

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, April 2, 2018
 AT&T, INC., ET AL., : 2:40 p.m.
 :
 : Day 6
 :
 Defendants. :
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AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT SENIOR JUDGE

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2 THE DEPUTY CLERK: Your Honor, recalling civil action
3 number 17-2511, The United States of America v. AT&T, Inc., et
4 at.

5 THE COURT: Mr. Orsini, when you're ready you may
6 proceed.

7 You remain under oath.

8 (Witness resumes the stand.)

9 MR. ORSINI: Thank you, Your Honor.

10 GOVERNMENT WITNESS COLEMAN BRELAND

11 CROSS EXAMINATION (Continued.)

12 BY MR. ORSINI:

13 Q. Mr. Breland, before we broke for lunch we were talking
14 about virtual MVPDs. Let's talk a little bit about the
15 negotiations that Turner had with YouTube Television.

16 What was your role in those negotiations?

17 A. I was not there when the deal was recently signed. But in
18 2016, I was the point person.

19 Q. Can you just generally explain what you recall about those
20 negotiations with YouTube TV?

21 A. Yes. It was unusual in that YouTube had actually set
22 their retail price before they had done the wholesale deals
23 which I had never really ever seen that happen before.

24 Meaning that they said it's \$35 a subscriber per month.

25 Then they backed into the model adding different networks and

1 working towards that price.

2 Q. Can you explain what you mean by that backing into the
3 price?

4 A. Yes, they did a deal. Originally in my conversations with
5 YouTube they said we believe probably we'll launch with two
6 broadcasters. Then it, and by broadcasters they meant they,
7 one of the assumption they would be taking the cable networks
8 that would go with a Disney and you get the Disney Networks or
9 NBC, you would get those. So they knew there would be more
10 than the broadcasters.

11 Over time they added the third broadcasters, then the
12 fourth broadcasters. By the time they got back to us,
13 basically they had run out of what they believed were their
14 funds to buy programming, so we were not in the package.

15 Q. When you said that if you bought Disney, you got the cable
16 networks. Can you explain what you mean by that?

17 A. Yeah, that means that the four broadcast networks also
18 have a bouquet of cable networks that go with them.

19 As often happens those networks are part of a deal when
20 you're doing a broadcast deal. They can also be involved in
21 that especially with a new distributor.

22 Q. Let's take ABC for example. What are the cable networks
23 that are affiliated with ABC?

24 A. Disney and the variations of Disney Networks, ESPN and the
25 their suite of networks as well.

1 Q. What were the implications for your negotiations of the
2 fact that they had already signed up deals with the
3 broadcasters?

4 A. We thought we would be early at the party. We were
5 actually late to the party and they launched without us.

6 Q. What do you recall about the rate discussions with
7 YouTube?

8 A. They were wanting to be creative in the way that they
9 approached us. They came to us with different models.

10 Again, the rates were our biggest issue because no matter
11 how they proposed another solution like we'll take some of your
12 networks, your more popular networks and we will put them on a
13 tier and at the base package, the one that everyone would buy
14 into would be networks maybe like NAT GEO and some, I'll call
15 them not as popular networks in the process.

16 But no matter what they proposed it never went very far
17 because we were so far apart economically.

18 Q. When you say far apart economically, what do you mean by
19 that?

20 A. The rates they proposed were some of the lowest that I'd
21 seen in the industry. There's a lot, there's Kagan data that's
22 out there. Kagan is an independent that to the best of their
23 abilities they will make an estimate of what they think the
24 rates are for all of the cable networks out in the market
25 place.

1 If you're a new distributor and you want to get a gauge for
2 what you think prices may be, Kagan might be a place you would
3 go to try to get a sense of how you would buy product and put
4 it in the package and what that would cost.

5 So I believe they were under the impressions that based on
6 Kagan data that our rates would be lower.

7 Q. Why didn't Turner agree to the rates that they were asking
8 for?

9 A. Because it would have a cascading effect with my MFNs. If
10 I gave a new entrant YouTube or anyone else lower rates than
11 what I already had in the market because of the MFN conditions
12 that we have upon our rates as we have spoke of earlier, then
13 that would cost me money with every one of those distributors.
14 Meaning that I would have to lower my rate to every one above a
15 new entrant that has a most favoured nations clause.

16 Q. When you say every one above, what do you mean by that?

17 A. Size wise in terms of subscribers.

18 Q. Do you have a general sense as to ballpark what that
19 impact would have been if you had gone with their rates?

20 A. Hundreds of millions of dollars.

21 Q. How, if at all, does that relate to the questions that
22 Mr. Carson was asking you earlier about whether the YouTube
23 model, the YouTube proposal would have irreparably harmed the
24 Turner model?

25 A. Well, the model is harmed because they were trying to find

1 creative ways for example to say maybe we'll put some of your
2 networks in a less distributed tier, meaning it would get fewer
3 subscribers but maybe we would pay you on phantom subs.

4 That means you are not going to have the eyeballs for ad
5 sales. So it just became a very contorted exchange and I
6 appreciate their efforts to be creative but it just didn't fit
7 into a model that we could make work financially.

8 Q. What do you mean by phantom subs?

9 A. I will carry your network, I'll take one of your networks
10 Turner and I'm going to put it in this package. This package
11 may not, I'm using this as an example, I will guarantee you, I
12 will pay you on 85 percent of the subscribers that I have in my
13 base package even though 85 won't take the tier with your
14 network in it which means they would pay on subscribers that
15 aren't receiving the service.

16 Does that make sense? I'm sorry, I know this is a little
17 complicated at times.

18 Q. It does. Why was that something that would be a problem
19 for Turner?

20 A. First of all, I'm going to lose, we want every distributor
21 to be successful. When they are successful, it means I'm not
22 going to be getting ad eyeballs on those networks. So I'm
23 going to be losing ad revenue if do that model.

24 Q. How did those negotiations wrap up, the YouTube
25 negotiations you were involved in?

1 A. I don't know. It didn't come together when I was in
2 charge of distribution.

3 I know we recently signed a deal, but I don't have any
4 details of it.

5 Q. You were shown a document by Mr. Carson, it's Plaintiff's
6 Exhibit 195 which will still be in that binder in front of you.

7 If you turn to page 26, 19526.

8 This is something I believe you said was called Rubik; is
9 that correct?

10 A. Yes, that's how this is titled Rubik summary.

11 Q. What was Rubik?

12 A. Rubik was an attempt, as far as I know it was an attempt
13 by research to try to gain some degree of insight into consumer
14 behavior.

15 Q. When you say research, what do you mean?

16 A. The internal research department at Turner.

17 Q. What, if anything, did you use, well -- strike that.

18 What was the general subject matter of what Rubik was
19 looking at?

20 A. I think they were looking at how would subscribers react
21 in different packages and different platforms. I don't really
22 recall, I didn't use the data to help me establish any
23 strategies going forward.

24 Q. When you say different distributors, what type of
25 distributors do you mean?

1 A. Virtual MVPDs.

2 Q. Who had overall responsibility for the strategy for
3 affiliate negotiations for virtual MVPDs at that time?

4 A. I did.

5 Q. What, if anything, did you use Rubik for? You said a
6 moment ago you didn't use it for strategy. What, if anything,
7 did you use it for?

8 A. I don't recall if there were one, two, five or ten
9 different Rubik studies. There were a lot of presentations and
10 decks that flowed through Turner. It was one of them, but I
11 don't recall a lot of details from it.

12 Q. You can put that aside.

13 You can, actually if you can turn in that binder to
14 Plaintiff's Exhibit 78. Sticking on the MVPD issue.

15 Do you have that, sir?

16 A. I do.

17 Q. This is a document that Mr. Carson showed you that relates
18 to the upfront. Just again, what are up-fronts?

19 A. Upfront is an annual event that networks do normally in
20 New York as far as I know. They bring talent. They put the
21 talent on stage. They roll out their shows, they talk about
22 the hits. It's a big presentation of here's what is coming
23 this year on network. Every network does this.

24 Q. What is the purpose of having an upfront?

25 A. It's to get the advertising community talking about the

1 programming that is going to be on our network. I believe most
2 of them meaning Turner will do one, Disney will do one, every
3 one will do one.

4 I believe they pretty much fall on a very tight time frame
5 in a week. So it's a bit like going from circus to circus in
6 terms of rolling out the talent, talking about the program.

7 Q. What is your role at the Turner upfront?

8 A. Just watch. It's an advertiser base. I don't talk to
9 media, I don't talk to the clients. I don't have distribution
10 clients there. So I'm in the audience. I'm there in a
11 supportive capacity.

12 Q. There are a number of talking points attached that
13 Mr. Carson walked you through. What, if anything, did you use
14 those for at the up-fronts?

15 A. I didn't really talk to anybody at the upfront except my
16 colleagues.

17 Q. Take a look at page 11, PX 78-011, please?

18 A. I'm sorry, the number again?

19 Q. Page 11?

20 A. Page 11. Okay, I'm there.

21 Q. These are some of the bullet points that Mr. Carson
22 pointed you to. If you look towards the top there are three
23 actual bullets and then a series of arrows.

24 Do you see that?

25 A. I do.

1 Q. The last arrow says that we feel we're well positioned
2 even if packages get smaller.

3 Do you see that?

4 A. I do.

5 Q. That's something that Mr. Carson pointed you to.

6 What do you generally understand that to mean in the
7 context of Turner's business?

8 A. Well, Turner I believe I mentioned before we were very
9 judicious in the number of linear networks that we launched. I
10 think we had two networks back in the early 2000, CNN Sports
11 Illustrated and CNN Financial News Network.

12 We actually shuted those networks on our own. We sort of
13 thinned the heard. This means we are well, we do believe
14 packages will get smaller over time. As I have stated publicly
15 and maybe in this courtroom, there are probably too many linear
16 networks.

17 I think everybody has to look at their portfolio and say am
18 I well positioned. Since the majority of my revenue comes from
19 four networks, I think that means I am well positioned in a
20 world where there will be smaller packages.

21 Q. Give me an example, if you could, of a type of a family of
22 networks that is not as well positioned and if you could
23 explain why they are not as well positioned?

24 A. I think any portfolio that is large, if you've got over
25 12, 13, 14, 15 networks, I think you've created a scenario

1 where you are trying to keep so many networks alive.

2 Again, we've shuttered two. We are moving Boomerang
3 really, there's a linear network for Boomerang. We are moving
4 this to a direct consumer product. So we are already thinking
5 about what this looks like in a world where there will be fewer
6 linear networks.

7 That goes back to content experiences because to be
8 successful it won't just be the best content. There's a show
9 on Netflix called Stranger Things, top rated show in 13 years.
10 But it's not just the show. It's actually the fact that they
11 will give you the entire season all at once. You don't have to
12 wait on a weekly basis.

13 In the case of Netflix there's no ads there. So they give
14 a better experience. I think if you are going to succeed and
15 prosper in the future you're going to have to look at your
16 portfolio and not think about brands per se as much as you
17 think about content and how consumers are going to want it
18 because the game has changed dramatically.

19 We're looking at it and saying that we don't have to, I
20 don't have to feed 20 networks for example. I have got 10. Of
21 those 10 four of them is the core of the revenue for Turner.
22 So the better I make those four, and that could end up costing
23 me one day with the other networks, I understand that.

24 So to make those four as flexible and as viable for the
25 fans themselves, if you are going to go through the

1 distributors you want to work with all of the distributors and
2 you want to get that product to the fan to make it as good as
3 possible to compete in a world where technology has made it so
4 much easier for consumers.

5 I am one of those. You get to set your own rules and that
6 is very exciting for consumers and you want to be where the
7 eyeballs are and you want to be on all of those platforms.

8 Q. So you mentioned contact experiences, so is skinny bundles
9 something you're looking at as the president of content
10 experience?

