

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CV No. 17-2511
vs.	:	
	:	Washington, D.C.
	:	Tuesday, April 17, 2018
AT&T, INC., ET AL.,	:	11:00 a.m.
	:	
	:	Day 15
Defendants.	:	
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MORNING SESSION  
TRANSCRIPT OF BENCH TRIAL  
BEFORE THE HONORABLE RICHARD J. LEON  
UNITED STATES DISTRICT SENIOR JUDGE

APPEARANCES:

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On behalf of the Defense:

Peter E. Rossi

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By Mr. Scheele

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On behalf of the Government:

Jim Holanda

By Mr. Conrath

2904

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

2 THE COURT: You can sit where you were. You can go  
3 back to where you were.

4 THE WITNESS: Okay.

5 THE DEPUTY CLERK: Good morning, Your Honor.

6 This is civil action 17-2511, United States versus AT&T,  
7 Inc, et al, DirecTV Group Holding and Time Warner, Inc.

8 I'm going to ask counsel to please approach the lectern  
9 and identify yourselves for the record.

10 MR. SCHEELE: Good morning, Your Honor.

11 Scott Scheele appearing on behalf the United States.

12 THE COURT: Welcome.

13 MR. HEIPP: Good morning, Your Honor, Justin Heipp  
14 for the United States.

15 THE COURT: Welcome.

16 MR. WELSH: Good morning, Your Honor.

17 Eric Welsh for the United States.

18 THE COURT: Welcome.

19 MR. WELSH: Thank you.

20 MR. CONRATH: Good morning, Your Honor.

21 Craig Conrath for the United States.

22 THE COURT: Welcome back.

23 MR. CONRATH: Thank you.

24 MS. LINDGRENSAVAGE: Good morning, Your Honor.

25 Cerin Lindgrensavage for the United States.

1 THE COURT: Welcome.

2 MR. KEMPF: Good morning, Your Honor.

3 Don Kempf for the United States.

4 THE COURT: Welcome.

5 MR. PETROCELLI: Good morning, Your Honor.

6 Daniel Petrocelli for defendants.

7 THE COURT: Welcome back.

8 MS. ROSEN: Good morning, Your Honor.

9 Katrina Robson for defendants.

10 THE COURT: Welcome back.

11 MR. OPPENHEIMER: Good morning, Your Honor.

12 Randy Oppenheimer for defendants.

13 THE COURT: Welcome back.

14 MR. WALTERS: Good morning, Your Honor.

15 Rob Walters here for AT&T and DirectTV.

16 THE COURT: Welcome.

17 MR. BARBUR: Good morning, Your Honor.

18 Peter Barbur for Time Warner.

19 THE COURT: Welcome.

20 MR. RAIFF: Good morning, Your Honor.

21 Mike Raiff for AT&T and DirectTV.

22 THE COURT: Good morning.

23 See counsel.

24 (Sealed bench conference.)

25 THE COURT:

1 MR. CONRATH:

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11 MR. PETROCELLI:

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4 MR. SCHEELE:

5 MR. BARBUR:

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7 MR. SCHEELE:

8 THE COURT:

9 (Open court.)

10 THE COURT: All right, well, we got that thing done,  
11 so start up again.

12 DEFENSE WITNESS PETER E. ROSSI, PREVIOUSLY SWORN

13 MR. SCHEELE: May I proceed, Your Honor?

14 THE COURT: YES.

15 MR. SCHEELE: Thank you.

16 CROSS EXAMINATION (Continued)

17 BY MR. SCHEELE:

18 Q. Good morning, Dr. Rossi?

19 A. Good morning.

20 Q. Reviewing your testimony from yesterday about the Altman  
21 Vilandrie study, it sounds like you're suggesting Charter one  
22 day in 2016 figured why don't we go out and flush \$800,000 and  
23 lots of our executives' time into an effort to create a  
24 simulation tool that is garbage.

25 Is that what your testimony is?



1 A. No, that's not my testimony.

2 Q. Do you think that Charter wanted a study that was riddled  
3 with errors?

4 A. No.

5 Q. And you come to your conclusions without having any  
6 background in this industry; isn't that right?

7 A. I have no background specifically in the  
8 telecommunications industry. Obviously, my background is in  
9 survey design analysis.

10 Q. Or the pay-TV industry?

11 A. Excuse me, in the pay-TV industry.

12 Q. But you would agree that Charter has some experience in  
13 the pay-TV industry wouldn't you?

14 A. Yes.

15 Q. Mr. Montemagno, Charter's leading negotiator, he has  
16 experience in that industry, doesn't he?

17 A. Yes, he has experience as a negotiator, yes.

18 Q. Are you aware that Mr. Montemagno came in and testified to  
19 this Court that he found the Altman study helpful when he was  
20 thinking about his negotiations for programs?

21 A. Programmers? I'm aware of some of his testimony. I'm not  
22 sure that's an accurate characterization.

23 Q. I'll read you the question and answer from the trial  
24 transcript?

25 A. Of his entire transcript?

1 Q. Page 249. Question, was this information helpful to you  
2 when you were thinking about your negotiations with the  
3 programmer at issue here?

4 Answer, yes. It was helpful.

5 Were you aware of that testimony?

6 A. I don't believe that characterizes his full testimony.

7 Q. And were you aware that Charter has incorporated the  
8 information from the Altman work into its internal studies?

9 A. I'm not aware of that.

10 Q. I'd like to shift gears a little bit, Dr. Rossi.

11 I want to talk with you a little bit about Sawtooth  
12 Software. You testified about Altman combining the results  
13 from two different types of study, the conjoint study and a  
14 Max-Diff study, right?

15 A. That's correct.

16 Q. And Altman did that using Sawtooth Software?

17 A. That's correct. Excuse me. Excuse me.

18 They did that with partially the Sawtooth Software. The  
19 combination was done outside of Sawtooth Software.

20 Q. Sawtooth Software was involved in combining those, right?

21 A. Not in combining, no.

22 Q. You have cited Sawtooth's technical manuals in your  
23 report, right?

24 A. I am aware of Sawtooth's technical manuals.

25 Q. And you're familiar with Sawtooth generally, right?

1 A. Yes, I am very familiar.

2 Q. Sawtooth is a commonly used program in survey analysis?

3 A. In certain types of survey analysis it is commonly used,  
4 yes.

5 Q. You actually I think testified on direct that you  
6 contributed, made some suggestions about the Sawtooth Software,  
7 isn't that right?

8 A. I think the correct way to say it is that some of the  
9 innovations that I developed as survey methodology have been  
10 incorporated into Sawtooth Software.

11 Q. Thank you.

12 The company that made Sawtooth has been around about 35  
13 years?

14 A. I, I --

15 Q. You're not sure?

16 A. At least 20.

17 Q. Okay. Are you aware that Sawtooth reports that it's been  
18 used to conduct more than 10,000 analyses by it's users each  
19 year?

20 A. Yes, I am.

21 Q. And Sawtooth allows a user to analyze Max-Diff results,  
22 right?

23 A. Yes, it does.

24 Q. Are you aware that in 2016 seventy percent of Sawtooth  
25 users reported using the Max-Diff functionality the prior year?

1 A. I'm not aware of that statistic. It doesn't surprise me.

2 Q. You're aware that Sawtooth produces technical manuals to  
3 instruct users on how to use the software, right?

4 A. Yes.

5 Q. But you didn't review any of those manuals in order to  
6 inform your opinions about how Altman had used Sawtooth  
7 Software in this case, did you?

8 A. I don't need to review those manuals. I know what's in  
9 Sawtooth Software.

10 Q. So the answer to my question is no, you did not review  
11 them?

12 A. I did not review specific manuals. I do not need to.

13 Q. I understand you don't feel you don't need to.

14 The answer to my question is no, you didn't review them?

15 A. I did not review the manuals, yes, that's correct.

16 Q. But in your report you cited a technical paper from  
17 Sawtooth that describes how to analyze Max-Diff results, didn't  
18 you?

19 A. I did, yes.

20 Q. And you criticized Altman for using Sawtooth as part of  
21 the conversion of Max-Diff scores into ratio based numbers,  
22 right?

23 A. No. Altman did not use Sawtooth to do that. It did it  
24 outside of Sawtooth.

25 It took inputs from Sawtooth and in their own program

1 modified them. This is not from Sawtooth.

2 Q. Are you aware that the Sawtooth technical manual that you  
3 cited in your report describes the exact same procedure that  
4 Altman used?

5 A. The procedure that Altman used is outside of Sawtooth  
6 Software and it's completely indefensible.

7 Q. Are you aware that academic journals in the medical  
8 profession have used Max-Diff rescaling procedure that Altman  
9 used?

10 A. You would have to show me the example.

11 What Altman did was try to convert Max-Diff scores into  
12 conjoint part-worths. That is impossible, logically impossible  
13 and incorrect.

14 What someone did in some medical journal, I don't know  
15 without having access to the journal article.

16 Q. Why don't we shift gears then.

17 You talked about Altman Vilandrie's use of set-top box  
18 data, right?

19 A. Set-top box data, that's one of the methods.

20 Q. You said that set-top box data can't be used to estimate  
21 subscriber losses unless a blackout is actually occurring,  
22 right?

23 A. There's no information at set top box data about the  
24 association between viewer concentration and switching which is  
25 how Altman Vilandrie uses it.

