

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, ) CV No. 17-2511  
 )  
 vs. ) Washington, D.C.  
 ) March 20, 2018  
 ) 11:00 a.m.  
 AT&T, INC., ET AL., )  
 )  
 Defendants. )  
\_\_\_\_\_)

TRANSCRIPT OF EVIDENTIARY HEARING  
BEFORE THE HONORABLE RICHARD J. LEON  
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

DEPUTY CLERK: All rise. The United States District Court for the District of Columbia is now in session, the Honorable Richard J. Leon presiding. God save the United States and this Honorable Court. Please be seated and come to order.

Good morning, Your Honor. This morning we have Civil Action No. 17-2511, the United States of America v. AT&T, Inc., et al.

Counsel for the parties, please approach the lectern and identify yourself for the record, please.

MR. CONRATH: Good morning, Your Honor. Craig Conrath for the United States.

THE COURT: Welcome back.

MR. WELSH: Good morning, Your Honor. Eric Welsh for the United States.

THE COURT: Welcome back.

MR. KEMPF: Good morning, Your Honor. Don Kempf for the United States.

THE COURT: Welcome back.

MR. STRONG: Good morning, Your Honor. Curtis Strong representing the United States.

THE COURT: Welcome back.

MS. BROWN-REILLY: Good morning, Your Honor. Alexis Brown-Reilly for the United States.

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THE COURT: Welcome back.

MS. GUDIS: Good morning, Your Honor.

Elizabeth Gudis for the United States.

THE COURT: Welcome back.

MR. BRENNER: Good morning, Your Honor.

Nathan Brenner for the United States.

THE COURT: Welcome back.

MR. PETROCELLI: Good morning, Your Honor.

Daniel Petrocelli for defendants.

THE COURT: Welcome back.

MS. ROBSON: Good morning, Your Honor.

Katrina Robson for defendants.

THE COURT: Welcome back.

MR. OPPENHEIMER: Good morning, Your Honor.

Randy Oppenheimer for the defendants.

THE COURT: Welcome back.

MR. WALTERS: Good morning, Your Honor.

Rob Walters here for AT&T and DirectTV.

THE COURT: Welcome back.

MR. BARBUR: Good morning, Your Honor.

Peter Barbur representing Time Warner.

THE COURT: Welcome back.

MR. ORSINI: Good morning, Your Honor.

Kevin Orsini for Time Warner.

THE COURT: Welcome back.

1           MR. RAIFF: Good morning, Your Honor. Mike Raiff  
2 for AT&T and DirecTV.

3           THE COURT: Welcome back.

4           All right, Mr. Conrath. Do you have anything to  
5 report on any progress that was made, if any, on the  
6 confidentiality potential order?

7           MR. CONRATH: I think some progress has been made,  
8 not specifically with respect to the confidentiality order,  
9 but I'm prepared to discuss that.

10          THE COURT: Okay.

11          Just procedurally, how we get from a situation  
12 where we probably, on both sides, have  
13 overconfidentiality-ized things to a place where we can move  
14 forward with, to the fullest extent possible, the testimony  
15 in this trial in this courtroom without closing those doors.

16          MR. CONRATH: All right.

17          So I think we have -- we've talked this morning  
18 with Mr. Petrocelli, and I think there's an accommodation  
19 with respect to some of the defendants' confidentiality  
20 objections that I think they're going to -- I'm sure  
21 Mr. Petrocelli will correct me if I'm getting this wrong.  
22 They're going to -- they've been sending us designations,  
23 which sometimes we think are overbroad, sometimes very  
24 overbroad.

25          THE COURT: Sure.

1           MR. CONRATH: We have sent back the "we think this  
2 is overbroad, and here's some stuff that looks like it is  
3 legitimately confidential."

4           I think where we are is that the defendants will  
5 accept the responses that we've gotten them, and some of  
6 those may yet be in course, Your Honor.

7           For purposes of going forward, reserving a right  
8 to object to particular questions that go to particular  
9 facts and reserving the right to redact exhibits that come  
10 into the record to keep the focus either to redact  
11 confidential information or to redact irrelevant material  
12 that would -- might otherwise be confidential but relates to  
13 another part of the business. That would be one part.

14           That's still going to leave some pretty important  
15 parts of defendants' information and issues under a  
16 confidentiality claim and one that we recognize, because we  
17 do recognize that defendants and third parties have  
18 legitimate confidentiality interests.

19           So if I could talk about where we are with respect  
20 to the third-party issues, because that's the most immediate  
21 one.

22           THE COURT: Yeah. And weave into your discussion,  
23 if you would, Mr. Barbur's suggestion that he made a week  
24 ago, I think it was, roughly, based on his trial experience  
25 in the *American Express* case.

1 MR. CONRATH: Based on our shared trial  
2 experience.

3 THE COURT: That's right.

4 MR. CONRATH: Yes.

5 THE COURT: Witnesses were confronted on the  
6 witness stand with documents that contained confidential  
7 information. But when the questioning was going on, the  
8 Judge had the full document in front of him or her -- I  
9 can't remember if it was him or her -- as did the witness,  
10 as did the questioner; but reference would be made to  
11 specific locations in the document without stating in open  
12 court what that confidential information was.

13 The Judge knew what was being pointed to, the  
14 witness knew what was being pointed to, and the questioner  
15 knew what was being pointed, and did opposing counsel, I  
16 might add.

17 It's not ideal maybe, but it's better than trying  
18 cases behind closed doors, if you can avoid it.

19 MR. CONRATH: So we certainly have always planned  
20 to do that kind of an examination, where the confidential  
21 information is amenable to that kind of a solution.

22 That works very well. So one of the main things  
23 that was at issue in the *American Express* case, that the  
24 third parties who were testifying, and sometimes American  
25 Express felt was confidential, was the actual -- the price

1 of their services that the merchant was paying. And so it  
2 was very easy to say, "See that third line? Was that the  
3 price you're paying?"

4 "Yes."

5 Everybody knew, just as you laid out, and it was  
6 in the record in a sealed document --

7 THE COURT: Sure.

8 MR. CONRATH: -- and it was clear.

9 There was also parts of that trial that were  
10 conducted in a closed courtroom, where the kind of evidence  
11 that was coming forward wasn't really that kind of a "here's  
12 a number" sort of a solution.

13 And we're going to have some of that here.

14 So, first of all --

15 THE COURT: So like analytics? So if one of the  
16 third parties has an analytic that they use to analyze the  
17 market strength or weakness of a particular product that  
18 they don't want people knowing, a competitor in particular,  
19 knowing that what analytics they used, they want to keep  
20 that confidential, okay?

21 MR. CONRATH: That's a part of it.

22 And let me take that a little further.

23 THE COURT: All right.

24 MR. CONRATH: And let me pick up my notes.

25 THE COURT: Take your time.

1           MR. CONRATH: So I want to emphasize that there's  
2 a lot of information from the third parties that's not  
3 confidential. And we obviously would -- we have been trying  
4 to maximize it, and we've been working with third parties to  
5 do that.

6           But there is an important issue, and the an  
7 important issue that the third parties all will be able to  
8 address is the prediction, the expectation, that this merger  
9 will cause prices to go up to these third parties and,  
10 therefore, the consumers. And that's the anti-competitive  
11 effect -- that's one of the anti-competitive effects that  
12 we've alleged in this case.

13           Now, those prices, they're not just like -- they  
14 don't just have a list price. These prices are set in  
15 negotiations between the third parties and Time Warner,  
16 between the third parties and other companies that sell  
17 content.

18           The merger is going to change the bargaining  
19 leverage in those negotiations, and that's the source of one  
20 of the important anti-competitive which have effects that  
21 we're going to talk about.

22           So the third parties, in order to put that  
23 evidence in front of Your Honor about how is this market  
24 going to work in the -- how does it work now? And then how  
25 would it change in the future based on what we know about

1 the market fact about how it works now?

2           They're going to have to testify about the  
3 bargaining leverage that they have and that the people that  
4 they negotiate with have, Time Warner and, frankly, others  
5 as well.

6           And they would have to be negotiating in the  
7 future with the merged Time Warner plus AT&T.

8           So their negotiating strategy is really an  
9 important part of how they are able to compete. Can they --  
10 as Your Honor was alluding to, what do they include in their  
11 packages and at what price they can get it, especially at  
12 what price they can get it if it's really important for  
13 their customers, is a critical part of how they compete.  
14 And that's why it's highly confidential.

15           So they're bargaining with Time Warner. They're  
16 bargaining with others.

17           Their negotiating strategy is a critical part of  
18 how the merger change in bargaining leverage would raise  
19 prices to them and then to their consumers.

20           If the other side knows what their bargaining  
21 strategy is, if it knows where they see the bargaining  
22 leverage, if it kind of can kind of figure out what their  
23 bottom line might be, obviously, that's something they would  
24 never disclose to somebody they're negotiating with.

25           And if that became public, they would be

1 competitively harmed because they'd be going into a  
2 negotiation having laid bare their negotiating strategy.

3 THE COURT: Let's be clear when you mean what you  
4 say "if it went public" --

5 MR. CONRATH: Uh-huh.

6 THE COURT: -- all right?

7 Are you suggesting that for purposes of  
8 cross-examination, the defendants can't know this.

9 MR. CONRATH: No, no, of course not.

10 But the defendants --

11 THE COURT: So you're saying, other than the  
12 defendants, who will be in this courtroom, who will be able  
13 to cross-examine these third parties, if it went public  
14 beyond that, that would be the problem?

15 MR. CONRATH: Yes.

16 And, more precisely, the Court's confidentiality  
17 order in this case allows some information to go to  
18 defendants' counsel but not on to the businesspeople. And  
19 this kind of confidential negotiating strategy would be in  
20 that category under the existing court order.

21 Under the existing court order, defendants'  
22 counsel have the documents of these third parties, but they  
23 can't show them to the businesspeople.

24 THE COURT: Exactly.

25 MR. CONRATH: And that's the standard practice in

1 these -- in cases where there's confidential information.  
2 And your order protects --

3 THE COURT: Right.

4 MR. CONRATH: -- the confidential information in  
5 that way.

6 But so what's important is that these witnesses be  
7 able to give Your Honor a full explanation of their thinking  
8 and why they -- what they see about the bargaining leverage.