11 A. Yes.

12 Q. What is Turner's view with respect to skinny bundles?

13 A. That skinny bundles they're already here. This is not a
14 concept. They are actually here.

15 The industry talks about it like it's one thing. Like it's
16 one boat. A certain number of networks are going to go into.
17 Actually, my personal belief is that there will be a lot of
18 different skinny bundles depending on the makeup of the
19 household and what people want in terms of the experience.
20 They are looking and saying which of our networks would work
21 and what type of skinny bundle.

22 We are also looking at, we are trying to get a gauge, but I
23 don't have enough information to do this. If I knew that for
24 example, you were a big fan of the animation content on Adult
25 Swim. You were also a fan of a show called Practical Jokers on

1 TruTV. You also liked a couple of shows on TBS. I might be
2 able to put an offer together for you specifically. I just
3 don't know who you are and if you exist at this stage. But we
4 are thinking to that degree.

5 Q. So I want to come back to the information point later.

6 You have been in the courtroom throughout the course of
7 this trial as Mr. Carson established and you were, weren't you,
8 sir, when Mr. Schlichting from Dish testified?

9 A. I was.

10 Q. You recall one of the topics he testified about was the
11 importance to Dish of being able to have a smaller number of
12 Turner Networks in their Sling package.

13 Do you recall that?

14 A. Yes, I do.

15 Q. As Turner's business is structured right now, what is the
16 minimum number of networks that a distributor can license?

17 A. One. Each network is available on a stand alone basis.

18 Q. If a distributor like Dish for example were to decide to
19 only license a single network what, if any, impact would that
20 have on the rate they pay for that network?

21 A. The rate card, I've got a separate rate card for each of
22 the individual networks.

23 Q. Can you explain what that means in terms of how the rate
24 will differ based on the number of networks carried?

25 A. Yes. For example, I'd rather not name the network if

1 that's okay. Let's say it's in the four cores, how's that? I
2 want to be careful with confidential information.

3 There's one of the networks in there that has a penetration
4 scale on the rate card. Meaning that if you only carry us from
5 0 to 29 percent of your subscriber base, your rate may be
6 higher and it needs to be higher because it means the other
7 side of the revenue stream ad sales won't be able to monetize
8 those eyeball. That's one. And then the rate goes down as you
9 give us better carriage. The more eyeballs you give us, the
10 lower the rate.

11 There's another network that is in the top four that is
12 just one rate, it doesn't even have a penetration base rate
13 card.

14 Q. Putting aside the penetration issue, just trying to
15 understand how if the distributor decides they want this single
16 network versus they want eight networks, the price they are
17 going to pay differs for the one network stand alone versus in
18 the bundle?

19 A. No, it doesn't. I don't have a penalty based rate card.

20 Q. One of your networks is HLN, correct?

21 A. That's correct.

22 Q. What is HLN?

23 A. HLN stands for Headline News that launched I believe in
24 1982.

25 Q. Generally speaking if a distributor carries CNN, what is

1 the rate that it will pay for HLN?

2 A. We waive the license fees for HLN if you carry CNN.

3 Q. There's no fee for HLN?

4 A. There's no fee.

5 Q. And CNN International, if someone carries CNN, what's the
6 rate for that?

7 A. We waive the license fee for that as well.

8 Q. We talked a fair bit about MFNs and the Court has heard a
9 lot about those from you and others.

10 In your 20 plus years of negotiating with distributors, who
11 is it that is typically asking for MFN? Is it you or is it the
12 distributors?

13 A. It's the distributors.

14 Q. We have heard about rate MFNs. Generally speaking, what
15 is your view as to rate MFNs?

16 A. I understand the concept that if I'm a buyer I want some
17 degree of equilibrium of how my rate may compare to someone
18 else in the market place but the problem with MFNs, well here
19 is an example.

20 So I had a small distributor who had an issue on how to pay
21 his own gratis accounts which gratis accounts would be schools,
22 government buildings, and they had gone above their limit.
23 That came up in an audit.

24 They called me and said this is a lot of money, can you fix
25 this. I would have been thrilled to have fixed this for them

1 but I had a very large distributor who had a rate MFN that
2 would have captured this which would have cost me multiple,
3 multiple, multiple times of what that one issue is.

4 I actually brought it up with the large distributor and
5 said I know you want some degree of assurance but this is why
6 the MFNs restrict us from solving problems along the way inside
7 of our business.

8 Q. What sort of none rate MFNs do you have generally
9 speaking?

10 A. Literally any term and condition in a contract can have an
11 MFN attached to it. It can be the number of ad avail a minute
12 which means the number of minutes per hour an affiliate gets to
13 sell on our network. Description of service. I mean, there's
14 just a multitude.

15 Q. Are you familiar with content parity provisions?

16 A. I am.

17 Q. What are those?

18 A. Content parity. Distributors want to make sure that in
19 addition to the linear networks. If you are going to offer
20 additional content and let's take this in a couple of quick
21 buckets.

22 The first is video on demand. If you are going to make
23 your shows available to any other distributor on a video on
24 demand basis which means after it airs linear it goes over here
25 in the on demand category so if you are a subscriber to a MVPD

1 or a virtual MVPD if they have video on demand you will have
2 access to that.

3 They want to make sure that we wouldn't favor one
4 distributor over another with video on demand, with full season
5 stacking rights which is basically where we say to a
6 distributor I'm going to give you the entire season as it
7 builds. There are 13 episodes.

8 Right after one episode airs you'll start stacking them
9 until you have the entire season of them. They want to make
10 sure that we won't discriminate against them.

11 Q. For example, Turner was to provide certain on demand
12 rights to DirecTV. What would the implication be to your other
13 contracts and distributors?

14 A. I have to provide it to other distributors and the ad
15 sales team would want other distributors to have this because
16 the only way you are going to modify video on demand is through
17 ad sales. Distributors do not pay an incremental fee for video
18 on demand.

19 Q. We have talked a little about data. How did data come up
20 in the negotiations that you had on behalf of Turner with
21 distributors?

22 A. For the most part with some of the ones that have been
23 named in earlier speaking with Mr. Carson, it would be in the
24 context of the negotiation.

25 And I appreciate creativity. Any time you can expand a

1 value exchange that's good. This is an important point.

2 If, first of all, the data has to be a value to us. So if
3 a distributor says this is the data I will sell you, I don't
4 know if that's the best they've got. It's just what they've
5 offered to sell me.

6 Which is why I send the data experts to look at it and say
7 is this worth buying. If they came back and said it's worth
8 buying, I have to be very prudent, honorable and respectful
9 here because if it's happening inside a negotiations, I have to
10 make sure that I'm buying this at fair market value.

11 That's because we honor our MFNs and we treat these as
12 sacred territory. What I mean by that if someone is to say
13 hey, I know we were negotiating on the broader deal, I want you
14 to buy data and the price is thirty million dollars.

15 And I go okay, I'll take it. Because I think they can use
16 that to factor it into the rate. I can't buy it higher than
17 market value. It's a very important point. I have to treat
18 that as though it's a transaction that I would make any other
19 day of the year.

20 Otherwise, it could be interpreted that I'm buying down the
21 rate. Which is why I would always rather for the most part
22 have a negotiation like that work through the networks or other
23 parts of the company because I don't want to blur the lines
24 between what someone is paying for the network.

25 I hope that makes sense.

1 Q. So let me unpack that a little bit.

2 What did you mean by buying down the rate?

3 A. Buying down the rate in other words, the way the MFNs work
4 it talks about net effective rate which means I want to make,
5 if I'm a distributor, I want to make sure that you're not
6 paying a distributor because they have a cable system in Boston
7 and I don't have the ability to have a cable system in Boston
8 that I don't catch that right.

9 So you want to be honorable in your MFNs and make sure that
10 they're no loop holes. There are ways that you can work around
11 that. I want to make sure that if I were to ever buy data it
12 has to be a legitimate -- first of all, it has to be data that
13 is valuable to Turner. The experts have to make that decision.

14 And then you have to make sure, I don't, I wouldn't mind
15 buying it but I would have to be one hundred percent sure that
16 the price is fair for that. I can't have any question to the
17 fact that I'm buying it but I really don't want it but it helps
18 you with your economic model back to your management to say
19 hey, Turner wanted X in rates. Because I sold them some data I
20 got it down.

21 I think that's another reason that we struggle, you know,
22 sometimes not only is it the right data or they are offering us
23 what's of value but what would be the price points. One of the
24 reasons we to date haven't done a bigger deal except with a new
25 virtual MVPD that came in.

1 Q. You mentioned the data experts that you would deploy.

2 Who were those data experts?

3 A. They work at the technology end of the company. They
4 understand a lot about these are privacy attorneys, these are
5 technicians who understand how you would collect data and put
6 it into your overall model of how you would evaluate
7 opportunity for ad sales and targeting.

8 Q. Do you know an individual named Stepfano Camit Turner?

9 A. I do.

10 Q. What's his role?

11 A. He recently got promoted into a, on a broader role. We
12 all look at him as he's the data guru of Turner.

13 Q. Mr. Carson mentioned the Comcast data during his
14 questioning. Did you have a sense as to how much of Comcast
15 data they were actually willing to sell to you?

16 A. When the teams went up because I wanted to treat it
17 respectfully. The teams went up and came back and said it's
18 not valuable. It's data that we can get elsewhere. It's not
19 what we were hoping that we would get in this type of offer.

20 So it moved off the table.

21 Q. Did you have a sense during those negotiations whether
22 there was additional Comcast data they might possess?

23 A. My tech team thought they would be seeing more than they
24 got.

25 Q. Mr. Carson asked you about Hulu. Generally speaking do

1 you know how many subscribers Hulu has?

2 A. Currently I do not. I'm not in distribution. I'm not on
3 that correspondence, so I don't know.

4 Q. Do you have ballpark sense?

5 A. I don't, I'm sorry.

6 Q. Okay.

7 Are there any other ways, well you said you've not
8 traditionally been able to get data. Were you, did you have
9 negotiations with DirecTV about data?

10 A. Our big deal with DirecTV was in 2013. And then in '16
11 the AT&T U-verse deal came up. We also did the DirecTV Now
12 deal. I don't remember any conversations about that at that
13 time.

14 Q. Which other large MVPDs have you been able to acquire data
15 from?

16 A. I have not acquired from any.

17 Q. Are there any other ways in which data comes up other than
18 as something you are trying to negotiate to purchase in the
19 context of these affiliate negotiations?

20 A. Not really.

21 Q. In the course of these affiliate negotiations, the Court
22 has asked a couple of distributors questions about how they
23 come back to you, the programmer, and talk about the value or
24 lack thereof of viewer networks.

25 Generally speaking how do those conversations go in your

1 experience?

2 A. Not always well. They have access to set top box data so
3 they understand they can go much further than a Nielsen rating
4 which is a small sample of the entire country.

5 So they would have access to know how long someone watched
6 the networks. My understanding from the experts is that they
7 could probably tell us total viewing time. I think I heard
8 Orange 16 talk about that, that they look at viewing time of
9 the networks.

10 So they have got an awful lot of information there. And
11 they can use it in the negotiation to say this is the value
12 that I equate to your network.

13 Q. Is that something that has actually happened?

14 A. Yes.

15 Q. What is your general response when they run those sorts of
16 arguments at you?

17 A. I don't have any data to talk back to that. So that's
18 just data coming towards me. It's not like I have got my
19 version of data as well.

20 Q. In sticking on this topic of how you were talking about
21 the value of the networks. You're familiar with the term must
22 have. We have heard a fair bit about it, correct?

23 A. Yes, like best cup of coffee. Well, best cup of coffee,
24 yes.

25 Q. What do you mean by that?

1 A. I mean I think Greg Rigdon who I have negotiated with for
2 over a decade is probably the third one when he said last week
3 everybody says they have must have, I am paraphrasing,
4 something to that extent. It just made me think about all of
5 the signs in restaurants and diners say well, best cup of
6 coffee.

7 So Greg and I actually agreed without any debate. So it's
8 a magic moment for me at that juncture.

9 Q. Is that a term that you use when you are negotiating with
10 distributors?

11 A. It's a term that's been around forever. I don't recall
12 the word must have coming from my lips.

13 We don't go into distributors. We use to do this 20 years
14 ago. You would go in with, we call it a brag book. You would
15 talk about your animated shows and the creator. We don't do
16 that any more. Everyone knows about the product per se. You
17 get straight down to business.