1 Q. So was the answer to my question yes?

2 A. Could you repeat your question, please?

3 Q. Sure.

4 You said that set-top box data can't be used to estimate  
5 subscriber losses unless a blackout is occurring?

6 A. That's not exactly correct.

7 What I said was you, that the link between viewing  
8 concentration and switching cannot be established using set-top  
9 box data alone.

10 Q. Are you aware of testimony in this trial from Cox that  
11 they used set-top box data to estimate how much leverage they  
12 have in program negotiations?

13 A. I am not aware of that specific testimony, no.

14 Q. Are you aware of testimony in this trial from Comcast that  
15 they use set-top box data to estimate subscriber losses from  
16 hypothetical blackouts?

17 A. I'm not aware of that testimony.

18 Q. Professor Rossi, you testified about how Altman changed  
19 its methodology for the Turner Networks in terms of its  
20 overall; is that right?

21 A. It changed its numbers, yes.

22 Q. And are you aware that according to Mr. Bewley's trial  
23 testimony this changed the methodology, took the Turner  
24 Networks out of a grouping of programmers, group 3, and created  
25 a more individually tailored estimate of the likely subscriber

1 loss just for the Turner Networks?

2 A. That's my understanding, yes.

3 Q. And prior to changing the methodology Altman Vilandrie's  
4 recommendation to Charter was that a blackout of Turner would  
5 result in a fourteen percent loss rate; isn't that right?

6 A. That's not quite correct.

7 Q. Are you aware of Mr. Bewley's testimony that prior to  
8 doing that, the recommendation was fourteen percent?

9 A. That's a different thing that you are saying. Yes, their  
10 recommendation was fourteen percent.

11 Q. Let me ask the question again so we're clear.

12 Prior to changing the methodology to this individually  
13 tailored methodology, Altman Vilanderie's recommendation to  
14 Charter was that a blackout of Turner would result in a  
15 fourteen percent loss rate, right?

16 A. Their recommended loss rate was fourteen percent prior to  
17 April 27th. Correct.

18 Q. Thank you.

19 And are you aware that Mr. Bewley from Altman Vilandrie  
20 testified in this trial that Altman made this change based on  
21 quantitative analysis?

22 A. Yeah, I don't know the basis for that analysis. They  
23 changed the numbers.

24 Q. Are you aware of that testimony?

25 A. I'm sure that's correct, but I do not, I'm not actually

1 aware of that specific statement. You used the term  
2 quantitative analysis.

3 Q. Are you aware that Mr. Bewley answered a question about  
4 quantitative analysis in that context?

5 A. I'm not aware of that. I don't recall at this point.

6 Q. Are you aware that Mr. Bewley testified that they made  
7 this change for the Turner channels to be more individually  
8 tailored first before they did it for other programmings close  
9 to a deadline?

10 A. I'm aware of that.

11 Q. And they did it related to Turner first because Turner was  
12 not quite exactly in group 3 or group 2, right; isn't that  
13 right?

14 A. I believe he testified to that affect without evidence.

15 Q. And are you aware that Altman Vilandrie later made the  
16 same change to provide for more individually tailored result?  
17 They made that change for all of the other programmers, isn't  
18 that right?

19 A. Without making material difference to any contract group  
20 except Turner, yes.

21 Q. And they delivered the results of that updated methodology  
22 to Charter six months later?

23 A. I believe in October, yes.

24 Q. And are you aware that Charter paid Altman Vilandrie more  
25 money in addition to it's original sum, it's original contract



1 sum beyond that original contract sum in order to refine its  
2 methodology and create the individually tailored methodology in  
3 October?

4 A. I don't know what they paid for. I know they paid an  
5 additional fee. I would not characterize this as refinement of  
6 a methodology.

7 I would characterize it as fudging numbers.

8 Q. Now you testified about Altman Vilandrie hard coding in  
9 your direct, right?

10 A. I did.

11 Q. You used the phrase hard coding?

12 A. That is actually not my phrase. That is a phrase from the  
13 email correspondence that is in evidence in this matter.

14 Q. I wasn't suggesting that you made it up.

15 I was just referring you, giving you contextually that  
16 phrase is a phrase that you used in your direct testimony,  
17 right?

18 A. That's correct.

19 Q. And prior to the hard coding the number representing the  
20 departure rate for Turner in an excel spread sheet was  
21 determined by a formula; isn't that right?

22 I'm trying to help the Court understand what we mean by  
23 hard coding.

24 So prior to what are you calling hard coding, the number  
25 representing that departure rate for Turner, that was

1 determined by a formula as opposed to being a number that was  
2 typed into the cell, right?

3 A. That's my understanding, correct.

4 Q. And that, the formula that underlied that cell prior to  
5 the, what we're calling hard coding, that was a formula that  
6 applied to group 3; isn't that right?

7 A. That's correct.

8 Q. And by hard coding essentially what you are meaning is  
9 that instead of that underlying formula for group 3  
10 determining what number appeared in that cell would determine  
11 what number appeared in that cell, they actually typed in nine  
12 percent; is that right?

13 A. I believe that's correct.

14 Q. And are you aware of the result of change in this  
15 methodology -- let me back up.

16 And that nine percent that they typed in, that was the  
17 result of their individually tailored methodology; isn't that  
18 right?

19 A. I wouldn't call it a methodology. You're right, it was a  
20 result of their treatment of Turner separately.

21 Q. And they didn't just, in other words, they didn't just  
22 make this nine percent up out of thin air. It was the result  
23 of a process. Whether you call it a methodology or not, I  
24 don't want to quibble with you, but it was the result of a  
25 process?

1 A. Virtually everything Altman Vilandrie did of consequence  
2 is a result of made up assumptions in my opinion.

3 Q. I understand that. That's not the question I asked you,  
4 Dr. Rossi.

5 Dr. Rossi, your counsel is going to have an opportunity to  
6 stand up and ask you questions on redirect.

7 If you would just answer my questions if you can simply,  
8 that would help us move along?

9 A. Certainly.

10 Q. So that nine percent that they manually plugged into the  
11 excel spread sheet, that was the result of a process that  
12 Altman Vilandrie, that individually tailoring process, right?

13 A. That's your characterization. My characterization is they  
14 altered the methodology specifically for Turner.

15 Q. And are you aware that as a result of this change to the  
16 methodology for Turner, Altman Vilandrie's recommendation to  
17 Charter for the appropriate loss rate for Turner actually went  
18 down from fourteen percent to nine percent?

19 A. Their recommended change from fourteen to nine, that's  
20 correct.

21 Q. Thank you.

22 I want to shift gears and talk with you about another  
23 topic.

24 Professor Rossi, you testified that using that nine percent  
25 subscriber loss rate Altman calculated a positive. I think the

1 phrase you used was a positive net present value to Charter if  
2 the Turner channels were dropped; isn't that right?

3 A. That's not my phrase. That's Altman Vilandrie's phrase  
4 from the slide deck.

5 Q. So just to clarify what that means, by net present value  
6 you mean when you testified about it on direct and presumably  
7 Altman Vilandrie meant that Altman Vilandrie was essentially  
8 telling Charter what Turner was worth. Is that a fair way to  
9 describe it?

10 A. No.

11 Q. Well, would you describe for us what net present value  
12 meant in that context?

13 A. It's an attempt to ask what would happen if they  
14 discontinued Turner financially in a net present value sense  
15 which is a discounted value of effectively savings minus losses  
16 over a five year horizon.

17 Q. When they were calculating that they were using that nine  
18 percent subscriber loss rate; is that right?

19 A. I believe that's correct.

20 Q. In essence they were essentially suggesting that with that  
21 nine percent subscriber loss rate, Charter was overpaying for  
22 Turner; isn't that fair?

23 A. Their fees, savings and the fees would exceed the loss of  
24 customers, that's correct.

25 Q. So if the subscriber loss rate were to decline from nine

1 percent to let's just say five percent, you would agree that  
2 Turner's value to Charter would also decline, right?

3 A. If the subscriber loss rate were to decline?

4 Q. Yes?

5 If the subscriber loss rate that was put through the  
6 methodology instead of being nine percent was five percent, you  
7 would assume that the value of Turner to Charter, you concluded  
8 that the value based on the Altman Vilandrie methodology, I'm  
9 not asking what you would conclude, but having reviewed the  
10 Altman Vilandrie methodology that the value of Turner to  
11 Charter would also decline, right?

12 A. The value to Turner? No, it would increase.

13 Q. So if the subscriber loss rate decreased --

14 A. If, excuse me. It would increase, excuse me. Yes, yes.

15 Q. Let me start again so we're clear, okay?

16 A. Yes.

17 Q. So if the subscriber loss rate declined from nine percent  
18 to let's say five percent, you would agree that Turner's value  
19 to Charter would also decline, right?

20 A. Yes.

21 Q. But you know Charter chose to keep Turner don't you?

22 A. Excuse me if I could.

23 Q. Absolutely?

24 A. In the way in which Altman Vilandrie was making that  
25 calculation.

1 Q. Yes, that's the question I was asking?

2 A. And focusing on that specific aspect of their business,  
3 yes.

4 Q. But you are aware that Charter chose to keep Turner  
5 though, right?

6 A. Yes, I am.

7 Q. So doesn't that suggest that the subscriber loss rate is  
8 unlikely to be any lower than the nine percent that Altman  
9 Vilandrie recommends?

