

1 relevant to what happens in this case.

2 JUDGE SIPPEL: "They" being who,
3 MASN?

4 MR. KIRK: MASN has conducted --
5 the witness has just identified this as a
6 MASN survey.

7 JUDGE SIPPEL: Well, if it's a
8 MASN survey of an area that -- but Mr.
9 Frederick's point is that -- well, one of his
10 points, anyway, is that it's -- I would say is
11 irrelevant because it doesn't -- it's not one
12 of the areas in contention.

13 MR. KIRK: The format of the
14 survey, and the types of questions that are
15 asked are very relevant to this case. We will
16 concede, we're not going to be introducing it
17 for the purpose of the results that are in the
18 survey.

19 JUDGE SIPPEL: All right.

20 MR. FREDERICK: Your Honor, Mr.
21 Cuddihy is not a survey expert. He's a fact
22 witness, and if they have questions they want

1 to pose to the expert, they could do that,
2 presumably through this document. It's a
3 business record. But the relevance to Mr.
4 Cuddihy, who is not a survey expert, who
5 didn't conduct the survey, is -- there's no
6 foundation for it, and there's no tie for this
7 document to Mr. Cuddihy.

8 JUDGE SIPPEL: Well, look, I'm
9 going to -- in light of the fact of the
10 representation that it's not going to be used
11 -- this document, at least with respect to Mr.
12 Cuddihy, is not going to be used for the
13 purpose of the truth of the matters asserted,
14 it's just -- let's see how far Mr. Cuddihy can
15 go. I'm going to permit it, up to a point,
16 I'm going to permit it. Let's see what we can
17 find out. So, I'm going to overrule the
18 objection on that very narrow basis. Comcast
19 100 is -- well, it's identified. Let's see
20 what he has to say before we receive it.

21 MR. KIRK: Okay. The only
22 purpose, Your Honor, for introducing this was

1 to get Mr. Cuddihy to indicate that this, in
 2 fact, is the survey reference for North
 3 Carolina, that it was conducted on behalf of
 4 MASN, and he's done so, so I will have no
 5 further questions for Mr. Cuddihy, other than
 6 having it admitted into evidence.

7 JUDGE SIPPEL: And who -- is there
 8 going to be further testimony on this, or is
 9 this it?

10 MR. KIRK: This is it.

11 MR. FREDERICK: Your Honor, we
 12 would object because if he's not going to ask
 13 any questions of the witness, there's no
 14 reason to have this admitted for this purpose
 15 with this witness. If he wants to try to
 16 admit it at a later time for his own survey
 17 expert, we can discuss the relevancy of this
 18 exhibit at that time. But counsel has already
 19 conceded that this document has nothing to do
 20 with the witness that he's cross examining.

21 JUDGE SIPPEL: Well, that's
 22 correct, but he's, in effect, using Mr.

1 Cuddihy as a -

2 MR. KIRK: Sponsor.

3 JUDGE SIPPEL: Yes, as a sponsor
 4 because of his position with MASN. And it's -
 5 - I could receive this just on the basis of it
 6 came from the files of the company.

7 MR. FREDERICK: Your Honor, there
 8 was a trial exhibit list that was put together
 9 at your direction to identify the sponsoring
 10 witnesses for documents. He's now trying to
 11 circumvent that rule by using this document
 12 ostensibly to cross examine Mr. Cuddihy, but
 13 he's just conceded he has no further question,
 14 so there is no cross examination question on
 15 the table with respect to this document. Had
 16 he intended to proffer it with a sponsoring
 17 witness, he could have done so. He chose not
 18 to do that on the list, and there is no cross
 19 examination purpose, by his own concession,
 20 for this document.

21 JUDGE SIPPEL: Well, as I -- this
 22 is not Comcast trying to get a Comcast

1 document in the record that's being objected
2 to. This is a MASN document. It was given to
3 him in discovery, and it has the appearance of
4 being a business record. It came from the
5 files.

6 MR. FREDERICK: Your Honor, they
7 still didn't identify it as an exhibit that
8 they intended to use in the trial with a
9 sponsoring witness.