9 I think that we had a little discussion yesterday  
10 about, well, could the third parties just tell us their  
11 bottom line in open court and then that would be enough?

12 And I think not for two reasons. One is, what's  
13 really important -- so customer witnesses -- and these are  
14 customers of Time Warner. They would be customers of the  
15 merged firm. Customer witnesses are important in antitrust  
16 cases because we're worried about protecting customers and  
17 consumers eventually, but they're important because they  
18 know market facts.

19 So in addition to what their projection, their  
20 prognostication of what might happen in the future, the  
21 Court needs the market facts on which they base those views  
22 and the market facts from which the Court can make its own  
23 evaluation of the likely future effect.

24 I mean, that's -- I guess it just reminds us that  
25 the Court's put in a tough position in these cases. The law

1 requires an assessment of what's likely to happen in the  
2 future. None of us knows that. It's our job to put in a  
3 convincing case to show you that what's likely to happen in  
4 the future --

5 THE COURT: Doesn't the Court also have to factor  
6 in evaluating these witnesses --

7 MR. CONRATH: Yes, absolutely.

8 THE COURT: -- third parties, the extent to which  
9 the third parties may be saying what they're saying in order  
10 to undercut the deal, in order to preserve the strength of  
11 their position in the bargaining process that they  
12 anticipate coming up with the defendants?

13 MR. CONRATH: Well, it's certainly true that the  
14 Court needs to evaluate those witnesses and other witnesses  
15 who might have similar motivations for the party witnesses.

16 THE COURT: Potential prejudices in all camps.

17 MR. CONRATH: That's right.

18 But that's -- so there are two -- two observations  
19 come from that, Your Honor. One is that that's an important  
20 reason why, and that was actually -- you're leading into my  
21 next point.

22 The witnesses can say what they project is the  
23 likely outcome of the merger, but, more important, is the  
24 underlying facts.

25 And, of course, as to their assessment of the

1 market, the Court is going to hear a different assessment of  
2 the market from the other side. And the Court's, therefore,  
3 going to need to make an evaluation of what's the best  
4 prediction, what do the market facts really show.

5           And for that, it's going to be important for these  
6 witnesses from third parties to explain how they negotiate.  
7 What's their assessment of bargaining leverage? What is  
8 their assessment of their own bargaining leverage, now and  
9 in the future if the merger goes through? What's their  
10 assessment of the bargaining leverage of the people they're  
11 negotiating with on the other side, Time Warner today,  
12 possibly both of them in the future?

13           Some of that is going to be based on years of  
14 business experience and knowledge. Some of that is going to  
15 be based on estimates and evaluations and analysis, which  
16 you kind of referred to a minute ago, their own internal  
17 analysis.

18           For anyone who's negotiating with them, their  
19 internal thinking about what's my negotiating edge here,  
20 what's my weakness, would be the crown jewels to know what  
21 your opponent's negotiating strategy is.

22           And that's why it's really critical to keep that  
23 part confidential. And to conduct that, we recommended a  
24 process to be able to conduct that examination in a closed  
25 courtroom.

1           So it's not uncommon in antitrust cases for  
2 portions, small portions to be heard in a closed courtroom.  
3 The *American Express* case, where Mr. Barbur and Mr. Orsini  
4 and I were all in, had a portion.

5           The *H&R Block* case before Judge Howell in this  
6 District had it.

7           Last year, both the *Anthem* case and, to a small  
8 extent, the *Aetna* case, had small portions.

9           So it's not -- it's often an important part of  
10 giving the Court an opportunity to really know the facts,  
11 where witnesses are free to explain it.

12           Now, you heard an interesting example yesterday.  
13 Mr. Welsh laid out how sometimes on this exact -- the exact  
14 topic of bargaining leverage, the defendants had been  
15 asserting confidentiality on their own bargaining leverage,  
16 on the same point saying that third parties' bargaining  
17 leverage information should not be confidential.

18           And so what's going on there? I mean, it could  
19 just be an accidental inconsistency. But maybe we should  
20 think about the fact that the defendants don't want the  
21 third parties to be able to testify fully and completely to  
22 lay out how this merger would affect them.

23           And we don't want -- it's important that  
24 confidentiality concerns not be used as a weapon to make the  
25 witnesses worry that they're going to have to shoot

1 themselves in the foot in order to give the Court a full and  
2 fair estimation of what the evidence is.

3           So that's why we're asking for some opportunity  
4 for witness -- for the third party -- we will conduct  
5 examination as much as possible in open court, the big  
6 picture, the specifics that we can put on a piece of paper  
7 in front of the witness.

8           And then when we get to the point where the third  
9 parties' counsel have told us, "This stuff is really  
10 confidential," give that third-party counsel an opportunity  
11 to make the case to the Court, because it's clear that the  
12 burden is always on somebody who's trying to keep something  
13 confidential. Let them make the case. And then, if so,  
14 we'd proceed with that part in closed session.

15           There's just one more thing if I can float back to  
16 it.

17           The Court's entirely correct a minute ago saying,  
18 you know, I've got to think about what's the incentive of  
19 every witness who comes in and the possibility that  
20 customers, third-party witnesses who are customers in this  
21 case, are just worried about protecting themselves.

22           So that's true in every case, every antitrust  
23 case, where the prediction of harm is that prices will go up  
24 to customers. And that's a self-interest. Of course, they  
25 don't want that.

1           But it's not a -- so far right there, that's a  
2 self-interest that is consonant with what the antitrust laws  
3 are trying to do. The antitrust laws are trying to say  
4 competition should protect customers, should protect  
5 consumers from price increases that result from something  
6 anti-competitive.

7           So when customers give that kind of testimony, it  
8 is certainly self-interested in that people don't want their  
9 prices to go up; but it's a self-interest that's consonant  
10 with the antitrust laws.

11           Now, we have a little unusual situation here  
12 because what drives those customers to be -- to have some  
13 concerns in some cases is that their negotiating partner,  
14 somebody they need to buy from, could be acquired by  
15 somebody that they compete with.

16           And so their incentive to keep their prices low,  
17 which is a pro-competitive incentive, does line up with the  
18 fact that they don't want their competitor to be working to  
19 jack up their prices even more than they might ordinarily  
20 go. And so the Court is correct. The Court needs to sort  
21 out what's their motive.

22           But I just want to be clear that the basic motive  
23 of a customer wanting not to have its prices go up is the  
24 basic idea of what the antitrust laws are supposed to do.  
25 It is going to be the Court's job to listen to the testimony

1 of these customers and evaluate if that's their motivation  
2 or if it's something else.

3 And one of the ways to help have that happen is to  
4 have a full -- have them able to fully and freely explain  
5 the reasons for their bargaining positions, which is an  
6 important part of how they set prices.

7 So with that, that's why we need the option to  
8 move the Court in particular cases, for some testimony in a  
9 closed courtroom.

10 THE COURT: So procedurally speaking, would you  
11 envision a day or two days in advance of someone testifying  
12 who would have potentially classified -- not classified --  
13 confidential information, bringing it to the Court's  
14 attention, saying, look, we're going to call a witness  
15 Friday or whatever day, two days from now.

16 MR. CONRATH: Right.

17 THE COURT: And this witness, the third-party  
18 witness, is going to have -- a portion of his or her  
19 testimony is going to be clearly covering confidential. We  
20 can get through probably 80, 90 percent of it with the doors  
21 open.

22 MR. CONRATH: Right.

23 THE COURT: But there's 10 percent that we're  
24 really going to need to close the doors off for at least an  
25 hour or something like that. Is that the kind of discussion

1 you would envision having with the Court?

2 MR. CONRATH: Yes. Exactly, Your Honor.

3 And I guess I think that would be the most  
4 efficient way to do it.

5 If the Court preferred to do it immediately before  
6 we moved to the closed session, we can do that. I think  
7 there's a lot of merit in doing it the day before. But  
8 we're at your disposal in terms of what seems to work.

9 THE COURT: I think having a more of a heads-up  
10 is --

11 MR. CONRATH: Right.

12 THE COURT: I try to think through the following  
13 day's sequence of witnesses.

14 And unless there's some reason why, let's assume  
15 for the sake of discussion that there were four witnesses  
16 who were going to testify tomorrow --

17 MR. CONRATH: Right.

18 THE COURT: -- but only one of the four poses this  
19 problem; then I would recommend putting -- unless there's a  
20 good reason why you don't want to do it this way, putting  
21 the fourth one, the one with the problem or the issue at the  
22 end of the day so that when we get to the portion of their  
23 testimony that's going to have this confidentiality issue,  
24 we can be -- at that point, the public will have been here  
25 all day. It might be the last 20 minutes of testimony, 15

1 minutes. We just, for their purposes, they're adjourned --  
2 the public and the press is adjourning early, and we're just  
3 going to continue on here in the courtroom with the doors  
4 closed for the next 20 minutes, a half hour, whatever it is  
5 afterwards.

6 Does that make sense to you?

7 MR. CONRATH: That makes lot of sense to me,  
8 Your Honor. Absolutely.

9 Thank you.

10 THE COURT: Thank you.

11 Hold on a second.

12 MR. PETROCELLI: Good morning, Your Honor.

13 THE COURT: Good morning, Mr. Petrocelli.

14 MR. PETROCELLI: So we took your comments to heart  
15 yesterday, and I advised Mr. Conrath this morning that with  
16 respect to the defendants' documents and with respect to our  
17 designations of confidentiality, that we would agree as  
18 follows.

19 We have been designating various pages of  
20 documents and even portions of documents as confidential.  
21 And bear in mind that these documents are all extremely  
22 thick. 95 percent of these pages are irrelevant.

23 But the whole exhibit has been proffered, and so  
24 we need to go through every page.

25 We've been disagreeing. So I finally said, with

1 the permission of my clients, look, we will accept the  
2 government's position on what they think is confidential  
3 about our documents.

4 So if you agree with part of it, that's fine. If  
5 you disagree, we'll just go with you, because we don't want  
6 to interrupt the proceedings.

