

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, :
 :
 : Plaintiff, : CV No. 17-2511
 vs. :
 : Washington, D.C.
 : Monday, March 26, 2018
 AT&T, INC., ET AL., : 2:40 p.m.
 :
 : Day 2
 Defendants. :
-----x

AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT SENIOR JUDGE

APPEARANCES:

For the Government: Craig W. Conrath, Esquire
Eric D. Welsh, Esquire
Timothy B. Walthall, Esquire
Andrew Finch, Esquire
Lisa A. Scanlon, Esquire
Melanie Kiser, Esquire
U.S. DEPARTMENT OF JUSTICE
Antitrust Division
450 Fifth Street, NW
Washington, DC 20530
(202) 532-4560
craig.conrath@usdoj.gov
eric.welsh@usdoj.gov
timothy.walthall@usdoj.gov
andrew.finch@usdoj.gov
lisa.scanlon@usdoj.gov
melanie.kiser@usdoj.gov

1 Appearances Continued:

2 For Defendant AT&T
and DirectTV Group
3 Holdings, LLC:Katrina M. Robson, Esquire
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006
4 (202) 220-5052
krobson@omm.com

5

6

Daniel M. Petrocelli, Esquire
M. Randall Oppenheimer, Esquire
O'MELVENY & MYERS LLP
7 1999 Avenue of the Stars
8th Floor
8 Los Angeles, CA 90067
(310) 553-6700
9 dpetrocelli@omm.com
roppenheimer@omm.com

10

11

Michael L. Raiff, Esquire
Robert C. Walters, Esquire
GIBSON, DUNN & CRUTCHER LLP
12 2100 Mckinney Avenue
Suite 1100
13 Dallas, TX 75201
(214) 698-3350
14 mraiff@gibsondunn.com
rwalters@gibsondunn.com

15

16 For Defendant
Time Warner, Inc.:Kevin J. Orsini, Esquire
Peter T. Barbur, Esquire
CRAVATH, SWAINE & MOORE LLP
17 Worldwide Plaza
825 Eighth Avenue
18 New York, NY 10019
(212) 474-1140
19 korsini@cravath.com
pbarbur@cravath.com

20

21 Court Reporter:

Crystal M. Pilgrim, RPR, FCRR
Official Court Reporter
United States District Court
22 District of Columbia
333 Constitution Avenue, NW
23 Washington, DC 20001
(202) 354-3127
24 crystal_pilgrim@dcd.uscourts.gov

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Table of Contents

Direct Cross Redirect Recross

On behalf of the Government:

Warren Schlichting

By Ms. Kiser

233

E-X-H-I-B-I-T-S

Marked Received

On behalf of the Government:

Exhibit No. PX 409 Sealed

233

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

THE DEPUTY CLERK: Your Honor, recalling civil case number 17-2511, United States of America versus AT&T, Inc., et al.

THE COURT: See counsel.

(Sealed Bench Conference.)

THE COURT:

MR. PETROCELLI:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT :

MR. PETROCELLI :

THE COURT :

MR. CONRATH :

THE COURT :

MR. CONRATH :

THE COURT :

MR. CONRATH :

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. PETROCELLI:

THE COURT:

MR. PETROCELLI:

THE COURT:

1

2

3

4

5

6

7

8

9

10

11

12 MR. PETROCELLI:

13

14 THE COURT:

15

16

17 MR. PETROCELLI:

18 MR. CONRATH:

19 (Open Court.)

20 THE COURT: All right, we're going to proceed with

21 this witness in a minute. Before we do, I think those

22 assembled should be entitled to a little explanation of what's

23 been going on here and also I need to reiterate some basic

24 ground rules that we are operating under here.

25 This is a trial that's going to have a number of third

1 party witnesses. These are people who do not work for AT&T or
2 DirecTV or Time Warner. And they come to the witness stand
3 with concerns about confidentiality of their business secrets
4 and business interests. These are people who are competitors
5 of the defendants to a certain extent.

6 And because they're competitors and because they have
7 concerns about sensitive confidential information, they're
8 represented by counsel other than the counsel seated at the
9 table. I should say in addition to.

10 Most of these witnesses will be appearing on behalf of the
11 government, these third party witnesses with outside counsel.
12 But some will be appearing, I believe, for the defense as well.

13 The Court has endeavored in past hearings, at least one
14 past hearing in particular, to make it very clear as to the
15 rule against witnesses as it applies in this case. Indeed,
16 Mr. Conrath himself at one point last week I believe it was, if
17 not the week before, said can we just before we get going,
18 Judge, be clear, crystal clear as to how the Court applies this
19 rule and how it's going to apply because it is done on a case
20 by case basis.

21 Well, the situation we had here today was a violation of
22 the rule against witnesses. Mr. Conrath informed the Court
23 that he learned this morning, at least that's my recollection
24 of what he told me, last night. He learned last night that the
25 counsel for the witness about to take the stand, Mr.

1 Schlichting, provided him with the transcript of the opening
2 arguments in this case on Thursday, and the more specifically
3 and more importantly perhaps, the testimony of the first
4 witness who appeared on Thursday both direct and cross
5 examination.

6 Of course doing that was in direct contravention of the
7 rules against witnesses in this case.

8 Now as is often the case when transgressions of this kind
9 occur there are lots of facts that the Court has to assemble to
10 figure out exactly what happened and that's what we were doing
11 this morning to try to figure out by reconstructing the events
12 through obtaining emails, talking to the participants in the
13 events and trying to figure out exactly what happened.

14 And to the full extent at this point that I can discern
15 what occurred, there was a mess up by a counsel. Shouldn't
16 have occurred and they've apologized for it. And the Court had
17 to weigh the decision whether or not to strike the witness all
18 together, which is and has been recognized by courts as an
19 appropriate remedy for violation of the rule against witnesses.

20 The idea of course is that no witness will gain the
21 advantage over any other witness by having the opportunity to
22 observe the testimony of other witnesses. Exceptions are made
23 to that rule, expert witnesses and party representatives such
24 as these two gentlemen seated right over here who will testify
25 at some point in this case. But they are exceptions to the

1 rule that are well known to the lawyers litigating this case.

2 Ultimately it's the lawyers litigating the case that have
3 to ride heard on the lawyers who are serving as outside counsel
4 to witnesses to make sure that compliance is taking place and
5 they'll be the ones who are held accountable going forward in
6 no uncertain terms.

7 So let me be very clear, in the words of Jack Nicholson,
8 crystal clear. Witnesses will not be permitted to listen to,
9 read or be briefed about the testimony of any other witness in
10 this case prior to their testimony. The only exceptions are
11 experts and party representatives.

12 Any person who provides a transcript of a prior witness's
13 testimony or briefs a witness on that prior testimony of
14 another witness will be held in contempt of court.

15 It is the duty of the attorney representing third party
16 witnesses, in this case Justice Department, but it could be
17 AT&T and Time Warner in another situation, to make sure that
18 those third party witness's counsel are not only extra sure
19 that they're aware of this rule, that they're complying with
20 the rule to the fullest extent possible.

21 And with regard to transcripts, one of the problems with
22 cases like this is there are daily transcripts being made. And
23 outside counsel for these third party witnesses are purchasing
24 them as they're permitted to do. But just because they
25 purchased them, doesn't mean they can just show them to anyone.

1 So rather than band them from purchasing them, I'm giving
2 them this rather public warning about the consequences of
3 misapplying and using them by sharing them with future
4 witnesses, in particular their future client in the case.

5 Should this happen again, hopefully it will not, the
6 witness will be stricken. So let the Department of Justice
7 lawyers and the AT&T lawyers be on notice that that's going to
8 be the consequence of it.

9 We can't really afford the time and the arguments and the
10 issues that we've had to devote to this today over and over
11 again throughout the rest of this trial. I mean, we've devoted
12 essentially a half day's time to this issue now and that's
13 pretty much all we can devote. Ideally, we wouldn't have put
14 this much time into it, but we're setting a precedent for the
15 future.

16 As far as the mix up in this case, I'll deal with that law
17 firm separately and I'll be in touch with them as to the
18 consequence there, but that's a separate issue.

19 So any questions for the government, Mr. Conrath?

20 MR. CONRATH: No, Your Honor.

21 THE COURT: Any questions for the defense, Mr.
22 Petrocelli?

23 MR. PETROCELLI: No, Your Honor, other than I be able
24 to cross examine the witness.

25 THE COURT: You will have absolute carte blanche to

1 question on any and all of these issues in this cross
2 examination.