10 JUDGE SIPPEL: Well, that's --
11 okay.

12 MR. FREDERICK: And -

13 JUDGE SIPPEL: I mean, you think
14 you're prejudiced by surprise with this
15 document?

16 MR. FREDERICK: Your Honor, our
17 point is that the rules were intended to
18 establish the means by which the parties could
19 prepare. We have not prepared Mr. Cuddihy on
20 this document, and -

21 JUDGE SIPPEL: Mr. Cuddihy isn't
22 going to testify on this document.

1 MR. FREDERICK: And that is why
2 this document is improperly admitted through
3 Mr. Cuddihy as a witness.

4 JUDGE SIPPEL: I'm having trouble
5 following what -- if this is a document -- you
6 had no objection to it as a genuine document,
7 or that it's -- I'm not going to get into
8 reliability, but this is a document that came
9 from the files, business records of MASN.

10 MR. FREDERICK: Your Honor, we
11 objected to this document on relevancy
12 grounds.

13 JUDGE SIPPEL: Yes.

14 MR. FREDERICK: Because it
15 concerns North Carolina, and has nothing to do
16 with the disputed areas.

17 JUDGE SIPPEL: Well, that's
18 another -

19 MR. FREDERICK: The question -

20 JUDGE SIPPEL: Mr. -- go ahead.
21 I'm sorry.

22 MR. FREDERICK: So, the question

1 of whether or not it's relevant for any
 2 purpose has been conceded with respect to Mr.
 3 Cuddihy because he has no questions of Mr.
 4 Cuddihy with respect to this document. If Mr.
 5 Kirk wants to try to introduce this document
 6 at some later time for some later purpose, we
 7 can discuss it at that time. But he's trying
 8 to circumvent the rules by which there would
 9 be a document used with a witness, and
 10 identified as such. And I just want to point
 11 that out, our objection, on the record.

12 JUDGE SIPPEL: Well, I'm not going
 13 to ascribe nefarious intentions with respect
 14 to this. He's found this witness with --
 15 usually, if it weren't for the fact -- the
 16 point that gives me the concern that you're
 17 raising, really, is the relevance of it. If
 18 it's a North Carolina survey, and I think you
 19 told me, Mr. Kirk, the only -- this is just a
 20 question of methodology that MASN used to do
 21 a survey. That's what I heard you say.

22 MR. KIRK: Correct.

1 MR. FREDERICK: And, Your Honor -

2 JUDGE SIPPEL: And you can't

3 establish that through this witness.

4 MR. KIRK: This witness is -

5 JUDGE SIPPEL: Or can you?

6 MR. KIRK: This witness is

7 establishing that he saw the document, that it

8 is the survey.

9 JUDGE SIPPEL: Yes.

10 MR. KIRK: And that's the purpose

11 I'm trying to introduce it for, Your Honor.

12 JUDGE SIPPEL: But he didn't have

13 anything -- did you have anything to do with

14 conducting the survey, or putting the document

15 together?

16 THE WITNESS: I did not.

17 MR. FREDERICK: This is an outside

18 consultant, Your Honor, named Gerstein Agney.

19 This is not a MASN internal document. This is

20 a consultant -

21 JUDGE SIPPEL: Well, it's

22 described as a normal course of business

1 document, isn't it?

2 MR. FREDERICK: No, it is not.

3 And they are attempting to introduce it so
4 they can bolster the survey done by their
5 expert.

6 JUDGE SIPPEL: Well -

7 MR. FREDERICK: That is the
8 purpose of this admission.

9 MR. KIRK: It's a document you
10 produced.

11 JUDGE SIPPEL: I'm sorry, it's a
12 document you -- that's true. But I'm saying
13 that if there's a nexus between an expert's
14 testimony and this document when your witness
15 takes the stand, or when MASN's witness takes
16 the stand, I'm going to leave it in the record
17 as an identified document, but I can't see any
18 reason for receiving it into evidence at this
19 time. Because -- well, for the reasons I've
20 stated. The thing that can cause confusion --
21 there is a Rule of Evidence on this point.
22 At a minimum, it can cause confusion down the

1 road.

2 Since it doesn't really relate to
3 something that's an issue in this case, I'm
4 inclined to sustain the objection. But I will
5 leave it in the record as an identified
6 exhibit. And if you can come back to it with
7 another witness, whether it's your witness or
8 a MASN witness, I'll reconsider it.