7 We do want to reserve the right, if something  
8 comes up in the course of questioning, to pop up and point  
9 out to the Court a problem. But we wanted to clear the path  
10 to make it as easy as possible for Your Honor to conduct  
11 these proceedings without having to close the courtroom.

12 The second thing I said to Mr. Conrath was, given  
13 that you're not going to use or refer more than a page or  
14 two of these thick documents, when they actually go into  
15 evidence, they should only go in with the cover page and the  
16 actual page that was used in court, not with all these other  
17 pages that have all kinds of proprietary financial  
18 information that doesn't have anything to do with the trial.

19 And he has agreed to that.

20 So I think with respect to the defendants'  
21 materials, that takes care of a lot of the issue,  
22 Your Honor.

23 Now, as to the third parties, I need to respond to  
24 some of the issues that Mr. Conrath pointed out. But  
25 obviously, Your Honor, this is a matter totally within the

1 Court's discretion. And we will defer to, obviously,  
2 however the Court wants to handle this.

3 I do want to say, however, as we discussed  
4 yesterday, that I do not believe much of this examination  
5 from these third parties really entails anything  
6 confidential.

7 First of all, Mr. Conrath was calling them  
8 customers, okay? As you're going to see or have seen from  
9 the briefing, they are not the customers that the antitrust  
10 law is concerned with. The antitrust law is concerned with  
11 the consumers.

12 THE COURT: Consumers.

13 MR. PETROCELLI: They are competitors.

14 Now, they are purchasing programming, but they are  
15 competing in the marketplace.

16 And you'll see, tomorrow, we'll show you, you  
17 know, sort of give you a picture of the competitive  
18 landscape.

19 But these are competitors.

20 And, Your Honor, they have an interest -- many of  
21 them are public companies. And they have an interest in  
22 testifying as much as possible in a closed courtroom,  
23 because they are motivated to testify that the world is  
24 going to end and their companies are going to go down the  
25 tubes if this merger is cleared. And that's not something

1 they want to say with analysts sitting in the courtroom.

2 But it's something, if the case is sealed, nobody  
3 sees it, then, of course, they have freedom to say how the  
4 sky is going to fall.

5 None of these witnesses, Your Honor, none of these  
6 competitors is coming forward with some confidential  
7 financial analysis of what's going to happen to them. It's  
8 as simple as this. We have taken their depositions. We  
9 have read their CID depositions.

10 Right now, before the merger, these are all  
11 distributor competitors that are being called, these are  
12 people who acquire programming from various networks, like  
13 Turner from NBC. They're cable companies -- or in one case  
14 a satellite company called Dish or an Internet distributor,  
15 and they then sell to customers, consumers, real consumers.

16 They say, right now, if we get into a tough  
17 negotiation with Turner, they're asking more than we want to  
18 pay to get their networks, here's what happens: We can't  
19 make a deal, just like in any other commercial arrangement.

20 So what happens when you can't make a deal? They  
21 call that going dark, blacking out. These blackouts,  
22 Your Honor, are rare. They happen for a day, a week.

23 Turner's only had two, and the longest was 30  
24 days.

25 Now, when these companies can't make the deal and

1 there's a blackout, what happens is the following: If  
2 you're a Comcast or you're a Dish or you're a Cox  
3 distributor -- consumer of cable TV and you're watching TV,  
4 all of a sudden the Turner network is not on. It's blank.  
5 No CNN.

6 So what might happen? Well, some people would  
7 wait, because they figure these things sort of work out  
8 after a day or two; usually they do. In extreme situations,  
9 some of them will say, you know what? I'm calling up to  
10 cancel. That's a big deal. You've got to stay home.  
11 You've got to wait until the cable guy to come out or the  
12 satellite guy comes out.

13 And then they have these, these distributors have  
14 what they call these save desks where they have these people  
15 who are armed to prevent you from canceling by offering you  
16 all kinds of discounts and promotions.

17 Hey, don't cancel. Wait another week or wait  
18 another day. We'll give you a free month. We'll give you a  
19 gift card of \$100. We'll do this. We'll do that -- to try  
20 to keep them.

21 Let's assume the save desk doesn't save everybody,  
22 and some people leave. Their theory is that some people are  
23 going to leave and they're going to go off to another  
24 distributor, sign up with DirecTV maybe. That's premerger.

25 Now, let's say this merger gets cleared. Now

1 we're having the identical negotiation, and they still can't  
2 make a deal, right?

3           It's the same programming. It's the same content.  
4 Nothing is different. This is a vertical merger. No  
5 horizontal -- there's been no-competitor that's being  
6 eliminated, Your Honor.

7           In a horizontal merger, you have four competitors.  
8 Two merge. Now you've got three. All of a sudden, you've  
9 got a real market problem, and you get into a lot of these  
10 market definition, market structural issues, market-share  
11 issues.

12           Here, no-competitor is being eliminated, so  
13 there's no reduction -- increase in market concentration.  
14 What you have is a supplier and a distributor joining hands,  
15 and that happens all the time. And there's no presumptive  
16 harm to competition. In fact, the case law is that it's  
17 pro-competitive.

18           And the reason why it's pro-competitive is because  
19 two companies have to earn a profit; now only one company  
20 earns the profit. And as a result, that company can offer  
21 lower prices to its consumers, which is precisely what their  
22 expert has actually admitted and acknowledged; that post  
23 merger, the consumers of DirectTV, for example, are going to  
24 pay lower prices.

25           So what's this whole fear that the sky is going to

1 fall?

2           So here's the theory, and it doesn't require any  
3 financial analysis to explain this to you on the witness  
4 stand.

5           The theory is this: So after the merger, Turner  
6 and, let's say, Cox -- the witness from Cox will be here  
7 tomorrow. They can't make a deal.

8           Cox is going to say, you know what? I am now  
9 forced to meet -- Turner is going to say, you know what?  
10 I'm going to charge you more than I would have yesterday,  
11 even though it's the identical content.

12           And Cox says, why are you going to do that? It's  
13 the same programming and same networks.

14           And Turner says, Well, I kind of got more leverage  
15 on you now.

16           Why do you have more leverage on me?

17           Well, here's why: Because before the merger, if  
18 we didn't make a deal, you were going to lose some  
19 customers. And now, if we don't make a deal, you're still  
20 going to lose some customers, but a couple of those  
21 customers may go to DirecTV, which is now a part of my  
22 company. So I may pick up a little bit more business than  
23 I would have before the merger.

24           Here's the problem, Your Honor. When a programmer  
25 does not make a deal with a distributor, it is catastrophic.

1 And you are going to hear that on the witness stand.

2 It is catastrophic because the programmer loses  
3 all of the revenue that it gets from the distributor the way  
4 the programmer, in this case, Turner, makes its money in two  
5 ways. I'm using hypothetical numbers.

6 Let's say it charged a company, a distributor  
7 \$5 per sub that the distributor has. Let's say the  
8 distributor has a million subs, subscribers, consumers. The  
9 day no deal is made and the programming is off the air,  
10 that's five -- that's 1 million times \$5. That's \$5 million  
11 a month that Turner loses every single month and never gets  
12 it back.

13 It's catastrophic for a programmer to not be  
14 distributed, because programmers are trapped. They don't  
15 have a direct relationship with the subscriber. They've got  
16 to go through the distributor, who has the relationship with  
17 the subscriber.

18 That's one of the virtues of this merger, to go  
19 direct to the consumer and not be trapped.

20 Now, it's catastrophic for a second reason,  
21 because in the television world, in today's world, a  
22 programmer makes its money two ways.

23 Number one, it gets these fees from the cable  
24 company. As I just said, the 5 million a month.

25 No. 2, it gets money from advertisers who

1 advertise on the network, okay?

2           And without getting into too much detail, it's  
3 roughly a 50/50 split, Your Honor. So if Turner is making  
4 \$5 million in my hypothetical from subscription fees, it's  
5 making \$5 million from advertisers.

6           When a programmer doesn't have its networks on the  
7 air, not only do they lose the subscription fees, they lose  
8 the advertising revenue, because you're selling that to an  
9 advertiser with the commitment that a certain number of  
10 viewers will be watching that commercial.

11           If now five million viewers or one million viewers  
12 less are watching that commercial because it's not on your  
13 TV, then the advertisers get their money back or they call  
14 it make goods. You now have to give them some more  
15 commercial spots to make up for what they lost.

16           Under the bargaining theory, Your Honor, I'll give  
17 you a simple example. Premerger, if a distributor and  
18 Turner can't make a deal in my hypothetical, Turner loses,  
19 let's call it, \$10 million a month. Post merger, Turner  
20 loses \$9,500,000 a month, because maybe a couple of  
21 subscribers left the distributor and came over to DirecTV.  
22 And DirecTV is going to pick up a few extra profit to offset  
23 the \$10 million.

24           Either case is a disaster. One is slightly less  
25 disastrous. That's the whole theory of the government; that

1 because post merger it's going to be slightly less  
2 disastrous than premerger, Turner has got leverage to demand  
3 more money.

4 Now, this is absolutely preposterous, as you are  
5 going to hear during the trial. But what I have just  
6 explained to you is what these witnesses are going to say.

7 Starting tomorrow, in order to explain this and to  
8 go through what I just did, we do not need to close the  
9 courtroom.

10 Now, I have no idea what Mr. Conrath plans to do  
11 with these witnesses. They've been working together.  
12 They're going to prepare their examinations. We're going to  
13 hear them for the first time.

14 If, for whatever reason, he is going to get into  
15 financial analysis and facts and figures, that's their  
16 tactical decision, Your Honor. We have no say over that, no  
17 ability to stop that.

18 If it turns out that Your Honor thinks that's  
19 appropriate and relevant and Your Honor feels it's necessary  
20 to close the courtroom, then that will be Your Honor's  
21 decision.

22 But what I am suggesting is that this is being  
23 vastly overstated. And with respect to the defendants, we  
24 have cleared the path for the government and for the Court  
25 so we don't really have to close the courtroom.