10 A. No.

11 Q. Isn't it a likely explanation for why Turner has not  
12 dropped Turner is that because Charter thinks Turner is even  
13 more valuable than Altman Vilandrie thought it was?

14 A. You use the term likely. I would not say that's likely.  
15 It is one possible explanation.

16 Q. Are you aware that Charter testified in this trial that  
17 Turner was quote critically important content end quote?

18 A. I don't know what critically important content means.

19 Q. I didn't ask you that. I asked you if you were aware that  
20 Charter testified that Turner was quote critically important  
21 content?

22 A. No, I'm not.

23 Q. Are you aware that Cox testified that they consider most  
24 of the Turner Networks to be must have?

25 A. No, I'm not.

1 Q. Are you aware that Dish testified that TNT and TBS are  
2 important sports networks?

3 A. No, I'm not.

4 (Witness leaves the stand.)

5 (Sealed Bench conference.)

6 THE COURT:

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9 MR. SCHEELE:

10 THE COURT:

11 MR. SCHEELE:

12 THE COURT:

13 MR. SCHEELE:

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19 MR. BARBUR:

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9 MR. SCHEELE:

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18 THE COURT:

19 MR. SCHEELE:

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21 THE COURT:

22 MR. SCHEELE:

23 (Open court.)

24 THE COURT: Come on back up.

25 (Witness resumes the stand.)



1 BY MR. SCHEELE:

2 Q. Dr. Rossi, I'd like to shift gears again and talk with you  
3 about your evaluation of Professor Hauser's survey.

4 Before I do I want to make clear that when you're coming  
5 into this court here criticizing Dr. Hauser you didn't conduct  
6 a survey of your own did you?

7 A. I did not.

8 Q. You didn't conduct any interviews or do any pre-testing,  
9 did you?

10 A. No, I did not. I did not conduct a survey.

11 Q. You're not going, you are not providing testimony today  
12 about any conclusions you've drawn about the survey you've  
13 designed in this industry or anything like that?

14 A. No.

15 Q. You're just here today to criticize Dr. Hauser's and  
16 Altman Vilanderie's survey, right?

17 A. I'm here to review those surveys and to understand how  
18 they fit in with the rest of Professor Shapiro's calculations?  
19 Yes.

20 Q. So let's talk about what you and Professor Hauser agree  
21 on. You and Professor Hauser agree that a well designed survey  
22 start with qualitative research using interviews, right?

23 A. Yes.

24 Q. And you agree that the purpose of these interviews is to  
25 obtain a better understanding of how choices are made and the

1 language with which customers describe the products at issue,  
2 right?

3 A. Yes.

4 Q. These pre-survey qualitative interviews they don't need to  
5 involve representative samples do they?

6 A. That's correct.

7 Q. You agree that conducting those interviews was appropriate  
8 and useful part of survey design in general, right?

9 A. In general, yes.

10 Q. And Professor Hauser he also did a pre-test of his survey  
11 didn't he?

12 A. Of sort, yes.

13 Q. And you agree that in most instances it's important for a  
14 survey to be pre-tested, right?

15 A. Pre-testing is valuable, absolutely.

16 Q. And the goal of pre-testing is to make sure that a survey  
17 is using language that's understood by respondents and is  
18 non-biased and non-leading, right?

19 A. It can be part of the pre-test, yes.

20 Q. So the steps we've discussed pre-survey interviews and  
21 pre-testing both of which Professor Hauser did, they're  
22 intended to ensure that a survey does not lead respondents to  
23 answer in a specific manner, right?

24 A. I would say that pre-testing is mostly about  
25 understanding. It's very difficult to access bias from

1 pre-testing.

2 Q. So you submitted a report in the Anthem data breach  
3 litigation, did you not?

4 A. Yes, I did.

5 Q. And do you recall writing in that report that through the  
6 use of these pre-testing procedures you would ensure the survey  
7 is designed in a way that does not lead the respondents to  
8 answer in a specific manner?

9 A. Obviously I wrote that, yes.

10 Q. These practices, they're standard practices in survey  
11 research to avoid leading respondents to answer in a certain  
12 way, right?

13 A. Pre-testing is a standard practice in survey research for  
14 many reasons.

15 Q. Thank you, Dr. Rossi.

16 I want to shift gears again.

17 Yesterday you testified about the connection between  
18 intention scales and behavior, right?

19 A. Yes, I did.

20 Q. And you testified just again in our context in that regard  
21 you testified about an article where there was a .3 and .6  
22 correlation, right?

23 A. A range of correlations.

24 Q. A range of correlations and you talked about .3 and .6,  
25 right?

1 A. On average, yes.

2 Q. I want to ask you just a few questions about the academic  
3 literature that you were referring to.

4 I'd liked to talk about an article Professor Hauser cited  
5 and I think you said you may have cited it as well, but I'm not  
6 sure about that. This is the article about Morwitz, Steckel  
7 and Gupta?

8 A. Yes.

9 Q. Are you aware of the article I'm referring to?

10 A. Yes, I believe in the International Journal of  
11 Forecasting.

12 Q. In the Morwitz article cited by Dr. Hauser, that's a  
13 meta-analysis, which means it is a compilation of other  
14 articles, right?

15 A. It actually contains two meta-analyses, that's correct.

16 Q. And you testified again about the .3 and .6, was that in  
17 connection with this article?

18 A. Yes. I was trying to give a range of the averages that  
19 have been found in these meta-analysis.

20 Q. Let's just, I want to explain to the Court, hopefully you  
21 can explain to the Court, what a correlation of .3 and .6  
22 means?

23 A correlation of 1.0, that would be a perfect correlation,  
24 right?

25 A. It is a perfect linear association, yes.

1 Q. With the correlation between intent and behavior 1.0, you  
2 would expect intention to predict behavior just about every  
3 time wouldn't you?

4 A. Yes.

5 Q. And so let's take a look at that Morwitz article that's  
6 cited by Dr. Hauser.

7 MR. SCHEELE: May I approach, Your Honor?

8 THE COURT: You may.

9 MR. SCHEELE: May I approach the witness, Your Honor?

10 THE COURT: You may.

11 MR. SCHEELE: Your Honor, I have handed up what's  
12 been marked as Plaintiff's Exhibit 550 for identification.

13 A copy has been provided to defense counsel.

14 May I proceed?

15 THE COURT: You may.

16 MR. SCHEELE: Thank you, Your Honor.

17 I'll try to be brief. I didn't raise these academic  
18 articles, so.

19 THE COURT: I hope so.

20 MR. SCHEELE: Professor Rossi did.

21 BY MR. SCHEELE:

22 Q. I'd like you to turn, Dr. Rossi, to page 354 of the  
23 article. I'd like you to look down, let me know when you're  
24 there?

25 A. I'm here. I'm here.

1 Q. I'd liked you to look down the second column there on 354.  
2 If you look down that you see some correlations at the top,  
3 there's one 9.921, a little bit below .992, .975, .969, .929  
4 and so on?

5 A. .021, .233, .178.

6 Q. Again, Dr. Rossi, your counsel, this is the second time.  
7 Your counsel is going to have an opportunity to examine you.  
8 If you would just answer my questions, we move along a little  
9 faster.

10 A. Certainly.

11 Q. Do you see all of the correlations that I read to you, do  
12 you see those?

13 A. I do see. Those are some of the many correlations on this  
14 page.

15 Q. Thank you. You can set that aside.

16 The conclusion of that article is that intentions are more  
17 correlated with behavior when certain conditions are present,  
18 right?

19 A. There is that sub analysis, yes.

20 Q. And the article concluded that they're more correlated  
21 with consumer behavior when used with a variety, in a variety  
22 of circumstances including when they're used with existing  
23 products. I think you testified about this on direct. The  
24 existing products.

25 When they're used with specific brands, direct brands

1 rather than categories. Durable goods, short times between  
2 question and decision and multiple product options, right?

3 A. I believe that's correct.

4 Q. You would agree that pay-TV, that's not a new product is  
5 it?

6 A. No, the blackout is a new experience.

7 Q. And pay-TV that's a product that's familiar with almost a  
8 hundred million American households, isn't it?

9 A. Yes, various aspects of pay-TV, yes.

10 Q. And the Turner Networks and those logos that are presented  
11 in Professor Hauser's survey, they're not new are they?

12 A. No.

13 Q. You are aware that Professor Hauser's testimony in this  
14 Court where he said he went through all of those five factors,  
15 right? He went through all of those?

16 A. I did read that testimony, yes. I don't agree with it.

17 Q. I understand.

18 Other than the new product, is there anything you disagree  
19 with?

20 A. Yes.

21 Q. Well, I'm sure your counsel will have an opportunity to  
22 talk with you about that then.

23 You also testified on your direct about the Daniel Kahenman  
24 article, do you remember that?

25 A. Daniel Kahenman's Body of Research, yes.

1 Q. Body of Research.

2 I think you testified something to the effect that  
3 according to some of that research that people would  
4 systematically overestimate the probabilities of infrequent  
5 events; is that right?

6 A. Correct.

7 Q. Now according to Kahenman's work, he would overstate the  
8 probability of events like an earth quake or a flood, right?

9 A. Those are among the examples.

10 Q. You would agree that the, wouldn't you, that Kahenman's  
11 work is primarily focused on events that are external to the  
12 person estimating the probability, not that person's own  
13 intentions wouldn't you?