9 MR. KIRK: Can I try and lay a
10 foundation with the witness, Your Honor?

11 JUDGE SIPPEL: Yes, if you think
12 you can. If you think -- yes. You'd have to
13 go beyond what you've done.

14 MR. KIRK: Certainly.

15 BY MR. KIRK:

16 Q Mr. Cuddihy, if I could have you
17 refer back to the map that was given to you as
18 you began your testimony.

19 A Yes.

20 JUDGE SIPPEL: This is 239,
21 Exhibit MASN number 239.

22 MR. KIRK: Correct.

1 MR. FREDERICK: Yes, sir.

2 BY MR. KIRK:

3 Q Do you see the tri-cities DMA?

4 A I do, sir.

5 Q Is that closer to the Baltimore
6 and Washington for DMAs, or closer to North
7 Carolina?

8 A It's closer to North Carolina.

9 Q Do you think the viewers in Tri-
10 Cities Virginia are going to have viewing
11 patterns similar to viewers in Baltimore and
12 Washington, the core DMAs, or to viewers just
13 across the border in North Carolina?

14 A Will you repeat that, please?

15 Q Do you think viewers in the Tri-
16 Cities DMA have viewing patterns and interests
17 that are more akin to viewers in Baltimore and
18 Washington, than North Carolina?

19 A Which part of North Carolina?

20 Q Just North -- the western -

21 JUDGE SIPPEL: Probably west North
22 Carolina.

1 MR. KIRK: Right. Western North
2 Carolina.

3 THE WITNESS: Yes. In Western
4 North Carolina -

5 BY MR. KIRK:

6 Q And do you think residents of Tri-
7 Cities, or Tri-Cities DMA may, in fact,
8 commute back and forth into North Carolina for
9 business and other purposes?

10 A Sir, I have no way of knowing
11 that. I just don't know.

12 Q A survey conducted of viewer
13 interests in North Carolina, do you think that
14 has any relevance to viewer interests in the
15 Tri-Cities DMA?

16 A No, because what I remember from
17 the survey is, it was taken for people in
18 Eastern North Carolina. If I can recall, it's
19 over two years ago, that I thought that this
20 survey was really germane -- I think the
21 questions and the respondents were in Eastern
22 North Carolina. That's what I remember, and

1 I might not be accurate, but that's what I
2 remember hearing.

3 Q Does it say that anywhere in this
4 survey?

5 A Sir, I haven't looked at that
6 survey in over two years.

7 JUDGE SIPPEL: It does say Time
8 Warner Cable Media Markets, so we don't have
9 a MASN or a direct connection with MASN, or
10 Comcast, if I'm reading that right.

11 MR. KIRK: Mid-Atlantic Sports
12 Network, Your Honor, is MASN.

13 JUDGE SIPPEL: Oh, yes, of course,
14 of course. But what is -- it says Time Warner
15 Cable Media Markets. What's -- well, okay.
16 I understand. I understand. This definitely
17 is a MASN -- but it's done by Gerstein, but
18 it's a MASN survey. And we don't know for
19 what purposes. You're saying Eastern North
20 Carolina?

21 THE WITNESS: What I remember,
22 Your Honor, was that this was a survey where

1 we were looking to talk to people in Eastern
 2 North Carolina, where many of the Time Warner
 3 systems are concentrated in Eastern North
 4 Carolina. Our territory is two-thirds of
 5 North Carolina, middle to east.

6 MR. KIRK: I think the -

7 JUDGE SIPPEL: Go ahead. Go
 8 ahead.

9 MR. KIRK: -- interests of viewers
 10 in North Carolina that abuts Tri-Cities, and
 11 also abuts the Roanoke-Lynchburg DMA may have
 12 relevance to demand for their programming.

13 MR. FREDERICK: I object to that,
 14 Your Honor, because there's no foundation in
 15 any of the evidence in the record on that
 16 point, and the purpose through Mr. Cuddihy is
 17 to try to establish the truth of the results
 18 of this survey about which he's testified he
 19 has no -- he was not involved at all in the
 20 formation of this survey. And Mr. Kirk's
 21 questions are trying to go to the truth of the
 22 facts within this survey about which MASN was

1 not the creator of this document.

2 JUDGE SIPPEL: Well, MASN was the
3 creator of the document through Gerstein.

4 MR. FREDERICK: No, it was for
5 MASN.

6 JUDGE SIPPEL: Yes. That's what I
7 say, MASN was responsible for having it done.
8 They didn't do it. Gerstein did it, right?

9 MR. FREDERICK: That's correct.
10 But it's Gerstein's methodology, it's
11 Gerstein's form of taking a survey. And the
12 questions Mr. Kirk was asking were designed to
13 have Mr. Cuddihy agree to conclusions on a
14 survey that MASN did not do with its own
15 personnel, but that MASN commissioned and
16 outside firm.