1 THE COURT: Let me ask you a question. From your  
2 perspective, and based on your study of these depositions  
3 and documents and all that, what's your impression as to --  
4 in each of the case of these third parties, we know the  
5 bottom line, of course. It's going to be that this is  
6 anti-competitive. That's a fair assumption that's what  
7 we're going to hear.

8 MR. PETROCELLI: You mean from the witnesses?

9 THE COURT: Yeah. If the witnesses are going to  
10 say --

11 MR. PETROCELLI: We don't agree with that,  
12 obviously.

13 THE COURT: No. I understand. But this is what  
14 they're going to say.

15 MR. PETROCELLI: This is what they're going to  
16 say. Right.

17 THE COURT: So we know they're going to say that.

18 MR. PETROCELLI: Right.

19 THE COURT: There's no secret about that.

20 MR. PETROCELLI: Right.

21 THE COURT: So the part that's to be clarified and  
22 the Court needs assistance with is, well, how did you reach  
23 that -- that's your conclusion. That's your opinion.  
24 That's what you think is going to happen if this merger goes  
25 through.

1           How much of their explanation, based on your  
2 knowledge of the facts -- which is way beyond mine at this  
3 point, just like Mr. Conrath's is way beyond mine at this  
4 point. How much of that explanation is going to be due to  
5 some kind of confidential studies or analytics or some kind  
6 of metrics that they used to monitor and assess the market?  
7 And how much of it is just basically refined business  
8 judgment that they have based on years of experience in  
9 their business in their assessment of how the relative  
10 strengths and weaknesses of the marketplace will  
11 reconstitute itself if this merger is blessed?

12           MR. PETROCELLI: Well, I can tell you --

13           THE COURT: How much of it is what?

14           MR. PETROCELLI: I think 95 percent of it is all  
15 their experience, and they're just going to say Turner will  
16 have a little bit more leverage because it's going to pick  
17 up some of my subscribers if we go dark.

18           And it's no different than what I just told you.  
19 Very few of them --

20           THE COURT: It's not science, in other words.

21           MR. PETROCELLI: No.

22           THE COURT: What you're saying is --

23           MR. PETROCELLI: No, Your Honor.

24           THE COURT: -- they're not going to point to some  
25 mathematical wizardry that MIT cooked up for their

1 assistance that says, okay, here, this is how the market is  
2 going to reconstitute itself; and, therefore, we're in  
3 trouble. We're going to be in trouble.

4 MR. PETROCELLI: I would be very surprised. It's  
5 their witnesses, so they can answer those questions better  
6 than I can.

7 THE COURT: Of course. I understand.

8 MR. PETROCELLI: We took their depositions. And  
9 you'll see, like the witnesses tomorrow, they don't have any  
10 calculations as to exactly what would happen if Turner and  
11 the distributor couldn't make a deal.

12 And, by the way, I don't want to get too far  
13 afield. Of course, Turner's offered them this bulletproof  
14 arbitration mechanism which completely takes away any  
15 leverage that they're talking about.

16 That was the letter that got sent out after the  
17 lawsuit to each and every one of the distributors, including  
18 new distributors, and say, I'll tell you what. We don't  
19 agree with the government's theory. But to erase any doubt,  
20 we won't ever agree to go dark. At your option,  
21 distributor, you can elect to take us to baseball-style  
22 arbitration, just like in Comcast, just like the government  
23 advocated to this Court and the Court approved.

24 And that's a structural part of the commercial  
25 agreements, Your Honor, and it's totally enforceable under

1 the law.

2           It's not a behavioral remedy. The government  
3 likes to call it a remedy. It's not a remedy. It's part of  
4 a contract just like any other provision of the contract.

5           Twenty small distributors have already signed up  
6 for it. It's contingent upon the merger being approved,  
7 okay? And, of course, the other ones are holding their  
8 powder.

9           And you know they're all going to sign up for it  
10 if the merger is approved. But right now, they don't want  
11 to touch it because they want to be able to come in and make  
12 the case to block the merger.

13           But since there have been so few actual blackouts,  
14 there's not much analytics to deal with. There's some --  
15 these companies run sometimes what they call drop reports.  
16 And what a drop report is, is as follows.

17           When the companies are starting to negotiate,  
18 these contracts, Your Honor, these carriage agreements,  
19 I mean, they're mind boggling. Sometimes, they're a  
20 thousand pages long. Hundreds and hundreds of pages long of  
21 these agreements between a programmer and a distributor.

22           And these contracts --

23           THE COURT: Sounds like it's overlawyered.

24           MR. PETROCELLI: Tell me about it.

25           These contract negotiations, I thought we were in

1 the adversarial business. These are the most contentious,  
2 nasty, combative negotiations you can imagine. And  
3 sometimes they go on for months. And a couple of times,  
4 they go on for years.

5 THE COURT: Oh, my goodness.

6 MR. PETROCELLI: And they keep extending the end  
7 of the contract to try to make a deal.

8 And so the idea that this very simplistic  
9 bargaining model could somehow apply to these extremely  
10 complicated contracts, you're going to hear, doesn't make  
11 any sense, Your Honor.

12 But these drop reports, sometimes, they say, well,  
13 look, if we can't cut a deal with Turner, how many subs are  
14 we going to lose? And sometimes these companies do their  
15 own internal analysis of, okay, if we drop Turner and we  
16 just don't have CNN, how many subs are we really going to  
17 lose? How much money are we going to lose? And who are we  
18 going to put on instead of Turner?

19 So they have these drop reports. Maybe they're  
20 going to use some drop reports. But even then, Your Honor  
21 can just look at it; the witness can look at it. You don't  
22 need to close the courtroom for that.

23 We're not projecting things onto the screen that's  
24 facing the audience. We don't even have to put some of  
25 these documents on the screen at all. You'll have a binder.

1 The witness will have a binder. We'll have a binder.

2 We think even though it's a difficult situation  
3 for both defendants, with a lot of proprietary, confidential  
4 information, including what our future business plans are,  
5 it's important that this trial occur in the light of the  
6 day. It's important. It's a matter of public interest,  
7 obviously. There are shareholders. There are all kinds of  
8 stakeholders and constituencies that have a keen interest in  
9 this case.

10 I believe that when you have witnesses testifying  
11 in open court, they are going to be most candid than if it's  
12 behind closed doors.

13 But at the end of the day, if Your Honor needs to  
14 put a witness behind closed doors for a brief time, then  
15 we will obviously abide by that.

16 We are disadvantaged because the government is  
17 working with these witnesses to prepare their examinations,  
18 and they can prepare the examination in such a way that they  
19 force us to cross-examine their witnesses behind closed  
20 doors in a way that we don't really want to get into now.

21 I might want to start in a different way and work  
22 up to that issue in order to lay out my cross-examination.  
23 But we can't be opening and closing the doors. I mean, it  
24 takes 20 minutes to empty this courtroom.

25 THE COURT: It's true. That's a very practical,

1 logistical concern the Court has. For lack of a better way  
2 of putting it, we'll call it the yo-yo effect. You know, in  
3 and out, in and out, in and out is a very --

4 MR. PETROCELLI: Doesn't work.

5 THE COURT: -- difficult process. And,  
6 accordingly, that's why it's so important to try to keep it  
7 to an absolute minimum.

8 And obviously, the Court's relying in no small  
9 part on the counsel to figure out how to do this with the  
10 absolute minimum of that kind of yo-yo impact, closing  
11 doors, opening doors, closing doors, opening doors. It's  
12 just not -- that doesn't work well.

13 And I don't want to, obviously, have a chilling  
14 effect on the parties' confidentiality protections. They  
15 have a right to protect certain information that's sensitive  
16 to their business interests and futures.

17 But, boy, this is a practical problem.

18 MR. PETROCELLI: And, Your Honor, in the *American*  
19 *Express* trial, Mr. Barbur and Mr. Orsini tried that case,  
20 and it was a seven-week trial. One witness, one time, they  
21 had to close the courtroom.

22 So that's nothing like what we're hearing from the  
23 government right now, which is, they are essentially going  
24 to want to do it on every single witness.

25 THE COURT: I'd take that deal right now, one

1 witness, one time, yeah, sure, I'll take that deal.

2 No one's offering that.

3 MR. PETROCELLI: I'll let you negotiate with the  
4 government on that, Your Honor.

5 Anyway, thank you, Your Honor.

6 THE COURT: All right.

7 MR. CONRATH: If I can, Your Honor, touch on a few  
8 of those points.

9 THE COURT: Sure.

10 MR. CONRATH: First of all, thinking about what  
11 these third-party witnesses are going to testify about,  
12 I don't think any of them are going to testify that they're  
13 going down the tubes. I don't know where that came from.  
14 They're going to testify to facts, facts about how the  
15 market works.

16 We're going to -- they'll explain or we will  
17 explain to the Court, when the time comes, how those facts  
18 add up to the factual conclusion that's relevant under the  
19 antitrust laws, that these customers' prices might go up  
20 and, ultimately, consumers' prices would go up.

21 THE COURT: So it's a prognostication situation.

22 MR. CONRATH: It is -- yes and no.

23 So there are the re -- and you're touching on an  
24 important point about merger trials and antitrust trials in  
25 general, because there are often customer witnesses that --

1 I won't say always, because sometimes the customers are so  
2 diffuse; they're individuals. But where there are entities,  
3 there are often customer witnesses.

4           And it's important to remember that the main  
5 function of the customer witnesses is to give the Court  
6 facts about the marketplace from which the Court can make  
7 its own prognostication, because the law -- the statute and  
8 the Supreme Court have told all of us that that's the job of  
9 the Court at the end of the day, to make a predictive  
10 effect, as the Supreme Court said, what's likely to be the  
11 case in the future? The Court needs to know market facts in  
12 order to do that.

13           Also helpful to the Court is the perspective of  
14 knowledgeable industry people about the likely effects of  
15 this transaction, and customers are one of those.

16           And, of course, the Court similarly can hear from  
17 the party witnesses.

18           And the customers in this case are customers of  
19 Time Warner and competitors of AT&T, DirecTV. That's why  
20 there's this issue in this case.

21           But the principal role of customer witnesses --  
22 and it should be every witness -- is to put facts in front  
23 of the Court so that the Court can make its own assessment  
24 of the facts.