18 So the idea that, I agree with the definition of must have
19 means it's popular, means hopefully they recognize that your
20 brand is somehow connected to your programming. But I don't in
21 a literal sense mean that I must have this content or I can't
22 be successful. I don't believe that there's a single network
23 in the world that we live in that you have to have it to be
24 successful in video.

25 No offense to my competitors in the content business or my

1 own brands. There are just too many other things you can do to
2 get news, entertainment, information and even certain sports.

3 Q. You are the president of Turner Classic Movies?

4 A. Yes.

5 Q. You include that in what you just about what is or is not
6 must have?

7 A. Yes, I do.

8 Q. That hurt.

9 A. But yes, I do.

10 Q. Let's move on to blackouts and going dark.

11 As a general matter how many negotiations that you had over
12 the course of the couple decade came down to the last minute
13 when the deal was going to expire?

14 A. I maybe signed one deal two or three days ahead in all of
15 those years. They always come down to the last day and
16 sometimes the last handful of minutes.

17 Q. Why is that?

18 A. The industry took a turn around 2010. This was, it was a
19 growth business. So every year the industry was adding a
20 million plus subscribers which means every one like me could go
21 to budget meetings and there would always be some degree of
22 just organic growth that would happen with more people coming
23 into market.

24 Then new options started to come about. People started to
25 say well, maybe I could go into that spot service and they

1 started to leave the industry.

2 There were probably other economic issues. When people
3 would start families, when they would start jobs and the
4 dynamics totally changed.

5 When that happened it meant that there was pressure on just
6 the day to day revenue stream that came in and that I think
7 upped the intensity. It's like there's not enough water at the
8 watering hole for all of the animals so everyone panics.

9 Q. You were shown a couple of documents by Mr. Carson about
10 the preparations for going potentially, having the go dark
11 experience with the distributor?

12 Do you recall that?

13 A. I do.

14 Q. The drop analyses I believe he called them?

15 A. Yes.

16 Q. Why do you sort of prepare those?

17 A. Because you are going to get questions from your
18 management. This has now become much more common in the
19 industry that there could be situations where networks go off
20 the air.

21 You want to be prepared for every scenario. By the way,
22 you never want to go dark if you are a programmer. You bleed
23 instantly. But you have to be prepared because they will want
24 to factor that into their thinking of how the year is
25 performing from a budget wise, and maybe a long range plan

1 wise. It's just prudent math.

2 Q. You said a moment ago in that answer that you never want
3 to go dark because you bleed instantly.

4 What did you mean by that?

5 A. I mean that when the networks come off the air, license
6 fees stop coming into Turner, and we, our networks start under
7 delivering in terms of the number of eyeballs and impressions
8 that they promise the advertisers who bought spots on our
9 networks. So that happens as soon as it goes off.

10 Q. What are the implications of under delivering on the ad
11 agreements?

12 A. It means that let's say you have bought ads time on the
13 Turner Networks. And I said you going to get your ads in
14 front of X number of eyeballs. Because I have now lost the
15 percentage of the market, it means I have to give you inventory
16 that I was going to sell to somebody else, to use that revenue.
17 Or I have to give up promotional inventory where I was going to
18 promote my own shows to try to increase the performance.

19 Q. I want to do this in open court, so we won't use specific
20 numbers.

21 But just sizing it, if you were to go dark with one of your
22 big four distributors, Comcast, DirecTV, Dish, one of those,
23 and we won't say which one, ballpark how much revenue from the
24 lost subscriber fees and the advertising revenue would Turner
25 lose per month if it was dark?

1 A. Per month? You are probably looking in the 75 million
2 dollar a month range, minimum.

3 Q. Would Turner get that money back once it's networks went
4 back up?

5 A. No. In my outages with Cable One and Dish, I received no
6 compensation back for the lost revenue of ads sales or for
7 license fees.

8 Q. We'll come to Dish and Cable One in a moment.

9 Does it make a difference to Turner in terms of its
10 financial exposure if it goes dark in the doldrums of summer
11 when nothing popular is on TV versus going dark during should
12 I say at March Madness?

13 A. Let's break this down. License fees you pay the same rate
14 throughout a calendar year. So I'm going to lose the same
15 amount of --

16 Q. That's the rate, I just want to make sure.

17 A. That's the monthly rate you would pay me. So I am making
18 it up. You are going to pay me fifty cents for a network.

19 So if you go off the air, you take me dark and we go off in
20 June I lose the same amount of money as I do in November in
21 license fees.

22 Your question to be thorough was what about total revenue.
23 If I go off and I'm in a moment of reruns that will not hurt ad
24 sales as much as in your example if we go off in March Madness.

25 This is one of the quandaries, this concept that everyone

1 likes to talk about it going dark and how horrific this is. If
2 we go dark in March Madness, it means not only do you lose your
3 license fees again standard for each month, but you are going
4 to lose higher volume of ad dollars because live sports bring a
5 premium for ad sales.

6 You probably also put your relationship in jeopardy with
7 NCAA or if it's NBA or MLB of the league. So you have now
8 created, not you, the situation has created a tremendous amount
9 of angst and strain on the system of what happens.

10 So I understand, lining up your programming or your
11 explorations around popular programming is prudent in one
12 sense. But it also chains you to the event itself. Meaning if
13 it goes dark, you have to live with the carnage that goes as
14 well as the other side.

15 So I have always looked at it as we both must be focused.
16 Mutual destruction is bad for us both. We don't want to go
17 dark.

18 So in some ways I think it keeps both sides very focused
19 when you have high profile programming, live sports, both sides
20 are I am hoping are more motivated because the outage will just
21 be bad for both sides' positions.

22 Q. Can you pull up Plaintiff's Exhibit 144. It's another
23 document that Mr. Carson showed you.

24 A. I'm there.

25 Q. Take a look at page 117.

1 A. I got it.

2 Q. This is one of those go dark analyses, correct?

3 A. Yes, it is.

4 Q. And the last bullet point on the page references ad
5 revenue loss. Takes into account timing of major sporting
6 events.

7 Do you see that?

8 A. I do.

9 Q. That's on page 117. What does that mean?

10 A. That means that as you try to factor and anticipate, it's
11 really what I was just saying. You have to think about the
12 lost revenue.

13 You are going to lose more ad revenue inside of a March
14 Madness game than you would in a summer rerun.

15 Q. You flip to the other page Mr. Carson showed you, 121.

16 A. Got it.

17 Q. Which distributor has the most drops?

18 A. DISH Network.

19 Q. Mr. Carson was asking you about some of the longer drops
20 on here. How many of the drops on this page were actually
21 Turner Networks?

22 A. On this page? This was in 2014, so three on this page.

23 Q. What three?

24 A. Court TV with Cable One. That was in 2007. All of the
25 networks in September of 2013. And then Court TV with Dish

1 Network in December of 2006.

2 Q. Which was the longest of those drops?

3 A. The longest of those drops was Court TV with Dish was five
4 weeks.

5 Q. For DirecTV one of the numbers that I think you mentioned
6 was 718 day drop, it references the G4 network?

7 A. I see that one, yes.

8 Q. What's the G4 network?

9 A. I believe it's a gaming network. A game network.

10 Q. One of the other long ones you mentioned was 849 days
11 which was Disney HD?

12 Do you see that?

13 A. I do.

14 Q. What is the significance of the fact that this says Disney
15 HD?

16 A. I look at that and say it's not one of their core
17 networks. I'm not that familiar with G4 and Disney HD. It
18 just says select nets, but I don't know which ones are included
19 there.

20 Q. You can put that aside. Thank you.

21 Given what you've described about the impact on Turner in
22 going dark, what are the circumstances in which Turner as it
23 engages in negotiations considers the possibility that it might
24 have to say to a distributor we can't sign that deal even if it
25 means that you won't carry our networks?

1 A. If it's detrimental to your long range plan, if it is
2 going to trip an MFN, are you going to put an MFN out there
3 that will hinder your ability to be innovative or run your
4 business.

5 Q. Sir, can you give me an example of an MFN without naming
6 the distributor, an example of the type of MFN that might have
7 been proposed by someone that Turner was unwilling to agree to?

8 A. Yes. An MFN that would say I distributor want protection
9 against you as a distributor Turner. Meaning that if you
10 decide to take your networks and go direct to consumer and
11 maybe you don't pay yourself, then I would get access to that
12 exact same content and I wouldn't have a license fee.

13 Q. Is that a hypothetical example or --

14 A. No, that's a real example.

15 Q. You also might consider this in a circumstance where it
16 would trigger other MFNs, correct?

17 A. That's correct.

18 Q. Let's look at another document that Mr. Carson showed you
19 which is Plaintiff's Exhibit 146.

20 A. Got it.

21 Q. This is an email that you sent to Mr. Martin in December
22 of 2016, correct?

23 A. That's correct.

24 Q. This relates to Charter?

25 A. That's correct.

1 Q. So if you go down looks like there's an email that's being
2 forwarded in here from you to John.

3 And you say John document signed.

4 Then a line or two down it references Charter accepting
5 2017 rates rather than paying 2016 rates in 2017.

6 Is that correct?

7 A. That's correct.

8 Q. What are the implications of that issue in the Charter
9 negotiations?

10 A. Well, if Charter could say look, I'm going to continue to
11 negotiate but I'm going to pay you 2016 rates into 2017.

12 There's a fundamental problem with that which means to
13 honor my other MFNs we will have to send out MFN letters and
14 say to other distributors for this month and going forward
15 there's a distributor who is paying a lower rate.

16 The distributor who receives the MFN letter would probably
17 say thank you very much, I'm glad to lower my rate. Which is
18 why the turn of the calendar is very important in deals. If
19 you don't secure the rates, you put your revenue stream times X
20 in jeopardy because you may inadvertently lower the rates for
21 everyone.

22 It's why we, you have to finally finish a deal. Because
23 you can't have a distributor pay '16 rates in '17 without
24 having, in most instances and definitely in this one, without
25 having it impact massive amounts of revenue above it.

1 Q. Mr. Carson asked you the question earlier whether Charter
2 had extended its agreement a number of times since 2016?

3 A. Yes.

4 Q. And the answer was yes?

5 A. Yes, they have.

6 Q. First of all, were you involved in discussions with
7 Charter back in late '16, early '17?

8 A. No. Late '16, early '17, yes I was.

9 Q. What do you generally recall about discussions with
10 Charter over whether they would sign a long term agreement?

11 A. Well, it was interesting because in one conversation there
12 was some musings and statements on their side, maybe we'll just
13 wait. Yeah, we'll just wait until after the merger and we'll
14 negotiate with you then which is what it felt like.

15 We had already put a lot of things on the table to try to
16 motivate them to sign because you want to sign a deal and move
17 on because you'll never get through the stream of deals.

18 But they seemed comfortable waiting until the merger would
19 sign.

20 Q. Without getting into the specific, how did the terms that
21 you had put on the table for Charter compare to terms that were
22 agreed to by their peers?

23 A. Very good terms.

24 Q. Do you know what the current status of the Charter
25 discussions is?

1 A. I do not. I think it's still extending. But I do not
2 know.

3 Q. Mr. Warren would know about that?

4 A. Yes, he would.

5 Q. You were also asked questions by Mr. Carson about Altesse
6 in some negotiations that almost resulted in a possible
7 blackout.

8 Do you recall that?

9 A. I do.

10 Q. So can you give the Court a little bit of context about
11 what was at issue in the those negotiations and why it was
12 something that came down to the wire?

13 A. Yes. I think you have to start with the fact that, how
14 Altesse, a foreign base company it started by a U.S. cable
15 company.

16 Q. You said foreign base?

17 A. Yes, foreign base, a European base company, Altesse.
18 Started by a U.S. Cable Systems.

19 When they did this there was a lot of pontificating in the
20 trade publications about how they were going to take a very
21 very aggressive stance. They assembled a new team. They had
22 cablevision.

