

1 [REDACTED] We're talking about approximately --

2 MR. FREDERICK: Counsel, I think
3 that's a confidential number.

4 MR. TOLLIN: Well, that may be but
5 you're using --

6 JUDGE SIPPEL: I'm sorry.

7 MR. TOLLIN: -- the inaccurate
8 number.

9 MR. FREDERICK: No, but I'm trying
10 to use the --

11 JUDGE SIPPEL: Yeah, he's trying to
12 keep --

13 MR. FREDERICK: I'm trying to keep
14 it confidential.

15 JUDGE SIPPEL: All right. All
16 right, we're here, we're here. Okay, let's
17 stay where we are.

18 MR. TOLLIN: He's certainly -- but
19 he's in the ball park.

20 JUDGE SIPPEL: All right, okay. I
21 wasn't that much concerned about a graphic
22 exact number, but we're talking about

1 something that's less than 25 percent and as
2 I tried to characterize it earlier, you got a
3 great big desirable whatever you want to call
4 it, a ball, a market, out there, and MASN has
5 got up to quite a bit of it, let's say 75
6 percent or more of it. And really this --

7 MR. TOLLIN: Oh, much more than
8 that.

9 JUDGE SIPPEL: Yeah, well, 80
10 percent or more. And then this argument is
11 all about the remaining 20 percent in places
12 like -- and I don't want to -- I'm not saying
13 anything bad about the people of Harrisburg or
14 anything but places like Harrisburg and this
15 type of thing.

16 MR. TOLLIN: Roanoke.

17 JUDGE SIPPEL: Roanoke.

18 MR. TOLLIN: Tri-Cities, Virginia.

19 JUDGE SIPPEL: Great places to
20 visit, they're really great. But that's not
21 the same thing as --

22 MR. TOLLIN: This isn't about

1 Washington or Baltimore.

2 JUDGE SIPPEL: Not Washington,
3 Baltimore.

4 MR. TOLLIN: Charlottesville,
5 Richmond. That's all covered.

6 JUDGE SIPPEL: All right, that's
7 all right. I mean, I'm not throwing my hands
8 up and saying that makes no difference, but
9 boy, something is wrong with the negotiators,
10 not personally, but the negotiations, because
11 those numbers just don't strike me as being
12 something that can't be figured out. But
13 that's not what we're here for. Okay, you may
14 continue, Mr. Tollin.

15 MR. TOLLIN: The other thing that
16 this case isn't about is it's not about not
17 having enough time to negotiate the agreement.
18 Actually MASN had Comcast -- a lot of leverage
19 over Comcast. It had an arbitration deadline
20 hanging over Comcast's head when it was
21 negotiating this contract. It also had a
22 hearing designation order that under the

1 Martin Commission had been granted and so it
 2 was going to have its choice of arbitration or
 3 a formal hearing as we're in now. This is
 4 hardly a bad position to be in. Nevertheless,
 5 Comcast told them that if time was a problem,
 6 they would agree to tolling whatever needed to
 7 be tolled so that they could have as much time
 8 as they wanted and they rejected that
 9 proposal.

10 We will also hear witness after
 11 witness for MASN tell you that even had they
 12 had more time, there's nothing else they would
 13 have checked, although again, I'm not sure I
 14 could figure out how you could miss Harrisburg
 15 from Schedule A. There just weren't that many
 16 names to check. When you see yourself what
 17 Schedule A looks like, in the middle of this
 18 case, you will see a list of markets that
 19 certain includes Baltimore and Washington, it
 20 certainly includes York and Carlisle and
 21 Lancaster but does not include Harrisburg and
 22 the Supp Numbers that are next to York, for

1 instance, could never have been mistaken for
2 Harrisburg because there are far more people
3 in Harrisburg than there are in York or
4 Carlisle. I mean, you could never mix the two
5 up.

6 JUDGE SIPPEL: I hear you now. Is
7 this -- I'm going ask Mr. Kim, is this the
8 document you were referring to that was --
9 that you were withdrawing the confidentiality?
10 Something about Schedule?

11 MR. KIM: No, sir, it was Mr.
12 Tollin who withdrew the confidentiality of a
13 document and it was not this document.

14 JUDGE SIPPEL: Okay.

15 MR. KIM: Mr. Tollin, I believe,
16 withdrew the confidentiality with respect to
17 a channel lineup card for Comcast.

18 JUDGE SIPPEL: Oh, yeah, but this
19 particular -- this particular schedule that
20 you're referring to, that is a confidential
21 document?

22 MR. TOLLIN: No, I don't think it

1 is, is it?

