

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	CV No. 17-2511
)	
)	Washington, D.C.
vs.)	April 26, 2018
)	2:40 p.m.
AT&T, INC., ET AL.,)	
)	Day 20
Defendants.)	
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TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES SENIOR DISTRICT JUDGE

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WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
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GOVERNMENT'S:

CARL SHAPIRO, Ph.D.		3903		3921
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1 P R O C E E D I N G S

2 DEPUTY CLERK: All rise. This Honorable Court is
3 now in session, the Honorable Judge Richard J. Leon
4 presiding. God save the United States and this Honorable
5 Court. Please be seated and come to order.

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

9 Counsel, please approach the lectern and identify
10 yourselves for the record and the party or parties that you
11 represent.

12 MR. WELSH: Good afternoon, Your Honor.
13 Eric Welsh for the United States.

14 THE COURT: Welcome back.

15 MR. WELSH: Thank you.

16 MR. CARSON: Good afternoon, Your Honor.
17 Dylan Carson for the United States.

18 THE COURT: Welcome back.

19 MR. CARSON: Thank you.

20 MR. HEIPP: Good afternoon, Your Honor.
21 Justin Heipp for the United States.

22 THE COURT: Welcome.

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

25 THE COURT: Welcome back.

1 MR. CONRATH: Thank you.

2 MR. SCHUETT: Good afternoon, Your Honor.

3 Ruediger Schuett for the United States.

4 THE COURT: Welcome.

5 MR. KEMPF: Good afternoon, Your Honor. Don Kempf
6 for the United States.

7 THE COURT: Welcome back.

8 MR. PETROCELLI: Good afternoon, Your Honor.

9 Daniel Petrocelli for defendants.

10 THE COURT: Welcome back.

11 MR. ROBSON: Good afternoon, Your Honor.

12 Katrina Robson for defendants.

13 THE COURT: Welcome back.

14 MR. OPPENHEIMER: Good afternoon, Your Honor.

15 Randy Oppenheimer for the defendants.

16 THE COURT: Welcome back.

17 MR. WALTERS: Good afternoon, Your Honor.

18 Rob Walters here for AT&T and DirectTV.

19 THE COURT: Welcome back.

20 MR. RAIFF: Good afternoon, Your Honor.

21 Mike Raiff for AT&T and DirectTV.

22 THE COURT: Welcome back.

23 We're missing some people.

24 DEPUTY CLERK: Mr. Barbur.

25 THE COURT: Mr. Orsini and Mr. Barbur are not

1 here. Are they okay?

2 MR. PETROCELLI: Yeah, they're fine.

3 THE COURT: All right.

4 MR. PETROCELLI: I'm here for Time Warner.

5 THE COURT: I understand. We know that.

6 All right. Is the witness ready to resume the
7 stand?

8 You remain under oath.

9 MR. WELSH: May I proceed, Your Honor?

10 THE COURT: You may.

11 MR. WELSH: Thank you.

12 CARL SHAPIRO, Ph.D, WITNESS FOR THE GOVERNMENT ON REBUTTAL,
13 HAVING BEEN PREVIOUSLY SWORN, RESUMED THE STAND AND
14 TESTIFIED FURTHER AS FOLLOWS:

15 - - -

16 REDIRECT EXAMINATION

17 BY MR. WELSH:

18 Q Good afternoon, Professor Shapiro.

19 A Good afternoon.

20 Q I just have a few questions for you this
21 afternoon, and let's get right to it.

22 I want to start off, Professor, by talking about
23 the Suddenlink-Viacom analysis, okay? And I want to get us
24 all back to that subject.

25 So you recall being asked questions about your

1 PXD11, this chart with the Viacom -- the blackout with
2 Suddenlink in October of 2014.

3 Do you recall that, sir?

4 A I do.

5 Q And we were talking about it in terms of the
6 criticism that Professor Carlton had raised with you about
7 the industry trend. He claimed you hadn't taken into
8 account the industry trend. Your testimony was speaking to
9 that issue.

10 Do you remember that?

11 A I do.

12 Q Okay. Now, you were also, that day, presented by
13 defense counsel with a new exhibit, which was DX943 that
14 Mr. Petrocelli represented to you was a printout directly
15 from your work papers. This is a two-column exhibit.

16 Do you remember that?

17 A I do.

18 Q Now, Professor, Mr. Petrocelli was a bit off in
19 his representations, so I'm going to tell you and I'll
20 represent to you that Exhibit DX943 actually is not a
21 printout directly from your work papers but, instead, was
22 pulled by the defendants from data accompanying your report
23 and formatted using code that was modified by defendants in
24 a way that aggregated the data of the different distributors
25 together, okay?