23 But they assembled a new team of negotiations, experienced
24 but a new team to Altesse. And the challenge, you didn't know
25 if their team was what degrees and authorities they had to

1 negotiate because you only knew what you were reading in the
2 press and we got some, some proposals from them. Again,
3 there's no way that we could entertain because of what it would
4 do to our budget long range plan.

5 Q. Did those rates have any implications for your MFNs?

6 A. Yes, they did.

7 Q. Do you have a general recollection of how significant the
8 impact would have been across your business?

9 A. I don't remember the model but I just remember they were
10 ridiculously low. We didn't even know how to counter, they
11 were so low.

12 Q. How were those negotiations wrapped up?

13 A. We got a deal done, a few bumps along the way, but we got
14 a deal done.

15 Q. Moving on to the two backouts that we have heard the most
16 about. There was a Cable One blackout in 2013, correct?

17 A. Correct.

18 Q. Mr. Carson asked you some questions about that earlier.

19 What's your general recollection as to how the negotiations
20 with Cable One proceeded and what was at issue that ultimately
21 led to the blackout?

22 A. Well, the team believed on the final day that we were
23 \$200,000 apart in economics. We had a solution to close that.

24 So we had, had all reason to believe based on how the
25 negotiation had gone for multiple months that we would wrap it

1 up that day. And I believe my word was sucker punched.

2 On the last day this wasn't small change. This is a
3 fundamental change. When someone starts a negotiation says
4 Turner, I want to carry a limited number of your networks, I'm
5 glad to have that conversation.

6 To start that conversation when the clock is almost out of
7 time because the clock is the most important element in these
8 negotiations.

9 So I look at it as we were having a very genuine
10 negotiation. But on the day you're suppose to sign a deal,
11 they change to that degree. I did not interpret as a we woke
12 up and changed our mind versus I played the clock. I'm now
13 going to do this. You won't have time to come in and convince
14 me and negotiate with me on why I should carry more than those.
15 I've got you.

16 I have never seen that in all of my negotiations and I have
17 been in some really tough rooms. Charlie Ergen is a tough guy.
18 I have been in some really tough rooms. I have never had
19 anyone do that.

20 And for us at that moment, as rough as these negotiations
21 get, you're still friendly with Gregory. Despite the fact that
22 you suit up across the table from each other.

23 But in this instance never before have I seen someone take
24 the trust of a relationship and break it like that and say no
25 time left on the clock. Although I do think we extended to

1 noon the next day.

2 Q. You mentioned that you had a solution to close the
3 \$200,000 gap.

4 What did you mean by that?

5 A. We had found a way to have economic stream in their favor
6 to close the economic gap. We thought that was the last thing
7 we had to do. We didn't think we were going to start over with
8 no time left on the clock.

9 And sort of brand new negotiations. That's why I felt like
10 it was gaming the system and playing us in the process.

11 Q. How many networks did they want to continue to carry?

12 A. They wanted to carry three.

13 Q. What was the relevance of the NCTC to these conversations?

14 A. The way I look at it, they ran the clock down on purpose.
15 And then wanted to go under the, they were members of NCTC. A
16 cable operator can be a member of the buying group. They
17 wanted to run under there.

18 I think they looked and said we can run the clock down, we
19 have got safe haven and we'll go under NCTC.

20 Q. Were they entitled to carry those three networks under
21 their NCTC agreement?

22 A. If they were in good standing, yes.

23 Q. What does that mean, in good standing?

24 A. If they pay the money due to Turner and make sure that
25 they honor their contract and honor going forward.

1 Q. Were they in good standing when they tried to go under the
2 NCTC agreement?

3 A. They had money in arrears.

4 Q. Do you recall why?

5 A. I don't, I don't know.

6 Q. Do you recall them taking steps to try and get themselves
7 into what they viewed as good standing?

8 A. Yes, they sent us a check.

9 Q. What do you recall about that?

10 A. I don't recall any, I don't remember the research. If I
11 knew it was a right amount or whatever. At this stage we
12 looked at it and said we are getting gamed.

13 Q. Now how long did that blackout last?

14 A. I believe 21 days.

15 Q. How did it ultimately get resolved?

16 A. We found a path to a deal and that deal continued I
17 believe until 2016 when that deal expired with Cable One. I
18 believe they went under the NCTC deal the last time around.

19 Q. You mentioned that at the time you went dark there was a
20 \$200,000 gap.

21 How was that resolved in the final deal that brought the
22 networks back up?

23 A. It cost me more to get back on. You might think that the
24 deal would change. Right. I would make the deal worse to get
25 back on.

1 Honestly, you're desperate when you are off the air. You
2 are bleeding money. Your phone rings every day from those
3 above you wanting to know when this is going to stop because
4 you are losing money.

5 So it ended up so the \$200,000 gap I think the number was
6 closer to a million dollars that went in favor of benefits and
7 rates with NCTC.

8 Q. Do you have a general recollection as to how much revenue
9 that Turner lost during the course of that blackout?

10 A. I believe between license fees, ad sales and there were
11 some degree of marketing, I think we did some social network
12 marketing, probably in the neighborhood of four and a half,
13 five million dollars.

14 Q. Mr. Carson showed you page 263 of your deposition.

15 A. Would you like me to go back there?

16 Q. Sure. I believe it's on page 262 and 263.

17 And just for the record, this has been marked as
18 Plaintiff's 530 for identification.

19 A. Okay, I'm on 262.

20 Q. He pointed you to some testimony that you had provided and
21 the questions that were asked about an exhibit to your
22 deposition.

23 Do you see that?

24 A. I do.

25 Q. And the issue that Mr. Carson was touching upon before was

1 some information Mr. Warren had forwarded to you about the
2 number of subscribers Cable One lost during the blackout.

3 Do you see that?

4 A. I do.

5 Q. Do you recall what the information Mr. Warren sent to you?

6 A. No, it could have been a trade article that basically said
7 I think that Cable One had lost a certain number of subscribers
8 in the third quarter which would then make me ponder I wonder
9 what the third quarter would look like.

10 MR. ORSINI: I would like to mark a document which
11 would be DX 927 for identification.

12 See if I can refresh the witness's recollection.

13 (Defendant's Exhibit Number DX 927 marked for
14 identification.)

15 MR. ORSINI: Your Honor, may I approach?

16 THE COURT: Yes.

17 BY MR. ORSINI:

18 Q. Mr. Breland, I've marked as Defendant's 927 for
19 identification the document that was in fact Plaintiff's
20 Exhibit 18 to your deposition.

21 Does this refresh your recollection as to what the
22 information Mr. Warren provided, established in terms of Cable
23 One subscriber loss?

24 A. It does. It looks like it's an article or a part of an
25 article from FierceCable.

1 Q. What do you recall that he was telling you in terms of
2 what they were reporting their subscriber loss was?

3 A. He just forwarded this to me and the headline speaks for
4 itself, Cable One shed 15,000 video, 5,000 internet subs in Q
5 3, 2013.

6 My response back to my colleague was going to be
7 interesting to see the fourth quarter meaning I wonder what
8 will happen when their networks were down.

9 Q. So 15,000 video subs, I believe you testified earlier
10 Cable One has how many subs?

11 A. At this time I believe around 700,000.

12 Q. What percentage of their subs would 15,000 be? I'm sorry
13 to make you do math --

14 A. I am glad you are going to make me do math. I don't think
15 I can do the math like this.

16 Q. It's about two percent?

17 A. That looks right.

18 Q. Okay, thank you?

19 A. I'm looking to see if I see 700, I just remember 700,000.

20 Q. Assuming 700,000 was right?

21 A. Yes, two percent.

22 Q. You can put that aside.

23 The other significant blackout that Turner has experienced
24 that we've all heard a lot about is the Dish blackout; is that
25 correct?

1 A. That's correct.

2 Q. How many times over the course of your career have you
3 negotiated with Mr. Ergen?

4 A. Starting back in the mid '90s, every time a deal was up.

5 Q. How would you compare negotiations with Mr. Ergen and Dish
6 to your negotiations with others?

7 A. It's like entering a vortex of unpredictability really.

8 Q. What do you mean by that?

9 A. I mean Mr. Ergen is a lot like Ted Turner, right;
10 macuricle (sic) incredibly creative, genius level in terms of
11 someone who can see something and create it. So I have a
12 tremendous amount of respect for Ted Turner and I have a
13 tremendous amount of respect for Charlie Ergen and to see what
14 he's built over all the years. Doesn't mean he's an easy
15 person to negotiate with however.

16 Q. So I don't want to touch upon parts of this story that
17 we've already heard. We don't need to repeat that.

18 But I would like to just get your broad recollection of how
19 the negotiations were going during the summer and early fall of
20 2014 leading up to the actual decision by Dish to take your
21 networks down?

22 Can you just provide that for the Court, please?

23 A. Sure. A few important points. We had a few fits and
24 starts. There were three different heads of programming for
25 Dish. I believe Dave Showel who I dealt with before was

1 leaving. A gentlemen named Steve Swain came in and took the
2 job for about two months. And then Warren I believe got there
3 August, September of 2014.

4 Q. Warren Schlichting?

5 A. Yes, Warren Schlichting. A bit of changes in horses.
6 Took them a while for us to get a red line, you know, changes
7 back to the draft. We sent them a draft and they had been
8 working on it for a while.

9 Look, it's always slow slogging through the mud in these
10 kind of negotiations. But there were some interesting points
11 to me and these came directly from Charlie. I remember we --

12 MR. CARSON: Objection, Your Honor, hearsay.

13 THE COURT: You can approach.

14 (Sealed Bench Conference.)

15 THE COURT:

16 MR. ORSINI:

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21 MR. CARSON:

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24 THE COURT:

25 MR. ORSINI:

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THE COURT:

(Open Court.)

THE COURT: You may proceed consistent with the discussion at the bench.

BY MR. ORSINI:

Q. Again high level, we can keep it fairly brief. Your recollection of the give and take of the negotiations and the events leading up to the blackout?

A. We thought we were in pretty good shape. Something changed. The mood had changed of the negotiation suddenly. It was instant. You could feel -- I got a call from Warren on Friday evening. He said I know our deal is up the first of next week. We've got to get the deal done. There was a concern in his voice that I'd never heard. I knew then from all of my dealings with Dish that something was wrong. I just didn't know what it was, but the tenor had changed.

There's no way to get this deal done in three days. It's too much paper, laws of physics you couldn't do it, but something had happened. Something had changed. I remember calling John Martin and saying I don't know what's happened, but this has taken a really bad turn.

Q. Did you ever get a sense as to what had happened?

A. No, I heard Mr. Martin speak last week about HBO Now had launched a week before and Mr. Ergen had reached out to

1 Mr. Bewkes. He had some I believe some concerns about that.
2 That was the only event that I know that could affect us.
3 There was nothing between my negotiating team and the Dish
4 negotiating team other than just the normal exchange of
5 negotiating.

6 Q. Now Mr. Schlichting testified about this issue of the
7 contract for the networks that went dark. Getting closer to
8 the expiration of the TBS and TNT contract. Do you recall
9 that?

10 A. I do.

11 Q. What do you recall about how, if at all, that was relevant
12 to your negotiation strategy?

13 A. It wasn't relevant at all. The terms you had TNT and TBS
14 expiring in December. I believe there was about six months
15 originally between the two.

16 As heads of programming changed and extensions continued,
17 neither side it never occurred to us that they're getting
18 closer together per se. Because again, a lot of what you're
19 negotiating terms and conditions and contracts for the other
20 networks beyond TNT and TBS would be the same.

21 So we didn't factor this and think oh this is strategic,
22 we're going to get them altogether. That never entered my
23 thinking whatsoever.

24 Q. During the time when the networks were actually dark on
25 Dish, how much revenue generally did Turner lose in terms of

1 subscriber fees and advertising revenue?