17 JUDGE SIPPEL: Well, be that as it
18 may, I'm not going to get down that road with
19 you. But it does -- there is testimony now
20 from Mr. Cuddihy that he thinks it's a focus
21 on the east coast, on the eastern part of
22 North Carolina, in any event, and North

1 Carolina to the west is where Tri-Cities -- if
2 there's any overlap, it's going to be in the
3 western part of the state.

4 MR. FREDERICK: Correct, Your
5 Honor.

6 JUDGE SIPPEL: And there's really
7 no -- there's no nexus here to anything, as
8 far as the market goes. I mean, there's --
9 methodology, that's too speculative, that's
10 too abstract. This is a witness who -

11 MR. KIRK: We'll withdraw it.

12 JUDGE SIPPEL: Thank you. Do you
13 want to just completely withdraw it, or do you
14 want to leave it in as identified?

15 MR. KIRK: We'll leave it in, and
16 try and get it introduced at a later time.

17 JUDGE SIPPEL: Okay. Thank you,
18 Mr. Kirk.

19 MR. KIRK: Thank you, Your Honor.

20 BY MR. KIRK:

21 Q Mr. Cuddihy, have you ever stated
22 that MASN was not giving viewers in

1 Washington, D.C. a reason to watch the
2 programming?

3 A I believe that was on an email I
4 sent to John Angelos referring to split fee
5 programming.

6 Q And did you indicate that MASN was
7 getting killed down there, referring to
8 Washington, D.C.?

9 A Yes. What I was referring to was
10 it made more sense to have a Washington radio
11 show in the Washington DMA, and we already had
12 a Baltimore radio show in the Baltimore DMA.
13 So, I wanted to serve the viewers of
14 Washington with Redskins themed programming.

15 Q And if you indicated that you were
16 giving viewers no reason to watch MASN in
17 Washington, D.C., what reason would viewers
18 have in Tri-Cities to watch MASN?

19 A I don't follow. Where are you
20 going? I don't follow the question.

21 Q You indicated -- you testified
22 that viewers in Washington, D.C. had no reason

1 to watch MASN, based on your email. Correct?

2 A My email, which I believe you
3 might be interpreting one way, was -- the
4 purpose was for me to get my boss to allow me
5 to spend money to acquire highly expensive
6 programs in Washington, D.C. That was a way
7 for me to push my boss. It wasn't to say that
8 we're getting killed in Roanoke, Norfolk,
9 Charlotte, or anywhere else. It was a way for
10 me to get my boss to move and allow me to
11 spend money on programming that's expensive.
12 That's what that clause is.

13 Q Have cable operators complained to
14 MASN that its rates are too high?

15 A I don't believe the cable
16 operators that are carrying us right now are
17 complaining they're too high.

18 Q Did any of them complain that your
19 rates were too high before they decided to
20 carry?

21 A Sure, that's common practice in
22 the industry. Most operators complain that

1 rates are too high for all programs.

2 Q And the cable companies that are
3 not currently carrying you, have they
4 complained that the rates are too high?

5 A Sure. There are some who say
6 rates are too high, yes.

7 MR. KIRK: I'd like to approach
8 the witness, and show him Comcast Exhibit 69.

9 JUDGE SIPPEL: Very well.

10 MR. KIRK: This has already been
11 introduced into evidence.

12 JUDGE SIPPEL: Thank you.
13 Comcast, Affiliate Status Report. Is this
14 going to remain privileged? Is that your
15 intention?

16 MR. KIRK: I will leave that to
17 MASN. It's a MASN produced document.

18 JUDGE SIPPEL: Mr. Frederick. If
19 you can give us a read on it. If you can't,
20 then -

21 MR. FREDERICK: For privilege, or
22 for confidentiality, Your Honor?

1 JUDGE SIPPEL: Confidentiality.

2 MR. FREDERICK: We would like to
3 keep it confidential, but we do not attach a
4 privilege to it. We disclosed this document
5 in discovery, notwithstanding the word
6 "privileged" on the top of it.

7 JUDGE SIPPEL: All right. So we
8 can strike privileged, anyway. Is Mr. -- what
9 is his relationship to -- is he an attorney?

10 MR. FREDERICK: He is an attorney,
11 Your Honor, and he is a consultant to MASN.
12 And we are not asserting attorney-client
13 privilege with respect to this document.