1 A I understand.

2 Q Okay. Now, Professor, I'd like show you what we
3 have marked as PX559, which I will represent to you is a
4 table taken from the same data that we're just talking
5 about, the same data set from your backup that defendants
6 used to create DX943, but this one breaks out the subscriber
7 levels for Dish from the other MVPDs.

8 MR. WELSH: Your Honor, may I approach?

9 THE COURT: You may.

10 MR. WELSH: May I approach the witness,
11 Your Honor?

12 THE COURT: Yeah.

13 MR. WELSH: May I also approach the witness to
14 give him a copy of DX943, Your Honor?

15 THE COURT: Sure.

16 MR. WELSH: Does Your Honor need another copy of
17 DX943?

18 THE COURT: No. I have that here.

19 MR. WELSH: Okay.

20 Do you need a copy?

21 MR. PETROCELLI: Yeah, I'll take one. Is it a
22 two-page or a one-page?

23 MR. WELSH: It's one, multiple copies.

24 THE COURT: It has a backside.

25 MR. PETROCELLI: Oh, okay.

1 MR. WELSH: Your Honor, I've handed PX559 as well
2 as DX943 to opposing counsel.

3 May I proceed?

4 THE COURT: You may.

5 BY MR. WELSH:

6 Q Now, Professor, if you could look at PX559,
7 do you see that the first two columns on PX559, that those
8 match up with the columns in DX943?

9 A Yes, I see that.

10 Q And do you see on PX559 that one of the
11 distributors, Dish, that information was broken out
12 separately in that right column, and then we have the other
13 column with all MVPDs, excluding Dish?

14 Do you see that?

15 A I do.

16 Q And if you flip it over to the second page,
17 do you see that that includes the December 2016 information
18 for Dish broken out separately.

19 A Yes, I see that.

20 Q Okay.

21 Now, Professor, similar to -- you were asked
22 question about DX943. So similar to that, do you believe
23 that the data that we have here on PX559, that that was from
24 your backup to your reports?

25 A I have no reason to doubt that.

1 MR. WELSH: Your Honor, I'd move for admission of
2 PX559.

3 THE COURT: Yeah. I want to see the parties about
4 this.

5 You can step down, sir.

6 (Sealed bench conference)

7 THE COURT:

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12 MR. WELSH:

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MR. PETROCELLI:

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MR. WELSH:

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THE COURT:

MR. PETROCELLI:

MR. WELSH:

THE COURT:

MR. PETROCELLI:

THE COURT:

(Open court)

THE COURT: We'll admit the document.

THE WITNESS: You may question him.

MR. WELSH: Thank you, Your Honor.

(Government's Exhibit PX559
received into evidence under seal.)

BY MR. WELSH:

Q Now, Professor Shapiro, you have PX559 in front of
you. I want to ask you some questions about, in compiling
your subscriber count for your reports, do you recall there
being an issue about the reliability of the data that was
produced by one distributor in December of 2016?

MR. PETROCELLI: Objection. That is leading,

1 Your Honor.

2 THE COURT: Well, you can rephrase the question.

3 MR. WELSH: Okay. I'll rephrase.

4 THE COURT: Rephrase the question.

5 BY MR. WELSH:

6 Q Do you recall, when you were doing your work in
7 compiling the sub counts for your reports, do you recall
8 there being any sort of an issue with respect to any data
9 coming in from a subscriber -- from an MVPD, excuse me?

10 A I do recall being aware of the, something
11 anomalous about the Dish data in that last month that we're
12 talking about. I don't recall the specifics, though.

13 Q So if we look at PX559 and look at November and
14 December, do you -- does that document indicate that there
15 was a drop in Dish subscribers from November to December of
16 2016?

17 A Yes. Am I allowed to use the numbers? I mean,
18 there's a --

19 THE COURT: Yeah. It's not under seal, right?
20 Or is it?

21 MR. PETROCELLI: We did 943 under seal at your
22 request.

23 MR. WELSH: Okay.

24 BY MR. WELSH:

25 Q Let's talk percentages. Maybe that's the easiest

1 thing, if we can.

