPPEL: All right, okay.
14 I'm not trying to fight you on anything, on
15 the evidence or -- the evidence is going to
16 control where we go on this, obviously. And
17 I don't want to get this in a position where
18 you're feeling defensive for advocating your
19 position. It's a good position, but all of
20 these things have to be refined under the
21 evidence.
22 MR. FREDERICK: Your Honor, we

1 know that you will keep an open mind to the
2 evidence and we are highly confident that the
3 evidence is going to establish discrimination
4 on the basis of affiliation that harms MASN.
5 JUDGE SIPPEL: Thank you very
6 much. Thank you, sir.
7 Mr. Tollin?
8 MR. TOLLIN: Well, a lot of things
9 that Mr. Frederick has addressed today, I
10 would really like to take up before I really
11 get into my formal presentation.
12 JUDGE SIPPEL: You should have
13 your black coat and hat on.
14 (Laughter.)
15 MR. TOLLIN: This case is not
16 about whether or not there's demand for the
17 Orioles or Nationals in the Washington, D.C.
18 and Baltimore areas.
19 The rights to carriage in those
20 areas has been settled for now years. In a
21 2006 agreement, we settled that carriage would
22 go out to Washington and Baltimore and the

1 surrounding environs including Richmond,
2 Charlottesville, all those carriage rights
3 have already been taken care of and yes, it's
4 true that Comcast has said that those rights
5 are valuable, but they've never said those
6 rights are valuable in Roanoke or Tri-Cities,
7 Virginia. They've never said those rights are
8 valuable in Harrisburg. That's all this case
9 is about.
10 And in fact, given the fact that
11 Mr. Frederick has said that his client was
12 fully aware that there was an Adelphia carve
13 out in southern Virginia, he knows full well
14 the case is only about Harrisburg. It may
15 sound like Comcast is this big, bad giant
16 corporation, but I will tell you that Congress
17 did not prohibit vertical integration in the
18 Cable Act. It prohibited discrimination on
19 the basis of affiliation only and it expected
20 the Commission when it put out its second
21 report and order, it expected that the parties
22 would bargain hard, as you were just talking

1 about.

2 And a small discount for carrying

3 MASN to approximately 90 percent of their

4 territory is hardly a big deal to MASN. MASN

5 advanced the ball tremendously by entering

6 into a carriage deal with Comcast to gain 90

7 percent distribution in its own area. It is

8 missing approximately 10 percent. But that 10

9 percent is at the fringes and that 10 percent

10 should have been detected, well, they did

11 detect actually the Adelphia, probably 5

12 percent of the 10 percent, but the other 5

13 percent, Harrisburg, frankly, we can't really

14 understand why they couldn't figure out that

15 Harrisburg wasn't covered because there was a

16 Schedule A that was published, fully

17 presentable. It was two pages. It had 60

18 markets on it. It clearly said geographically

19 what was being covered. It said what

20 subscribers were being covered. No reasonable

21 person could read this map and think

22 Harrisburg was covered.

1 You could see York. You could see Carlisle.
2 You could see Lancaster, but there was no
3 Harrisburg.
4 Now this business about time
5 pressure, okay.
6 JUDGE SIPPEL: Is Harrisburg, is
7 that the big deal?
8 MR. TOLLIN: Harrisburg is.
9 JUDGE SIPPEL: Is that what this
10 case is about, Harrisburg?
11 MR. TOLLIN: Yes, it is.
12 JUDGE SIPPEL: If I'm
13 understanding you right, Comcast is willing to
14 give, has already given MASN and this is very
15 loose language I'm giving you, but has
16 basically struck a deal and has given MASN
17 let's say 90 percent of the big apple.
18 MR. TOLLIN: Correct.
19 JUDGE SIPPEL: And 5 to 10 percent
20 is missing.
21 MR. TOLLIN: Right.
22 JUDGE SIPPEL: Because of some,

1 whatever the reason might be.

2 MR. TOLLIN: There's a dispute

3 over whether the 5 percent was intentionally

4 left out, although I think the MASN witnesses

5 will testify that they all thought the 5

6 percent was being left out. So it's over the

7 other 5 percent which is Harrisburg. That's

8 all this case is about.

9 JUDGE SIPPEL: You mean the

10 parties can't resolve that one?

11 MR. TOLLIN: Sadly, they can't.

12 JUDGE SIPPEL: Well, this is a --

13 I'm sorry, I don't mean to interrupt your

14 argument, your presentation, but is that any

15 way true, Mr. Frederick, from your standpoint?

16 MR. FREDERICK: Your Honor --

17 JUDGE SIPPEL: Are we talking about

18 five to 10 percent?

19 MR. TOLLIN: We're talking about [redacted]

20 [redacted].

21 JUDGE SIPPEL: [redacted]

22 MR. TOLLIN: We're talking [redacted]