2 MR. FREDERICK: I think the term
3 sheet is confidential that --

4 MR. TOLLIN: The schedule is not
5 confidential, but I thought that the terms
6 within the terms sheet that are rate, the rate
7 card, that is all rate card information. That
8 is confidential.

9 JUDGE SIPPEL: The Schedule A is
10 not confidential. All right, that' good.

11 MR. TOLLIN: The Schedule A is not
12 confidential.

13 MR. FREDERICK: Even though there
14 are sub-numbers and Comcast has treated those
15 as highly confidential.

16 JUDGE SIPPEL: No, I'm not
17 interested in any sub-numbers. Just the
18 names.

19 MR. FREDERICK: Just the names, but
20 there are numbers next to those names.

21 MR. TOLLIN: Oh, that's true.

22 JUDGE SIPPEL: Well, you can mask

1 those out.

2 MR. KIRK: I think we'd be willing
3 to put a redacted version, if necessary, that
4 would redact out the subscriber numbers so you
5 could see publicly the system that --

6 JUDGE SIPPEL: Yeah, I wish you
7 would because this is -- this transcript goes
8 on the record pretty quickly and people from
9 the outside reading it, they may want to see
10 the schedule.

11 MR. TOLLIN: The only problem is --

12 JUDGE SIPPEL: Obviously not with
13 the numbers, yeah.

14 MR. TOLLIN: The subscriber numbers
15 are actually important because none of the
16 subscriber numbers could ever be mistaken for
17 the number of subscribers in Harrisburg. So
18 we want to make sure that your Honor sees the
19 subscriber numbers.

20 JUDGE SIPPEL: Yeah, well, I want
21 to see them, yeah. No, I'm saying that the
22 one that goes maybe up to the Press Office is

1 the one that's not going to have it.

2 MR. TOLLIN: Sure.

3 JUDGE SIPPEL: But I think you're
4 right. I think -- well, I'm not going to --
5 never mind. Okay.

6 MR. TOLLIN: The other thing Mr.
7 Frederick forgot to mention is that CSNMA,
8 which is a Comcast affiliate in the Middle
9 Atlantic, did carry the Orioles on a sport's
10 tier not expanded basic, on a sport's tier and
11 this is very significant because putting
12 someone on a sport's tier is not something
13 MASN has any interest in. They want full
14 carriage to every single customer, not a
15 sport's tier where people pay ala carte for
16 the programming. And when our own affiliate -
17 - I'm sorry, I'm talking now about Harrisburg,
18 this is in Harrisburg and I'm talking about
19 where CSNMA was carried on the sport's tier.
20 When our own affiliate said, "We want to be
21 carried on expanded basic to all of your
22 customers and not paid for ala carte", Comcast

1 actually dropped them from the system, even
2 though at the time they were carrying Orioles
3 programming.

4 JUDGE SIPPEL: Say that again,
5 Comcast --

6 MR. TOLLIN: Comcast dropped CSNMA
7 when they were carrying the Orioles because
8 CSNMA required that they be taken off the
9 sport's tier, not paid for ala carte and
10 instead put on expanded basic, the exact tier
11 that MASN is demanding now.

12 JUDGE SIPPEL: But CSNMA, that was
13 the -- in other words, that's the affiliate --

14 MR. TOLLIN: The affiliated of
15 Comcast --

16 JUDGE SIPPEL: -- sports.

17 MR. TOLLIN: -- that was offering
18 the Orioles at the time.

19 JUDGE SIPPEL: And Comcast dropped
20 --

21 MR. TOLLIN: Dropped them
22 completely.

1 JUDGE SIPPEL: Dropped them because
2 they wanted --

3 MR. TOLLIN: Because they wanted to
4 be on expanded basic in Harrisburg and not on
5 the sport's tier. But Comcast judgment was
6 that the demand for Orioles' programming in
7 Harrisburg was so small that they were willing
8 to drop the Orioles programming on their own
9 affiliate.

10 JUDGE SIPPEL: The reason I'm kind
11 of perplexed by that is how -- how can an
12 affiliate decide that they're going to drop
13 something? You know, it's the affiliate that
14 was making the decision.

15 MR. TOLLIN: The affiliate
16 obviously, was not happy with Comcast's
17 decision.

18 JUDGE SIPPEL: Well, affiliates
19 might not be happy about a lot of things but
20 the if the parent company wants something
21 done, does the affiliate have that much
22 bargaining power?