2 THE COURT: So 943 is under seal?

3 MR. PETROCELLI: I think so, at his request.

4 MR. WELSH: I think it was, if I recall from the
5 transcript, it was, Your Honor.

6 THE COURT: Because if it doesn't need to be under
7 seal, that's fine. I rather it not be.

8 MR. WELSH: Can I confer with counsel?

9 THE COURT: I didn't note it as under seal when I
10 wrote it down.

11 (Government counsel conferred off the record.)

12 MR. WELSH: It's not going to need to be under
13 seal, Your Honor.

14 THE COURT: Okay. Good.

15 All right. So neither one does now.

16 MR. WELSH: That's my understanding, correct,
17 Your Honor.

18 BY MR. WELSH:

19 Q Now, so the --

20 A I apologize.

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

22 THE COURT: Yes. You can use the numbers now.

23 MR. WELSH: Okay.

24 BY MR. WELSH:

25 Q Go ahead.

1 A Thank you.

2 So according to this exhibit, 559, the data here
3 shows the Dish subscriber count going down from 10.9 million
4 to 9.7 million from November to December of 2016, which is
5 more than a 10 percent drop.

6 Q Now, from your work, sir, does it sound reasonable
7 to you that there can be a drop of that magnitude in one
8 month for any one MVPD. Does that make sense?

9 A Well, it does look very peculiar, particularly
10 given the previous time series for Dish, which is gradually
11 declining. And that's then very -- it stands out.

12 So there's a question about it.

13 Q Did you see anything reported in SEC filings for
14 Dish that would report on such a loss of that sort of
15 magnitude for a single month?

16 A I did not recall seeing such a thing, no.

17 Q And looking at PX559 and looking at the other
18 column, so this would be the one with the other MVPDs,
19 do you see that column?

20 A Yes, I do.

21 Q Looking at that, do you see any sort of what
22 counsel had called on Tuesday being a precipitous drop in
23 industry subscriber counts? Do you see that in that column
24 for the MVPDs in December of 2016?

25 A No.

1 If you took at the column excluding Dish, the --
2 there's essentially no change from November to December.
3 It's a 6,000 drop out of 60 million. So, you know, tiny.

4 Q And the trend, then, for the other MVPDs -- the
5 other MVPDs, putting Dish aside, was that trend essentially
6 flat?

7 A You mean from November to December or more
8 generally are you asking me?

9 Q More generally, in 2016.

10 A Yes.

11 So it's very -- yes. We can just look at the data
12 here so we're clear. From, let's say, December 2015 to
13 December 2016, so we're using the same month, we have
14 68,900,000.

15 In December 2015, 68,500,000--some in a year later.
16 So that is, just give me a moment, four hundred -- so that's
17 very small, again, less than a percent.

18 Q Now, does having an anomalous 10 percent drop for
19 one MVPD in one month, does that translate into an
20 industry-wide trend?

21 A Certainly not.

22 Q And going back now to your demonstrative, your
23 chart, PXD011, has your opinion changed here, Professor,
24 about whether there was a change in the industry subscriber
25 trends starting in October of 2014?

1 A No. I stand by that.

2 There are two issues. One is this data, this
3 extra month. And I think we've addressed that now.

4 The other is whether we see a trend in the data
5 that I do report on that chart, and I did test
6 econometrically whether there was a drop-off and there was
7 not one. So I stand by what I said in court previously.

8 Q And even with this issue of the reliability of the
9 Dish data for December of 2016, this one MVPD, does that
10 affect your response to Professor Carlton's "holy mackerel"
11 claim or criticism that was directed at the whole industry,
12 starting to trend down faster in October of 2014?

13 A No. I think this is a bit of a sideshow.

14 Your Honor, the main -- what I did is I looked at
15 how Suddenlink was doing before the blackout and after the
16 blackout, and I saw it dropped off, which I think is
17 reliable.

18 What Professor Carlton did was say that there was
19 a change in the industry trend, not that I wasn't accounting
20 for trends, but I missed a change in the trend in the
21 industry. And I don't think that happened. I stand by that
22 for the reasons given.

23 Q Would this -- Professor, would this be another
24 example of the defendants relying on a single month of data,
25 even if it's not the best way to do economic analysis?

1 MR. PETROCELLI: Objection. Foundation and
2 argumentative.

3 THE COURT: Yeah. No. I'll sustain that
4 objection.

5 THE WITNESS: Thank you, Your Honor.

6 BY MR. WELSH:

7 Q Professor, let's change topics. I just have a
8 couple other questions for you, and then we'll finish up.

9 Professor, let's talk about the range-of-harm
10 numbers. I think you were asked some questions about this,
11 and I specifically want to come back to the averaging of the
12 lifetime values. There were questions asked of you by
13 Mr. Petrocelli on that subject, okay?