3 Ms. Kiser, call your witness.

4 MS. KISER: Melanie Kiser for the United States.

5 The United States calls Warren Schlichting of DISH Network
6 to the stand.

7 THE COURT: Go get him.

8 MS. KISER: Your Honor, as a preliminary matter we
9 would like to introduce one exhibit through this witness.

10 We have cleared it with counsel and if it's okay with the
11 Court, we would like to admit Plaintiff's Exhibit 409 now.

12 THE COURT: Well, let me see it.

13 MS. KISER: May I approach?

14 THE COURT: Right here. This is the gentleman you
15 need to talk to.

16 MS. KISER: Yes, and this is under seal.

17 THE COURT: All right, no objection Mr. Petrocelli?

18 MR. PETROCELLI: No objection.

19 THE COURT: It'll be admitted under seal.

20 (Government Exhibit No. 409 received in evidence under
21 seal.)

22 THE COURT: Come on up, Mr. Schlichting, and be
23 sworn.

24 GOVERNMENT WITNESS WARREN SCHLICHTING SWORN

25 DIRECT EXAMINATION

1 THE WITNESS: Good afternoon.

2 MS. KISER: Your Honor, may I proceed?

3 THE COURT: You may.

4 BY MS. KISER:

5 Q. Good afternoon, Mr. Schlichting?

6 A. Good afternoon.

7 Q. Where do you work?

8 A. I work at DISH.

9 Q. Where is DISH located?

10 A. In Denver, Englewood to be exact.

11 Q. Can you tell the Court a little bit about what your
12 responsibilities and role are at DISH?

13 A. Sure. I oversee Sling. I'm the president of Sling.

14 I also oversee the programming, the negotiating team, as
15 well as ad sales.

16 Q. What services does DISH offer?

17 A. Pay-TV services both satellite under DISH and Over the Top
18 internet delivered with Sling.

19 Q. How many subscribers does DISH have between the two
20 services?

21 A. Between the two just over 13 million.

22 Q. How does that compare to other pay-TV providers?

23 A. We're the fourth, second largest satellite, fourth largest
24 overall.

25 Q. Going back to your responsibility. How long have you been

1 president of Sling?

2 A. Since early December of 2017.

3 Q. What was your title prior to that?

4 A. EVP in charge of marketing for Sling and DISH, programming
5 and media sales. It's kind a mouthful, sorry.

6 Q. When did you take charge of programming for DISH and
7 Sling?

8 A. The middle of September, 2014.

9 Q. Do you still oversee programming for both satellite?

10 A. I do, I do.

11 Q. So now let's take a step back and talk about DISH. How
12 long has DISH been in the pay-TV industry?

13 A. In the current form since I think 1996.

14 Q. How has DISH positioned itself in the market?

15 A. Well, DISH is always the challenger brand. We've been
16 number two a long time, so we're sort of try harder disruptive
17 force in the industry.

18 Q. When did DISH launch Sling?

19 A. In February of 2015.

20 Q. Was anybody else offering an internet delivered pay-TV
21 service at that time?

22 A. Not at the time.

23 Q. So what does Sling have in common with traditional pay-TV
24 services such as satellite and cable?

25 A. Well, it has, the networks that Sling carries are

1 typically carried by the pay-TV service.

2 Q. Do you carry all the same channels as other pay-TV
3 services?

4 A. Certainly not all of them. One of the places that we
5 tried to innovate is to carry fewer channels, many fewer
6 channels.

7 Q. What do the packages available to consumers look like?

8 A. This is where I think we've tried to do, you know, one of
9 the biggest complaints of consumers is networks paying for
10 networks that they don't watch. So we have I guess you call it
11 a skinny bundle or a skinny base package.

12 And then to that you can add genre packs that from a like,
13 like networks in certain packages kids and news, Lifestyles.

14 Q. How many base packages are there?

15 A. There are two base packages, Sling Orange and Sling Blue.

16 Q. So let's talk about Sling Orange first?

17 What is the price for the Sling Orange base packet?

18 A. The Sling Orange package is \$20.

19 Q. What are the main networks that a consumer gets with Sling
20 Orange?

21 A. So we have four, ESPN, Disney Networks. So ESPN 1, ESPN
22 2, Disney and Freeform. You can also access ESPN 3 from that.

23 We have four Turner Networks. So PBS, TNT, Cartoon and
24 CNN.

25 We have one network Performance 1, we have three from

1 Scripts. And we have, that covers most of the big ones. We
2 have a few independents as well. I think there are almost 30
3 total.

4 Q. Was Sling Orange the original base package that DISH
5 offered?

6 A. It was.

7 Q. When did Sling Blue launch?

8 A. Sling Blue launched, I am going to be general about this.
9 I think it launched late in 2015, maybe early 2016.

10 Q. Can you tell the Court a little bit about the differences
11 between Sling Blue and Sling Orange?

12 A. Sure. Sling Orange is restricted to just one stream.
13 It's a single stream service. What that means is that only one
14 person at a time can log on one device at a time.

15 So Sling Blue is a multi stream service. There are three
16 streams, three devices at a time which more closely mimics a
17 household with two or three televisions in it.

18 That service does not include the three stream service
19 Blue, does not include the Disney Networks, but it includes
20 nearly all the networks, the rest of the networks that are in
21 Sling.

22 Q. Does it include any additional networks not in Sling?

23 A. It does. There are a few. So let's see, it has Fox
24 Networks. And it has NBC Universal Networks. I believe it has
25 one extra Turner Networks and two extra Viacom Network.

1 Q. What's the price for the Sling Blue package?

2 A. The base package is \$25.

3 Q. You mentioned that you can add on genres here. How does
4 that work?

5 A. So similarly, many are almost exactly the same. If you
6 don't have kids, why pay for Kids Networks. So we have a kids
7 pack. You can take it or not. We have a Hollywood Extra pack.
8 If you're interested in movies, great. If you are not, no need
9 to pay for that.

10 Same thing with news, we have a Lifestyle which is a little
11 bit more general package. So in each case you can add or not
12 add as your interest dictate.

13 Q. So other than the skinny bundle element is there anything
14 else that sets Sling apart from traditional pay-TV services?

15 A. Well, it's just, we try to go after all of the complaints
16 in the pay-TV industry.

17 So there's no contract, you can add, you can come and go as
18 you please. We don't sell you any equipment.

19 There is, if you don't have a smart TV you'll need a
20 streaming box, but we don't sell that to you.

21 So no contract, no commitment, no equipment are three other
22 places where we feel like we were trying to meet the consumer
23 and deal with the paying points, deal with the consumer
24 complaints.

25 Q. Can a consumer sign up instantly for stream?

1 A. Yes, they can. We try to get people to watch TV under two
2 minutes.

3 Q. How about canceling?

4 A. It's very easy to cancel too.

5 Q. Have other internet based TV providers entered since Sling
6 launched?

7 A. They have, there have been quite a few.

8 Q. How does Sling pricing compare to traditional pay-TV
9 providers, satellite and cable?

10 A. Typically it's a lot lower. There are all sorts of
11 promotions but a typical pay-TV package at least at DISH starts
12 at \$50. So it's basically 20 or \$25 versus 50 by comparison.

13 Q. How does it compare to the internet delivered services
14 that have entered since Sling on pricing and channeling up?

15 A. So I believe Sling is less expensive than nearly all. I
16 believe it's a file which doesn't have any sports in it.

17 Compared to DirecTV Now I believe that their base package
18 is 35. Hulu TV is like YouTube TV, it was at 35. I think they
19 just raised their price to 40.

20 And so it's a comparison of 20 or \$25 and our basic package
21 compared to 35 or \$40 at the lowest end on others.

22 Q. How did DISH decide what programming to put in the
23 original Sling Orange package?

24 A. It was really just programming we felt we needed to create
25 a pay-TV service. By that I mean, you know, the most popular

1 programming.

2 Q. Were there certain types of programming that were higher
3 priority than others?

4 A. There were.

5 Besides being popular, this is a live internet streaming
6 service so that typically means there's an emphasis on live
7 sports and live news.

8 Q. In negotiating with programmers for the rights to Sling
9 were there certain terms that were especially high priority for
10 Sling?

11 A. There were. We typically negotiated, well, there are a
12 couple of pieces to this answer. But we would insist that the
13 pricing for OTT which is Sling be the same so the rate would be
14 the same as satellite. Typically most programmers tried to
15 upcharge us for over the internet or over-the-top rights.