25           And so while we'll be hearing projections from the

1 third-party witnesses in some cases, in other cases, I mean,  
2 often what we will do with a third-party witness is just  
3 come in and just the facts, ma'am. Just tell us what the  
4 facts are about the industry, from which we will argue, from  
5 which the Court can make its ultimate determination.

6 So it's not a -- we don't call customer witnesses  
7 in kind of a popularity contest about the merger. That's  
8 not the point.

9 The point is, what are the facts? What are the  
10 facts that'll help educate us?

11 And so with that in mind, the facts and the  
12 analysis that goes behind the facts is what's really  
13 important to the Court.

14 So just to touch on how this works, because the --  
15 there is the description of how negotiating happens. I  
16 appreciate Mr. Petrocelli laying out a little bit of our  
17 case for us here.

18 How negotiating happens is that each side is  
19 thinking about what's going to happen if I don't do a deal.  
20 That's the same principal as a basic principal of  
21 negotiation if you're trying to buy something at a flea  
22 market, you're trying to settle a litigation, or if you're  
23 doing these hundreds-of-millions-of-dollar deals.

24 You think about, what's my option if there's no  
25 deal? What's the other side's option if there's no deal?

1 And between those two facts, you work out what kind of a  
2 contract you can come to or maybe not come to.

3 So it's important in these particular negotiations  
4 for what's going to be the price, what are going to be the  
5 terms for carrying Turner content on a distributor's  
6 service.

7 Both sides use the threat of a blackout. That's a  
8 two-way street. Both of them say, okay, you want a  
9 blackout; you're going to suffer. Because it's correct that  
10 the blackout is not good for either side in the current  
11 world. In the current world, there's a cost to the  
12 distributor, and there's a cost to the programmer, to  
13 Time Warner.

14 One of the things the distributors have to worry  
15 about is if there's a blackout and they lose some customers,  
16 including customers who go to DirecTV, if they lose  
17 customers because they don't have Turner content that the  
18 customers want, pretty hard to get those customers back. So  
19 they lose those customers. They're gone. They signed up  
20 with somebody else.

21 From the programmer's side, if they have a  
22 temporary blackout, they don't get revenue; they don't get  
23 the revenue from the fees or from the ads while there's a  
24 blackout. But once they sign up, that spigot turns on  
25 again. They don't have that lingering effect of the

1 customers that we could have signed up during that period,  
2 we're not going to get back.

3           So there's a little of that. That's a fact.  
4 That's a fact that the Court can hear about from the  
5 distributors who have to live in that, and they'll explain  
6 why that's important.

7           Some of the reasons, and I think why they, how  
8 they affect, how they think about their bargaining leverage,  
9 are very much based on years of experience in the industry.  
10 Some of it is based on an analytics. Some of it is based on  
11 math.

12           Some of them, just like in any business or in any  
13 field of life, there are people who rely on business  
14 judgment built up over years; and there are people who say,  
15 let me try to figure out how this is going to work.

16           And so there are witnesses who will, from third  
17 parties, who will talk -- who make these evaluations more  
18 generically and say, I just know. I've been in the  
19 business. I know that at the end of the day I need to have  
20 Turner content.

21           Others do some kind of an analytical process and  
22 they say, what would happen to us if we didn't have Turner?  
23 Because you want to think seriously about it and ask, you  
24 know, how bad or not bad would it be? And they ask that  
25 about other networks as well.

1           And so they've got a more analytical approach, and  
2 their evidence about how that works will help inform the  
3 Court, because the question of "how many customers would I  
4 lose, if I don't have Turner?" is a pretty critical question  
5 for those distributors, for those third-party witnesses.

6           They need to think about that in figuring out,  
7 okay, how much am I really going to let them raise the price  
8 to me?

9           And so the logic behind their thinking, whether it  
10 is intuition based on years of experience, whether it is  
11 analytical, is going to be important to the Court in order  
12 to evaluate their opinion.

13           I mean, the defendants' position is clear.  
14 They're going to say that idea is preposterous.

15           Well, let the witnesses come in and tell you so  
16 that the Court itself can decide whether it's preposterous  
17 or whether it's sound business planning. That's the reason  
18 for us wanting to delve into their underlying thinking.

19           And I think an important point that may be --  
20 I don't think got addressed by distinguished counsel for  
21 defendants, is that giving away your negotiating strategy is  
22 a clear path to getting hammered in the next negotiation,  
23 not just with these defendants but with anybody.

24           And yet what the Court needs to know is, what are  
25 they thinking about their negotiating strategy? And so

1 that's why some of what -- some of the evidence that we need  
2 to put in front of the Court is evidence that fairly  
3 deserves to be treated as confidential and heard in a closed  
4 courtroom.

5 And we would propose to do -- that burden, of  
6 course, is on the party that wants the confidential  
7 information. They're sitting over there. They'd have to  
8 explain it.

9 But the basis is essentially, I think, what I've  
10 laid out here.

11 THE COURT: I'm relying on the party putting on  
12 the witness that has confidential information. I'm relying  
13 on the counsel putting on the witness to carry the burden --

14 MR. CONRATH: Okay.

15 THE COURT: -- to persuade me --

16 MR. CONRATH: Sure.

17 THE COURT: -- not some third-party lawyer.

18 That third-party lawyer is there to whisper in the  
19 ear and give guidance to their client.

20 MR. CONRATH: Okay.

21 THE COURT: They're not litigators in this case.

22 MR. CONRATH: Okay.

23 THE COURT: You and your team, Mr. Petrocelli and  
24 his team, is who I'm looking to to give me, convince me that  
25 this is something that really needs to be protected and this

1 is something we need this courtroom to be closed for. And  
2 if you don't convince me, then we cannot go into it at all  
3 or even go into it in public.

4 MR. CONRATH: Fair enough, Your Honor.

5 THE COURT: I'm not going to have third-party --  
6 counsel for third-party witnesses addressing the public.  
7 That's just not going to happen.

8 MR. CONRATH: Fair enough, Your Honor.

9 I wasn't thinking ahead to how this would actually  
10 go. And obviously, we're the ones --

11 THE COURT: No offense to them. It's just, we've  
12 got enough cooks in the kitchen. Take a look. Come on.

13 MR. CONRATH: Fair enough. We're the ones making  
14 the motion. The burden is obviously on us.

15 And I think maybe the way I should have expressed  
16 it is that it's not our confidentiality interest. We have  
17 to learn it from people who are expressing it.

18 And, frankly, we're -- we are working with those  
19 third-party witnesses, as any conscientious counsel would  
20 do, in order to try to make an efficient presentation to the  
21 Court.

22 And one of the things that we're working with them  
23 is to try to minimize any need for confidentiality and to be  
24 realistic so that we can make a representation to the Court  
25 on that topic.

1           There are just a couple of other topics that kind  
2 of came up in that last discussion. One is the arbitration  
3 letters that defendants sent as kind of their proposed  
4 self-help fix.

5           So their position, I think, pretty much, is,  
6 there's nothing with this merger, but we've solved it. And  
7 we're going to -- obviously, that's a question that can be  
8 asked of third parties.

9           They sent a thousand letters. If they've got 20  
10 signed up, that's probably a pretty good indication of  
11 people voting with their feet of how impressed they are with  
12 it.

13           So that's a topic that we'll be coming to in the  
14 trial eventually, but I didn't want to leave that stuff  
15 untouched.

16           THE COURT: All right.

17           MR. CONRATH: There's another topic that came up,  
18 and that was one of the -- an observation that's correct,  
19 that often vertical mergers have a pro-competitive effect.  
20 And it's possible that they can have a mix of pro- and  
21 anti-competitive effects, and that's the case here.

22           Our expert candidly said, look, there are some  
23 ways in which this merger could have a pro-competitive  
24 effect. Could -- and I think the description is pretty  
25 good.

1           AT&T could reduce the price to itself of  
2 Time Warner. So it doesn't have to make two profits on the  
3 DirecTV service that it gets -- or, I'm sorry, the Turner  
4 program that it gets itself.

5           Our expert accounted for that. He said, you know  
6 what? There's a point there, and we can estimate that using  
7 standard economic tools.

8           And while that effect is there, according to his  
9 analysis and he's willing to recognize it, it's pretty  
10 small.

11           So when you hear defendants come in and say, well,  
12 the price to DirecTV is going to go down, true. And our  
13 expert forthrightly accounts for it, and then  
14 counterbalances that against the way in which prices  
15 generally to consumers are going to go up.

16           And that comes up with a number of  
17 400-some-million dollars of harm to consumers. So that  
18 includes recognizing this idea that there will be some price  
19 decrease to DirecTV consumers.

20           So I just want to have that in the proper  
21 perspective as we're going forward.

22           THE COURT: Will you be focusing at any point in  
23 your case on the relative advantage to the marketplace, or  
24 disadvantage to the marketplace, from whatever practice  
25 perspective you all have, the merged entities' ability to

1 compete with other entities to better compete or -- not  
2 compete better -- with -- to purchase from programmers for  
3 the content that's being created by these very studios --

4 MR. CONRATH: Yes.

5 So the way in which that --

6 THE COURT: -- the Googles and all these other  
7 massive entities you are competing to get content in the  
8 marketplace or even just starting their own content  
9 producers?

10 MR. CONRATH: So there are -- that issue will come  
11 up during the trial.

12 I think the way -- to think of it in terms of the  
13 antitrust law is it becomes relevant because the other side  
14 says, we can do all these good things with the merger. And  
15 efficiencies, synergies are words that they often use for  
16 that.

17 And the way that is potentially relevant is that,  
18 assuming we're in a position to prove that there will be  
19 some bad things coming from the merger, anti-competitive  
20 effect, the logic of the efficiencies defense says, well, if  
21 there are so many good things that will -- it will erase,  
22 outweigh the bad things, the anti-competitive effect, then  
23 maybe we should -- it would be an appropriate thing to do to  
24 let the merger go through, recognizing that the anti -- that  
25 the anti-competitive effect on these consumers will be

1 outweighed by a pro-competitive effect on these consumers.