2 A. North of 30 million dollars.

3 Q. I'd like to hand up if I could, Your Honor, documents
4 marked as Plaintiff's Exhibit 414.

5 May I approach, Your Honor?

6 THE COURT: Yes.

7 Q (By Mr. Orsini) Mr. Breland what is Plaintiff's Exhibit
8 414?

9 A. This is the extension agreement to get the networks back
10 on the air which takes us through March 31st, 2015.

11 Q. About a four month extension?

12 A. That's correct.

13 Q. And you'll see that on the third page which is 414-3, this
14 is signed by Mr. Schlichting and Mr. Warren correct?

15 A. That is correct.

16 MR. ORSINI: Your Honor, we offer this agreement into
17 evidence under seal?

18 MR. CARSON: No objection.

19 THE COURT: Be admitted under seal.

20 (Plaintiff's Exhibit No. 414 received in evidence under
21 seal.)

22 BY MR. ORSINI:

23 Q. Mr. Breland, I'd like to walk through a couple of the
24 provisions. I want to be careful because we have
25 confidentiality issues, so I think we do it in open court with

1 the document.

2 If you take a look at paragraph 2 of this agreement. Do
3 you see that?

4 A. I do.

5 Q. Can you generally describe what paragraph 2 contains?

6 A. This improved the Dish MFN.

7 Q. Why did you improve the Dish MFN.

8 A. It's one of the things I needed to do to get back on.

9 Q. If we look at paragraph four, there's a reference to
10 affiliates over-the-top service, do you see that?

11 A. I do.

12 Q. Is that Sling?

13 A. That is.

14 Q. There's a reference to Exhibit 2. If you could turn to
15 414010, you'll see Exhibit 2?

16 A. Yes, I do.

17 Q. These were the terms for them to carry your networks on
18 Sling?

19 A. That's correct.

20 Q. Paragraph 2 carriage, talks about a requirement that they
21 have a certain number of unaffiliated networks on their system,
22 on their service before they launch with Turner. Do you see
23 that?

24 A. I do.

25 Q. What's the purpose of this provision?

1 A. The purpose of this provision is basically we wanted to be
2 surrounded by strong product, popular product if we're going to
3 be launched, we didn't want to be the only ones in. You don't
4 want to be the only ones in or only maybe one of two in because
5 you want to be successful and offering to consumers that failed
6 would be a poor reflection. We took it as a degree of
7 seriousness. If you're serious then just have seven of the top
8 35 non-Turner networks.

9 Q. Let's go back to the first page of 414. Paragraph 5, what
10 generally is paragraph 5 providing?

11 A. It's basically a clean slate for any money due to Turner
12 from Dish from audits.

13 Q. What do you mean by audits?

14 A. There's a third party audit process that goes through that
15 every one goes through with programmers and distributors where
16 an auditor will go to the distributor, get binders like this
17 full of data. They'll look at how many subscribers Dish had
18 each month, what they're suppose to pay us, the conditions of
19 the contract and then report what they owe us. And in some of
20 the past audits there were monies due to Turner.

21 Q. Do you recall roughly how much money was released by
22 Turner under this paragraph for these audits of Dish?

23 A. Under these audits of Dish probably a 120 million dollars.

24 Q. Those were monies that were owed to Turner by Dish?

25 A. That's correct.

1 Q. Then the next paragraph, paragraph six?

2 A. Yes.

3 Q. Can you explain generally what that means?

4 A. Yes, just give me one second.

5 These are monies that were due from Turner to Dish and it
6 says we will release these dollars to Dish.

7 Q. What do you mean by release these dollars to Dish?

8 A. These were MFN, these are dollars that they're MFN
9 captured. So it was money that we owed them and we paid that
10 money.

11 Q. So you can put this aside sir. So all in with the loss
12 revenue plus the audit and not accounting for any impact the
13 improved MFN had, how much did it actually cost Turner to go
14 dark with Dish and then get back up to the four months?

15 A. You're talking a 120 on the audit, those are monies that
16 we believe were due to us.

17 You've got north of 30, let's do easy math and call it 30
18 that's a 150 million dollars that it cost me to get back on in
19 loss revenue. Then we also released these additional dollars,
20 the MFN money to Dish.

21 Q. Why did Turner give up all of that money to get back on
22 for four months?

23 A. I'm bleeding, I'm losing a tremendous amount of money. I
24 have to get back on.

25 Q. Mr. Schlichting testified that Dish was the one who made

1 significant gives in this document to end the blackout. What's
2 your recollection or you can look at the document as to what
3 actual gives Dish made?

4 A. I don't see gives for Dish here.

5 Q. Once this contract was signed you then went into another
6 around of negotiations with the expiration in March of 2015?

7 A. That's correct.

8 Q. Just at a high level again, keep it short because we've
9 heard some of this already, but I want to get your perspective
10 on it. What was the nature of those negotiations and the open
11 issues?

12 A. One of the big issues at the end that almost tripped us up
13 again was data as a matter of fact. Dish had presented to us
14 that one of the great benefits of Sling was that they would
15 provide us with viable consumer usage data which of course our
16 networks were very excited about. It's great insight.
17 Remember you've got Netflix using artificial intelligence to
18 track behaviors and we're sort of making fire with sticks so we
19 were very excited about that.

20 But at the last minute late ate night they informed us that
21 we're still going to give you the data, but you can't put it
22 with any other data and use it and have your ad sales group use
23 that to sell.

24 Q. What did that mean from Turner's perspective?

25 A. It's like having a bicycle and you can ride it inside. It

1 means I can't use the data to monetize. So I can get it, but
2 if I can't put it with third party data then it means the ad
3 sales I've given them a hollow shell. There's nothing they can
4 really use to monetize.

5 Q. How was that issue resolved?

6 A. It was very testy. To the point that I remember getting
7 on the phone with Mr. Martin and Bewkes talking us through
8 because this was a very serious issue and it was part of what
9 we thought we were getting in the negotiations. We acquiesced
10 because we needed to get a deal done.

11 Q. Your Honor, I'd like to hand out another exhibit.

12 MR. ORSINI: May I approach, Your Honor?

13 THE COURT: Yes.

14 BY MR. ORSINI:

15 Q. Mr. Breland, I've handed you a document that's been marked
16 as Plaintiff's Exhibit 411. It's a one page e-mail from Rich
17 Warren to you and David Levy, copying Donna Northington on
18 March 25th, 2015. And on the back page there is a -- there's a
19 series of graphs, a line graph and a chart, do you see that?

20 A. I see it.

21 MR. CARSON: May I approach, Your Honor?

22 THE COURT: Yes.

23 (Sealed Bench Conference.)

24 MR. CARSON:

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THE COURT:

MR. ORSINI:

MR. CARSON:

MR. ORSINI:

THE COURT:

MR. ORSINI:

(Open court.)

THE COURT: You may proceed consistent with the
discussion at the bench.

MR. ORSINI: Thank you, Your Honor.

BY MR. ORSINI:

1 Q. Mr. Breland, Mr. Warren worked for you at this time,
2 correct?

3 A. That's correct.

4 Q. And who is Ms. Northington?

5 A. Donna Northington heads up financial and strategic
6 planning for distribution.

7 Q. Okay. And there's a reference, just to establish the last
8 piece of foundation here without getting into the substance.
9 There's a reference in the first line of this e-mail to some
10 payment backup data from DISH. Do you see that?

11 A. I do.

12 Q. What is payment backup data?

13 A. We receive subscriber data from all of our affiliates that
14 basically says this is how many subs I had in this month, and
15 this is the change on a month to month basis so they know how
16 many subs to pay us on.

17 Q. And Ms. Northington has access to that data?

18 A. Yes, she does.

19 MR. ORSINI: Your Honor, I offer Plaintiff's 411
20 under seal.

21 MR. CARSON: No objection, Your Honor.

22 THE COURT: Accepted.

23 MR. ORSINI: Thank you, Your Honor.

24 (Plaintiff's Exhibit No. 411 was received under seal.)

25 BY MR. ORSINI:

1 Q. Mr. Breland, we've got to be a little careful here with
2 confidentiality, but Mr. Warren says in the first line that
3 he's attaching a graph slash chart which illustrates the
4 massive sub loss of some number during the month of January.
5 And he says, "I believe that this demonstrates the result of
6 going dark with the Turner networks. We generated a downward
7 spiral in terms of sub loss, and as a consequence going dark
8 with Fox had an even more pronounced impact on the DISH sub
9 base. Do you see that?

10 A. I do.

11 Q. Now, if you look at the graph, can you explain to us where
12 that number -- can't say it out loud because it's DISH
13 confidential information. But where that number that
14 Mr. Warren refers to in his cover e-mail appears on the back of
15 this document?

16 A. There's a box at the bottom of the page, this would make a
17 reference to a subscriber change in the month of January 2014.

18 Q. So you're looking at the chart --

19 A. I'm sorry, 2015.

20 Q. You're looking at the chart at the bottom of the page?

21 A. Yes, I am.

22 Q. And so there are three different sets of rows labeled
23 "total subs for '14, '13 and '12." Do you see that?

24 A. That's correct.

25 Q. What does that reflect?

1 A. It's just a -- it's a comparison chart to say how many
2 subscribers in '12, '13 and '14 for each of the calendar
3 months.

4 Q. Okay. And then let's stick with '14, we see numbers with
5 12s on them in the first row. What are those numbers?

6 A. That would be a million, that's the total number of
7 subscribers, that's the number of total DISH subscribers as
8 they report to us.

9 Q. Okay. And then the numbers below that, some of which are
10 in parentheses and some of which aren't?

11 A. That's correct, if they're in parentheses it designates a
12 loss; if not, it's a gain to subscribers.

13 Q. A loss, so, for example, in February, without showing the
14 number, it shows a loss, a loss as compared to what?

15 A. A loss as compared to the month prior.

16 Q. Okay. And the loss of?

17 A. Subscribers.

18 Q. And the number that Mr. Warren refers to, I believe you
19 said is all the way to the right at the top in January?

20 A. That's correct, it's on the line for '14, but it's January
21 2015.

22 Q. Okay. And which networks were dark with DISH the
23 preceding month?

24 A. All of the Turner networks except for TNT and TBS.

25 Q. I'm sorry, the month preceding January of 2015?

1 A. Oh, in December, the networks that were dark. We were
2 dark from December 21st through -- I'm sorry, October 21st to
3 November 22nd.

4 Q. Right, and so which network group?

5 A. I'm sorry, they were dark with Fox, I'm following up here.

6 Q. Okay. So looking at this chart, again, without using the
7 numbers, but we can do it in relative figures. For the month
8 when DISH was actually dark with Turner in November of 2014,
9 what percentage of their subscribers does this report that they
10 lost?

11 A. You're saying when the Turner networks were off the air?

12 Q. Correct.

13 A. Which includes the month of November, basically, in 2014.

14 Q. Correct.

15 A. If my math is right, that is probably less than one tenth
16 of one percent in the month of November when the Turner
17 networks that were dark were off the air.

18 Q. And how does that sub loss figure compare to the preceding
19 Novembers just in relative terms?

20 A. It's right there in the same neighborhood.

21 Q. And was Turner dark in those preceding Novembers?

22 A. We were not.

23 Q. Okay. So going back to the e-mail that Mr. Warren sent.
24 In the description he has of massive sub loss and downward
25 spiral. What's your interpretation of Mr. Warren's e-mail.

1 MR. CARSON: Objection, Your honor.

2 THE COURT: Overruled. You can limit your answer to
3 your impression of what it meant.

4 THE WITNESS: My impression of the e-mail, these are
5 very intense negotiations. To me the most important part of
6 this e-mail is what Mr. Warren puts in parens because he talks
7 about we have leverage, we have leverage. And it's like a --
8 it's a bit of a battle cry when you're in the zone of
9 negotiating.

10 But to me, what is so revealing is when he says, "But it
11 helps," and in parentheses, "at least it helps me to remember
12 that we do not need to be deleveraged by Ergen."