1 MR. TOLLIN: Well, if you're -- if
2 you're during the term of a contract --

3 JUDGE SIPPEL: All right.

4 MR. TOLLIN: When the contract runs
5 out though, at that point, then the affiliate
6 can demand anything it wants of Comcast and
7 Comcast can say yes or no to it. It said no
8 in this case.

9 JUDGE SIPPEL: So then it's no
10 longer an affiliate. That --

11 MR. TOLLIN: It's still an
12 affiliate but it's not in Harrisburg.

13 JUDGE SIPPEL: All right, maybe
14 I'll understand it better when you put some
15 evidence in but, all right, go ahead, I'm
16 sorry.

17 MR. TOLLIN: Okay, at bottom this
18 is really a simple case about the terms of a
19 carriage agreement entered in August of 2006.
20 MASN freely and voluntarily agreed to permit
21 Comcast to exclude the systems in three
22 disputed areas. MASN does not even claim that

1 Comcast has breached the agreement. As a
 2 matter of law and policy, compliance with that
 3 contract can't be discrimination on the basis
 4 of affiliation. In other words, if Comcast
 5 thought it was relying on the contract, how
 6 can they be accused of discriminating on the
 7 basis of affiliation when they thought the
 8 contract spelled out the rights of the parties
 9 and they relied on that. And we're not even
 10 being accused of violating that agreement.

11 The 2006 agreement settled the
 12 carriage dispute where MASN claimed the right
 13 to 100 percent coverage in their MLB
 14 territory. Instead of getting the 100 percent
 15 coverage, they got 90 percent or approximately
 16 90 percent. This included Comcast subscribers
 17 in MASN's most important core markets,
 18 Baltimore and Washington. The agreement also
 19 gave Comcast the discretion to carry MASN in
 20 certain fringe areas of MASN's territory.

21 Consumers in those markets are far
 22 less interested in MASN's primary programming

1 that is the Orioles and Nats. That's their
2 primary programming. MASN has publicly
3 acknowledged that the agreement was a big
4 success. Nevertheless, it now asks the FCC to
5 leave the contract in effect but grant MASN
6 more carriage than it provides for. The
7 denial of carriage here was hardly a grand
8 plan by Comcast to discriminate against MASN
9 on the basis of affiliation or non-
10 affiliation. Comcast simply acted in good
11 faith under the contract negotiated freely by
12 the parties. The evidence will demonstrate
13 that this is a garden variety contract dispute
14 masquerading as a carriage complaint.

15 MASN claims that Comcast deceived
16 MASN by not including subscribers in
17 Harrisburg, Roanoke and Tri-Cities from the
18 mandatory carriage obligation in Schedule A.
19 That's in the 2006 agreement. But the
20 language of the agreement couldn't be clearer.
21 There is no mention of Harrisburg. There is
22 no mention of Roanoke. There is no mention of

1 Tri-Cities on Schedule A. The list of
2 mandatory -- and that is the list of mandatory
3 carriage markets in the agreement that was
4 signed by MASN.

5 Moreover, the evidence will
6 demonstrate and Comcast developed Schedule A
7 based on legitimate business considerations,
8 including band width, price, and demand for
9 the programming. You can only imagine how
10 much demand there is for Baltimore Orioles
11 programming in Tri-Cities, Virginia. Comcast
12 concluded that based on these criteria
13 carriage of MASN was not justified in the
14 three disputed areas.

15 Six months after the agreement,
16 however, MASN began claiming that these areas
17 were improperly left out of the agreement.
18 But this is a contract interpretation point
19 that the parties disagree on, not a carriage -
20 - not a matter that's actionable under the
21 carriage rules. They should have gone to
22 court and said there was no meeting of the

1 minds on this contract. You know, set this
 2 contract aside, but they didn't do that. The
 3 reason they didn't do that is they liked the
 4 contract.

5 Six months later, they didn't like
 6 that Harrisburg was left out of the contract
 7 and the Orioles and the Nats, obviously,
 8 weren't doing too well on the ratings so the
 9 easiest way to get carriage was to come back
 10 and sue at the Commission during a former
 11 administration and see what they could get.
 12 MASN wants the Commission to approve the deal
 13 it freely negotiated but the fact that MASN
 14 wants to make more money than it bargained for
 15 doesn't make this actionable under the
 16 carriage rules.

17 Even were the tribunal here to
 18 take up MASN's contract claims, that it was
 19 somehow fooled into signing the contract,
 20 which didn't include the three disputed
 21 markets, the relevant facts support Comcast.
 22 The agreement provides in relevant part,

1 number one, Comcast revise the term sheet as
2 Mr. Frederick said and prominently struck out
3 the word "all", that had been put into the
4 contract by MASN, indicating that Comcast
5 would be required to carry MASN only on those
6 systems listed on Schedule A of the agreement.