16 And then there are a number of other pieces with respect to
17 the way that our tiers work. I guess I would say are a little
18 bit competitively sensitive I guess if we have to walk through
19 that.

20 Q. Sure, we'll return to that later.

21 You said that you were able to pay the same rate for Sling
22 for satellite. How did you accomplish that?

23 A. Well, almost every trade that we made including this we
24 paid for, you know, we have this large platform that is, that
25 buys a lot of programming and so we typically made some give on

1 that side to get what we wanted on the Sling side.

2 Q. Does Sling compete with services like Netflix?

3 A. We see Netflix as complimentary. I guess in the broadest
4 sense you would say for eyeballs because there are a lot of
5 ways to view video now. But Sling is live linear, so live
6 linear streaming which means live news, live sport in current
7 seasons.

8 Netflix is past seasons and then increasingly they are
9 doing their own original content as well.

10 Q. Have you heard the term must have content before?

11 A. I have.

12 Q. Is that a term that you use in your business?

13 A. We do, yeah.

14 Q. And what does it mean to you when you use it?

15 A. I guess it's a must have content, it's popular content.
16 So, you know, you are going to have to have some, some of these
17 you are just going to have to have a pay-TV service.

18 I guess I would say must have also I guess means when I
19 think about it from a have it or don't have it. It's hard to
20 substitute for it. You don't have a ready substitute.

21 And I would say as well that you would, I mean I hate to
22 say this, is it okay to say we might pay more than we think it
23 is worth just because we have to have it.

24 Q. So you said --

25 A. It's a terrible thing for a negotiator to say.

1 Q. You have to have it to have a pay-TV service?

2 A. Yes.

3 Q. What do you mean by that.

4 A. Well, there's just certain things that you are, you are
5 just not going to be competitive if you don't have certain
6 pieces of programming.

7 So I don't know, did that answer your question?

8 Q. Yes. You also said that it's harder to substitute for
9 must have content. How is that?

10 A. So if you have, the best example is probably like kid's
11 content. Kid's content often gets very high viewing hours but
12 it's frankly not that hard to find some other kid's content
13 whereas I'm just thinking about right now during March Madness,
14 if you don't have March Madness you're not in the pay-TV
15 business. So sort of the two ends of the spectrum.

16 Q. Who has must have content?

17 A. So there are five groups that I guess I would say are the,
18 that they're the five families, right, the way we refer to them
19 internally. ABC, NBC, CBS, Fox and Time Warner are the five
20 groups that you, you just, it's very hard to have a pay-TV
21 service without them.

22 Q. What distinguishes those five programmers from others?

23 A. Well, they've all made big investments in live sports.

24 Almost all of them have some sort of important news presence,
25 and then they have, you know, most of them have important

1 entertainment content as well.

2 Q. Why is it important that they've invested in live sports?

3 A. Well, more and more you've got time shifted viewing so
4 Netflix is a good example. Hulu is another good example where
5 you can access prior seasons or prior content, but really
6 sports, the minute the game is over sports is stale.

7 So if you're going to have a live linear service, then
8 sports is a critical piece of that.

9 Q. You mentioned time shifting, can you explain?

10 A. It's an industry term. It just means that it's recorded,
11 previously recorded content. And you might watch it a month
12 later, a year later, many years later. It's just something
13 that's, it's content that's been recorded and somebody has the
14 rights to.

15 Q. You also mentioned that Netflix is an SVOD? What is an
16 SVOD?

17 A. It's a subscription video on demand. So it just means
18 that you pay a monthly fee and they have a number of shows that
19 are recording and available literally on demand when you decide
20 to watch.

21 Q. Are all sports rights of equal importance?

22 A. No. They're certainly some events that are bigger than
23 others, Super Bowl is a huge event, must have. March Madness I
24 would put in that category.

25 The finals of different various sports leagues in terms of,

1 in terms of sports there are certainly some that outrank
2 others.

3 Q. I notice that Viacom is not in the top five programmers
4 you mentioned. What networks does Viacom have or what are its
5 main brands?

6 A. So Viacom has about 27 which frankly I think is part of
7 the problem. But their big brands are MTV, BET, VH1, CMT,
8 Comedy, Spike. I think that's probably seven or eight that
9 those are the primary brands and then there's MTV 2 and 3 and,
10 you know.

11 Q. Can you explain for the Court why you don't consider
12 Viacom must have?

13 A. I think Viacom would have been must have five, six, seven
14 years ago. But they've really stopped investing in their
15 product. I think this is generally accepted. It's written
16 about.

17 And so you've seen viewership declines, you have seen, you
18 know, Viacom struggling a bit in the market now. Their current
19 CEO has been very sort of open with the craft that they are
20 going to reinvest in five of those networks.

21 So they have actually started to putting money back into
22 the networks, investing in shows. I think the hope is, their
23 hope anyway that in the next few years they get back to the
24 place where they're considered must have.

25 Q. What networks are must have from Time Warner?

1 A. So Time Warner I guess I would say, you know, TBS, TNT,
2 CNN, I would put HBO in that for sure. I guess I would say on
3 the bubble is, you know, Cartoon Network gets a lot of viewing.
4 To my other comments, I don't know if that, if that absolutely
5 falls into must have. So I would say, those are the four or
6 five that must have networks.

7 Q. So why are TBS and TNT must have?

8 A. TBS and TNT are mostly about sports rights in terms of
9 must have. They have done a good job with not only March
10 Madness but they have got NBA content as well. A great all
11 star game on Turner. So those have been important sports
12 networks for us.

13 Q. How about CNN, why is CNN must have?

14 A. Well, imagine coming around to midterm elections without
15 CNN, right. There are probably three networks that have a huge
16 amount of viewing. I would say two that get the lions share
17 and then you've got MSNBC, Fox News. MSNBC is by far the third
18 in terms of volume.

19 Then CNN is just a very important news source. You know,
20 it's important, it's been important really since the last
21 election. They've risen in popularity considerably. But
22 coming into midterms that will only become a more important
23 network for us.

24 Q. How about HBO, why is it must have?

25 A. You know, HBO has just been a part of the pay-TV fabric.

1 We have almost one and five subscribers on the satellite side
2 that watch or that subscribe to HBO.

3 So it's a big number and it raises, it's hard to imagine
4 having a pay-TV ad or a marketing campaign that has no HBO. I
5 mean, it's just expected by consumers.

6 Q. I'd like to shift gears a little bit and talk about your
7 negotiations with programmers. Do you prepare for negotiations
8 with programmers?

9 A. We do.

10 Q. Can you tell the Court a little bit about what you do to
11 prepare for your negotiations?

12 A. Yeah, we do a lot of homework. We probably start six
13 months in advance. We look at view measurement data.
14 Typically that's our own data from our own set up boxes.

15 We look at old contracts with the press. We look at any
16 number of factors to try to figure out where they are in the
17 market, what their motivation is. We'll do, sometimes we'll do
18 analysis of what would happen if they, if we were to go dark
19 with this network. We really try to have all of the angles
20 covered.

21 Q. So let's go back through those in a little bit more
22 detail.

23 What kind of viewership analysis do you do?

24 A. Well we, we have a couple of things that we do on a
25 regular basis. So the first cut is we look at viewership data,

1 just total gross hours, the biggest bucket. Then we'll look at
2 hours viewed in a month by households.

3 We'll look at dollars viewed by, the amount we pay the
4 programmer divided by the hours viewed. And we'll do that not
5 only on a monthly basis. This by the way, we do every month
6 regardless.

7 But then when we're preparing for the deal, we'll look for
8 seasonality. We will look for individual blips, if they've got
9 premiere.

10 So I don't know if that, does that get your question? We
11 cut the data in a lot of different ways.

12 Q. Yeah. So what do, what is the gross viewing hours tell
13 you about a programmer?

14 A. Just overall popularity. That's just the most, that's the
15 basic, that's the basic measure of how popular a network is.

16 Q. And how about hours viewed per household?

17 A. So there we try to figure out, that's directly related to
18 if there's some chance of going dark, how many households are
19 just really passionate versus casual viewers of a network.

20 So you might have huge viewing hours but if they're all
21 concentrated in 15 or 20 percent of the homes, that's different
22 than if you've got a very, you know, a big viewing hours, but
23 it's evenly distributed. Just in different risk profiles.