14 Do you recall testifying, sir, that if you used
15 the average of those 2017 lifetime values to calculate the
16 profit margins and then a 9 percent subscriber rate, loss
17 rate, that the net annual MVPD cost increase from the
18 bargaining model would be \$98 million?

19 Do you remember that testimony?

20 A Yes.

21 Q Okay. Now, I know you said in response that
22 that's the lower end and that Mr. Petrocelli just wanted to
23 talk about the lower end; and you wanted to, I think,
24 mention the higher end. So let's talk about the higher ends
25 here.

1 I want to ask you -- first off, let's look at
2 2016, the 2016 margins. If you used the 2016 margins and
3 looked at a 14 percent subscriber loss rate, that would be
4 the higher end; is that right?

5 A Yes.

6 Q If we did that, do you recall what the net
7 amount -- the net annual MVPD cost increase would be in that
8 situation?

9 A I think it was four or five hundred million range
10 rather than 235 million, but I don't have the exact number
11 memorized.

12 Q If you put your report in front of you, would that
13 help you?

14 A It would.

15 MR. WELSH: May I approach the witness,
16 Your Honor?

17 THE COURT: You may.

18 THE WITNESS: Thank you.

19 MR. WELSH: Would Your Honor would like a copy as
20 well or not?

21 THE COURT: I think I have a copy somewhere here.
22 He's just refreshing his recollection?

23 MR. WELSH: He is, Your Honor. I'm just going to
24 point him to a page and that's it.

25 THE COURT: Don't read the report out loud. Just

1 refresh your recollection.

2 THE WITNESS: Should I look for it or do you want
3 to help me?

4 BY MR. WELSH:

5 Q I'll help you.

6 Your initial report, and if you look at page 65 --
7 you can tell me when you're there. I'm going to look at my
8 copy as well to make sure I'm right.

9 A Thank you.

10 I see the number here says \$561 million annually.

11 Q Does reading that refresh your memory that that
12 was the amount, sir?

13 A Yes, that's correct.

14 Q That's the amount at 14 percent, with the 2016
15 margins under your bargaining model; is that correct?

16 A Yes.

17 Q You can put that to the side now. Thank you, sir.

18 And now if we spring forward and we look at the
19 lifetime value averaging margins and then apply the
20 14 percent subscriber loss rate to that, so that higher end
21 of those calculations, do you recall as to the amount of the
22 net annual MVPD cost increase there?

23 A We're still using the 2016?

24 Q I'm looking at 2017, looking at the averaging of
25 those lifetime values. Do you know what -- if we're looking

1 at the 14 percent higher bound of that, do you know what
2 that amount is?

3 A I believe that's -- the number \$348 million is in
4 my head. I think that's the right range. I can't swear to
5 the exact number.

6 Q Is that your best recollection, though?

7 A It is.

8 Q Last question for you, Professor. After hearing
9 the criticisms of Professor Carlton, is it still your
10 opinion, sir, as an antitrust economist, that this proposed
11 merger would lead to a substantial lessening of competition?

12 A Yes.

13 MR. WELSH: Okay. I have no further questions,
14 Your Honor. Thank you.

15 THE COURT: All right.

16 Recross, limited to redirect.

17 - - -

18 RE-CROSS-EXAMINATION

19 BY MR. PETROCELLI:

20 Q When I showed you the -- your chart with the data
21 through November 2016 when you left off December -- through
22 November 2016, when you left off December 2016 -- that was
23 Exhibit 943 that I showed you on Tuesday -- you didn't have
24 any recollection of why December was not there.

25 Do you recall?

1 A I did not remember that at the time; you are
2 correct.

3 Q Yes.

4 And now you have this recollection that it's all
5 about Dish. What have you done since Tuesday to today to
6 refresh your recollection?

7 A I reviewed some of the -- some of my materials
8 that I had used to prepare for testimony originally.

9 Q So after you left court on Tuesday until today,
10 you reviewed materials related to this data; is that right?

11 A I didn't look at data sets itself. I just had
12 materials that I had as part of my preparation.

13 Q But as part of your preparation, you refreshed
14 your recollection that the month you left off had to do with
15 Dish, correct?

16 A That's correct.

17 Q So you knew before you were just asked by
18 Mr. Welsh that he was going to ask you about that, right?

19 A I thought he probably would, because it seemed to
20 me that was a missing piece from the cross-examination.

21 Q So did you talk to anybody about coming to court
22 today and being prepared to talk about the Dish subscriber
23 loss in the month of December 2016?