7 Schedule A, in turn, contained a
8 two-page list of 60 Comcast systems described
9 by system name and geography and subscriber
10 numbers. Under no conceivable reading was
11 Harrisburg, Roanoke, Tri-Cities on that list.
12 The agreement also gave Comcast Systems not
13 listed on Schedule A the ability to add MASN
14 in markets where it wasn't being carried. So
15 MASN should have fully known that all markets
16 weren't being carried because there was a
17 provision that was prominently displayed in
18 the agreement that said, "We'll add you in
19 markets where systems elect to carry you." In
20 other words, had Harrisburg elected to carry
21 MASN, Comcast would have carried MASN.

22 Harrisburg did not elect to carry

1 MASN so we are not carrying MASN in
 2 Harrisburg. The same is true of Tri-Cities
 3 and Roanoke. MASN did not object to any of
 4 these changes to the agreement. Finally and
 5 very importantly, the agreement contained a
 6 clause drafted by MASN itself which indicated
 7 that the written agreement was the only
 8 understanding between the parties. In other
 9 words, any oral understandings like Mr.
 10 Frederick was talking about, are irrelevant
 11 under the agreement. Everything merged into
 12 the written contract.

13 JUDGE SIPPPEL: What seems to be the
 14 explanation for those three distinct areas
 15 being left out?

16 MR. TOLLIN: They're on the fringe
 17 of MASN's territory. At the very north end is
 18 Harrisburg, at the southern, towards the
 19 southern end, maybe not quite at the end they
 20 go into North Carolina some but at the bottom,
 21 bordering on the southern -- the border of
 22 Southern Virginia and Tennessee is Tri-Cities

1 and Roanoke. No one is obviously going for
2 Roanoke to the Orioles baseball games, you
3 know, on a daily basis. It's got to be five
4 or six hours away.

5 JUDGE SIPPEL: Well, let me -- let
6 me get -- who prepared Schedule A and
7 presented it to --

8 MR. TOLLIN: Schedule A was
9 prepared by Comcast and presented to MASN.

10 JUDGE SIPPEL: All right, why were
11 those -- why were those -- I'm trying to ask
12 the question again. May you've already
13 answered that but why were those three
14 distinct areas left out? Harrisburg, and then
15 you've got the Tri-State (sic) areas and then
16 you've got Roanoke.

17 MR. TOLLIN: Right, the Tri-Cities
18 area and Roanoke.

19 JUDGE SIPPEL: What is the Tri-
20 Cities area?

21 MR. TOLLIN: It's in the
22 southwestern corner of Virginia, bordering --

1 I think it actually -- part of it, I think,
2 may be is in Tennessee.

3 JUDGE SIPPEL: Do you know the
4 names of the cities?

5 MR. TOLLIN: Pulaski, Galax.

6 JUDGE SIPPEL: Galax?

7 MR. KIM: For the record, your
8 Honor, it's Galax.

9 JUDGE SIPPEL: Galax?

10 MR. TOLLIN: Thank you.

11 MR. KIM: I know that because my
12 mother-in-law was born there.

13 JUDGE SIPPEL: You've got to know
14 that one. It's like an anniversary date
15 almost. Galax.

16 MR. KIM: Galax, your Honor.

17 JUDGE SIPPEL: Galax, thank you,
18 sir. Galax.

19 MR. TOLLIN: Did I say Pulaski?

20 JUDGE SIPPEL: Yeah, Pulaski, like
21 the general that saved us from the Revolution.
22 Pulaski, that Pulaski?

1 MR. TOLLIN: Pulaski, I think that
2 is one of the communities.

3 JUDGE SIPPEL: Okay.

4 MR. TOLLIN: And there's a bunch of
5 very, very small communities where there's
6 very low demand for Baltimore Orioles
7 programming but high demand for ACC
8 basketball, which is what Comcast carries into
9 the Tri-Cities.

10 JUDGE SIPPEL: What's the third?
11 What's the third?

12 MR. TOLLIN: I'm sorry.

13 JUDGE SIPPEL: The third. You've
14 got Galax, Pulaski and there should be a third
15 one. This is Tri-Cities.

16 MR. KIRK: Your Honor, Tri-Cities
17 refers to an area in Southwestern Virginia,
18 the actual quote "Tri-Cities" are major cities
19 aren't located just in Virginia. The cities
20 that Mr. Tollin was referring to are areas in
21 and around the southwestern portion of
22 Virginia.