2           So the, there's actually no court has ever firmly  
3 said that this defense really exists. And the last time the  
4 Supreme Court kind of talked about it, which was  
5 *Philadelphia National Bank* in -- perhaps before I was  
6 practicing.

7           Here, one of our ages practicing law, but...

8           THE COURT: Before your years.

9           MR. CONRATH: But they expressed kind of pretty  
10 much skepticism about it.

11           But there's a lot of logic to it. So courts have  
12 thought seriously about it and addressed it.

13           THE COURT: Well, it may be this case presents a  
14 particularly apt situation for that defense to be  
15 considered, because, I mean, the market cap on these other  
16 entities that AT&T has to compete with for content is three,  
17 four, five times the size of AT&T. They're massive.

18           MR. CONRATH: Right. Right.

19           THE COURT: They're massive.

20           MR. CONRATH: Yeah.

21           So it is an issue in this case. And I think  
22 the --

23           THE COURT: Facebook and Google are like three or  
24 four times market cap sizes.

25           MR. CONRATH: Yeah, sure.

1           But their main business is not selling pay TV to  
2 subscribers and doesn't look like it's going to be their  
3 main business anytime soon.

4           THE COURT: No.

5           MR. CONRATH: So a lot of the market cap is  
6 designed to doing a search or whatever it is Facebook does.

7           But the relevance -- so I guess getting back to  
8 try to answer your question. We've looked at the claims  
9 that defendants are making. And this is a matter where the  
10 defendants have the burden of going forward with the  
11 evidence on the efficiencies or synergies.

12           And the Courts -- because what's being asked with  
13 an efficiencies defense is, you should approve a merger that  
14 otherwise would be anti-competitive, the Courts have put  
15 some pretty stringent conditions on it. And they are,  
16 first, that they be verifiable. That is, this is not by in  
17 the sky. This is not just what somebody thinks.

18           So, I mean, it's not surprising that the  
19 executives who signed the deal think that the deal is going  
20 to do a lot of great things.

21           And, and the verification obligation that courts  
22 have imposed is by way of saying, you know, you can't  
23 approve an anti-competitive merger on what somebody wishes  
24 to do on speculation. It's got to be verified with hard  
25 numbers and realistic.

1           And when we look at a lot of the claims of  
2 efficiencies that defendants put in here, we think they  
3 don't meet that task.

4           And we have -- we'll bring in as a rebuttal  
5 witness, if they put on evident that merits rebuttal, a  
6 rebuttal witness looking at their efficiencies, cost-saving  
7 claim, and their synergies, especially with respect to  
8 advertising, to address that question.

9           The second obligation the Court's put on is that  
10 it has to be merger-specific. So if it's going to be a  
11 reason to approve an anti-competitive merger, you ought to  
12 need the merger in order to be able to do it; in other  
13 words, you couldn't -- there couldn't be something that's  
14 going to rise in the marketplace without the merger,  
15 couldn't be something you could do with a contract, with a  
16 joint venture. And we'll have some evidence from our  
17 advertising expert on that.

18           And the third element the Courts have examined, or  
19 impose on efficiencies defense is that it's got to be a  
20 benefit that will pass through to consumers, because if the  
21 idea is it will reverse the effect of the -- the  
22 anti-competitive effect, it's got to reach the consumers.

23           So, for example, last -- the efficiencies defense  
24 was discussed by the D.C. Circuit in the *Anthem* case.

25           And you can look there. There's a reference,

1 I think, in Judge Kavanaugh's dissent. Judge Kavanaugh was,  
2 I would say, a little more open to hearing the evidence of  
3 the efficiencies defense there; but he expresses there that,  
4 look, it's going to be a hard burden for defendants to show  
5 that these benefits will actually get transmitted on to  
6 consumers.

7 And that's an appropriate standard, given that  
8 what we're saying is that we're going to prove -- approve an  
9 anti-competitive merger because of these efficiencies.

10 So we will be prepared to address that. I think,  
11 for us, that comes in rebuttal. I expect defendants to put  
12 on evidence of that, and we'll be prepared to talk about it.

13 I think at the end of the day, we'll say that  
14 there's a lot of speculation, there's a lot of hopeful  
15 thinking.

16 It makes perfect sense that the CEOs of the two  
17 companies think that everything is going to be great. They  
18 put the deal together; of course, they think it's going to  
19 be great.

20 If mergers could be approved because CEOs come and  
21 say everything is going to be great, they'd all be approved,  
22 I promise you, Your Honor.

23 So this is going to be -- this will be another  
24 interesting fact-based issue that is put to the Court. It's  
25 another predictive exercise, asking, is there a prediction

1 that they can reverse the anti-competitive effect, one  
2 that's borne out in reality.

3 THE COURT: All right. Well, let's take the  
4 morning recess. My reporter has been working awfully hard  
5 for quite a while now, he deserves a break, and you all  
6 could use one probably too.

7 So we'll be back in 15 minutes. We'll go to  
8 around 1:00, 1:15 before we take the luncheon recess.

9 MR. CONRATH: Thank you, Your Honor.

10 THE COURT: Yep.

11 DEPUTY CLERK: All rise.

12 (Recess from 12:11 p.m. to 12:34 p.m.)

13 DEPUTY CLERK: The United States District Court  
14 for the District of Columbia is again in session, the  
15 Honorable Richard J. Leon presiding. God save the United  
16 States and this Honorable Court. Please be seated and come  
17 to order.

18 MR. PETROCELLI: Your Honor, with your permission,  
19 may I respond to a couple of new points that were raised?

20 THE COURT: Sure.

21 MR. PETROCELLI: Thank you very much, Your Honor.

22 The Court asked Mr. Conrath about the relevance  
23 and role of companies such as Google and Facebook, and  
24 Mr. Conrath gave a somewhat lengthy answer, arguing that, at  
25 most, they play a role with respect to what he called an

1 efficiencies defense.

2 And we disagree with that in the following  
3 respect. This is relevant not just to efficiencies, nor are  
4 we arguing a defense.

5 And I want to address both of those. We have a  
6 significant legal disagreement on the latter point.

7 On the former, Your Honor, the role of what we  
8 call FAANG, it's now called -- Facebook, Apple, Amazon,  
9 Netflix, and Google -- that meant nothing to me, by the way,  
10 before I started working on this case.

11 Now I hear about it and read about it all the  
12 time: FAANG.

13 THE COURT: Was it on one of those slide decks?

14 MR. PETROCELLI: Trust me, Your Honor, on more  
15 than one.

16 THE COURT: More than one.

17 MR. PETROCELLI: More than one.

18 So the role of those Internet giants, those tech  
19 giants, could not be more relevant for the imperative reason  
20 for this merger. And it's something that we believe the  
21 government fundamentally misunderstands.

22 The content that these companies are producing and  
23 acquiring has exceeded, by all measures, anything that  
24 traditional motion picture studios have done. I mean,  
25 Netflix alone in this year is projected to spend \$8 billion

1 on acquiring content, either producing it itself or  
2 acquiring it, vastly more, vastly more than, for example,  
3 HBO.

4 THE COURT: It's a good time to be a screenwriter.

5 MR. PETROCELLI: It is a very good time to not  
6 only be a screenwriter, to be in the content business, and,  
7 frankly, to own a content business, which is what you are  
8 going to hear from Mr. Bewkes and Mr. Stephenson.

9 Now, the relevance of these companies and how they  
10 have completely transformed the industry almost overnight,  
11 far beyond what was projected, by the way, when Your Honor  
12 approved Comcast-NBCU just seven years ago. No one could  
13 have imagined what is happening.

14 The cord cutting, they call it, people who are  
15 giving up their cable systems, no more paying \$100 a month  
16 or more to watch television, because they can watch it on  
17 the Internet and they can watch not only live television on  
18 the Internet, but they can now watch on the Internet any  
19 show they want at any time they want, and they can  
20 binge-watch it all at once.

21 THE COURT: That's what the Millennials do.

22 MR. PETROCELLI: Well, yeah, and the Millennials  
23 and beyond, Your Honor.

24 And my kids -- I have a couple of teenagers --  
25 they're never going to have a cable package. I mean, I'm

1 sitting in the living room watching television with them,  
2 and I'm still with the clicker watching my, proud to say, my  
3 DirecTV, TV. And then they're on the couch with their  
4 computers.

5 THE COURT: Laptops.

6 MR. PETROCELLI: What are you doing? I'm watching  
7 television.

8 That's how they watch television. They watch  
9 television on computers, on laptops, on devices. They're  
10 binge-watching. They can even watch live.

11 And so the question of these giants goes directly  
12 to the nature of the market, the definition of the relevant  
13 market, and whether Time Warner and TNT could possibly have  
14 any market power whatsoever in this enormous, exploding  
15 marketplace.

16 Just to give you a couple of metrics, Your Honor,  
17 the market cap of FAANG, okay, is some \$3 trillion. If this  
18 merger goes through, the market cap of AT&T and Time Warner  
19 will be roughly 300 billion, ten times less.

20 Since this merger was announced back in October of  
21 2016, the market cap of FAANG has grown \$1.2 trillion, just  
22 in the last 15-or-so months, since this merger was announced  
23 and while we are waiting to get clearance. They are running  
24 away with the industry.

25 Facebook and Google get roughly 90 percent right

1 now, these two companies alone, 90 percent of every  
2 advertising dollar in the digital world. And they're now  
3 coming into television advertising, and that is a huge part  
4 of this story, Your Honor.

5 If you go back to the old days when we watched TV  
6 on the rabbit ears -- and I remember when I would break, as  
7 a kid, the antenna on my TV, and I'd actually go get a coat  
8 hanger and stick it in there to try to get reception. We'd  
9 get five or six stations, right?

10 THE COURT: Right.

11 MR. PETROCELLI: Well, the television networks  
12 like NBC, CBS, ABC, they made their money in one way, not  
13 from the consumer. TV was free. The way --

14 THE COURT: I remember that.

15 MR. PETROCELLI: The way they made their money,  
16 Your Honor, was from advertising. That was the sole source  
17 of revenue.