24 A No, sir.

25 Q Did you talk to any members of your staff?

1 A No, sir.

2 Q Anybody?

3 A No.

4 Q Did you talk to anybody about anything related to
5 this case?

6 A No.

7 Q Where did you find the materials to review on the
8 Dish subscriber loss?

9 A I had them with me. They were printed out.

10 Q Who printed them out?

11 A They were printed out by -- Bates White printed
12 them out for me, and I asked them to print out some
13 materials when I arrived in D.C. last Saturday to prepare to
14 testify.

15 Q So you already had these data sets printed out
16 such that you were able to go and figure out that it was
17 about Dish?

18 A No, I did not have the data set printed out.

19 Q So how did you refresh your recollection
20 specifically that the month of December, which you left off
21 your chart, had to do with Dish subscriber loss?

22 A Well, as part of my preparation, I asked my team
23 in this case, the economists at Bates White, to prepare --
24 there were a series of topics I want to be prepared, many
25 that I want to be prepared about.

1 And this is all prior to -- it was a week ago --
2 well, not quite a week ago. Last Saturday. And so there
3 are some memos that they produced for me that -- to help me
4 prepare. And one of those memos related to this topic or
5 had -- yes, related to this topic.

6 Q Well, if you had all of that material prepared
7 before you testified on Tuesday, how come you didn't know
8 the answers to my questions on Tuesday?

9 A Well, I thought I did pretty well, but that one
10 did not stick in my head on that particular data point. So
11 my memory is not perfect.

12 Q So you just went and looked at that material
13 between Tuesday and today?

14 A Yes, sir.

15 Q And do you recall, then, deliberately leaving
16 December 2016 off that chart when you created it for use in
17 this case?

18 A I recall that -- actually, that's -- my
19 recollection is vague on exactly that conversation, but --
20 so I'm not absolutely certain.

21 Q Conversation with whom?

22 A With the Bates White people about when we
23 originally prepared the chart, about whether we -- about
24 exactly which -- how long to extend the time series.

25 Q So you made a decision, then, in consultation with

1 others to prepare this chart to show a trend; but you
2 deliberately left off the last month of the year, knowing
3 that it would show a steep decline, right?

4 A I can't -- again, I can't remember that exact
5 conversation. But my recollection is more from the memo
6 that I read more recently about the data being unreliable
7 for Dish that year. I don't have a specific recollection
8 about the earlier conversation.

9 Q And when you say the data is unreliable, you have
10 no knowledge about what actually happened at Dish during
11 that month, right?

12 A Oh. I don't know why they reported such a steep
13 drop-off. But it's pretty clear to me that to the extent
14 there was a drop-off for Dish in 2016, that is not
15 informative about what happened to Suddenlink for the two
16 prior years.

17 Q But it's --

18 A So it --

19 Q I'm sorry.

20 A So I wouldn't change my analysis because of this
21 one later anomalous data point.

22 Q But it is part of the industry, and there are ups
23 and downs and that's a down. And to be complete, it should
24 have been included, right?

25 A Well, again, I don't think it's reliable. It

1 stands out.

2 It would not ultimately affect my conclusions much
3 if you were to include that data point because I think it
4 should get this -- it's much later. And I just don't think
5 it's informative, like I said, about the blackout effects
6 over -- that it started more than two years earlier.

7 Q Let me ask you about something else that you said
8 on Tuesday, and I think you just repeated it when you were
9 talking about this industry trend.

10 You said, quote -- and this is at page 3877 of the
11 trial transcript from Tuesday.

12 "We did the statistical analysis, and there was no
13 statistically significant difference in the trends."

14 Do you recall saying that?

15 A I do.

16 Q Now, Professor --

17 MR. WELSH: Your Honor, objection.

18 THE COURT: Come here.

19 MR. PETROCELLI: Okay.

20 (Sealed bench conference)

21 MR. WELSH:

22 MR. PETROCELLI:

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THE COURT:

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(Open court)

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THE COURT: You may proceed, based on the

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discussion at the bench.

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BY MR. PETROCELLI:

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Q So I read you that testimony about a statistical

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analysis. You recall that, right before our little

25

conference with the Judge?

1 A Just now, yeah.

2 Q Yeah.

3 And you will agree with me that there is no
4 statistical analysis of this trend identified anywhere in
5 either your first report or your rebuttal report, correct?