14 A. There is, that literature is vast. And this is a very  
15 influential figure in the literature.

16 I would say that the, virtually every possible combination  
17 of products, events, and personal versus out-sternal  
18 probability would have been used in that literature.

19 Q. So the literature includes earth quakes and floods. Can  
20 you provide an example where it involves the person's own  
21 intentions?

22 A. Yes. There has been a lot of studies of lotteries and  
23 gambling in that literature and people do, not expert gamblers  
24 of course, but the lay person tends to overestimate. Again,  
25 the probability of success in a gambling situation where a win



1 is at a low probability which is why people play slots.

2 Q. That's an example of a person's own intentions, their odds  
3 of winning something gambling?

4 A. Their assessments of probabilities.

5 Q. You provided an example yesterday of the odds of getting  
6 in an accident on the Baltimore Washington Parkway. That's  
7 external to you, right? That's not your own intentions?

8 A. It's my subjective assessment of it but it is an external  
9 event, correct.

10 Q. I want to talk to you now a little bit about AT&T's use of  
11 intention scales.

12 Are you aware that AT&T uses intention scales similar to  
13 the one Professor Hauser used in the ordinary course of their  
14 business?

15 A. I'm not aware of that and it would not surprise me.

16 MR. SCHEELE: I'd like to hand up a demonstrative,  
17 Your Honor.

18 May I approach?

19 THE COURT: You may.

20 MR. SCHEELE: May I approach the witness, Your Honor?

21 THE COURT: Yes.

22 MR. BARBUR: Your Honor, can we get a copy of the  
23 document on which this is based?

24 MR. SCHEELE: If you like, we can provide that to  
25 you.

1 MR. BARBUR: Seems to me this is, it's not on your  
2 witness list, on your exhibit list is it?

3 MR. SCHEELE: This is cross-examination. It's  
4 designed for impeachment.

5 Your Honor, I've provided a copy of what's been marked for  
6 identification purposes PX D 12 to defense counsel.

7 May I proceed?

8 And indeed, I believe as requested by defense counsel the  
9 underlying document is being provided; is that correct?

10 MR. HEIPP: It has been provided, that's correct.

11 MR. SCHEELE: It has been provided.

12 BY MR. SCHEELE:

13 Q. Dr. Rossi, on the top half of PX D 12 is an intentions  
14 scale that AT&T has used in its ordinary course of its  
15 business.

16 The question on that intention scale is how likely is it  
17 that you might consider becoming a DirecTV subscriber again at  
18 some point in the future?

19 And the question and your, Dr. Hauser's survey below uses  
20 that same term in the beginning. How likely are you to switch  
21 your TV provider on a scale from 1 to 99. Those look pretty  
22 similar don't they?

23 A. No, they do not.

24 Q. You said in your testimony yesterday, Dr. Rossi, that the  
25 juster scale typically is used for purchases but not switching;

1 is that right?

2 A. I have not seen an instance in my experience of it being  
3 used for switching.

4 Q. You cited a paper in your report in which the Juster scale  
5 was used to measure people's likelihood of losing jobs didn't  
6 you?

7 A. I'm not aware of that citation that you made.

8 Q. This is the Chandrashekar article?

9 A. Yes. I don't recall the contents of that particular  
10 article right at this point.

11 Q. Let's move are you are of a 2002 paper that uses the  
12 Juster scale to study customers switching in banking?

13 A. I just said I was not aware of the use of it in a  
14 switching context. That doesn't mean it hadn't been used.

15 Q. So you are not aware of it and you've never empirically  
16 tested the relationship between purchase probabilities scales  
17 and switching behavior, have you?

18 A. No. Other people have tested the empirical quality of the  
19 scale in terms of buying intentions. Not switching. You're  
20 right, I'm not aware of a particular analysis of that.

21 Q. I'd like to shift gears then, Dr. Rossi.

22 You testified that the difference between switching and  
23 purchasing is, comes down to essentially the switching costs;  
24 is that fair?

25 A. It's one aspect of it, yes. And an important aspect.

1 Q. But regardless of what switching costs we are talking  
2 about, the description of switching cost in Professor Hauser's  
3 survey is the same in the control condition and in the blackout  
4 condition, isn't it?

5 A. It is that description, that script about one aspect of  
6 switching costs, yes.

7 Q. And Professor Hauser's survey measured the switching from  
8 one distributor to another by looking at the difference between  
9 the control group and the blackout group, right? It was the  
10 difference?

11 A. He did.

12 Q. Thank you.

13 Dr. Rossi, you testified yesterday a little bit about the  
14 representativeness of Professor Hauser's survey; isn't that  
15 right?

16 A. I did.

17 Q. And you testified, you testified that in virtually all  
18 cases you have taken the position that internet surveys are not  
19 representative, right?

20 A. No, that's not what I said.

21 Q. Well, let me read. I just may have gotten, characterized  
22 it incorrectly, so let me read the question and answer that I'm  
23 referring to.

24 A. Certainly.

25 Q. The question was have you taken the position what the

1 results of your internet surveys were representative of the  
2 broader population?

3 The answer was in virtually all cases, no. In other words,  
4 I use the internet sample as an illustration of a method.

5 For example, in a patent case, excuse me, not a case, but  
6 the patent article, in a few cases I have asserted  
7 representatives but always after offering affirmative evidence  
8 that my sample was relative.

9 Is that a, did I get that right?

10 A. That's different than what you said in your question.

11 Q. Okay. Well then, I stand corrected.

12 But you have proposed using an internet panel in litigated  
13 cases in the past haven't you?

14 A. Yes, I have. All I have said is that Professor Hauser has  
15 not offered evidence of representativeness.

16 Q. You were retained in the Anthem breach data case, right?

17 A. I was.

18 Q. And in your expert report in that matter you said you had  
19 a great deal of experience with SSI, the internet panel, right?

20 A. I have had some experience with them, yes.

21 Q. And you characterized SSI as a high quality provider in  
22 that case, didn't you?

23 A. I'm not sure I used the term high quality provider, but I  
24 do believe it is a quality provider, yes.

25 Q. You were also an expert in the Tempur-Sealy litigation and

1 submitted a report there, right?

2 A. I did.

3 Q. In the Tempur-Sealy matter in order to accept the  
4 representativeness of an internet sample you compared the  
5 characteristics of that sample to the known characteristics of  
6 the population didn't you?

7 A. With respect to variables relevant to the matter of the  
8 survey which is about mattress purchasing. Not with respect to  
9 age and gender.

10 Q. Let's take a look at what you did in that matter.

11 MR. SCHEELE: May I approach, Your Honor?

12 THE COURT: You may.

13 MR. SCHEELE: May I approach the witness, Your Honor?

14 THE COURT: You may.

15 MR. SCHEELE: Thank you, Your Honor.

16 BY MR. SCHEELE:

17 Q. Dr. Rossi, I've handed you what's been marked as PX D 13.  
18 This is marked for identification purposes.

19 It is a section from one of your reports in Tempur-Sealy  
20 and Professor Hauser's trial testimony here.

21 MR. SCHEELE: May I proceed, Your Honor?

22 THE COURT: Uh-hmm.

23 BY MR. SCHEELE:

24 Q. Professor Hauser, reading from your report in Tempur-Sealy  
25 it says I would use a high quality internet base panel provider

1 as well as some demographic and appliance ownership questions  
2 to establish that my sample is representative and therefore  
3 projectable to the population of U.S. consumers; is that right?

4 A. I did say that, yes.

5 Q. And you wrote that?

6 A. Yes, of course I wrote that.

7 Q. In this trial Dr. Hauser was asked a similar line of  
8 questions. The question was did the sample that you ended up  
9 with, the market shares ended up with the market shares of the  
10 pay-TV providers match the market shares of the real world with  
11 the two share points?

12 Answer, that's right, yes. And the screen we ask people of  
13 course what their provider was.

14 So we have a statement of that and then we have publicly  
15 available data again which is itself an estimate but we have  
16 publicly available data of what shares are of the various  
17 providers and the two of those match up. They match up within  
18 two share points.

19 Were you aware that Professor Hauser testified that way?

20 A. I am aware that he testified to that.

21 Q. And that he had attempted to establish representativeness  
22 that way?

23 A. No, he didn't provide any evidence of that. It's not in  
24 his report or any of his backup materials.

25 Q. You are aware that you talked a little bit about SSI and

1 internet panels in general and some scepticism you had about  
2 them. You talked about the one responding to 1500 surveys in a  
3 month or something like that, right?

4 A. I did say that.

5 Q. Okay. But you're aware SSI does, has lots of procedures  
6 to prevent issues like that aren't you?

7 A. As I said, I was not giving that as an example of SSI but  
8 more generally about internet panels.

9 Q. In that event, I'm going to move on to the next topic.

10 You criticized Professor Hauser for not simply asking  
11 people to switch instead of first asking them whether they  
12 would consider switching; is that right?

13 I think you testified about that?

14 A. No. I told, I suggested that rather than using this two  
15 part question with this very confusing intent to switch scale  
16 that you might just ask people whether they would switch, yes.

17 Q. And so that two step question you're familiar with that  
18 two step approach. You are familiar with the survey chapter in  
19 the reference manual on Scientific Evidence published by the  
20 Federal Judicial Center?