24 Q. How do the risk profiles differ?

25 A. Well, the best example again this would be on one side of

1 the spectrum. But if you have a regional sports network and in
2 a certain region you've got 20 or 30, 40,000 fans that watch
3 that network, I don't know. They might watch 30 hours a month.

4 Okay, those are committed fans and you take it away and
5 you're going to lose those subs. Versus on the other end of
6 the spectrum you can imagine casual viewing dipping in and out
7 spread across many, many households.

8 Again, does that answer your question?

9 Q. Yeah. You also mentioned dollars per viewing hour. Why
10 do you look at that?

11 A. Well, we pay programmers, you know, these huge amounts.
12 So we're just trying to figure out where they, where these
13 prices fit.

14 Many of these contracts are just, they're just kind of like
15 ancient Greece where one foundation is built on the next.

16 One of the networks I just talked about a little bit about
17 have had these prices that continued to advance but their
18 programming has not.

19 So we check for anomalies just to make sure that we're not
20 completely, that this is not a complete outlier that we're
21 paying for in terms of dollars per hour.

22 Q. Are there reasons you would pay more per hour for some
23 networks than others?

24 A. Sure. I mean, there are some networks that you need, you
25 want, you just must have. So there are absolutely the group of

1 networks that you'll pay a lot for.

2 Q. You also mentioned that you look at where in the market
3 the programmer is and what their motivations might be.

4 How do you go about doing that?

5 A. Well, we're, we try to observe if they're on the rise or
6 if they're investing or if they've just signed.

7 One of the classic piece of information is if they've just
8 signed a big contract with a network or sorry, with a league.

9 We'll say okay, they'll come at us with what we call a rate
10 reset. It's not just 5, 6, 7 percent move upward. If they've
11 just signed with the NBA or somebody else there'll be a
12 significant bump. That's one, when we say in the market place,
13 that's what I mean.

14 Q. Do you do anything to try to get inside of the shoes of
15 programmers and understand what they may be asking for?

16 A. Well, we do actually occasionally, not every time, but
17 we'll do mock negotiations.

18 I kind of like that because it gives the junior team
19 members a chance to go up against the more seasoned
20 negotiators. So I don't know if that's the kind of thing
21 you're thinking about.

22 But we let them take a few swings, and they do homework as
23 if they are, you know, the programmer. It always yields a
24 couple of interesting kernels, you know. It's basically the
25 junior guys are trying to stump the more senior negotiators.

1 Q. Do you use anything that you have learned in the mock
2 negotiations with the actual negotiations?

3 A. We will. Mostly it's uncovering weak spots in our own
4 negotiating team.

5 Q. You mentioned earlier that one of the reasons you look at
6 hours per subscriber is for if you might go dark with the
7 programmer.

8 What does it mean to go dark?

9 A. It just means that we don't have the right to display the
10 content anymore. So, you know, if you come, so many of these
11 expirations are at midnight. So midnight on the, whatever the
12 20th of the month, we will either be far apart, both sides will
13 still be shooting at each other or we won't be so far apart.

14 We can't display the content unless we have the rights to
15 do it and if the network decides that we're not close enough to
16 keep going or extending, they'll pull the rights.

17 Q. What's the effect if DISH goes dark with the programmer?

18 A. Typically, typically pretty bad.

19 I would say the more popular the content the worse it is.
20 Probably makes obvious sense. But we don't like take downs.
21 We typically -- actually, I didn't make this up. I kind of
22 wish I had.

23 But our sales guy said once that it's like having a heart
24 attack. And you can come back, you can get yourself in shape
25 again after a heart attack, but you're never quite all the way

1 back to where you were before.

2 So going dark with a programmer is almost always bad for
3 us.

4 Q. Why is it bad for you?

5 A. We lose subscribers. And we lose their, no matter how
6 much we try to educate subscribers about working on behalf of
7 the consumer and trying to get lower prices and negotiating
8 hard, at some point they, they'll be disgruntled or give up on
9 it and say you know what, I'm going to go to another provider.

10 Q. So what is your message to consumers when you go dark with
11 a programmer?

12 A. Well, we try to let them know with sort of mixed success
13 that it's not about us. We're always negotiating for lower
14 prices and trying to slow down this crazy freight train of
15 programming prices. So we try to communicate that either in
16 video or in press or whatever.

17 Q. You mentioned a crazy freight train of programming prices,
18 what are you referring to?

19 A. Well, sports rights have spiraled out of control. I was
20 hopeful a couple years ago that we had seen the peak but
21 clearly we haven't.

22 So those rates go, they get more and more expensive with
23 every passing year. And growing much, much faster than the
24 cost of living or even the cost of other, other entertainment
25 networks.

1 Then the other one that has really taken off which is
2 disturbing if you are trying to run a pay-TV service are the
3 retransmission consent deals.

4 Those deals are with the local affiliates, the broadcast
5 affiliates and their owners that have sort of amassed
6 affiliates in different cities. Those are incredibly high
7 prices or are high growth rates. So those are the two quote
8 unquote freight trains.

9 Q. When you say local affiliates, are you talking about local
10 broadcast stations like local ABC, NBC affiliates?

11 A. Yes, exactly.

12 Q. Back on rate increases are you typically accepting rate
13 increases in negotiations of programmers?

14 A. You know, programming rates only go one direction. They
15 go up and so the question, our negotiations are typically about
16 how do we limit the increases.

17 Q. Have you ever seen your programming rates go down in the
18 time you've been at DISH?

19 A. You know, very, I mean, one or two times in very small
20 networks that didn't have, just didn't have any programming to,
21 you know, to consider.

22 Q. Do you have a sense of how many customers you lose when
23 you go dark?

24 A. It varies by network groups. So we do keep track of it.
25 If we ever do go dark we do keep track.

1 Q. How do you try to keep track of it?

2 A. Well, the primary way on satellite is to when people call
3 up to disconnect we ask them, say where are you going, what's
4 happening, why are you disconnecting? And sometimes they'll
5 tell us, sometimes they won't.

6 On Sling it's harder. We make it so easy, some might say
7 too easy. But we make it very easy to cancel and it's harder
8 to know what's happening on that one, why someone is leaving.

9 Q. So other than the subscribers that call up and say I'm
10 canceling because you lost this programming, are there any
11 other effects from going dark?

12 A. We have a general, general I said disgruntlement before.
13 You do damage your sub base. So even if they don't disconnect
14 this time, we look at overlap.

15 So particularly retransmission consents are a good example.
16 If somebody owns affiliates in 20 cities and then we have the
17 chance of another, another chance to go dark and there's
18 overlap in cities, if you're a subscriber and you're going to
19 have a second black out or you're going to go dark, those
20 subscribers are much more likely to leave.

21 So every time you do this you just, you end up having this
22 sort of really tough knock on affect.

23 Q. Does going dark have any affect of you signing up new
24 subscribers?

25 A. Absolutely.

1 Q. How so?

2 A. Well, so whenever you're dark, you know, with a local
3 affiliate, you are just not going to be able to sign up subs in
4 those cities.

5 If you're dark with a popular national network, your entire
6 acquisition is going to slow to a crawl. You're only going to,
7 you're only going to sign up people that don't care about that
8 particular network.

9 Q. Do you ever see other pay-TV providers taking advantage of
10 DISH or other distributors going dark?

11 A. We do. We see people a little bit more, marketing more
12 aggressively if you are a dark network. Yeah, that's a fairly
13 common affect.

14 Q. You said a minute ago you try to track where subscribers
15 go?

16 A. We do.

17 Q. Where do they go when they cancel with DISH?

18 A. Where do they go when they cancel with DISH?

19 Q. Yeah?

20 A. Well, we're a satellite provider, so people have typically
21 identified themselves as more, as predisposed to satellite if
22 they go with DISH. So it's a really good chance that they'll
23 go to DirecTV, the other satellite choice.

24 Q. If going dark is so detrimental to DISH's business, why
25 does it ever happen?

1 A. You know, we're part negotiators for better pricing and if
2 you look at the number one consumer complaint, it's the prices
3 are too high. They're too high and we're paying for hundreds
4 of networks that we don't watch.

5 So we do everything we possibly can to try to keep prices
6 low. We've kind of staked out the value end of the spectrum
7 for better or for worse. So we have got to keep the prices
8 down or we're not going to be in business.