18 Proctor & Gamble and Ford Motor Company put  
19 commercials on, beer commercials. That's how they made  
20 money.

21 Then along came cable, late '70s into the '80s,  
22 and they could stick a wire in your house. And with that  
23 wire, you could get not just five or six channels. First,  
24 you could get 50, then 100. Now you can get a thousand  
25 channels, because of the ability to push video through a

1     fiberoptic or coaxial cable that goes right into your house.

2             Now, what did that do? That completely changed  
3 the nature of the television business. Why? Because it  
4 introduced a second revenue stream.

5             So ABC, NBC, CBS, and now it's spawned a whole  
6 world of cable networks, including the Turner Cable  
7 Networks. They got their money two ways now. One, from  
8 advertising, like the old way.

9             But now they have a second revenue stream, which  
10 is they get paid by the cable company who spent all that  
11 money to put that wire and lay it in the street and get it  
12 into your house. They're the ones selling the television to  
13 the consumer, and they're paying the networks.

14             And for every subscriber that a distributor has, a  
15 cable company has, they pay a network a per-subscriber fee.  
16 And they actually break it down by channel. I'll pay you a  
17 dollar for this channel. I'll pay you \$5 for this channel.

18             And so what happened, however, as a result of  
19 that, the television networks got disaggregated from the  
20 consumer, because now they're a middleman. They're getting  
21 the programming. They're putting it together. They're  
22 giving it to the distributor. And now the distributor, the  
23 cable company and the satellite companies, are dealing with  
24 the consumer.

25             They're the ones that have the call centers.

1 They're the ones that have the billing records. They're the  
2 ones that are sending you the bill and getting the money.  
3 They have the relationship.

4 They put the set-top boxes in your house. They  
5 put the satellite dish on your roof. And that's how it's  
6 been for the last 30-or-so years.

7 Now it's changing again and in an odd way, it's  
8 going back to the old days in this sense. Because of the  
9 Internet, it's now become possible to stream video over the  
10 Internet.

11 So you don't have to -- you don't have to buy a  
12 big cable package anymore. You can turn on your computer  
13 and sign up for particular services that will provide you  
14 either Netflix shows or live television on something like  
15 Google TV or YouTube TV.

16 And what they call this is direct to the consumer,  
17 where the companies now have a direct relationship with the  
18 consumer. And they call this going over the top.

19 And what you're seeing now is more and more  
20 companies going direct to the consumer without having to go  
21 through these cable companies.

22 And the cable companies themselves are now doing  
23 it. So they have a traditional cable system for people,  
24 perhaps, like you and me. And then they have over-the-top  
25 service for other people, who want to get their television

1 over the Internet.

2 More and more, Your Honor, if you can use the  
3 information from the Internet to learn about your customer,  
4 what your customer's watching, how long they're watching the  
5 show, what are they -- when do they turn off the show, what  
6 do they watch next, and other information that's available,  
7 when you have a direct relationship with the customer,  
8 sometimes they call this customer data, you're able to  
9 package that information and provide that to advertisers and  
10 tell advertisers that instead of your having to put ads on  
11 the old-fashioned way where you don't know whether somebody  
12 who's interested in sports, for example, is going to watch a  
13 sports commercial, now we can tell you the people who are  
14 interested in sports. And you can address that ad to that  
15 person or to people who fit that characteristic.

16 That's worth a lot of money to advertisers because  
17 they'd rather be able to spend money on directing their ads  
18 to people who are going to be most interested in their  
19 products, rather than the old-fashioned way, which they  
20 happen to call the "spray and pray method." You just spray  
21 all the commercials on TV, and you hope somebody is  
22 interested in your product.

23 Google and Facebook have changed the advertising  
24 world on that, because in the Internet world, in the digital  
25 world, they have all this information about people who use

1 their search engine, people who use their Facebook service.  
2 They know everything about their customers. They're able --  
3 on an anonymous basis, they're able to provide more  
4 information to advertisers, and advertisers are putting all  
5 their money into digital advertising.

6 One of the things that television networks and  
7 television distributors now want to do, one of the things  
8 that AT&T and Time Warner want to do is to take the customer  
9 information that AT&T has, because AT&T, through its DirecTV  
10 service, and DirecTV Now service, they have a direct  
11 relationship as a distributor of programming. They have  
12 set-top box data. They've other information about what the  
13 customers' preferences are.

14 Time Warner and Turner and HBO, for example, they  
15 have none of that, because they're like a wholesaler.

16 If you put these companies together, now, all of a  
17 sudden, with the information that AT&T has, the Turner  
18 networks can now package that and tell advertisers, hey, if  
19 you want to sell diapers, we know, generally, where the  
20 families are that have young children who might be  
21 interested, or the moms or dads might be interested in  
22 buying diapers or pickup trucks or whatever. So that  
23 advertising suddenly becomes way more valuable.

24 And here is now the consumer benefits. And this  
25 is the important piece. Right now, companies like Turner

1 and traditional networks are suffering because their  
2 advertising revenue is declining because all the money is  
3 going to the digital companies, like Google and Facebook,  
4 because they provide better, more-relevant advertising.

5           If AT&T and Time Warner provide the same kind of  
6 relevant advertising opportunity, it then increases their  
7 advertising revenue and then takes pressure off having to  
8 charge consumers for the networks, for the programming.

9           So the more General Motors is willing to pay AT&T,  
10 Time Warner for the right to advertise on the Turner  
11 networks, the less consumers have to pay to buy the Turner  
12 networks. The more advertising dollars, the less consumers  
13 have to pay.

14           So you shift the dollars to the large corporations  
15 who purchase advertising, and you take it away from the  
16 consumer.

17           And the consumer is at a point, right now,  
18 Your Honor, because of this explosion of Internet  
19 distribution, they're leaving what we call the traditional  
20 TV system in droves.

21           Just last year in 2017 -- and this is public  
22 information -- AT&T alone, DirectTV alone, lost 1.2 million  
23 subscribers.

24           The pay TV ecosystem, meaning not only DirectTV but  
25 Charter cable, Charter, Comcast, all the big cable

1 companies, collectively lost about 4 million subscribers.

2 Now, these are the people who are actually leaving  
3 because they no longer want to pay \$100 or more. This  
4 doesn't even take into account the people like my kids who  
5 are never going to sign up in the first place. So they're  
6 never going to ask to be a customer of a cable company  
7 because why should they? They can get on the Internet and  
8 get it a lot cheaper.

9 So one of the critical things that Your Honor has  
10 to evaluate is how important this radical transformation  
11 that's been going on, how important is that to the ability  
12 of companies like AT&T or Time Warner to compete?

13 And you're going to hear that, as Mr. Stephenson  
14 testified, we're chasing their taillights. They are so far  
15 ahead of us in terms of their advertising platforms, in  
16 terms of the content that they're creating.

17 Mr. Stephenson is going to explain that the cable  
18 customer is at a gag point. They won't pay any more. The  
19 cable bills can't go up any more, because no one is going to  
20 pay any more, because they have so many options and they're  
21 already leaving in droves.

22 So this is why this issue of Facebook, Apple,  
23 Amazon, Netflix, Google is absolutely critical, not just to  
24 understanding the market conditions but understanding the  
25 need to be able to compete at their level, especially in the

1 advertising arena.

2 We have two companies, Your Honor, that are a real  
3 duopoly right now and that are dominating the entire  
4 advertising world.

5 And good for them. They know how to do it, and  
6 they're doing it the right way. But it's time for somebody  
7 else to be able to enter the marketplace and compete and  
8 provide consumers yet another option.

9 Now, on the legal side, here is the fundamental  
10 disagreement. Mr. Conrath kept talking about our defense,  
11 our efficiencies defense, our efficiencies defense.

12 We don't have a defense in this case, Your Honor.  
13 He is referring to case law strictly in horizontal mergers  
14 where one company is eliminated; competition is necessarily  
15 reduced because you now have eliminated a competitor. That  
16 does not exist in a vertical merger. No competitors are  
17 eliminated, none.

18 And in those cases, if the market that's left is  
19 sufficiently concentrated, the law presumes, the law  
20 presumes -- the government doesn't have to go any -- do  
21 anything more, a harm to competition.

22 The burden then shifts to the defendant to show  
23 that that harm can be overcome by cost savings and other  
24 synergies and other things that will benefit consumers to  
25 see if it can outweigh, outweigh the harm to competition.

1           No case that we can find has ever actually held  
2 that the efficiencies overcome the harm.

3           But those are horizontal cases, Your Honor. There  
4 is no such case law in a vertical merger. It is the  
5 government that has to balance out what they think will be a  
6 price increase, which we think will not happen at all, but  
7 they're going to try to prove a price increase to consumers,  
8 trivial one, I might add, 45 cents a month or \$5 a year.  
9 It's their job, then, to take into account the benefits to  
10 consumers and balance those out to decide whether, on  
11 balance, there's harm to competition.

12           What they are trying to do is put us in the  
13 horizontal straitjacket, where all they have to do is show a  
14 price increase; they stop and they say, okay, we win unless  
15 you prove your efficiencies.

16           Your Honor, there is no law to that effect.

17           And their expert acknowledged that he had to take  
18 into account certain benefits of this merger in doing and  
19 rendering his opinion.

20           He's a very qualified expert, their expert. So is  
21 ours. And he correctly acknowledged, yes, I do have to take  
22 into account some benefits, but he did not take into account  
23 the other benefits.

24           And we asked him, why didn't you?

25           And he said, because that wasn't part of my

1 assignment. That, he said, others are supposed to address,  
2 other experts.

3 But my point is that we don't have the burden;  
4 they have the burden.

5 Now, they come back and they say, well, how can  
6 you not have the burden? How do we know what the benefits  
7 are? How do we know how much advertising revenue you're  
8 going to gain? How do we know how consumers are going to be  
9 better off? That information is all in your head.

10 That's what they say to us.

11 We said, wait a second. We've been litigating  
12 this case going back to November of 2016. You took 20-or-so  
13 depositions during the regulatory phase. You've got almost  
14 30,000,000 documents. Then you filed this lawsuit. And  
15 then you got 50 or 60 more depositions and countless other  
16 documents.

17 We have given a massive amount of evidence  
18 regarding the consumer benefits of this transaction. They  
19 have no excuse, when they get -- and present their case not  
20 to take any of that into account.