21 A. Yes, I referred to that in my testimony yesterday.

22 Q. You agree that chapter encapsulates a fairly standard body  
23 of knowledge on surveys?

24 A. It does.

25 Q. And you cited that manual in the past, right?



1 A. I have.

2 Q. That chapter on the manual says that when faced with a  
3 direct question without a preliminary question quote,  
4 particularly one that provides response alternatives,  
5 respondent obligingly may supply an answer that, answer even if  
6 the respondent has no opinion.

7 Are you familiar with that?

8 A. It's, I paraphrased that in my direct testimony, yes.

9 Q. So you are aware that the manual recommends using a filter  
10 question to reduce guessing by quote by first asking the  
11 respondent if he or she has an opinion about the issue. And  
12 then asking end quote, then asking the substantive question of  
13 those who indicated they do have an opinion, yes?

14 A. Professor Hauser did not use a question.

15 Q. That's not what I asked.

16 I asked if you are aware of that phrase from the manual?

17 A. Yes, I am.

18 Q. You agree that filter questions are ways to discourage  
19 questioning, don't you?

20 A. They can be.

21 Q. But you're not sure of whether in any design you designed  
22 you ever used a filter question?

23 A. I'm not sure I have.

24 Q. You also testified yesterday about Professor Hauser's  
25 margin of error, correct?

1 A. Yes.

2 Q. That opinion wasn't in your report, was it?

3 A. I said that Professor Hauser failed to provide a measure  
4 of reliability in his survey and his margin of error was not in  
5 his report.

6 Q. So that's the extent of your opinion that he failed to  
7 provide it?

8 A. No. Subsequently Professor Hauser in his deposition  
9 testimony did provide a range of, a margin of error and I was  
10 simply commenting on that range that he provided in his  
11 deposition testimony is very wide, amount to about forty  
12 percent of his estimate.

13 Q. Are you aware that Professor Hauser did include a standard  
14 of error terms in his report?

15 A. It's called standard error, yes.

16 Q. And as you said, Professor Hauser testified about that,  
17 correct?

18 A. No. In his deposition testimony he was invited to compute  
19 a measure of reliability which was not in his report. And he  
20 did so.

21 Q. I wanted to ask you a little bit about the Turner logos  
22 that you had mentioned in the, in your direct testimony. That  
23 the use of those Turner logos, I think the term is focalism; is  
24 that right?

25 A. Can be one use of that, yes.

1 Q. So you criticized Professor Hauser's survey for putting  
2 too much emphasis on the blacked out Turner channels because it  
3 has too many of those logos, right?

4 A. He presented it six times.

5 Q. In your report you didn't mention anything about the size  
6 of the logos relative to the font or anything like that, did  
7 you?

8 A. I don't recall what I said about it. It's certainly true.

9 Q. So your concern is the number of times?

10 A. Both.

11 Q. Okay. You're aware that Professor Hauser did a pre-test  
12 in his survey, right? You testified about that earlier?

13 A. Yes.

14 Q. And you are aware that no one in Professor Hauser's  
15 pre-test reported that the survey questions were leading; isn't  
16 that right?

17 A. This is, it's not clear this is a conscious realization.  
18 But I am aware of the responses to one question at the end of  
19 the survey.

20 Q. And that was an open ended question, right?

21 A. It was.

22 Q. And but you didn't examine the responses to that open  
23 ended question in the three weeks that you formed your opinion  
24 in this matter?

25 A. I did look at some of them, yes.

1 Q. In your deposition you don't, do you recall testifying  
2 that you did not look at those?

3 A. No. In Professor Hauser's deposition he referred to some  
4 of those responses and I did follow up by looking at some of  
5 them.

6 Q. I see.

7 So based on your analysis of Professor Hauser's survey you  
8 are then aware that only three out of 1,600 survey respondents  
9 reported the survey was related at all to Turner; is that  
10 right?

11 A. That's my understanding, yes.

12 Q. What percentage of that?

13 A. It's a small percentage, less than one percent.

14 Q. It's less than .2 percent isn't it?

15 A. I'm sure you can do arithmetic.

16 Q. So even with all of those logos, less than .2 percent of  
17 survey respondents reported that the survey was related to  
18 Turner, right?

19 A. That's not a test of bias.

20 Q. I didn't ask your opinion on whether it was a test of  
21 bias. I'm asking you to confirm what you understand about --

22 A. That's my understanding, yes.

23 MR. SCHEELE: May I have the Court's indulgence for  
24 one moment? I'm about to wrap up I believe.

25 THE COURT: Yes.

1 (Pause.)

2 BY MR. SCHEELE:

3 Q. Professor Rossi, you worked with surveys as part of your  
4 academic work, right?

5 A. I have.

6 Q. But you've only designed a handful of surveys for  
7 businesses, right?

8 A. I don't know the exact number, but it's probably less than  
9 20, yes.

10 Q. Didn't you testify in your deposition it was three or four  
11 times?

12 A. I don't recall the number of times.

13 Q. Do you have any reason to doubt that you testified in your  
14 deposition that it was three or four times? We can look at it  
15 if you want?

16 A. No, I have no doubt of that.

17 Q. And you have never designed a survey for a company in the  
18 telecommunications industry, right?

19 A. That's correct.

20 Q. Or a media company?

21 A. That's correct.

22 Q. And you have never done research in the television  
23 industry?

24 A. Not specifically, no.

25 Q. And you have never done any research related in

1 negotiations between pay-TV distributors and networks, right?

2 A. No, I have not.

3 Q. In cases like this one when you have been retained to  
4 access the reliability of survey evidence is it fair to say  
5 that in the majority of those you concluded the survey was not  
6 reliable?

7 A. In the majority, yes, not all.

8 Q. Indeed, in your deposition you estimated that in about  
9 nine out of ten surveys you have analyzed you have concluded  
10 that the surveys or conclusions were not reliable; isn't that  
11 right?

12 A. That's correct.

13 Q. That's about ninety percent, isn't it?

14 A. That's correct.

15 Q. Nine out of ten?

16 A. That's correct.

17 Q. I'm not a numbers guy?

18 A. That's correct.

19 Q. In about three weeks time between the time when you were  
20 retained and when you completed your report, you were able to  
21 add these two surveys to your records, so now you're about  
22 eleven for twelve, right?

23 A. These errors are so obvious, it would take no time at all  
24 to assess the errors.

25 Q. Thank you, Dr. Rossi.

1 MR. SCHEELE: I don't have any further questions.

2 I would request again possibility of, before a break, a  
3 ten minute session under seal.

4 MR. BARBUR: Just a few questions, Professor Rossi.

5 REDIRECT EXAMINATION

6 BY MR. BARBUR:

7 Q. Mr. Scheele had confronted you with some testimony about  
8 Mr. Montemagno of Charter.

9 Do you recall that?

10 A. Yes, I do.

11 Q. I believe you said you thought it was incomplete or  
12 inaccurate or words to that effect?

13 A. Incomplete, certainly.

14 Q. Have you read Mr. Montemagno's testimony in this trial  
15 about the Altman Vilandrie survey?

16 A. Portions of it, yes.

17 Q. Are you aware that he said, and I'm now on page 1355 of  
18 the trial transcript. So even though you're the head of  
19 content negotiations you had no involvement in commissioning or  
20 generating that study; is that right?

21 Correct.

22 In fact, you never even heard of Altman Vilandrie before  
23 the last several months; isn't that right?

24 That's right.

25 And then on page 1356 he said you explained there don't you

1 that I don't recall it ever being explained to me how this came  
2 about, how it was commissioned, why, what the overall  
3 objectives are for.

4 Do you see that?

5 Yes.

6 Then on page 1357 he says but no one at Charter had ever  
7 conveyed to you that before that notwithstanding the fact that  
8 you were the head of content negotiations, nobody had ever  
9 explained that the primary purpose of the study was purportedly  
10 for content negotiations? No one had ever done that had they?

11 No, I don't recall that.

12 In fact, the first time you ever heard that they, this was,  
13 this meaning the study, was when you and I met at your  
14 deposition, right?

15 Yes.

16 Is that the testimony you reviewed?

17 A. That's my understanding.

18 Q. I want to turn to the Morwitz's article that Mr. Scheele  
19 showed you.

20 In particular page 354 and the following pages. You had  
21 said that you calculated an average of the correlation of an  
22 intention scale with actual behavior; is that right?

23 A. Yeah. Excuse me if I could just elaborate, I'm sorry.

24 Q. Sure?

25 A. I expressed a range of these correlations to try to give



1 you aware of what the overall correlations are. That is  
2 actually from table four of this article.

3 Q. Which is the one on page 354?

4 A. It's actually on page 360 and the overall is R equal .414.  
5 Which is between .6 and .3 and .6 the last time I checked.

6 Q. So even though Mr. Scheele selectively read you some  
7 numbers in the .9 range, the average that you calculated was  
8 based on this same article?

9 A. Yes. And also in the same table that Mr. Scheele was  
10 referring to, if you look at all the new products you get many,  
11 many very low correlations including a negative 0.093, a  
12 positive .142, a positive .178, a positive .233, a positive  
13 .301 and a positive .436.

14 Again, in fact if anything, I was being generous.

15 Q. Using the Morwitz's article, Mr. Scheele also asked you  
16 about the degree to which a Juster scale is better at  
17 predicting under some circumstances than others.