9 Q. Has DISH ever gone dark with any Time Warner Networks?

10 A. We have.

11 Q. Can you tell the Court a little bit about what networks
12 went dark?

13 A. Sure. And in September 2014 I was brand new to the job,
14 so I was a real welcome party there. We were negotiating with
15 the Turner Networks, not TBS and TNT, but CNN, HLN, Crew and
16 Cartoon and Boom was part of that as well.

17 And we ended up going dark, I guess it was near the end of
18 November of 2014.

19 Q. Was near the end of November is that the beginning or the
20 end of the going dark period?

21 A. Yeah, I have to remember. I think we, you know what, it
22 might have been end of October that we actually went dark.

23 Q. Did you say --

24 A. I think we went dark for about a month.

25 Go ahead.

1 Q. Did you say that you didn't go dark with TBS and TNT?

2 A. That's right. They were on another contract.

3 So I think we got within, so if I remember right their TBS,
4 TNT contract was due, I guess it's okay to say, right. We
5 don't use these dates anymore. December 5th, and so it would
6 have been sort of October 20th I think we went dark with, with
7 the Turner Networks.

8 Q. So you had two different contracts for the Turner
9 Networks?

10 A. That's right. And a third by the way for HBO.

11 Q. And CNN, Cartoon and some others besides TBS and TNT, they
12 expired around October 20th?

13 A. What had happened was we had been extending. We hadn't
14 been able to reach agreement. So the two sides mutually agreed
15 to extend a number of times. But we are, you know, we were
16 fearful that if the two, TBS, TNT was not extending. So we
17 were fearful that if the rest of the Turner Networks got too
18 close to that expiration, that all of the networks together
19 would be negotiated and that would certainly put DISH in a
20 weaker position.

21 Q. Why would that put DISH in a weaker position?

22 A. Well, it's already very strong. These are tough
23 negotiations. First of all, the Turner team is very, they're
24 good. They're hard core negotiators.

25 But secondly, we would be negotiating for even more

1 networks and TBS, TNT are important networks to us. So we
2 wanted to keep those expirations apart.

3 Q. How did the importance of TBS and TNT compare to the other
4 networks at that time?

5 A. I think TBS and TNT were probably, it's hard to say. I
6 would say they were more important at the time. They certainly
7 were, they've always been good networks. So it's a little bit
8 more subjective. More important or less important.

9 Q. You mean more important than the other networks?

10 A. Right. CNN, CNF had surged in popularity since then. So
11 it wasn't quite as important to us then as it is now.

12 Q. And so did I understand correctly that you had been
13 extending the CNN contract, but not extending the TBS, TNT
14 contract so they had inched closer and closer together?

15 A. That's exactly right.

16 Q. Did you ultimately reach a deal to put CNN and the other
17 networks back up?

18 A. You mean after they went dark?

19 Q. Yes?

20 A. We did, we did.

21 Q. When did you put the networks back up?

22 A. I think it was about a month after that. So I think
23 that's the November date. Maybe November 20, 21.

24 Q. How long did you extend the agreement for that time?

25 A. So we had sort of a tricky situation where we had a, well

1 I guess all extensions are temporary. But we had an extension
2 through the, I think this is probably through the end of March.
3 In fact, I'm, so it's through the end of March.

4 So we had an agreement to put it back up. We had this go
5 ahead to launch with Sling, but we had to get everything else
6 done including HBO by March 31st or the thing would blow up
7 again.

8 Q. When was HBO set to expire?

9 A. March 31st.

10 Q. So they all ended up with the same expiration date?

11 A. Because of that agreement, this is a call between Charlie
12 and I thought it was John Martin, it might have been Jeff
13 Bewkes.

14 A call between Charlie and Turner, Time Warner, all three
15 ended up on March 31st which from a negotiating team's
16 perspective wasn't ideal, but that's our --

17 Q. You said March 31st, so is that just four months out from
18 when you had gone dark?

19 A. Yes, March 31st, 2015.

20 Q. Where was Sling at that time? Had it launched yet?

21 A. It had not. We launched in February of '15, so we
22 launched with that permission. It's crazy when I look back
23 that we did that.

24 But we did that and I guess we were reasonably confident we
25 would get to a deal. Although there were certainly a lot of

1 negotiating all the way up to March 31st.

2 Q. So when you say it was crazy that you did that, what are
3 you referring to?

4 A. Well, we took a risk. We launched with Turner Networks
5 but it's possible they would have come right back off the
6 service if we hadn't gotten there March 31st.

7 Q. Did you go dark with any other cable networks during this
8 period between October of 2014 and March 2015?

9 A. We did. We went, we had a hard time with Fox News and
10 Business.

11 Q. Without disclosing any confidential numbers, did you lose
12 any subscribers due to these take downs?

13 A. We did.

14 Q. Do you know where the subscribers who left went?

15 A. We have a pretty good idea. We certainly know, you know,
16 as I mentioned before, there's a whole group of people that
17 will say where they're going.

18 So we know if they went to DirecTV or cable or some place
19 else. But then there's a whole group of folks that won't
20 necessarily tell you and there's, you know, a couple of
21 different buckets here of folks that you're estimating.

22 Q. What are the buckets?

23 A. Well, I have, you mentioned before I would say there are
24 the, there's the group that calls up and says we're
25 disconnecting. Some will tell, you some can't. In a way,

1 there are two buckets there. Some will tell you, some won't.

2 Then there's a group of people that won't buy you. It's
3 just your acquisition, your subscriber acquisition really
4 dwindles. We measure that for a certain period of time,
5 certainly like 90 days.

6 After that you have a tale. And the tale is just this
7 general, you know, A, you're not, you're sort of viewed poorly
8 in the market place.

9 And B, if you have that second, if you go dark with anyone
10 else there's a chance you lose those subscribers.

11 Q. So just to step back and go through the timeline here.

12 You were negotiating for CNN and the other networks and went
13 dark with them around October 20 of 2014?

14 A. That's right.

15 Q. At that time your TBS, TNT contract was set to expire
16 December 5th?

17 A. That's right.

18 Q. And the CNN contract had been getting closer and closer to
19 that date?

20 A. It had been.

21 Q. Then you were dark for about a month?

22 A. We were.

23 Q. But TBS and TNT never went dark?

24 A. That's right.

25 Q. And then you reached an agreement to push it out for about

1 four months to March 31st?

2 A. Right. Sort of a temporary extension to get everything
3 wrapped up.

4 Q. Did you ultimately reach deals with Turner and HBO by
5 March 31st?

6 A. We did.

7 Q. We'll come back to this topic in a sealed setting?

8 A. Okay.

9 Q. But moving on for now, let's talk about the merger between
10 AT&T and Time Warner?

11 A. Yes.

12 Q. Do you expect that to have any effect on your next
13 negotiations with Time Warner?

14 A. Absolutely.

15 Q. How so?

16 A. I mentioned before these negotiations with Turner are
17 tough, you know, without any merger on the table. It's great
18 content. They're a good team. They are truly a good
19 negotiating team.

20 So that's the tough negotiation and there are a couple of
21 things about the way the last contract ended that I can share
22 at the right time. But with no merger, that's going to be a
23 really, you know, hard negotiation.

24 I'd say with a merger, that kind of throws the card table
25 up in the air. I think all of the incentives change at that

1 stage.

2 You've got a really important supplier or we've got a
3 really important supplier, teaming up with our biggest
4 adversary, our head to head competition. And I just don't know
5 what insensitive Turner would then have or Time Warner would
6 then have to really get to a deal with us.

7 Q. Why do you say that?

8 A. Well, I mean, we need each other now. I mean again, I use
9 the term internally, I hope it doesn't sound too aggressive.
10 It's a mutual headlock.

11 We and Turner have each other in this mutual headlock. But
12 we know we got to get to a deal and we might fight like cats
13 and dogs.

14 I think with the merger that really just changes 180,
15 right. If I put myself in their shoes, they can raise prices
16 and make more money and make us less competitive, or they can
17 raise, they can present onerous terms that we can't accept.
18 And if we don't accept it, we don't have a business or we lose.

19 I wouldn't say we don't have a business, but we would
20 certainly lose a lot of subs. It would be severe bleeding.
21 And most of those subs would accrue to their benefit. Lose
22 lose for us, win win for them.

23 Q. Would you expect that costs to Time Warner to be any
24 different after the merger than it is now?

25 A. How do you mean?

1 Q. I'm trying to understand how, how the incentives would be
2 different.

3 What exactly would change in the negotiating dynamic?

4 A. I just think right now they have, they're an independent
5 company with separate P and L statement. They don't have a
6 pay-TV service. They provide programming to pay-TV services.