13 So we went off the air. And we don't know why we went off
14 the air. We're 21 days, are we going to go off the air again?
15 We're in the dimension of unpredictability that comes with
16 DISH. And so I read it as it's -- I've got to keep myself --
17 we've got to stay pumped up. We've got to believe we can
18 prevail though this again even though we're not quite sure
19 what's going to happen.

20 The numbers on the back don't match that. The use of
21 words, I think I even said in one of my depositions that I
22 didn't necessarily agree with my colleague on the use of the
23 word "massive." But this is what you do to get yourself pumped
24 up, but the numbers don't watch the words.

25 MR. ORSINI: Okay, thank you, Mr. Breland.

1 Your Honor, I'm done with this document.

2 THE COURT: All right. We're going to take the
3 afternoon recess. We'll be going until five o'clock today.

4 You're a witness under oath, remain independent of all
5 others. Do not discuss your testimony so far with anybody or
6 what it might be when you return.

7 Stand in recess for fifteen minutes.

8 (Recess at 3:52 p.m.)

9 (Proceedings resumed at 4:15 p.m.)

10 THE COURT: All right, you remain under oath, sir.
11 You may continue.

12 MR. ORSINI: Thank you, Your Honor.

13 (Breece Coleman Breland resumed the witness stand.)

14 CROSS-EXAMINATION (Cont'd)

15 BY MR. ORSINI:

16 Q. Mr. Breland, one last topic, and perhaps even one last
17 question, sir, to follow up.

18 You've been here for the last two weeks during this trial,
19 and you've heard the government theory that as a result of this
20 merger, if the Court permits the merger to go through, Turner
21 will have enhanced bargaining leverage and will be able to
22 extract higher affiliate fees as a result of using a blackout
23 tool given their shared ownership with AT&T, DirecTV. Do you
24 generally understand that theory?

25 A. I do.

1 Q. And what's your view based on your decades of experience
2 as the lead Turner negotiator as to whether or not that theory
3 actually holds any water?

4 MR. CARSON: Objection, Your Honor, calls for
5 speculation.

6 THE COURT: Overruled, he can answer.

7 THE WITNESS: The concept that Turner would push
8 although going dark is good for us, I believe I've given
9 examples today of why it's just the opposite. I lose money the
10 minute I go dark. It can be catastrophic to my business, and I
11 also get a share of the blame in the eyes of the subscribers
12 who bought the service.

13 The idea that a lot of people will leave, I think is not
14 accurate whatsoever.

15 I've got two real market examples, DISH Network, and I
16 believe I said one tenth of one percent when they were dark,
17 albeit without TNT and TBS. But when we were dark with Cable
18 One, I believe their word about the outage was something along
19 the lines of insignificant.

20 So then the issue of could we control? Maybe we want to
21 go dark because we can control where subscribers go. And I
22 don't believe we have any chance of controlling. It's like
23 taking a vase breaking it with a thousand marbles and they
24 scatter on the floor. I don't have their e-mails, I don't know
25 their names, their phone numbers, their addresses. How would I

1 motivate them to go anywhere?

2 Oh, and by the way, yet another outage probably means some
3 of those people may just say I've had it with the MVPD world.
4 It's just too disruptive, I'll leave.

5 And finally, the last point about how would we behave as a
6 vertically integrated company. I've been in Turner when we
7 were a vertically integrated company and had a sister company
8 called Time Warner Cable. And I can tell you at no time during
9 my tenure there did anyone ask me to consider in my
10 negotiations and how I dealt with other distributors the
11 outcome and impact at Time Warner Cable, I was never asked to
12 consider that nor would I consider that. And, in fact, we
13 would run extensive marketing campaigns with satellite
14 distributors pushing subscribers and potential subscribers into
15 the likes of Best Buy, Montgomery Ward, Circuit City, HH Gregg
16 to say buy a satellite dish.

17 So I just -- you will do what's best for your business.
18 When you're in distribution it's all about the scale and reach.
19 You have to be on all the platforms. Otherwise you don't have
20 to a chance of being successful in this business, you have to
21 be on every platform. And you favor none over the others;
22 that's all.

23 Q. You mentioned the satellites, was DISH one of the Time
24 Warner cable competitors you negotiated with?

25 A. Yes.

1 Q. When the company was vertically integrated?

2 A. That's correct.

3 Q. And was Mr. Schlichting at DISH at that time?

4 A. He was not, I believe he came in August or September of
5 '14.

6 MR. ORSINI: Thank you. No further questions, Your
7 Honor.

8 THE COURT: All right, redirect.

9 REDIRECT-EXAMINATION

10 BY MR. CARSON:

11 Q. Mr. Breland, let's start at the end with DISH. Can you
12 turn to Exhibit 411 in your binder?

13 A. (Witness complies.)

14 Q. And this is the same exhibit, right, correct?

15 A. Yes.

16 Q. Okay. With the e-mail from Mr. Warren to yourself where
17 you highlighted the language with Mr. Orsini about what this
18 means as we have massive power here and Mr. Warren was telling
19 you?

20 A. Correct.

21 Q. And above, two lines above it says, "We generated a
22 downward spiral in terms of sub loss," do you see that?

23 A. I do.

24 Q. And then he wrote later, "I recognize that in terms of
25 highlighting the leverage we have here I'm telling you

1 something you already know." Do you see that?

2 A. I do.

3 Q. And you responded to Mr. Warren's e-mail, correct?

4 A. I did, although I don't see it on 411.

5 MR. CARSON: May I approach, Your Honor?

6 THE COURT: You may.

7 BY MR. CARSON:

8 Q. I'll give you what's marked as PX 532 for the record.

9 THE COURT: 532?

10 MR. CARSON: 532.

11 May I proceed, Your Honor?

12 THE COURT: Mine says 22. 532. All right, go ahead.

13 BY MR. CARSON:

14 Q. And this was your e-mail response to Mr. Warren. First he
15 forwarded -- his e-mail was to you and Mr. Levy, the president
16 of Turner, do you see that?

17 A. I do.

18 Q. And Mr. Levy responded, "Here we go, good info." Do you
19 see that?

20 A. I do.

21 Q. And Mr. Warren reminded you and Mr. Levy, "Let's not
22 forget they still had TBS and TNT on the air," do you see that?

23 A. I do.

24 Q. And your response to Mr. Warren was, "Good to get that
25 message circulating. Need the brass to have belief in our

1 leverage," do you see that?

2 A. I do.

3 Q. And when -- your reference to the brass there were the
4 people above you like Mr. Levy, correct?

5 A. Correct.

6 MR. CARSON: Your Honor, we move to admit PX 532 into
7 evidence?

8 MR. ORSINI: No objection under seal, Your Honor, the
9 numbers here DISH is claiming confidentiality over.

10 THE COURT: All right, be admitted under seal.

11 (Plaintiff's Exhibit No. 532 was received in evidence under
12 seal.)

13 BY MR. CARSON:

14 Q. Let's go to Cable One. Do you have the e-mail, your
15 Plaintiff's Exhibit 18 from your deposition in front of you?

16 A. The FierceCable blurb, correct?

17 Q. Correct, the one where Mr. Warren forwarded you the
18 article that said, "Subscriber losses will likely increase in
19 Q4 considering the quarter began on the first day of the
20 blackout."

21 THE COURT: What's the number of this?

22 MR. CARSON: This is -- well, we'll call this PX 533,
23 Your Honor.

24 THE COURT: Oh, this is something we don't have up
25 here?

1 MR. CARSON: No, you do. Mr. Orsini provided it to
2 you, it's the one that says 18 on the bottom.

3 THE COURT: Well, let's not get confused about this.
4 How many notations do we need?

5 MR. CARSON: It was the Deposition Exhibit 18, we can
6 mark it with another orange sticker that says PX 533 if that
7 would help the record.

8 MR. ORSINI: Your Honor, if I may, I marked it for
9 identification, identification only to refresh the witnesses.

10 THE COURT: Yes, it wasn't admitted.

11 MR. ORSINI: That's correct, it was marked for
12 identification as Defendant's 927.

13 MR. CARSON: 927?

14 THE COURT: This is the one that says's Plaintiff's
15 Exhibit 18?

16 MR. CARSON: Yes. So DX 927, Your Honor.

17 THE COURT: DX 927. All right.

18 MR. CARSON: And for the record, then, we move to
19 admit DX 927 into evidence, Your Honor.

20 THE COURT: Any objection?

21 MR. ORSINI: We do have an objection, Your Honor, as
22 to this coming in as substantive evidence.

23 THE COURT: Okay, you can approach.

24 (Sealed Bench Conference.)

25 MR. ORSINI:

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THE COURT:

MR. ORSINI:

MR. CARSON:

THE COURT:

MR. CARSON:

(Open court.)

THE COURT: You may proceed consistent with the
discussions at the bench.

BY MR. CARSON:

1 Q. Quick question, Mr. Breland, on DX 0927. Your comment,
2 "Going to be interesting to see fourth quarter," do you see
3 that?

4 A. I do.

5 Q. And that was a reference to the reported subscriber losses
6 that Cable One had as a result of the blackout with Turner,
7 correct?

8 A. Correct. If this was a third quarter, I was just
9 pondering what would a fourth quarter bring.

10 Q. And your reference to the fourth quarter was tied to the
11 reference in the information that Mr. Warren sent you
12 highlighting that the subscriber losses might increase will
13 likely increase in the fourth quarter, true?

14 A. I don't know what would happen. I'm simply saying it
15 would be interesting to see subscriber loss or no loss.

16 Q. Thank you, put that aside.

17 A. (Witness complies.)

18 Q. Now, with Cable One, you said it came down to the last day
19 just like every other negotiation since 2010, do you remember
20 that?

21 A. I do.

22 Q. Now, you could have extended Cable One's contract for, say
23 a month, true?

24 A. True.

25 Q. And you have extended contracts that are set to expire all

1 the time, right?

2 A. True.

3 Q. But instead, you -- well, you didn't extend with Cable
4 One, right?

5 A. We did, we extended until October 1st.

6 Q. So you gave them another twelve hours, right?

7 A. I'm sure we would have taken as much time as we could
8 possibly get. The rates don't change until January. I would
9 welcome more time.

10 Q. But you didn't give an extension to January, you took them
11 dark the next day, true?

12 A. They took our networks dark.

13 Q. And the three networks that were still up, you took them
14 dark after your twelve hour extension, fair?

15 A. That's correct, if they wanted another extension, I would
16 have given them another extension.

17 Q. Can you turn to PX 146.

18 A. (Witness complies.)

19 Q. And this was the e-mail about the charter extension to
20 April 2017, right?

21 A. That's correct.

22 Q. And you see at the bottom you're writing to Mr. Martin,
23 you believe his relationship with Mr. Rutledge and personal
24 assurance on how we run our business factored into the
25 confessions he offered, do you see that?

1 A. I do.

2 Q. And so Charter made concessions to Turner in order to
3 extend the carriage agreement, correct?

4 A. I wouldn't consider based on some of the requests they
5 made to be anything that we would consider so I wouldn't call
6 it necessarily a concession if it was something I wouldn't
7 consider, but they did agree to take our rates into 2017.

8 Q. And that was your word, the concessions that Charter
9 offered, right?

10 A. Yes, and I wanted to amend my statement to say they took
11 the rates.

12 Q. And not only that, but in the second bullet under the
13 increased rates that Charter paid in order to avoid going dark,
14 Charter -- you wrote, "Charter surrendered under demand to
15 capture all more favorable terms and conditions," do you see
16 that?

17 A. I do.

18 Q. So Charter wanted an MFN on terms and conditions?

19 A. Every term and condition in the contract.

20 Q. And they surrendered on that demand, true?

21 A. That is the word I used.

22 Q. Okay. Put that the aside.

23 A. (Witness complies.)

24 Q. Now, you talked about the explosion of content since 2010
25 and the change in the industry dynamics with your counsel,

1 true?

2 A. True.

3 Q. And you indicated that the change in the industry dynamics
4 has upped the intensity on you in negotiations, true?

5 A. True.

6 Q. Can you take a look at PX 123 and go to page 9.

7 A. (Witness complies.)

8 Q. And this is that executive summary slide we looked at
9 before with the bar charts of the increasing revenues over time
10 for Turner?