18 Do you recall that?

19 A. Correct.

20 Q. And he asked you whether you agreed with Professor  
21 Hauser's discussion of that and you said no.

22 Do you recall that?

23 A. I do.

24 Q. And could explain why?

25 A. Yes. There's two principal errors that Professor Hauser

1 did in applying these conditions. One is to characterize this  
2 as an existing product. It is absolutely correct.

3 Pay-TV is an existing product. This is not, the survey is  
4 not about pay-TV. It's about the reaction of the respondents  
5 to a new experience for most of the respondents being black  
6 outed.

7 So I consider that to be the analogous question is like in  
8 a new product situation and I think that's undoubtedly true.

9 The other thing that Professor Hauser said is he  
10 characterized this product which is actually a service, right.  
11 You don't buy a physical thing. You rent a service in access  
12 to these channels as a durable good. It is not a durable good.

13 A durable good is something like a car which throws off a  
14 series of service flows over, apparently there was some car  
15 issues this morning. But that's the problem we all have with  
16 our cars is that we buy them at one point in time and they  
17 throw off transportation services over time. That's what a  
18 durable good is.

19 Pay-TV is a rental service. It's not a durable good. So I  
20 don't, and I don't know of any marketer or economist who would  
21 characterize this product as a durable good.

22 Q. Then I want to turn to this one demonstrative that you  
23 were shown entitled AT&T as used in intention scales, do you  
24 have that?

25 A. I do.

1 Q. And you were asked by Mr. Scheele whether you thought that  
2 the scale used by DirecTV looked the same as the one used by  
3 Professor Hauser.

4 Do you recall that?

5 A. I do.

6 Q. And you said no, but you weren't given an opportunity to  
7 explain.

8 So could you explain why your answer was no?

9 A. Yes. I would ask that people actually look at the  
10 demonstrative. The top one is a scale from one to ten, not  
11 from one percent to ninety-nine percent.

12 It's about consideration, not switching. In fact, we just  
13 heard some cross examination about the importance of separating  
14 out consideration from switching behavior.

15 It uses likely to consider. This is a very very different  
16 question with a very very different scale. You'll notice also  
17 the textual labels that are on Professor Hauser's scale are  
18 absent in the top scale.

19 So I would not characterize this as similar at all. They  
20 are scales. They do go from roughly one to nine or from one to  
21 ninety-nine, but the similarity I think ends there.

22 Q. Can you also pull out the demonstrative entitled agreement  
23 with Professor Hauser representativeness?

24 A. Yes.

25 Q. And in the quote from your expert report it says you had

1 established that my sample is representative and therefore  
2 projectable to the population of U.S. consumers.

3 Do you see that?

4 A. I do.

5 Q. Did Professor Hauser do that here?

6 A. No, he did not.

7 Q. You were also asked some questions about a manual and  
8 filter questions.

9 Do you recall that?

10 A. Yes, I do.

11 Q. Did the filter question that Professor Hauser purported to  
12 use conform with the description of filter questions in that  
13 manual?

14 A. No, it did not.

15 Q. Why not or how not?

16 A. It's the way in which he used it. It is true that  
17 Professor Hauser had a, we agreed to discuss yesterday, would  
18 you consider switching question, yes or no.

19 Then if you said you would consider, he then evokes his  
20 scale measurement, right. But he doesn't use it as a filter  
21 question.

22 A filter question, where does filter comes from, it means  
23 to remove from. So in a filter question scenario and anyone  
24 who said they would not consider would be removed from the  
25 analysis and only the scale values for people who would say

1 they would consider would be used.

2 That's not what Professor Hauser did. He misused filter  
3 questions by assigning a number zero. So he's not conforming  
4 to the suggestions of Shari Diamond in the manual Judicial  
5 Evidence at all.

6 Because he's using in his departure rate calculations  
7 people who said they wouldn't consider. It's really a misuse.  
8 It's either you call it a misuse or an incorrect  
9 characterization on the part of Professor Hauser.

10 Q. So last point you were also asked questions about a  
11 question that Professor Hauser put in his survey toward the end  
12 to try to detect bias.

13 Do you recall that?

14 A. Yes.

15 Q. And just explain what that question was?

16 A. So actually there were two references made to detecting  
17 bias. One is the pretest and the other is the responses to the  
18 open ended question.

19 At the end of the survey I believe it says something to the  
20 extent are you aware of the purpose of the survey. And as you  
21 recall, so this happens at the end of the survey, you're an  
22 internet panel. You've gone through all of these screens.

23 You are receiving compensation for it, modest compensation  
24 to be sure, but you are receiving some compensation. At the  
25 very end they say do you have some idea of what the survey is

1 about and then most people don't say anything.

2 So they want to complete this thing. This is not the way  
3 to detect bias, right.

4 The person might not even be aware of the bias. In fact,  
5 it's pretty clear that they aren't because most of them don't  
6 report that they think this is being used for a law suit.

7 So this is no way to detect bias and the notion that it has  
8 any value in proving that survey is unbiased is to my way of  
9 thinking incorrect.

10 And that the better way of thinking about it is these logos  
11 were presented in a large graphical format six times before  
12 people were asked questions, that seems to be a source of bias.

13 MR. BARBUR: No further questions.

14 THE COURT: We'll take the morning recess.

15 Come back in 15 minutes. If you have any recross limited  
16 to redirect, you can ask it then.

17 You are a witness under oath. Refrain from discussing  
18 your testimony with anyone including counsel.

19 THE WITNESS: I will not.

20 THE COURT: See you in 15 minutes.

21 (Witness excused.)

22 (Recess taken at 12:19 p.m.)

23 (Proceedings resumed at 12:39 p.m.)

24 THE COURT: Come on back up.

25 (Dr. Peter Rossi resumed the witness stand.)

1 THE COURT: Witness remains under oath.

2 Redirect.

3 MR. SCHEELE: Yes, Your Honor, thank you.

4 May I proceed?

5 THE COURT: You may.

6 RE CROSS EXAMINATION

7 BY MR. SCHEELE:

8 Q. Dr. Rossi, you testified in response to Mr. Barbur's  
9 redirect of you about the circumstances where correlations are  
10 higher in the Morwitz article, a new product you testified  
11 about, and then durable goods, right?

12 A. No, new products are lower.

13 Q. I understand.

14 I want to talk with you about the durable good aspect.  
15 Because we talked on your cross about the new product. So, the  
16 durable good aspect, that wasn't something you had an opinion  
17 about in your report, was it?

18 A. I didn't have access to Professor Hauser's testimony. It  
19 wasn't in his report either.

20 Q. So the answer to my question is it wasn't in your report?

21 A. That's correct.

22 Q. And, but you did have access to the Morwitz article, which  
23 he cites in his report, right?

24 A. That's correct.

25 Q. I'd like you to turn -- you have the Morwitz article in

1 front of you, just very quickly about durable goods. If you  
2 turn to page 350 in the Morwitz article. And let me know when  
3 you're there.

4 A. Yeah, I will. Just one second, please.

5 Yes.

6 Q. And the heading there says, "Durables versus nondurables,"  
7 do you see that?

8 A. Yes.

9 Q. And then there's a sentence there that defines durable  
10 goods as tangible goods and nondurable goods are -- are  
11 tangible goods that are normally consumed in one or a few uses,  
12 right?

13 A. Yes.

14 Q. And then -- and you would agree that a set-top box is a  
15 tangible good, wouldn't you?

16 A. Yes, but that's the device by which the service is  
17 rendered.

18 Q. So you would agree it's a tangible good?

19 A. A set-top box is a tangible good. But I'm not really  
20 buying a set-top box, I'm renting video content.

21 Q. And then the next witness says, "Two characteristics of  
22 consumer durables are likely to affect the predominant decision  
23 process. First, durables are used repeatedly; second, they  
24 tend to be higher in price than nondurables." Isn't it true  
25 that those are characteristics of pay-TV?



1 A. Higher than -- in price than nondurables? I'm not clear  
2 that's true.

3 MR. SCHEELE: No further questions, Your Honor.

4 THE COURT: All right.

5 MR. SCHEELE: Your Honor, subject to our request for  
6 a ten-minute session under seal. Thank you.

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

8 (Witness excused.)

9 THE COURT: Call your next witness.

10 MR. CONRATH: Your Honor, the United States calls Jim  
11 Holanda.

12 THE COURT: Say again.

13 MR. CONRATH: The United States calls Jim Holanda,  
14 H-O-L-A-N-D-A, and we have a -- we'd like to raise a  
15 preliminary matter if I can.

16 THE COURT: Okay.

17 (Sealed Bench Conference.)

18 MR. CONRATH:

19 MR. PETROCELLI:

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21 MR. CONRATH:

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24 THE COURT:

25 MR. CONRATH:

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3 MR. PETROCELLI:

4 MR. CONRATH:

5 (Open court.)

6 MR. CONRATH: United States calls Jim Holanda.

7 THE DEPUTY CLERK: Sir, please raise your right hand.

8 JIM HOLANDA, PLAINTIFF WITNESS, SWORN

9 THE DEPUTY CLERK: You may be seated, sir.

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

11 THE COURT: You may proceed.

12 DIRECT EXAMINATION

13 BY MR. CONRATH:

14 Q. Please state your name for the record?

15 A. Jim Holanda.

16 Q. And, Mr. Holanda, you are affiliated with RCN; is that  
17 right?

18 A. That's correct.

19 Q. And RCN is an over-builder; is that right?

20 A. RCN/Grande and Wave, which are the three cable companies.  
21 I am the CEO, are generally considered over-builders or the  
22 third wire end of the home versus the incumbent cable company  
23 and the incumbent telephone company.