14 JUDGE SIPPEL: All right. You may
15 proceed, sir. We'll keep it confidential for
16 now, anyway.

17 BY MR. KIRK:

18 Q Have you seen this document
19 before?

20 A I have, yes.

21 Q And, in this document -- can you
22 describe this document for the Court?

1 A Sure. This document is an email
2 from David Gluck, our consultant who
3 negotiates almost all of our carriage deals,
4 certainly the biggest ones. It's an email
5 from David to John Angelos, who's the COO of
6 MASN, myself, Mike Haley who is the CFO of
7 MASN, Mark Wyche, who is another of our
8 consultants who helps negotiate carriage
9 agreements, and Jim Buckle, who works for me
10 as my Director of Affiliate Relations.

11 Q Based on this status report, why
12 did [REDACTED] not want to carry MASN?

13 A [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 Q And [REDACTED], why did
17 [REDACTED] indicate it did not want to carry
18 MASN?

19 A [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 Q Same question for [REDACTED]

1 [REDACTED]

2 A [REDACTED] has stated that [REDACTED]

3 [REDACTED] [REDACTED]

4 [REDACTED] [REDACTED]

5 [REDACTED]

6 Q Thank you, Mr. Cuddihy. In your
7 testimony you discussed overflow issues. Is
8 that correct?

9 A I did, yes.

10 Q How often, based on your
11 experience with CSN Mid-Atlantic, did CSN Mid-
12 Atlantic require an overflow channel on an
13 annual basis for its programming?

14 A I'm sorry. CSN Mid-Atlantic?

15 Q Correct.

16 A I don't know -- I didn't get your
17 question.

18 Q You previously worked for CSN Mid-
19 Atlantic. Correct?

20 A I was Vice President there, yes.

21 Q And you testified that they
22 required an overflow channel. Correct?

1 A We were given an overflow channel.

2 I can't say we required it.

3 Q How often did you use that
4 overflow channel on an annual basis?

5 A Well, during basketball and hockey
6 season, from November until April, we used it
7 for the two sports, so that's six months of
8 the year. And then when baseball came on in
9 April, that was another month where we would
10 use a third overflow channel, if necessary, so
11 at least six or seven months out of the year.

12 Q For how many games?

13 A I haven't been there since 2004,
14 so to recall, it could have been 30 or 40 a
15 year for football, I'm sorry, for hockey and
16 basketball, maybe five to ten for baseball.
17 But, again, you're asking me something that
18 happened in 2001, 2002, 2003, 2004, and I
19 haven't looked at those schedules probably
20 since the fall of 2004, so I can't recall with
21 exact accuracy. I'm giving you a ballpark.

22 Q Would you say less than 50?

1 A Yes, I would say less than 50. I
2 think, yes, it could be right around that
3 number. But maybe less than 50.

4 Q And how many games overlap on
5 MASN, thus triggering an overflow channel?

6 A About 125 a year, 125 conflict
7 nights a year.

8 Q So, for CSN Mid-Atlantic, they
9 required an overflow channel for less than 50,
10 but MASN requires an overflow channel for up
11 to 120. Is that what you're saying?

12 A Well, you're using the word
13 "required", and I can't sit here and tell you
14 that CSN Mid-Atlantic required all operators
15 to carry an overflow channel. In fact, there
16 were operators who didn't carry an overflow
17 channel. Comcast was one that made sure the
18 games got on, because of the parent company,
19 and affiliate relationship.

20 Q Let me rephrase then, so you're
21 comfortable. The number of games that
22 overlapped that would trigger the need for an

1 overflow channel for CSN Mid-Atlantic was less
2 than 50. And for MASN, it was upwards of 120?

3 A Yes. Yes, that's correct.

4 Q Do you think that's a significant
5 difference?

6 A Well, the difference, to me, is
7 between three channels, when you have hockey,
8 basketball, and baseball in the month of April
9 versus two channels, which is what MASN
10 requires. That's a significant difference, I
11 think. We only ever ask for two channels.

12 Q Are you testifying regarding the
13 demand for MASN programming?

14 A I am.

15 Q And does your testimony discuss
16 the creation of Home Television Territories
17 for Major League Baseball?

18 A Yes, we have discussed Home
19 Television Territories for Major League
20 Baseball, yes.

21 Q And your current written direct
22 testimony, does it discuss the creation of the