7 I think if you, but if you combine that with a national,
8 not one but two, maybe even three, depending on how you cut it.
9 But DirecTV has national pay-TV service with satellite and they
10 have a national pay-TV service with DirecTV Now. So it's
11 always, it's more lucrative to take subs than it is to, you
12 know, collect programming, programming fees.

13 Or typically in my, the way I would think of it is you can
14 raise the rates and create terms that are onerous for us. If
15 we choose to accept, they win. We become less competitive.

16 If we choose not to accept, it's easy to see our subs
17 walking across the street to either the other satellite
18 provider or the other over-the-top provider.

19 Q. And the other satellite provider is DirecTV?

20 A. DirecTV.

21 Q. And the other, over the top, what does over-the-top mean?

22 A. Over-the-top is Sling, our internet service.

23 Q. What DirecTV property does Sling compete with?

24 A. DirecTV Now.

25 Q. So you said it's more lucrative to take DISH's subscribers

1 than to get programming fees from you.

2 Why is that?

3 A. Well, I guess if you look at the gross profit of a
4 subscriber on a monthly basis, it's many times the programming
5 fee that we would pay Turner.

6 Q. So would you expect to be more likely to go dark if the
7 merger goes through?

8 A. I would.

9 Q. How would that affect DISH's approach to the negotiation
10 with Time Warner?

11 A. It's a great question. I don't think we've quite figured
12 out what we would do. I mean, we really are the, you know,
13 it's a Hobsion (sic) choice for us. They're going to come to
14 us with extraordinary terms and the reason I say that is almost
15 every negotiation starts there.

16 This time on the other hand, when they want to present us
17 with these high rates and onerous terms and we're going to say,
18 no, no, no, you got to be down here. I don't know how the
19 negotiating proceeds from there. What happens next. I just
20 don't see them having any incentive to move.

21 Q. You said it's a Hobsion choice between taking the onerous
22 terms or losing Turner. What does that mean?

23 A. In a typical programming negotiation, a programmer
24 especially one with clout like Time Warner or the other four
25 that I mentioned will come and say we want every network

1 distributed broadly to your subscribers and we need large rate
2 hikes. That's sort of the playbook. It's been the playbook
3 for programmers for some time. Then we work and struggle and,
4 you know, kick and fight to try to meet in the middle.

5 This time I just don't see them having any motivation to
6 move. So the Hobsion choice is we accept onerous terms which
7 is bad.

8 A, we certainly would hurt our chances of profitability.

9 B, it could mean that we raise rates to the point where
10 we're not competitive. That's one side, or we don't accept.

11 But this time if we don't accept there's, we don't know
12 what happens. Because if we go dark our subs that we lose in
13 that period just easily go across the street. In fact, it
14 accrues to their benefit.

15 So I just don't know what incentive, what motivation they
16 would have to budge, to move, to get to an agreement with us.

17 Q. You talk about onerous terms. Would you expect any of
18 these terms to affect Sling?

19 A. I do, absolutely.

20 Q. How so?

21 A. We've fought hard and one of the big holdups there were a
22 number of unsettled issues when we did the, the last
23 negotiation.

24 But one of the places we just, just been single minded is
25 limiting the number of networks in our Orange and Blue, but

1 Orange in particular. And so it's easy to imagine somebody
2 with this sort of clout and this sort of incentive coming in
3 and saying we need to take all eight. Once that happens, that
4 breaks our model.

5 I mean it's sort of a fragile existence that we have
6 innovated. We've got subscribers who are voting with their
7 checkbooks, you know, with a leader in this and it could just
8 go away if we're forced to take eight networks.

9 Q. Would you expect it to be any more likely to get a
10 proposal like that from a merged Time Warner than from a
11 independent Time Warner today?

12 A. Yes.

13 Q. Why?

14 A. Because they now have a competing service and DirecTV Now.
15 So the switching, in the satellite business you actually have
16 to call up. You have to have somebody come visit your house.
17 They have to be there, they take the equipment, there's a lot
18 of inefficiency.

19 So the switching cost is much higher than if you go to your
20 phone, you go to the site and you just say cancel. So the
21 switching cost is almost zero for Sling. And you can see our,
22 the sub base that we've managed to build dissipate quickly.

23 Q. So you said that you think you would be more likely to go
24 dark with Time Warner if it were owned by AT&T.

25 Would the effects on DISH going dark be any worse?

1 A. I think it would be more dramatic. You know, we went dark
2 once. This example that we talked about in fall of '14. At
3 the time that was just satellite to satellite.

4 Here we would have Sling to DirecTV Now. And those, I
5 personally think those subs would go faster.

6 Q. So you're saying that during the 2014 going dark at the
7 sub, Sling wasn't in existence yet?

8 A. That's right, had not launched yet.

9 Q. So people were just going satellite to DirecTV or where
10 ever else?

11 A. Right.

12 Q. Now Sling is in existence, how many subscribers does it
13 have?

14 A. 2.2 million.

15 Q. How does that compare to the other internet based pay-TV
16 providers?

17 A. It's about twice as large as the number two, DirecTV Now,
18 if I remember the numbers right.

19 Q. Would you anticipate there to be any affects on the
20 satellite side of the business as opposed to just the Sling
21 side?

22 A. There would be. Those are certainly valuable customers as
23 well, but we would absolutely lose subs.

24 Q. Could DISH just choose to drop Turner from the Sling
25 programming line rather than accept more networks?

1 A. We could, but that gets back to this idea that, you know,
2 what kind of, what kind of service would we have?

3 I keep thinking about March Madness because we're right in
4 the middle of it. But it's hard to imagine having Sling with
5 no March Madness. It's hard to imagine getting to an election
6 without no CNN. It's hard to imagine getting NBA, NBA finals
7 without TNT. It's possible, but certainly not what we built
8 our business on.

9 Q. So if you were forced to take more networks into the Sling
10 package or pay significantly higher rates than you're
11 expecting, how would that affect the Sling product and its
12 customers?

13 A. So we've fought as I mentioned before long and hard to
14 limit Sling Orange to four cable networks. Some have fewer
15 still. Folks say Scripps only got three.

16 Q. And Scripps that's HGTV, Food Network and Travel Channel?

17 A. That's right. So A there would be more cost, right. And
18 we're already on razor thin margins with Sling. So that would
19 mean we'd have to raise prices almost certainly.

20 But then secondly, whoever the next group is in 2019 to
21 negotiate would, there's just no way we would be able to keep
22 them at four if Turner had eight.

23 So it only takes a couple of those and the model is broken.

24 THE COURT: Is this a good time to take the afternoon
25 recess?

1 MS. KISER: Yes, Your Honor.

2 THE COURT: All right, we're going to take a 15
3 minute recess. You are a witness under oath in the case.

4 THE WITNESS: Okay.

5 THE COURT: What that means is you're not allowed to
6 discuss your testimony so far or what it might be when you
7 return with anyone, including your own lawyer. You can't talk
8 to anyone about it. You have to be able to answer the question
9 under oath, did you discuss your testimony with anyone and say
10 no.

11 So stay independent of all others. Be back in 15 minutes
12 and we're going to go to five o'clock today.

13 (Witness excused.)

14 THE COURT: Now how much longer do you have on
15 direct?

16 MS. KISER: I would say 30 minutes.

17 THE COURT: Thirty minutes, very good.

18 (Recess at 4 o'clock p.m.)

19 (Proceedings resumed at 4:20 p.m.)

20 THE DEPUTY CLERK: Your Honor, recalling Civil Action
21 Number 17 dash 2511, United States of America versus AT&T,
22 Inc., et al.

23 THE COURT: All right. You remain under oath.

24 Proceed when you're ready.

25 MS. KISER: Thank you, Your Honor. We'd like to show

1 the witness the sealed exhibit that we introduced earlier. May
2 I approach?