24 Q. And you mentioned RCN, the three companies that you're  
25 affiliated with, RCN is one, right?

1 A. Yes.

2 Q. Grande is another?

3 A. Yes.

4 Q. And the third is Wave?

5 A. Yes.

6 Q. And Wave is an over-builder in San Francisco and a  
7 traditional cable company in some other markets; is that right?

8 A. Yes, that's correct.

9 Q. Can I just talk about RCN/Grande and Wave together as RCN  
10 for simplicity sake as we go forward?

11 A. That's fine.

12 Q. And if I have a specific question about just RCN, I'll say  
13 "just RCN," is that all right?

14 A. Okay.

15 Q. Okay. Where are your offices?

16 A. Our offices are in Princeton, New Jersey.

17 Q. And you're the CEO of RCN?

18 A. That's correct.

19 Q. And how long have you been the CEO?

20 A. Of RCN, it's been seven and a half years, Grande five, and  
21 Wave broadband has been three months.

22 Q. All right. And what positions did you have prior to  
23 becoming RCN's CEO?

24 A. Prior to that I was the CEO of a cable company in Puerto  
25 Rico called Choice Cable. Prior to that I was the president --

1 Patriot Media which owned cable companies in central New  
2 Jersey, and prior to that I had various VP of operations roles  
3 at Charter, and then finance roles at Comcast in my early  
4 career.

5 Q. So what was your first job in the industry?

6 A. My first job in the industry was a cable installer for  
7 Comcast fresh out of college.

8 Q. All right. And you're the guy who brought the -- strung  
9 the wires to the house?

10 A. Climbed telephone poles and did connects and disconnects,  
11 yes.

12 Q. All right. How long all together have you worked in the  
13 industry?

14 A. That was thirty years ago.

15 Q. So where does RCN, just RCN offer services?

16 A. RCN offers services in the greater Boston area, Manhattan  
17 and Queens in New York, the suburbs of Philadelphia,  
18 Washington, D.C., and some of the suburbs here in this market,  
19 eastern Pennsylvania and Chicago.

20 Q. And where does Grande offer services?

21 A. Throughout most of the metro-plexus in Texas.

22 Q. And where does Wave offer services?

23 A. Wave is primarily in Seattle, Portland, Sacramento and San  
24 Francisco.

25 Q. And how do the three companies together compare to other

1 distributors in terms of size?

2 A. We have just shy of a million customers, over five hundred  
3 thousand of those customers take video services from us. We  
4 think we're the sixth largest cable company in the United  
5 States. And probably the eleventh largest distributor of video  
6 in the United States.

7 Q. What products does RCN offer?

8 A. We're a traditional triple play provider that offers  
9 broadband services via cable modem, television services and  
10 phone service.

11 Q. And historically, how did RCN as an over-builder compete  
12 with the larger distributors, the cable or satellite companies?

13 A. Originally RCN did that by having a very strong technology  
14 platform. They were the first to offer true triple play  
15 services in most of the markets that they service. And that  
16 was really how they gave customers choice against the larger  
17 cable companies for the first time in all of those markets and  
18 that was their underlying business philosophy.

19 Q. Do you compete against Comcast Cable?

20 A. Yes, we compete against Comcast Cable in a lot of markets.

21 Q. In which ones?

22 A. In Boston, Philadelphia, D.C., Chicago, and San Francisco.

23 Q. Do you compete against AT&T?

24 A. We do.

25 Q. And where?



1 A. We compete against them throughout the State of Texas, and  
2 in Chicago and San Francisco.

3 Q. And do you compete against DirecTV?

4 A. Yes, we compete against DirecTV across the entire company.

5 Q. You're familiar with something called the NCTC?

6 A. I am.

7 Q. And what does that stand for?

8 A. The National Cable Television Co-op.

9 Q. And what is NCTC?

10 A. NCTC is a buying co-op for very small and medium size  
11 cable companies to try and buy programming and other supplies  
12 efficiently for our businesses.

13 Q. Is RCN a member of NCTC?

14 A. Yes.

15 Q. And what's your role, if you have a role at NCTC?

16 A. I sit on the NCTC board of directors.

17 Q. What's the benefit of negotiating through NCTC?

18 A. The benefit to the content providers is on any given deal  
19 generally we're negotiating on behalf of anywhere from three to  
20 seven and a half million customers that the member companies  
21 make up, and the advantage is us bringing together that size,  
22 we try and do better obviously in terms of negotiating over  
23 seven hundred and fifty separate deals because there's over  
24 seven hundred and fifty members within NCTC.

25 Q. So does RCN negotiate some programming contracts itself?

1 A. Yes, we do.

2 Q. Directly?

3 A. Yes, we do.

4 Q. And as RCN's CEO, are you involved in RCN's negotiations  
5 for programming?

6 A. At a high level, I am, and if there's a problem or a  
7 decision to be made towards the end of the negotiations, I get  
8 involved, but generally speaking we have a team of people that  
9 handles that.

10 Q. And do you have a -- do you stay aware of the NCTC  
11 negotiations?

12 A. Yes.

13 Q. As a board member?

14 A. Yes.

15 Q. Now, let's talk about programming. Does RCN purchase  
16 programming for video customer packages?

17 A. Yes, we do.

18 Q. And are you familiar with the Turner networks?

19 A. I am.

20 Q. And what importance do you consider that Turner has with  
21 the video packages that you put together?

22 A. We consider the Turner content to be significantly viewed  
23 by our customers.

24 Q. And do you collect information about what your customers  
25 are viewing?

1 A. We do.

2 Q. And what does that show you about the value of Turner to  
3 RCN?

4 A. We have technology that pulls all of our cable boxes every  
5 fifteen minutes so we know what our video customers are tuned  
6 to. We've been tracking that information actually for seven  
7 years. And so of the hundred plus cable channels that we  
8 deliver in our expanded basic digital package over the last  
9 four or five years, the Turner networks rank very high in terms  
10 of our customers viewing those networks.

11 Q. And when you say a high, can you be more precise?

12 A. Three of the Turner networks are in our top ten.

13 Q. And do you use the viewership data that you collect in  
14 this way in helping you to make programming decisions?

15 A. It's one part of what we use to make those programming  
16 decisions.

17 Q. How does the viewership of Turner networks compare with  
18 the viewership of Viacom networks at RCN?

19 A. The Turner networks are ranked higher than Viacom  
20 networks.

21 Q. And do you have an explanation for why that is?

22 A. Obviously our customers see value in CNN, TNT and TBS.

23 Q. Do you offer HBO to your customers?

24 A. We do.

25 Q. And how important is that to your video offering?

1 A. We think it's important. We have a lot of customers that  
2 subscribe to HBO as a service and even a large group of  
3 customers that obviously watch and take those services.

4 Q. Is it one of your top subscribed?

5 A. It's our second most subscribed to, and it's our top  
6 viewed premium network.

7 Q. Okay. Let's talk about programming costs for a minute.

8 As RCN's CEO, do you pay attention to programming costs?

9 A. We do.

10 Q. And why is that?

11 A. It's the single biggest cost of our business.

12 Q. All right. And what's been happening to programming costs  
13 over the last five years?

14 A. They have been going up significantly.

15 Q. Relative to inflation?

16 A. Five times, five to eight times the amount of inflation  
17 each year over the last five years.

18 Q. Okay. How do RCN's programming costs compare to the  
19 programming costs of other distributors?

20 A. Obviously it's generally the same when compared to other  
21 members of the NCTC that we buy programming from. I think  
22 compared to the larger distributors, you know, they have volume  
23 discounts for being their size. We think they have anywhere  
24 from a twenty-five to forty percent programming cost advantage  
25 because of their size.

1 Q. Okay. As a result of the programming cost increases over  
2 the last five years that you've described, have you changed  
3 your pricing to your subscribers?

4 A. We have.

5 Q. And in what way?

6 A. Generally speaking at RCN and Grande, we have historically  
7 passed through about eighty percent of those increases on to  
8 the consumer.

9 Q. And you mentioned RCN and Grande, what about Wave, what's  
10 been their historic pass-through of cost increase?

11 A. Three years ago they switched to a model where they're  
12 passing through one hundred percent of the cost of the  
13 programming on to their video customers.

14 Q. Okay. Historically speaking, how are RCN's prices  
15 compared to its competitors of the prices to consumers? Let's  
16 back up and make sure we're talking about this right.

17 Historically, how were RCN's prices to its customers  
18 compared to the prices of its competitors in the cable  
19 satellite business?

20 A. I think generally speaking we've always tried to be price  
21 conscious and price competitive on double and triple play and  
22 single play services. That's obviously gotten harder over the  
23 last two and three years as costs for video continue to  
24 increase.

25 Generally speaking, we feel our larger competitors have a

1 ten to fifteen dollar advantage on price, and we try and make  
2 up for that by adding additional services to our bundles to  
3 just try and make that up and keep things as competitive as  
4 possible.

5 Q. And tell us what you mean by trying to add additional  
6 services and so on to be competitive?

7 A. We may add additional converter boxes in our base bundle.  
8 We try and give customers more speed for the same price for  
9 Internet services within our bundles. And so those are  
10 typically the things that we do to try and stay competitive.