6 A That's correct, because this was in response to
7 something Professor Carlton did in his rebuttal report.

8 Q So you did this after Professor Carlton's rebuttal
9 report, correct?

10 A That is correct.

11 Q Okay. And you never disclosed it to us, correct?
12 I think it may have come up in my deposition.

13 You never disclosed any work product to us about
14 any statistical analysis that you did; and even in your
15 deposition, you didn't say that you had done such a
16 statistical analysis.

17 You said you were thinking about doing some
18 things, and you hadn't decided on what you were going to do.

19 Do you recall that?

20 A I don't recall that nuance. I know it came up in
21 the deposition. I don't remember the specifics that you're
22 asking about.

23 Q Well, I can show -- I'll get the deposition, and
24 we'll show that.

25 But who ran this analysis?

1 A I did, supervising the people -- the economists at
2 Bates White.

3 Q Why was it not given to us?

4 A You'd have to ask the lawyers. I didn't believe
5 there was another round of disclosure at this point.

6 MR. PETROCELLI: Well, Your Honor, may I approach?

7 THE COURT: You may.

8 (Sealed bench conference)

9 MR. PETROCELLI:

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MR. WELSH:

(Open court)

1 THE COURT: You may continue.

2 BY MR. PETROCELLI:

3 Q One final question.

4 Now, you were asked to run through some numbers on
5 your high end. But do you recall testifying on Tuesday at
6 page 3852 of the trial transcript: "So the way I think
7 about these things is that I have a range. And since the
8 low end of the range led to significant consumer harm, that
9 is what I reported, while [sic] there was a higher end.
10 That is what I did. And that is my normal practice, and I
11 will stick with it."

12 You reported on the lower end, sir, and that's
13 when you stick with, correct?

14 A I highlighted the lower end and described the
15 range, and I stick with that, yes, sir.

16 MR. PETROCELLI: Nothing further, Your Honor.

17 THE COURT: Okay.

18 MR. WELSH: Your Honor, this is a housekeeping
19 measure. I am advised that we will need to put PX559 under
20 seal because of confidentiality issues.

21 THE COURT: Oh.

22 MR. WELSH: The DX943 does not need to be, but
23 PX559 will be -- will need to be.

24 MR. PETROCELLI: 943.

25 MR. WELSH: What did I just say?

1 943 does not need to be.

2 MR. PETROCELLI: Because there's no names.

3 MR. WELSH: Right. So PX559 does.

4 Thank you, Your Honor.

5 THE COURT: All right. Any objection to that?

6 MR. PETROCELLI: No objection, Your Honor.

7 THE COURT: All right. So PX559 will be admitted
8 under seal. PX943 will be admitted but not under seal.

9 You're excused.

10 THE WITNESS: Thank you, Your Honor.

11 THE COURT: Take care.

12 Mr. Conrath, do you have any more witnesses you
13 want to call?

14 MR. CONRATH: We could keep going, but I think
15 it's time to quit, Your Honor.

16 So I've got a couple of housekeeping matters.

17 THE COURT: Housekeeping matters there?

18 MR. CONRATH: Yes. One is a housekeeping matter.

19 You'll recall the other day that PX558, we asked
20 to be under seal so we could redact some information. And I
21 have a redacted copy of PX558, which if I could pass up, I'd
22 appreciate it.

23 THE COURT: You've shown it to the defense there?

24 MR. CONRATH: They already have it from yesterday.

25 THE COURT: All right.

1 Yes, I remember this now.

2 MR. CONRATH: Right.

3 THE COURT: I understand.

4 MR. CONRATH: Yeah. It had --

5 THE COURT: It's probably timely that you do that.

6 MR. CONRATH: Pardon?

7 THE COURT: It's probably timely that you do that.

8 MR. CONRATH: Yeah, I think so.

9 Second, Your Honor --

10 THE COURT: I'm just saying, yeah.

11 MR. CONRATH: -- I'd like to move the Court to
12 take judicial notice of certain PXs that are public filings.
13 And I have -- if I may approach to pass these up and also a
14 short memorandum in support of this motion.

15 THE COURT: All right.

16 The defense has seen all of this and reviewed all
17 this?

18 MR. CONRATH: They've seen this, although I did
19 not give them the memorandum until earlier today. And so I
20 obviously have no objection if in a day or so they respond
21 in writing, if that's their preference.