3 THE COURT: Yes.

4 DIRECT EXAMINATION (Cont'd)

5 BY MS. KISER:

6 Q. Could you please turn to page 38 of Exhibit 409.

7 A. Okay.

8 THE COURT: You have to identify what this document
9 is for the record.

10 BY MS. KISER:

11 Q. Mr. Schlichting, what is this document?

12 A. This is the Carriage Agreement for Turner Networks, dated
13 April 1st, 2015.

14 THE COURT: All right.

15 BY MS. KISER:

16 Q. So if you'll turn to page 38, paragraph A-2.

17 A. Okay.

18 Q. Under 7, term and rates, do you see the date there in
19 paragraph A?

20 A. I do.

21 Q. Is that the expiration date of your agreement with Turner?

22 A. It is.

23 Q. All right. You can set Exhibit 409 aside.

24 A. Okay.

25 Q. So before the recess we were talking about the AT&T Time

1 Warner merger.

2 A. Okay.

3 Q. Are you aware that Comcast acquired NBC Universal seven
4 years ago?

5 A. I am.

6 Q. How does Comcast footprint compare to that of DirecTV?

7 A. Geographically it's about thirty percent of national,
8 yeah, DirecTV has a national footprint, so Comcast would be
9 thirty percent of that.

10 Q. Does that difference have any implications for your view
11 of that vertical integration versus this one?

12 A. It does.

13 Q. How so?

14 A. Well, this satellite is a national wide service. So we
15 compete, you know, we really compete in all of the nooks and
16 crannies of the entire U.S.

17 So, you know, by comparison we would only compete against
18 Comcast and thirty percent of the geography.

19 Q. And why would that affect your view of their mergers?

20 A. It's just, you know, it's our -- I mean, DirecTV is our
21 primary competitor. And every single subscriber that we
22 potentially acquire is also potentially a DirecTV subscriber,
23 whereas with Comcast it's more than likely not the case that,
24 you know, that Comcast would be able to acquire that sub.

25 Q. Have you negotiated with NBCU since it was acquired by

1 Comcast?

2 A. I have.

3 Q. When was that negotiation?

4 A. That was in spring of 2016.

5 Q. Were the FCC order and consent decree related to the
6 Comcast NBC merger in effect at that time?

7 A. They were.

8 Q. And what was your understanding at a high level of the
9 arbitration provisions in those?

10 A. If we couldn't come to terms, then we could file, we could
11 give notice that we wanted to go to arbitration. There was
12 some time in between, ten to fifteen days, I think it was, not
13 less than ten, not more than fifteen, set aside for a cooling
14 off period. But we had to decide after ten days if we wanted
15 to proceed and make an offer, which would have been done, you
16 know, would have been our offer in arbitration.

17 Q. Okay. So it was a baseball style arbitration?

18 A. Yes, baseball style arbitration where you choose one.

19 Q. And the first step to invoking would be filing a notice?

20 A. Yes.

21 Q. And then you mentioned a cooling off period. What is
22 that?

23 A. So I think it's just a period during which both sides take
24 a chance to figure out if they really want to go through with
25 this.

1 Q. And then after the cooling off period, you said that's
2 when you would submit your offer?

3 A. Right.

4 Q. And what's your understanding of what would happen once
5 you submitted a final offer to arbitration?

6 A. So the way I think it works is that -- I mean, you've
7 got -- the way this is written, the way the Comcast NBC
8 Universal consent decree is written, there's a single
9 arbitrator who looks at, you know, the market comparables and
10 collects as much market data, at least hopefully, as they can.
11 And then chooses one of the offers.

12 Q. Was NBC Universal and Sling at the time of the
13 negotiation?

14 A. They were not.

15 Q. Were you seeking rights to put them in a Sling package?

16 A. We were, we were.

17 Q. And at any point during negotiation, did you come close to
18 going dark with NBC?

19 A. Not really. We ended up, we -- this arbitration, the way
20 it's written for sure, it's just risky. It's a risky
21 consideration, so prior to giving notice, we thought long and
22 hard about whether or not we should put our -- the way we think
23 about it, for better or for worse, is put our head in the
24 noose, this arbitration, because that carries with it a lot of
25 risk.

1 But then on the other side, the risk was going dark. And
2 so those we weighed that decision before we gave notice. So in
3 danger of going dark, no. We were trying to choose between the
4 two.

5 Q. So what happened after you gave notice of intent to
6 arbitrate it?

7 A. So after we gave, I think we did that -- I think it was
8 the 18th of March. And I think the contract expired on the
9 20th. So then we had a period during which we really had to
10 figure out if we wanted to give the go ahead, right. And by
11 the way, it was for -- that was for satellite only. We did not
12 want to put Sling at that sort of risk. So it was just sort of
13 an uneven process that carried with it a lot of risk for our
14 business. And so we spent a lot of time chasing around whether
15 or not this was a good thing or not, you know, it could blow up
16 on us.

17 Q. Did you ever submit a final offer and agree to be bound by
18 arbitration?

19 A. We did not.

20 Q. Did you reach a deal with NBC?

21 A. We, I think we did eventually. I mean, I can't say it was
22 a very -- I don't know. I wouldn't -- I didn't like that deal,
23 but what happened next was that I think we must have both
24 agreed that we would try again, and so we extended for a longer
25 period of time. And I think it was maybe three months later

1 that we finally signed a deal. It was a long time.

2 Q. So let's talk about the arbitration offer that's on the
3 table in this case. Have you received an offer from Turner?

4 A. We have.

5 Q. When did you receive that?

6 A. Sometime in November, I don't remember the exact date.

7 Q. Does it resolve the concerns you've discussed about this
8 merger?

9 A. It does not.

10 Q. Why not?

11 A. Well, for the same -- the same reason that I was just
12 talking about with NBC Universal, but more of it. It's -- this
13 is a complicated -- these deals are complicated. And so one of
14 the biggest risks to my mind is that an arbitrator will even
15 understand what the documents say and that puts and takes,
16 gives and gets, there's just so much trading going on that the
17 written word is not going to tell you what was given before,
18 sacrificed, you know. So it's complicated.

19 It's an all or nothing proposition, so the risk is really
20 high in our mind that you have this. It's, you know, and by
21 the way, the way I understand the offer from Time Warner,
22 you've got to do both, you know.

23 And so it's both meaning satellite and Sling, and that --
24 that's just hard to -- that's a hard proposition for us in
25 terms of the risk. Not only do you have risk in satellite,

1 which is a little bit better established, but this Sling is,
2 it's just new, and it's innovative and it's different and
3 unique, and it's just so easy to see that thing get crushed.

4 So we see the risk really as it's asymmetrical risk from
5 the standpoint that, you know, it's -- it's -- we're all in
6 when we go to arbitration. Whereas the other side, I would --
7 I mean, I don't want to minimize it, but it's a temporary blip
8 for them if things don't go exactly as planned.

9 Q. Let's go back to the first thing you said for a minute
10 about fair market value. Do you have an understanding of what
11 that term means?

12 A. Well, I don't really. I mean, I guess if you -- if you
13 say that it equals rate, then there's just a whole host of
14 things. I mean, these deals are more about everything else
15 than they are about rate. So I would -- that -- I feel uneasy
16 about that because fair market value could only be concrete if
17 it's about rate. If it's about everything else, then I don't
18 really know what it means.

19 Q. How much of the time you spend negotiating with
20 programmers is on rate versus other terms?

21 A. Oh, I don't know. I think when I got to the job I thought
22 it was going to be sort of 80 percent about rate and, you know,
23 that's sort of the way the legend works. Twenty percent on
24 everything else. I'd say it's probably flip-flop. It's
25 probably eighty percent about all these other complicated

1 rights on digital and over the top and B.O.D. There's just a
2 lot of digital negotiation that goes on now. So I would say, I
3 mean, it's a guess, but I would say the majority of the time is
4 on -- is not about rate.

5 Q. Do those other terms affect Sling or satellites'
6 competitiveness?

7 A. They do. They really do. They affect both, but Sling in
8 particular.

9 Q. Why is it Sling in particular?

10 A. Well, Sling is, you know, all digital and so it's fairly
11 new ground in a lot of respects. And so Sling is fledgling,
12 it's digital, those are new rights. And so it wouldn't -- it
13 doesn't take much of a shift to really impact Sling's future.

14 Q. Do you know what evidence the arbitrator would look at in
15 determining fair market value?

16 A. Well, that's another, you know, with respect to Sling,
17 that's actually, that's an interesting -- so we think Sling is
18 unique, truly unique. But if you think about it, if it is
19 unique and we're right, then I don't know what the comparable
20 is out there. I mean, if I look at the way we fought so hard
21 to keep our skinny bundle. If every other service has these
22 big bloated, you know, all the networks in the base package or
23 many networks in the base package, that would be the
24 comparable, so I guess that's really where a lot of our fear
25 comes from is that if the arbitrator looks at the comparables,

1 we could have a deal that looks like them and that would be
2 really bad for us. I mean, that would break what we think is a
3 unique model.