11 A. Yes, I recall.

12 Q. And there's a row under the bar charts that says, "TCD
13 rate increase percentage," do you see that?

14 A. I do.

15 Q. And the first two years indicated there 2016 and 2017, do
16 you so those?

17 A. I do.

18 Q. So in the context of the explosion of content you were
19 able to secure these double digit rate increases for Turner's
20 content, correct?

21 A. That's correct.

22 Q. You can put that aside.

23 A. (Witness complies.)

24 Q. You talked about YouTube. And you recall testifying that
25 YouTube signed up for Turner content and launched Turner this

1 year, right?

2 A. That's correct.

3 Q. You're aware that YouTube raised its prices in connection
4 with the acquisition of Turner content?

5 A. Yes, I believe I read that in the trade.

6 Q. And Mr. Orsini asked you about Turner wanting to be on
7 every distribution platform, do you remember that?

8 A. I do.

9 Q. And you said that Turner wants every distributor to be
10 successful, do you remember that?

11 A. That carries our content, yes, I do.

12 Q. Do you know whether AT&T wants every distributor to be
13 successful?

14 A. I can't protest to know any of AT&T's business.

15 Q. You said Turner was looking at skinny bundles and wanted
16 to be kind of the anchor tenant of any new skinny bundle, do
17 you remember that?

18 A. I remember the research saying anchor tenant, yes.

19 Q. Do you know whether AT&T wants to support skinny bundles
20 in the future?

21 A. I've had no conversations with AT&T on their plans going
22 forward.

23 Q. You testified that distributors can license just one
24 Turner network, do you remember that?

25 A. That's correct.

1 Q. There are no major MVPDs that license just one Turner
2 network, correct?

3 A. That's correct.

4 Q. If you can flip to PX 144. And go back to page 121.

5 A. 144, 121?

6 Q. Yes, and this is the slide from the long range plan that
7 shows the past network drops, do you see that?

8 A. I do.

9 Q. And if I heard you right, you said the longest Turner
10 blackout was five weeks with DISH, right?

11 A. On Court TV, that is correct.

12 Q. But that wasn't correct, was it? If you go down to Cable
13 One with Court TV, it says ten months, do you see that?

14 A. I do.

15 Q. So the Court TV drop of -- with Cable One of ten months,
16 that was, in fact, the longest drop that Turner experienced,
17 true?

18 A. That was. I was making reference to the last five years,
19 but you were correct on this chart, I misread that, ten months.

20 Q. Thank you, you can put that aside.

21 A. (Witness complies.)

22 Q. You testified that Turner tries to negotiate all of its
23 networks at the same time because it's more efficient?

24 A. Correct.

25 Q. But it's not just efficient, it gives Turner increased

1 leverage in bargaining to have all of its networks coterminous
2 with each other, correct?

3 A. I would say the more I have on the table, it improves,
4 yes.

5 Q. Was that -- did that provide you any leverage with -- was
6 that a goal of yours in the DISH negotiations that you
7 discussed?

8 A. No.

9 Q. Do you know whether Turner became coterminous all of its
10 networks as a result of the DISH negotiations?

11 A. We did.

12 Q. Will it help in the future with DISH to have Turner being
13 coterminous with DISH?

14 A. It might, or perhaps Charlie Ergen sees something I don't
15 and the leverage swings to him because all my networks are up
16 at once.

17 Q. Was making all of Turner networks coterminous one of the
18 most controversial issues in the Comcast renewal in 2015?

19 A. I don't believe so. It was a pretty even keeled
20 negotiation.

21 MR. CARSON: May I approach, Your Honor?

22 THE COURT: You may.

23 (Pause.)

24 MR. CARSON: Your Honor, we've marked for
25 identification PX 534.

1 BY MR. CARSON:

2 Q. Mr. Breland, to yourself, if you could read the first line
3 of the second paragraph of PX 534 and let me know when you're
4 done.

5 A. I'm done.

6 Q. And let me ask you again, was making all Turner networks
7 coterminous one of the most controversial issues in the Comcast
8 renewal in late 2015?

9 A. I see, yes, but two years ago I used the word.

10 Q. And was getting the Turner networks coterminous a
11 tremendous advantage to Turner?

12 A. I see that written here, yes.

13 MR. CARSON: Your Honor, we move to admit PX 534?

14 MR. ORSINI: No objection, Your Honor.

15 THE COURT: Admitted.

16 (Plaintiff's Exhibit PX 534 was received in evidence.)

17 BY MR. CARSON:

18 Q. You can put that aside.

19 A. (Witness complies.)

20 BY MR. CARSON:

21 Q. Mr. Breland, you testified about a catch-up period that
22 Turner went through in recent years with respect to rate
23 increases?

24 A. That's correct.

25 Q. And that catch-up period meant that Turner was able to

1 secure double digit rate increases for its networks, true?

2 A. That's correct, we thought we were behind with CNN,
3 Cartoon Network and truTV.

4 Q. And some of those price increases were in the upper double
5 digits that we saw in an earlier exhibit, true?

6 A. I believe there was truTV when that was in the upper
7 double digits.

8 Q. And there was TBS and TNT that were kind of in the half
9 the mid-double digits, do you remember those?

10 A. I do.

11 Q. And that truTV rate increase with Time Warner cable, that
12 was not when Time Warner cable had already been spun off from
13 Time Warner at the time, right?

14 A. I believe so.

15 Q. And so that was an arm's length transaction with Time
16 Warner cable as a separate company, true?

17 A. That's correct.

18 Q. And Turner was able to secure those rate increases from
19 Time Warner cable and others because it had the bargaining
20 leverage to impose those price increases, true?

21 A. I'm hoping we also brought value in our product and
22 benefits such as video on demand and other pieces to the table,
23 yes.

24 Q. You mentioned you wouldn't want to go dark during the NCAA
25 tournament because you wouldn't want to anger the NCAA, do you

1 remember that?

2 A. That would possibly be one of the outcomes, that's
3 correct.

4 Q. As part of your DISH negotiations, Turner went to the NCAA
5 to get approval for the language that Turner would use in any
6 kind of blackout marketing during any potential blackout with
7 DISH, true?

8 A. I believe that's true. I did not do that personally nor
9 my team, that would have probably come to the sports division.

10 Q. I think I asked you in your deposition whether Turner
11 reached out to the NCA [sic], and you heard back from, I think
12 Ms. Mirgorod on the NCA's approval of the scroll language at
13 the bottom of the screen for the potential DISH blackout, do
14 you remember that?

15 A. I believe that's correct, yes.

16 Q. So your team was involved in making sure that the NCAA was
17 aware that DISH, that Turner might go dark with DISH during the
18 NCA tournament, true?

19 A. No, I don't believe Ms. Mirgorod had those conversations,
20 she was probably conveying the message from Turner sports.

21 Q. But your team was aware of the conversations with the NCA
22 over the approval of any blackout related marketing, true?

23 A. Yes.

24 Q. And you refer to the ability of Turner to go dark during
25 the NCA tournament as Turner's NCAA leverage, true?

1 A. That's true.

2 Q. And you use that term because setting a contract to expire
3 during the middle of March would give Turner leverage because a
4 distributor would not want to go dark in the middle of the
5 tournament, right?

6 A. That is one possibility or the leverage could swing the
7 other way and the affiliate wants to go dark and cause me
8 problems with others. I'm just saying that the door swings two
9 ways. So I have to be cognizant of that if I'm going to put
10 more popular programming in harm's way.

11 Q. And your use of the -- well, you use the term NCAA
12 leverage, true?

13 A. True.

14 Q. And for the next fifteen years Turner will have NCAA
15 leverage, true?

16 A. If it's leveraged during that fifteen years, yes.

17 Q. You talked about -- you testified about Sony, do you
18 remember that?

19 A. I do.

20 Q. You testified that Sony paid a slight differential in
21 rates when it entered as a new virtual MVPD, do you remember
22 that?

23 A. I do.

24 Q. But the premium that Sony paid wasn't slight, was it?

25 A. I don't remember the exact percentage. I do know,

1 according to certain MVPDs who have shared that they have seen,
2 based on what they thought they were going to get, a hundred to
3 two hundred percent increases based on rates from others.

4 Q. So your testimony is that Sony thought that it would get a
5 hundred to two hundred percent premium above?

6 A. No, I'm saying that I look at it as a slight compared to
7 what I had heard others had been asking Sony and other new
8 entrants to pay over time. Same thing with Telco, same thing
9 with DDS.

10 MR. CARSON: May I approach, Your Honor?

11 THE COURT: Okay.

12 MR. CARSON: Your Honor, I've handed up what's been
13 marked as PX 535.

14 May I proceed, Your Honor?

15 THE COURT: What do you want to do?

16 MR. CARSON: So I'd like to refresh his recollection.
17 He's indicated he did not remember.

18 THE COURT: Read it to himself.

19 MR. CARSON: Okay.

20 BY MR. CARSON:

21 Q. So, Mr. Breland, if you can look at your e-mail from March
22 13th, 2015 to Mr. Washington of the last -- read the last
23 paragraph to yourself, starting with, "From A." And let me
24 know when you're done?

25 A. I'm done. I'm done.

1 Q. The rate premiums that Sony paid in 2015 as a new entrant
2 were not slight, were they?

3 A. I don't know what the market would necessarily bear. I do
4 notice that it came down ten percent the following year.

5 Q. The rate listed there in that paragraph, that's the -- for
6 2015, that's the premium that Sony paid for that -- the year
7 that it entered, true?

8 A. That is correct. That is with no subscribers.

9 Q. And then the -- the premium that was paid -- Sony paid in
10 2016 is listed in the -- right after 2015, right?

11 A. Correct, and it came down ten percent from the 15 number.
12 My point being that you start and you earn great benefits as
13 you go, and time moves in the contract.

14 MR. CARSON: Your Honor, we move to admit PX 535?

15 THE COURT: Admit?

16 MR. CARSON: Yes.

17 MR. ORSINI: No objection, Your Honor.

18 THE COURT: You can approach.

19 (Sealed Bench Conference.)

20 THE COURT:

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22 MR. CARSON:

23 THE COURT:

24 MR. CARSON:

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THE COURT:

MR. ORSINI:

MR. CARSON:

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MR. CARSON:

(Open court.)

MR. CARSON: May I proceed, Your Honor?

THE COURT: Go ahead.

MR. CARSON: And for the record, is PX 535 admitted?

THE COURT: It's admitted.

(Plaintiff's Exhibit No. PX 535 was received in evidence.)

BY MR. CARSON:

1 Q. Mr. Breland, every new virtual MVPD could pay the premium
2 that Sony was paying in 2015, true?

3 A. They could have, I'm not sure where they all ended up.

4 Q. Well, these are the rate premiums that Sony paid, true?

5 A. That's correct.

6 Q. And you wouldn't characterize those as slight, would you?

7 A. When you're starting with no subs, it's not a big impact
8 to -- to the overall expense. In other words, this isn't a --
9 I won't say the number, but the percentages and across a
10 million subscribers, for example, or two hundred million or two
11 million, three million.

12 So yes, I understand that it's a percentage differential
13 and this told me the market would bear the price and Sony was
14 prepared to pay.

15 Q. And you were able to impose that rate premium on Sony,
16 correct?

17 A. Yes, but again, I think it's important to point out that
18 we didn't do this and say I'll see you when your deal's up, we
19 already built in a benefit in the second year the drop in ten
20 percent from this number.

21 MR. CARSON: Okay. That's all I have. Thank you,
22 Your Honor. Thank you for your time, sir.

23 THE WITNESS: Thank you.

24 MR. ORSINI: No questions, Your Honor.

25 THE COURT: You're excused, you may step down.

1 (Witness excused.)