11 Q. Okay. I'd like to talk, without disclosing any  
12 confidential information, RCN's current video strategy.

13 So can you tell the Court what RCN's current video strategy  
14 is?

15 A. Well, we continue to compete for double and triple play  
16 customers. We have not given up on the video business as we  
17 have seen a few other midsize companies do so in our industry  
18 over the last several years. We are in development of an IP  
19 technology platform within our company to be able to deliver  
20 our channels and video packages across the newer technology  
21 that's available to consumers via the retail market today, and  
22 we still view the video business as important.

23 Q. All right. Do you have a relationship with some  
24 over-the-top providers?

25 A. We do, yes.

1 Q. And can you -- and do you have -- do you use the TiVo  
2 product as well?

3 A. In 2010, RCN signed the first deal to team up with TiVo,  
4 who is a maker of cable boxes, as well as integrated  
5 technology, and we were the first to do so in the United  
6 States; that has been a good relationship for us.

7 TiVo allows us to integrate things over-the-top as well as  
8 bring customers' apps on their big screen, and so we thought it  
9 was a way to differentiate our video product. And it's been a  
10 good partnership for us.

11 Q. Okay. And explain to us how you cooperate with OTT  
12 providers?

13 A. So it was four years ago now that we partnered with  
14 Netflix and Hulu to integrate those into our set-top box and  
15 into our customers' viewing experience just like you would tune  
16 to channel 300 to watch HBO, you could turn to channel 400 and  
17 your Netflix account would just launch and it would  
18 automatically go into -- with your sign-in credentials.

19 We also have an app store with three hundred and fifty  
20 apps, but obviously things like Facebook and YouTube and  
21 weather apps and business apps are the most used within the app  
22 store. But it's about trying to bring in all things  
23 over-the-top in an integrated way to the customer.

24 Q. And how does offering those over-the-top products and apps  
25 benefit RCN in the marketplace?

1 A. We were the first to do so, and for two years no one  
2 followed us. I guess it was a little over a year ago that  
3 Comcast integrated the Netflix app on their X1 platform and now  
4 obviously others are moving in that direction as well.

5 Q. And do you have a functionality that involves searching  
6 across all platforms?

7 A. That's -- TiVo has that technology, yes, that's able to  
8 search. If you type in Sopranos, it goes and looks not only at  
9 your linear, but your video on demand, your Netflix accounts  
10 and everything that you're authorized for and subscribe to,  
11 yes, it searches across those products.

12 Q. And is that attractive to customers?

13 A. Yes, customers like it very much.

14 Q. So since RCN is cooperating with some of these  
15 over-the-top companies, does RCN still offer its own video  
16 packages itself?

17 A. Yes, we do.

18 Q. And how many of your customers take an RCN video package?

19 A. Just over five hundred thousand of our almost one million  
20 customers.

21 Q. And does RCN plan to continue its, I guess you already  
22 told us, you plan to continue offering the video package?

23 A. Yes.

24 Q. Let's switch to another topic. I want to ask you some  
25 questions on the subject of Comcast NBCU offering content to



1 RCN.

2 Does RCN offer a product called Broadcast Basic?

3 A. Yes, we do.

4 Q. And what is Broadcast Basic?

5 A. It's the base package that all providers are supposed to  
6 provide the baseline. It's the broadcast channels paired with  
7 government and public access channels. It's the most basic and  
8 cheapest level of service.

9 Q. So why would a customer want to buy Broadcast Basic  
10 over -- from you or from a cable company or a satellite company  
11 instead of getting that programming off the air with an  
12 antenna?

13 A. When the broadcast signals went from analogue to digital  
14 back in 2009, the area where you can actually pick up off their  
15 channels with an antenna shrunk greatly throughout the United  
16 States actually, and in our high rises in places like Chicago,  
17 New York and Boston, you simply can't get off air signals, or  
18 in rural Pennsylvania or in the suburbs of any of our major  
19 markets, you can't simply get those services with an antenna  
20 any longer.

21 Q. And why do you want to offer a broadcast basic package to  
22 your customers?

23 A. We -- in 2012 actually we decided we would pair the  
24 broadcast channels with robust broadband services and see if  
25 that was something that customers wanted, and a funny thing

1 happened, customers loved that product. For forty or fifty  
2 dollars, customers got high speed Internet and they got their  
3 local news, they got live sports, they got the great shows that  
4 are on the broadcast channels, and it was a very popular  
5 package for our customers.

6 Q. And does being able to offer Broadcast Basic help you  
7 compete with cable and satellite companies?

8 A. Yes, I think it does, and I think we struck a niche in  
9 that, that's when all the streaming services, especially  
10 Amazon, Netflix and Hulu were really starting to take off. So  
11 pairing Broadcast Basic with those other over-the-top services  
12 was certainly a product set that a lot of our customers liked.

13 Q. And does Comcast offer Broadcast Basic service in  
14 competition with you?

15 A. Yes.

16 Q. Are you able to offer Broadcast Basic to all of your  
17 customers?

18 MR. WALTERS: Your Honor, may we approach?

19 THE COURT: Uh-hmm.

20 Step down, sir.

21 (Witness withdrew from the witness stand.)

22 (Sealed Bench Conference.)

23 MR. WALTERS:

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THE COURT :

MR. WALTERS :

MR. CONRATH :

MR. WALTERS :

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MR. CONRATH:

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THE COURT:

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MR. WALTERS:

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MR. CONRATH:

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(Open court.)

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THE COURT: Come on back up, sir.

1 (Witness resumed the witness stand.)

2 THE COURT: You may proceed consistent with the  
3 discussion at the bench for another five minutes, and then  
4 we'll take the break.

5 BY MR. CONRATH:

6 Q. So are you able to offer Comcast basic to all of your --  
7 are you able to offer Broadcast Basic to all of your customers?

8 A. I am not.

9 Q. And why not?

10 A. There are several geographic areas where Comcast contracts  
11 are prohibiting us from selling any more Broadcast Basic to  
12 customers without selling them the entire bundle.

13 Q. And is that a product of some penetration requirements  
14 that are in certain of your agreements with NBCU?

15 A. Yes, that's correct.

16 Q. And those penetration requirements have the effect of  
17 setting a percentage limit of how much of your product can be  
18 sold as Broadcast Basic?

19 A. Yes, that's correct.

20 Q. And what do you do when you approach that percentage  
21 limit?

22 A. We no longer offer a low cost television solution for our  
23 customers.

24 Q. And that -- the application of those penetration  
25 requirements to make it hard for you to sell Broadcast Basic,

1 did that change after Comcast acquired NBCU?

2 A. Originally, yes, seven and a half years ago, yes. In  
3 regards to the NBC programming, yes.

4 Q. All right. So when NBCU was not owned by Comcast you  
5 didn't have the same problem you have today; is that right?

6 A. That's correct.

7 Q. And the change was to make the penetration requirements  
8 more stringent?

9 A. That's correct.

10 Q. And the more stringent requirements made it hard for you  
11 to sell Broadcast Basic in competition with Comcast?

12 A. Correct, once we were no longer able to sell that level of  
13 service, we saw Comcast come enter the marketplace with their  
14 own low cost double play offering to, you know, to compete in  
15 that marketplace knowing that we could not sell it anymore.

16 Q. All right.

17 MR. CONRATH: I'm about to change topics, Your Honor.  
18 You can tell me to go ahead or keep going.

19 THE COURT: How long?

20 MR. CONRATH: Well, I have two more topics to handle  
21 in open session.

22 THE COURT: Okay.

23 MR. CONRATH: I just wanted to alert you before I go,  
24 I'm not making a request.

25 THE COURT: All right, well, do one more and then

1 we'll stop.

2 MR. CONRATH: Okay, very well.

3 BY MR. CONRATH:

4 Q. So you compete with AT&T; is that right?

5 A. We do.

6 Q. And earlier we discussed the value of Turner programming  
7 to RCN, do you remember that?

8 A. Yes.

9 Q. Given that value of Turner programming, do you have any  
10 concerns over the possible merger of AT&T and Time Warner?

11 A. Sure, we have the same concerns that we had with Comcast  
12 and NBC.

13 Q. And what are the concerns that you've got?

14 A. The concerns are using Turner programming to  
15 disadvantageous us in competition for broadband customers and  
16 double and triple play customers in the areas where we compete  
17 against them against their wire line networks.

18 Q. And --

19 MR. WALTERS: Your Honor, may we approach?

20 THE COURT: Uh-hmm.

21 Step down.

22 (Sealed Bench Conference.)

23 MR. WALTERS:

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MR. CONRATH:

THE COURT:

MR. CONRATH:

MR. WALTERS:



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MR. CONRATH :

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9 MR. CONRATH:

10 (Open court.)

11 THE COURT: All right, sir, come on back up.

12 (Witness resumed the witness stand.)

13 THE COURT: We're going to take the luncheon recess  
14 now. You're a witness under oath in the case, which means  
15 you're not at liberty to discuss your testimony so far or what  
16 it might be when you return with anyone, including counsel who  
17 you're working with here. So stay independent of all others  
18 and be able to answer the question that you haven't discussed  
19 your testimony with anyone when you come back, okay?

20 THE WITNESS: Okay.

21 THE COURT: See you in 2:45.

22 (Luncheon recess at 1:19 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

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Date: April 18, 2018