21 And what they are trying to signal to Your Honor,  
22 very clearly, is that they don't intend to do that. They  
23 said they're going to save it for the rebuttal case and that  
24 it's going to be up to us to prove all of this.

25 And we say, that is not the law.

1           And even in the horizontal cases, Your Honor, the  
2 case law is that the government has the ultimate burden of  
3 persuasion, which makes sense, because they are seeking  
4 drastic equitable relief, which is to block this merger, and  
5 they cannot put any burden on us.

6           Now, to be clear, this may be somewhat academic  
7 because in this trial, there will be presented by  
8 defendants, even though it's not our burden to do so, a  
9 substantial amount of concrete evidence laying out exactly  
10 the kinds of things that I've been trying to generally  
11 describe: the advertising benefits, the cost savings, other  
12 innovations that are going to benefit consumers as a result  
13 of this merger, including not only Internet consumers, but  
14 including people who watch TV the old-fashioned way.

15           There's going to be new and different kinds of  
16 programming that'll be made available. All the mobile  
17 customers will have all kinds of new types of programming  
18 for people who like to watch TV now on cell phones. Whether  
19 you're an AT&T customer or Verizon customer or some other  
20 customer, all of that is going to come out in the trial.

21           But ultimately, it is the government's job to  
22 balance these out, not simply to say, we proved the 45-cent  
23 increase; we win unless you carry your burden.

24           So there's going to be a fundamental legal issue.  
25 But at the end of the day, Your Honor, to the extent we have

1 any burden whatsoever in this case, it will be more than  
2 satisfied because we will be filling the record with  
3 evidence of these consumer benefits.

4 Now, on the confidentiality issue, if we could get  
5 back to that, I wanted to suggest something. I think we  
6 could do this largely the same way that we have proposed on  
7 the parties' side, which is that I think that the witnesses,  
8 the government should make every effort, as they have said  
9 so. And after all, they are preparing these witnesses, to  
10 avoid having to use analytical data or something that may be  
11 truly confidential.

12 But if something comes up at the time, we can try  
13 to deal with it in the way they did in the *American Express*  
14 trial. And I think what's going to happen, Your Honor, is  
15 that we're not going to see a need to close the courtroom.

16 And so any procedure that is designed in advance  
17 to close the courtroom, I think will end up being behind  
18 closed doors more than would actually be the case.

19 I'm betting that it can be done by the lawyers  
20 very carefully and very responsibly, protecting everybody's  
21 truly, truly confidential information.

22 And if at the time someone says, "You know what?  
23 This is confidential," Your Honor can take a quick look at  
24 it and you can make a judgment. After all, you're the  
25 decision-maker.

1           So that's how I would submit that we proceed.

2           Thank you.

3           THE COURT: Thank you, Mr. Petrocelli.

4           I learned a long time ago, when I was a full-time  
5 law professor, that the hardest class to teach was the one  
6 right before lunch.

7           So I'm going to give you -- to protect you there a  
8 little bit, ten minutes, and then we're going to lunch.

9           MR. CONRATH: All right. I'm in favor of lunch,  
10 Your Honor.

11          THE COURT: All right.

12          MR. CONRATH: So I will do that.

13          THE COURT: All right.

14          MR. CONRATH: Let me talk about the  
15 confidentiality question first, that last thing.

16          I think that last statement we heard from the  
17 other side is they don't see at all a need to close the  
18 courtroom.

19          And I think I just want to emphasize, that's a  
20 recipe for us being unable to present fully evidence that we  
21 need, not want, but need to be able to present to this Court  
22 so that the facts on which we are going to rest our case can  
23 be heard fully and completely by the Court.

24          We have a -- I want to give advance notice -- the  
25 witness, first witness we're going to call tomorrow has a

1 little bit of her testimony that relates to negotiating  
2 strategy that we're going to ask to be held in a closed  
3 courtroom.

4 We'll ask that at the very end of our examination.  
5 It relates to their negotiating strategy, things they had  
6 to -- terms of a contract they had to agree to or eventually  
7 were able to get off, that if they were displayed in open  
8 court, would be, according to their counsel, like laying  
9 your poker hand on the table and then doing the bet for the  
10 next negotiation they go into with either these parties or  
11 with some other parties.

12 So we're going to make that motion in light of the  
13 obligation to notify in advance. I'm doing that now.

14 And the other thing, though, I think I'd say is,  
15 that's going to be a concrete example. The next witness  
16 probably has a small portion as well.

17 Let's go ahead and see how that goes, and we're  
18 going to try to be responsible. I think we're at more than  
19 90 percent for tomorrow. We expect it to be open.  
20 It would be a small percentage. Let's go ahead and see how  
21 it goes, and then the Court can hear the testimony of the  
22 first few witnesses on this.

23 It's always possible to direct people to go back  
24 and review the transcript and see if anything in retrospect  
25 should be made public. That's an alternative protection for

1 the public.

2 But my proposition is that's where we are. Let us  
3 proceed with the first couple of witnesses, and I think  
4 we'll see that it's an appropriate way to go forward.

5 Now I've got to go back and talk about  
6 efficiencies, and I think I only have about seven minutes  
7 left, if I'm --

8 THE COURT: Roughly.

9 MR. CONRATH: All right.

10 I will be quick, Your Honor.

11 I think a couple of points here.

12 There's been some transformative change, and there  
13 is still going on some transformative change in this  
14 industry as a whole, and that's interesting and that's  
15 informative. That's part of what's going on in this case.

16 Antitrust cases come down to particular markets.  
17 So we're talking about the market for pay TV.

18 Relevant that other parts of the market are  
19 changing, we have to consider that. But it's -- we've got  
20 to be careful to focus the antitrust analysis on exactly the  
21 competition that is -- that would be affected by this  
22 merger, and that's competition to deliver people their pay  
23 TV services.

24 So, for example, just by way of analogy, Netflix,  
25 which, you know, first started sending you movies and now

1 you can get them over the Internet or sometimes even through  
2 your cable TV subscription, they're a content company. And  
3 they provide -- they have been an important development.

4 But they're not so much, for some people, they  
5 might be a substitute for your regular pay TV service. But  
6 mostly, they're a complement, not a substitute. About  
7 85 percent of Netflix subscribers, I think the statistic  
8 will come in, are also subscribers to their traditional  
9 cable or satellite, live TV feed.

10 And that's because that product -- which is a  
11 great product, lot of people like it -- is on-demand  
12 product. It's movies and shows. It's not a very good  
13 substitute for most people who want to watch their live  
14 news, their live sports, their -- that kind of regular  
15 programming.

16 So it's an interesting development. We've got to  
17 keep it in mind. It's maybe not exactly where we're  
18 focused. We need to keep in mind what's the competition  
19 that's at issue in this case.

20 Their own projections about what's happening to  
21 the traditional TV service show them being, a very large  
22 percentage of customers who get live TV will not be the cord  
23 cutters or the people who do without live TV.

24 Their projections to 2024, to 2030 show the  
25 traditional pay TV providers -- cable, satellite, telco --

1 still being the lion's share of what's going on.

2           Now, that doesn't mean that competition from these  
3 new live TV, over-the-Internet companies, which are Dish  
4 Sling, Sony Vue, Google or YouTube TV, that doesn't mean  
5 that that's not important. It's going to be, according to  
6 their own projections, a relatively small slice over the  
7 next few years, but it's important.

8           And that's, in part, why our case is important,  
9 because these new competitors who are trying to deliver a  
10 service that's more like your traditional pay TV service but  
11 delivered over the Internet could be a real disruption to  
12 this industry, could bring lot of new competition. And  
13 they're starting to do that.

14           I think Dish Sling just started in 2015.  
15 So this is pretty recent.

16           But this merger would -- they might be disruptive,  
17 these companies; but they'd be taking business away from the  
18 traditional companies like DirecTV.

19           So that's not good for DirecTV. They've got to be  
20 careful. They don't -- if they had their druthers, they  
21 wouldn't see these new disruptors coming in and taking away  
22 some of their customers and maybe disrupting their industry.

23           If they own Time Warner, Turner content in  
24 particular, and to some extent HBO, are things that these  
25 new competitors need. They need to be able to get them on

1 terms that will let them offer a competitive service.  
2 Sometimes they offer pretty good low prices for a narrow  
3 bundle where you don't have to buy everything.

4           They can't do that if they can't sign up the  
5 content that they need at a reasonable price and on  
6 reasonable terms.

7           And putting it in the hands of someone who's their  
8 competitor, who doesn't want disruption, who wants stability  
9 instead, threatens the growth and the ability for  
10 transformative change to happen and the risk that that might  
11 be disrupted as is part of what we're concerned about in our  
12 second theory of harm.

13           So I just want to leave that thought on the table.

14           And with that in mind, I think I've used up my  
15 time, Your Honor.

16           THE COURT: All right. Well, we'll reconvene at  
17 2:45 and cover whatever is left of what really needs to be  
18 covered before we break for tomorrow's -- now, be thinking  
19 about the weather situation, counsel.

20           I just heard on the break that they're projecting  
21 somewhere between four to six inches of heavy snow. It's a  
22 projection. It could be completely wrong. But projections  
23 oftentimes are wrong.

24           But that might cause a delay in starting time  
25 tomorrow. I just don't -- I'm keeping a close eye on it.

1           The Chief Judge -- as is our practice, the Chief  
2 Judge is the one who makes the decision for the Court as to  
3 delay in opening court or closing court. I don't get to  
4 make that decision.

5           So we're going to have to monitor how this is  
6 going to proceed. And they're saying it's going to snow all  
7 day tomorrow. How much of it's going to be wet and just not  
8 accumulate? No one knows the answer to that question.

9           So be thinking about dealing with that, especially  
10 as it relates to your witnesses and their availability and  
11 travel plans and all those kind of considerations that are  
12 inevitable in these situations.

13           See you in a while.

14           DEPUTY CLERK: All rise.

15           This Honorable Court will stand in recess until  
16 the return of court.

17           (Proceedings concluded at 1:08 p.m.)

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C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: March 20, 2018                      /S/ William P. Zaremba

William P. Zaremba, RMR, CRR