2 THE COURT: Call your next witness.

3 MR. SCHWINGLER: Peter Schwingler for United States,
4 Your Honor.

5 THE COURT: Who?

6 MR. SCHWINGLER: Peter Schwingler. We're calling
7 Richard Warren as an adverse party witness.

8 THE DEPUTY CLERK: Would you raise your hand?

9 RICHARD WARREN, GOVERNMENT WITNESS, SWORN

10 MR. SCHWINGLER: May I proceed, Your Honor?

11 THE COURT: Yes.

12 DIRECT EXAMINATION

13 BY MR. SCHWINGLER:

14 Q. Good afternoon, Mr. Warren. Would you please state your
15 name for the record?

16 A. Richard Warren.

17 Q. Mr. Warren, you're the current president of Turner Content
18 Distribution; is that correct?

19 A. I am.

20 Q. You took over from Mr. Breland in June of last year?

21 A. That's correct.

22 Q. And before that, you were executive vice-president of
23 content distribution strategy, correct?

24 A. That's correct.

25 Q. And when you were in that role you were also an attorney

1 in Turner's general counsel's office, correct?

2 A. I was in our legal and business affairs department, yes.

3 Q. And as executive VP of content distribution and strategy,
4 you were involved in affiliate renewal negotiations for the
5 Turner networks?

6 A. Correct.

7 Q. And today you run the division of Turner that handles
8 those negotiations?

9 A. Yes, I manage the team that handles the negotiations, yes.

10 MR. SCHWINGLER: Your Honor, we have some binders
11 that may help the witness. May I hand them up?

12 THE COURT: Yes.

13 BY MR. SCHWINGLER:

14 Q. Mr. Warren, I direct your attention -- well, let me pause
15 for a moment. The Court has heard some testimony about
16 Turner's negotiation with DISH in 2015. I'd like to discuss
17 one document that you wrote in connection with that. And I'll
18 direct your attention to PX 411 in your binder.

19 MR. SCHWINGLER: And, Your Honor, this was admitted
20 during Mr. Breland's testimony this afternoon. And this is
21 under seal.

22 BY MR. SCHWINGLER:

23 Q. Are you there, sir?

24 A. I am.

25 Q. Mr. Warren, this is an e-mail from you to David Levy and

1 Mr. Breland on March 10 of 2015, correct?

2 A. Yes, sir.

3 Q. And you copied Donna Northington, correct?

4 A. I did.

5 Q. Ms. Northington is one of your direct reports, right?

6 A. At the time she was not, but she currently is, yes.

7 Q. And attached to the e-mail in this exhibit is a graph that

8 Ms. Northington prepared at your request; is that right?

9 A. If you would give me one moment.

10 Yes, as I recall, she did.

11 Q. And this was at your request, correct?

12 A. I had requested that she furnish some subtrend data, and

13 she put it into a chart form, yes.

14 Q. I'd like to discuss the context of this exhibit. So at
15 this point in March 2015, Turner was negotiating with DISH for
16 all of the Turner networks, correct?

17 A. Yeah, we had gone off the air and came back, we resumed
18 being back on the air, and we were negotiating -- we were back
19 up for a short period of time, and we were negotiating again
20 for a long term deal.

21 Q. And my question, sir, is simply at this time you were
22 negotiating with DISH for all of the Turner networks, correct?

23 A. Correct.

24 Q. And as you mentioned, the previous fall some of the Turner
25 networks had gone dark with DISH for about a month, correct?

1 A. That's correct.

2 Q. And after Turner's partial blackout with DISH ended, DISH
3 then had another blackout, this time with Fox, correct?

4 A. Yes.

5 Q. And so now fast-forward to March 2015, your team had
6 informed you that DISH had a significant subscriber loss a few
7 months earlier, correct?

8 A. My team had indicated today me that, as I said here, DISH
9 lost a certain number of subscribers, yes.

10 Q. And you asked Ms. Northington to prepare a graph to map
11 the fallout, correct?

12 A. That's my recollection, yes.

13 Q. You wanted a graph so you could see subscriber trends and
14 draw conclusions about the reasons for those trends; is that
15 right?

16 A. I wanted to see trends both historical and current so that
17 we could be thinking about what might have caused those trends,
18 yes.

19 Q. And my question, sir, was you wanted the graph so you
20 could draw conclusions about the reasons for those trends?

21 A. I don't know if I would say conclusions, but certainly
22 hypothesize and think about what may have caused those trends,
23 yes.

24 Q. It may help to take a look at your deposition transcript.

25 MR. SCHWINGLER: Your Honor, may I hand up binders

1 with the transcripts?

2 THE COURT: Hand him his.

3 THE WITNESS: Thank you.

4 MR. SCHWINGLER: And, Your Honor, Mr. Warren's
5 transcripts have been marked for identification as PX 527,
6 that's the individual transcript, and PX 528 for the 30(b)(6).

7 BY MR. SCHWINGLER:

8 Q. And, Mr. Warren, I'll direct your attention to your
9 individual deposition transcript PX 527 and page 97, 4 through
10 21. And I asked you the following question.

11 A. I'm sorry, can you just give me one second to get there?

12 Q. Absolutely. Page 97, lines 4 through 21.

13 A. Okay, I'm now with you.

14 Q. "Question: What do you mean by trending data?"

15 "Answer: So what I meant there was month by
16 month payment backup. And when I was asking Donna
17 earlier is this accurate, I wanted to know really what
18 it was based on. And I don't get into the weeds on
19 payment backup, but I wanted some assurance that what
20 I would be looking at was as reasonably accurate as we
21 could have at the time.

22 "So what I wanted to do, and I think I said it in
23 here, perhaps a graph or something that illustrates it
24 so that we could look at month over month and see
25 subtrends and draw some conclusions as best we could

1 about the reason for those trends."

2 And I asked you that question and you gave that answer at
3 your deposition, correct?

4 A. I did, and later on, sir, I did say so we could interpret
5 the data as best as we could based on that information. But
6 yes, we were drawing some, either conclusions or
7 interpretations based on that data.

8 Q. If you could set your deposition aside and return to PX
9 411. PX 411, your e-mail conveys your conclusions to your
10 superiors, correct?

11 A. Yes, my e-mail gives my superiors my sort of view in
12 posturing on what was occurring at the time.

13 Q. Sir, my question is, PX 411 conveys your conclusions to
14 your superiors?

15 A. Again, it's my -- PX 411, that e-mail conveys my
16 interpretation, and what I was trying to position to them
17 internally, yes.

18 Q. Why don't we take a look at what you wrote in the e-mail.
19 In the first sentence you informed your superiors that DISH had
20 a massive subscriber loss a few months earlier, correct?

21 A. I was, yes, referencing the Fox blackout, yes, sir.

22 Q. The word you used was "massive," correct?

23 A. I did.

24 Q. You then wrote, "I believe that this demonstrates that as
25 a result of going dark with the Turner networks, we generated a

1 downward spiral in terms of sub loss and as a consequence going
2 dark with Fox had and even more pronounced impact on the DISH
3 sub base." Do you so he that?

4 A. I do.

5 Q. And by going dark with the Turner networks, you were
6 referring to the partial blackout the previous fall, correct?

7 A. I was referring to the period of time that we were off the
8 air with DISH for several of our networks, yes.

9 Q. And turning to the next sentence, first you wrote, "What
10 this means is that we have massive power here." Do you see
11 that?

12 A. I do.

13 Q. And when you use the phrase, "we have massive power here,"
14 you were referring to negotiations with DISH, correct?

15 A. Well, I was referring to the atmosphere as to what was
16 going on, and that my team and particularly my superiors should
17 be thinking about what was in DISH's mind at the time, having
18 gone off the air with Fox as well. And as I said further in
19 here, I knew that we didn't want to be de-leveraged. And I was
20 worried that people internally, particularly my bosses, would
21 not understand what was going on on the ground level and would
22 be making decisions that I thought would be problematic for our
23 business, in large measure because they were things we hadn't
24 done and also from an MFN perspective that it would travel to
25 other deals.

1 Q. Respectfully, sir, you will have your opportunity on cross
2 to explain more.

3 My question is simply this e-mail was about your
4 negotiations with DISH, correct?

5 A. Yes, sir.

6 Q. And you went on to explain, "Among other things, they are
7 already hurting. The impact of going dark with the Turner
8 networks yet again will be particularly problematic for them."
9 Do you see that?

10 A. That's what I wrote, yes.

11 Q. DISH was already hurting because of the previous
12 blackouts, right?

13 A. I was referencing the Fox blackout that, yes, I was
14 referencing Fox.

15 Q. You were also referencing the prior blackout with the
16 Turner networks, that's very clear from the face of your
17 e-mail, correct?

18 A. I was referencing it along with data that indicated the
19 sub loss for both blackouts, yes.

20 Q. You ended the sentence by stating, "Removing our networks
21 from the Sling TV product will be terrible for DISH's
22 business," do you see THAT?

23 A. Yes, again positioning for my bosses, but yes.

24 Q. So my question is, did you write, "Removing our networks
25 from the Sling TV product will be terrible for DISH's

1 business"?

2 A. I did.

3 Q. And losing Turner would have been terrible for DISH and
4 for Sling because Sling was relatively new in the market at
5 that time, correct?

6 A. Again, I was positioning for my bosses but that was
7 certainly something that I thought we should have been
8 contemplating whether DISH would want to go and take us dark
9 again, yes.

10 Q. Sir, my question is the reason losing Turner from the
11 Sling TV product would have been terrible for DISH's business
12 was because Sling was relatively new in the market at that
13 time?

14 A. I was trying to understand from a Sling/DISH position
15 whether another customer disruption would be something they
16 would be thinking about yes.

17 Q. And this was because they were relatively new at the time,
18 correct?

19 A. They were relatively new nascent in the marketplace, yes?

20 Q. And at that time --

21 THE COURT: All right, we're going to take the
22 evening recess.

23 You're a witness under oath in the case.

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: So that means you're not allowed to

1 discuss your testimony so far or what it might be when you
2 return tomorrow morning at 10:30 with anyone, including your
3 attorney.

4 THE WITNESS: Yes, Your Honor.

5 THE COURT: Anyone, you have to be able to say you
6 didn't discuss it with anyone.

7 THE WITNESS: Yes Your Honor.

8 THE COURT: All right.

9 THE WITNESS: Thank you.

10 THE COURT: You're excused. You can step down.

11 THE WITNESS: Thank you, sir.

12 (Witness excused.)

13 THE COURT: All right. How much more have you got?

14 MR. SCHWINGLER: Probably 25 minutes.

15 THE COURT: All right. And how long is the cross?

16 MR. ORSINI: Thirty to 40 minutes max, Your Honor.

17 THE COURT: All right. And then we're going with
18 Mr. Bewley, is that the next witness?

19 MR. CONRATH: Mr. Bewley is the next witness, Your
20 Honor.

21 THE COURT: All right.

22 MR. CONRATH: There will be confidentiality issues
23 with the next two witnesses. I have affidavits. If the Court
24 would like them now, I'd be glad to pass them up.

25 THE COURT: All right. You can leave those with my

1 deputy clerk.

2 MR. CONRATH: I will.

3 THE COURT: Now, that should take the rest of --
4 pretty much the rest of the day, although Mr. Torres might be
5 able to fit in at the end, I think. Possibly.

6 MR. CONRATH: I think it's Mr. Bewley,
7 Mr. Montemango, Mr. Torres, and so we may get to Mr. Torres.

8 MR. PETROCELLI: Well, he's available, Your Honor.

9 THE COURT: He's available?

10 MR. PETROCELLI: Yeah, he's one of our people. We're
11 obviously going to have to have a discussion with you tomorrow
12 about this confidentiality issue.

13 THE COURT: All right. We can deal with that.

14 MR. PETROCELLI: Okay.

15 THE COURT: 10:30 to 5:30 tomorrow.

16 MR. PETROCELLI: Right.

17 THE COURT: Any other issues?

18 MR. PETROCELLI: No, thank you.

19 MR. CONRATH: Thank you.

20 (Proceedings concluded at 5:06 p.m.)

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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.

/s/Crystal M. Pilgrim, RPR, FCRR

Date: April 3, 2018