4 Q. You also mentioned an asymmetric risk, can you explain to
5 the Court what you're talking about there?

6 A. Yeah, that might be -- I don't know, that's kind of a
7 fancy term. It's not as risky for them as it is for us. We're
8 going to put our business at risk, and, you know, my view of
9 the other side, they put monthly fees at risk for awhile. It
10 just doesn't seem like the same risk. They're -- for sure
11 they're not putting their entire business at risk. And I feel
12 like, as president of Sling, I would be putting all of it at
13 risk. It would just --

14 Q. Why do you think you'd be putting all of the Sling
15 business at risk?

16 A. Well, it would just be our model, you know, I don't want
17 to be too dramatic there. But we are really competing, you
18 know, we're trying to listen to the consumer and say, you don't
19 have to pay these high prices, you don't have to pay for scads
20 of networks that you don't want, don't watch. And as soon as
21 the programmers have their way, they will jam as many networks
22 as possible into those base packages, and then suddenly you've
23 got this bloated pay-TV bundle again.

24 I mean, again, I don't want to disrespect the others, but I
25 feel like the innovation we've brought is by just keeping it to

1 three, or sometimes two, two, three or four networks. And
2 every other package that you see out there has many, many
3 networks. They basically duplicated the pay-TV on cable or
4 pay-TV on satellite, they've duplicated those packages, and
5 it's just over the Internet now. So I don't know, you know,
6 I'll just -- I'll stop there.

7 Q. When you say two, three or four networks, are you talking
8 about Sling orange or Sling blue?

9 A. Well, in both cases we've fought like crazy to keep
10 network numbers low, but particularly in orange, Sling orange,
11 we have fought to say it's four cable networks, right? And
12 even in blue, we've, you know, we haven't been able to hold
13 the -- put the lid on it quite as much. But we fight to keep
14 networks out.

15 Q. What's the most networks of any programmer in the blue
16 package?

17 A. So technically we have four NBC Universal cable networks
18 but they were able to jam us with NBC broadcast.

19 Q. Is that in all the NBC markets or just the ones that --

20 A. No just the own and operated. So we've said no to all the
21 affiliates, but they've jammed us with that. Then they've got
22 the RSNs in there. And then when the Olympics come around
23 they've got the Olympics in there. So, you know, it's four
24 core cable networks, but they kind of got us with the others.

25 Q. Another issue you mentioned is that you think you'd have

1 to arbitrate for satellite and Sling.

2 A. Yes.

3 Q. If you could just arbitrate for satellite, would that --
4 would that solve that issue?

5 A. It would not.

6 Q. Why not?

7 A. It would not. Well, the -- I think the issue remains, I
8 mean, I'm going to back up here a second.

9 So if they can jam eight networks into that basic package
10 because those are the comparables in arbitration. Then you
11 say, okay, we'll take Sling out of arbitration and have that
12 stand alone. Sling is then orphaned from its parent, which is
13 where it gets all of its power in these negotiations. So it
14 might be even easier to jam, you know, eight networks or pick
15 your number into Sling if it had to negotiate on the standalone
16 basis. But neither of those, just neither of these is a good
17 scenario for us, right.

18 Q. And what networks are covered by the arbitration offer?

19 A. I believe all of the Turner Networks and not HBO.

20 Actually, you should ask the question. HBO scares me, because
21 if I'm in their shoes as negotiator, I hold HBO out, and now
22 I've got a hammer to -- I've got leverage outside of the
23 arbitration with which I can affect the arbitration is probably
24 the best way to say it. It's like waive your rights. That's
25 an obvious one, there are less obvious ways to do it too.

1 Q. Does the arbitration offer mitigate any of your concerns
2 related to the effects on Sling?

3 A. Not really. Not really.

4 MS. KISER: Your Honor, at this time that concludes
5 the questions we can -- that I can ask publicly.

6 So we would ask that we close the courtroom or put on the
7 husher to go through a few more questions.

8 THE COURT: We're going have to do a -- you'll have
9 to make a proffer to the Court at the bench as to why you need
10 to do this. And then Mr. Petrocelli, if he wishes to oppose
11 it, will get to make his arguments as to why he wants to oppose
12 it.

13 So you can have a seat, sir. Just step down right over
14 there and sit there.

15 (Witness withdrew from the witness stand.)

16 (Sealed Bench Conference.)

17 THE COURT:

18

19 MR. CONRATH:

20

21

22

23

24 THE COURT:

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. PETROCELLI:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT :

MR. CONRATH :

THE COURT :

MR. CONRATH :

THE COURT :

MR. CONRATH :

THE COURT :

MR. CONRATH :

THE COURT :

MR. CONRATH :

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT :

MR. CONRATH :

THE COURT :

MR. CONRATH :

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT :

MR. CONRATH :

THE COURT :

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. CONRATH:

THE COURT:

MR. PETROCELLI:

THE COURT:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. CONRATH:

THE COURT:

MR. CONRATH:

MR. PETROCELLI:

MR. CONRATH:

MR. PETROCELLI:

THE COURT:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. PETROCELLI :

MR. CONRATH :

MR. PETROCELLI :

MR. CONRATH :

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT :

MR. PETROCELLI :

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT :

MR. PETROCELLI :

THE COURT :

MR. PETROCELLI :

THE COURT :

MR. PETROCELLI :

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT :

MR. CONRATH :

THE COURT :

MR. CONRATH :

THE COURT :

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. CONRATH :

THE COURT :

MR. CONRATH :

THE COURT :

MR. PETROCELLI :

MR. CONRATH :

THE COURT :

MR. CONRATH :

THE COURT :

MR. CONRATH :

THE COURT :

MR. CONRATH :

THE COURT :

MR. CONRATH :

THE COURT :

MR. CONRATH :

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT :

MR. PETROCELLI :

THE COURT :

MR. PETROCELLI :

THE COURT :

MR. CONRATH :

THE COURT :

MR. CONRATH :

THE COURT :

MR. PETROCELLI :

THE COURT :

MR. PETROCELLI :

THE COURT :

MR. PETROCELLI :

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT:

MR. PETROCELLI:

MR. CONRATH:

MR. PETROCELLI:

THE COURT:

MR. CONRATH:

MR. PETROCELLI:

THE COURT:

MR. PETROCELLI:

MR. CONRATH:

(Open Court.)

(Witness resumed the witness stand.)

THE COURT: All right. Here's the situation.

We've got to get to the bottom of a couple of legal

1 questions over night. Tomorrow morning we will start by
2 addressing those in a closed courtroom. So you won't be in
3 here for that.

4 THE WITNESS: Okay.

5 THE COURT: But the DOJ team will have someone who
6 will have you close by, closer by than before. Where did you
7 have him, in the basement, in lockup or something? So keep him
8 closer than that, please.

9 So you should be ready to go at 10:30, but you won't be
10 actually going at 10:30 because we're going to have some
11 arguments in here.

12 THE WITNESS: Okay.

13 THE COURT: Then we're going to have to let the --
14 either let the people back in or I have to make a decision to
15 have a portion of your testimony in closed session.

16 THE WITNESS: Okay.

17 THE COURT: I have to figure that part out with the
18 added assistance of counsel. So what that means is you're a
19 witness under oath over night.

20 THE WITNESS: Got it.

21 THE COURT: Which means you can't discuss your
22 testimony so far or what it might be when you return with
23 anyone, including your lawyers or the Justice Department
24 lawyers or anyone else, including your in-house counsel,
25 nobody.

1 THE WITNESS: Okay.

2 THE COURT: Tomorrow morning you have to be able to
3 answer under oath you haven't talked with anybody about your
4 testimony since you left here today, okay.

5 THE WITNESS: Okay.

6 THE COURT: You're excused.

7 THE WITNESS: Will do, thanks.

8 THE COURT: Step down.

9 (Witness excused.)

10 THE COURT: All right. Anything else for the
11 government?

12 MR. CONRATH: Nothing, Your Honor.

13 THE COURT: Anything else for defense?

14 MR. PETROCELLI: No, thank you, Your Honor.

15 THE COURT: Have a nice evening.

16 (Court adjourned at 5:05 p.m.)

17 -oOo-

18

19

20

21

22

23

24

25

CERTIFICATE

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the stenographic notes provided to me by the United States District Court, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

Crystal M. Pilgrim, RPR, FCRR

Date: March 27, 2018