22 But the request is for the Court to take judicial
23 notice of filings that have been made by AT&T and also
24 DirecTV. And I offer them, as appropriate in any time, of
25 course, judicial notice. But here --

1 THE COURT: What are they filings in?

2 MR. CONRATH: They are filings in several
3 proceedings at the Federal Communications Commission.

4 THE COURT: Okay.

5 MR. CONRATH: They make statements that are
6 inconsistent with what -- some of the statements by their
7 executives in this trial, saying that the government's
8 theory of vertical integration is absurd, doesn't make any
9 sense.

10 They're basically espousing the same theory in
11 those cases. And we ask the Court to take judicial notice,
12 which we think is entirely appropriate.

13 MR. PETROCELLI: May I respond, Your Honor?

14 THE COURT: You will in a second.

15 Go ahead. Finish your thought, Mr. Conrath.

16 MR. CONRATH: So I think this is the last -- we're
17 not calling any more witnesses, offering any more
18 exhibits -- the subject to resolution or to the Court's
19 resolving this. We're prepared to close our rebuttal case.

20 THE COURT: Okay. Mr. Petrocelli?

21 MR. PETROCELLI: Your Honor, we object to each and
22 every one of these exhibits. We've had extensive argument
23 about these already.

24 THE COURT: Between the parties or in front of me?

25 MR. PETROCELLI: With Your Honor at the two days

1 of hearings that occurred prior to the first witness on
2 March 19 and March 20.

3 They've attempted to lay foundation with
4 Mr. Stephenson with one of the documents. He had no
5 familiarity with it.

6 They have not called a single witness with respect
7 to any of these documents to try to lay foundation and get
8 them in evidence.

9 Every one of these documents is completely
10 irrelevant under 401, 402, 403. They relate to other
11 proceedings.

12 There's been no witness testimony about any of
13 them. Those proceedings are unrelated to this case. They
14 have not been used to impeach any witness.

15 They are rife with hearsay. And six of them have
16 expert reports of experts, wholly inadmissible expert
17 reports of experts who never testified, are not subject to
18 cross-examination.

19 We went through this at length on the 19th and/or
20 20th, and they didn't even attempt to put these into
21 evidence in their case-in-chief, Your Honor.

22 They never actually offered them into evidence in
23 their case-in-chief, except they tried, one of the
24 documents, Exhibit 442, with Mr. Stephenson. You gave them
25 an opportunity to lay foundation. They were unable to do

1 so, and the document was not admitted.

2 They did not attempt to present any of the other
3 documents to any other witnesses or call any witnesses with
4 regard to these documents.

5 THE COURT: So as I understand it, these are
6 documents that the government is offering to be able to cite
7 in its closing brief, closing argument as admissions of the
8 company, AT&T, right?

9 MR. PETROCELLI: That would be their argument with
10 respect to some of these, but they can't even make that
11 argument with respect to others, because, for example,
12 several of these are for DirectTV pre-acquisition.

13 THE COURT: Pre-acquisition?

14 MR. PETROCELLI: Pre-acquisition.

15 And those under the cases that I cited to you at
16 the time, Your Honor, are not admissions against the
17 successor company.

18 For example, that was the case of
19 *Three Rivers Confections*. Statements made by a predecessor
20 in interest or employees of a predecessor are not
21 admissible.

22 I also cited case law to you that the expert
23 reports are inadmissible.

24 The citation to that is
25 *Mahnke versus Washington Metro*, 821 F. Supp. 2d 125. That's

1 a D.C. District Court opinion, 2011.

2 THE COURT: For the benefit of the record --

3 MR. PETROCELLI: Excuse me?

4 THE COURT: For the benefit of the record, this
5 notebook, it's about 4 inches thick of paper. And I have no
6 way of knowing, from looking at this notebook, what
7 sentences or paragraphs in here the government is pointing
8 to as admissions that they would like to be able to use in
9 their closing argument or in their trial brief.

10 How could I do that without knowing that for
11 starters?

12 MR. PETROCELLI: Well, Your Honor, that is
13 certainly true.

14 This is just an inexcusable document dump on the
15 last minute of the trial, when we have no ability to respond
16 to any of this.

17 Every one of these has an explanation of
18 completely different circumstances, and I could probably
19 find you an equal number of documents in which the
20 government has asserted exactly the opposite positions,
21 including in the Comcast-NBCU merger, where they advocated
22 to Your Honor how great the arbitration remedy was, for
23 example. And now, all of a sudden, they have no interest in
24 it.

25 THE COURT: Yeah.

1 MR. PETROCELLI: So we can both play this game.

2 These are totally different transactions. Some of
3 them are not even transaction. They involve sunseting of
4 the exclusivity rule under the FCC rules. Some of them go
5 back to other -- Charter-Time Warner merger, all kinds of
6 things in here.