1 JUDGE SIPPEL: So the --

2 MR. FREDERICK: The third is
3 Bristol, your Honor.

4 JUDGE SIPPEL: Beg your pardon?

5 MR. FREDERICK: Bristol.

6 JUDGE SIPPEL: Bristol? B-r-I-s-t-
7 o-l, like -- all right. I mean, I'm -- okay,
8 but this is in the southwest corner of
9 Virginia, across from Tennessee, perhaps
10 overlapping into Tennessee. Very well. What
11 baseball do they watch down there? I mean,
12 what teams do they like, do they follow?

13 MR. TOLLIN: If they're going to
14 watch baseball at all, it appears to be the
15 Yankees and the Red Sox.

16 JUDGE SIPPEL: Wow, they're close,
17 huh?

18 MR. TOLLIN: Not too close.

19 JUDGE SIPPEL: All right, but it's
20 basically a basketball.

21 MR. TOLLIN: It's more of a
22 basketball and college market. Atlanta

1 Braves, they also watch the Atlanta Braves.

2 JUDGE SIPPEL: Atlanta Braves, that
3 would be -- yeah.

4 MR. TOLLIN: Right.

5 JUDGE SIPPEL: Now, okay, all
6 right. Continue with your presentation.

7 MR. TOLLIN: The -- as you've heard
8 Mr. Frederick say, the MASN believe that they
9 have been told by -- orally, they have been
10 told orally by Comcast that the markets that -
11 - let's see Comcast had just acquired from
12 Adelphia were not to be included in Schedule
13 A. And those markets, a lot of those markets
14 were in Roanoke and Lynchburg and sprinkled in
15 the southern part of Virginia but there were
16 a lot of Adelphia markets actually throughout
17 the MASN area that Comcast actually included
18 which makes this quite confusing, of course.
19 If there was an Adelphia exclusion, why were
20 24 of the 60 markets Adelphia markets? The
21 markets that Adelphia -- that we could have
22 picked up in Roanoke and Tri-Cities and

1 Harrisburg could have been picked up under
2 what they call hunting license was in the
3 agreement.

4 The hunting license would have
5 allowed any one of these markets to elect to
6 pick up MASN programming. Frankly, it just --
7 they never made that election. They never
8 decided that the prices and the -- the prices,
9 the demand and the band width were worth it.

10 JUDGE SIPPPEL: Were the hunting
11 licenses, were they actually in the agreement?

12 MR. TOLLIN: Yes.

13 JUDGE SIPPPEL: But they were just
14 never exercised.

15 MR. TOLLIN: No, in fact, instead
16 of MASN going forward and trying to convince
17 the systems to carry them, they, instead,
18 sued. Your Honor, I really don't think I have
19 anything more to say. The agreement will
20 speak for itself. MASN is not even accusing
21 Comcast of violating the agreement and that
22 really is the end of this matter.

1 JUDGE SIPPEL: Well, what is -- the
2 agreement terminated though in 2006, by its
3 own terms.

4 MR. TOLLIN: No, no, it began in
5 2006. It was executed.

6 JUDGE SIPPEL: Oh, I've got 1996 to
7 2006.

8 MR. TOLLIN: No, the agreement
9 settling the carriage complaint was --

10 JUDGE SIPPEL: Oh, is this the one
11 that -- I see what you're saying, 2006.

12 MR. TOLLIN: August 4th, 2006.

13 JUDGE SIPPEL: All right, so this -
14 - but -- wasn't there any arbitration? Wasn't
15 there some kind of an arbitration of this?

16 MR. TOLLIN: No, there was the
17 threat --

18 JUDGE SIPPEL: The agreement.

19 MR. TOLLIN: There was the threat
20 of arbitration but it never went to
21 arbitration. MASN could elect to go to
22 arbitration or formal hearing and they elected

1 neither one. We settled the day before the
2 arbitration deadline.

3 JUDGE SIPPEL: All right, all
4 right, so there was a settlement in August,
5 you say August 2006.

6 MR. TOLLIN: August 4th.

7 JUDGE SIPPEL: I have that
8 agreement.

9 MR. TOLLIN: Yes.

10 JUDGE SIPPEL: All right.

11 MR. TOLLIN: And that's the one
12 that has the Schedule A in it.

13 JUDGE SIPPEL: Okay. Is there any
14 -- are there any specifics now that Mr.
15 Tollin, specific points that you want to
16 address at this point or do you want to just
17 let it lay the way it is.

18 MR. FREDERICK: Well, I would point
19 out that the negotiators never discussed
20 Harrisburg at all.

21 JUDGE SIPPEL: Why?

22 MR. FREDERICK: We thought that we