7 And this is solely for the purpose of being able
8 to cherry-pick and quote, out of context, with no witness
9 testimony and with no ability of the defense to respond or
10 explain the circumstances so that they can put it in a
11 post-trial brief and probably an appellate brief,
12 Your Honor.

13 That's what this is about. And it would be a
14 manifest injustice to, at this late stage, to let them dump
15 these documents indiscriminately into the record.

16 THE COURT: Well, we're not going to have that.

17 MR. PETROCELLI: And I'm happy to address all of
18 this in writing, but I don't think Your Honor needs any
19 writing. And this is like the fourth or fifth time we've
20 passed on this issue.

21 THE COURT: I've got a lot of paper here. I don't
22 need any more writing at the moment.

23 So, Mr. Conrath, at an absolute minimum, you're
24 going to have to isolate and identify as to each document
25 what statement or statements you believe are, A, relevant;

1 B, statements that would be qualified as admissions of a
2 party, if that's your theory, okay; statements that are not
3 in violation of 403 in any way.

4 I mean, so I don't know how long it will take to
5 do that, because this is a lot of paper. This is a lot of
6 paper.

7 And as Mr. Petrocelli pointed out correctly, I
8 might add, 442, we went through the exercise with
9 Mr. Stephenson as to 442. And I would not admit it, under
10 the circumstances, based on the proffers that were made and
11 the things that you were pointing to.

12 So I've already rejected the admission of 442, and
13 I can't even imagine the rationale for why I would
14 essentially be reversing myself as to 442.

15 So now, I don't know how long it's going to take
16 to do what I just said. But if you want to do closing
17 arguments Monday, you've got a lot of work ahead of you.

18 MR. PETROCELLI: Your Honor, we would need an
19 opportunity to respond.

20 And I need to emphasize to the Court how
21 prejudicial this would be to the defendants, because we've
22 had no opportunity to address these matters. And seeing
23 them for the first time in a closing argument or in a
24 closing brief or an appellate brief is inappropriate.

25 They had every chance to call witnesses --

1 THE COURT: I already told you I'm not going to
2 admit it.

3 MR. PETROCELLI: And the request for judicial
4 notice doesn't do anything. It's not a silver bullet that
5 all of a sudden allows them to dump in hearsay and
6 irrelevant evidence.

7 THE COURT: I've got a feeling that this is stuff
8 that you would like but you don't need.

9 MR. CONRATH: So if I can address a couple of
10 points Your Honor made.

11 So in the -- the memorandum that I handed up
12 isolates and lists the specific statements, and I'm happy to
13 limit to those that are identified on page 3 and 4.

14 These -- it is correct that this includes 442.

15 I did not offer 442 or did not request judicial
16 notice. And so I'm offering it under a different approach
17 here, and that's the only reason on why it would come back
18 to 442.

19 And as to the question of DirecTV, in the motion
20 that we -- the motion response that we filed with respect to
21 DirecTV in footnote -- I won't recall the number, addresses
22 the question of the appropriateness of looking at something
23 from DirecTV.

24 These documents that we've submitted do include
25 some statements that are adoptive admissions, when a party

1 submits an expert report to a court or to -- and asks the
2 Court to rely on it or in this case to a federal agency and
3 asks the Court to rely on it, that party is adopting it.
4 And I think that's a pretty standard judgment of whether a
5 party has adopted something.

6 So there are a couple expert reports in there, and
7 they're adoptive admissions for that reason.

8 So with those limitations, I think we have
9 addressed the questions that Your Honor posed, identified
10 the specifics. And I ask the Court to --

11 THE COURT: Well, look, here's the practical
12 reality. The practical reality is that you want me to rule
13 on this prior to Monday. You want to use these Monday?

14 MR. CONRATH: I would like the right to.

15 THE COURT: Well, I don't know how I can be in a
16 position to review all of these documents, which are
17 mammoth, in order to have the context in which the limited
18 portions you're pulling out of it, cherry-picking out of it,
19 as Mr. Petrocelli's suggests, without having some sense of
20 the context.

21 And like I said, we're talking 4 inches here or
22 more. I mean, it's lot of paper, a lot of paper.

23 Today is Thursday afternoon. Closing arguments
24 are supposed to be Monday morning.

25 So I just -- and we might need to have argument on

1 some of these issues.

2 So I've got a feeling that, at an absolute
3 minimum, you can't use any of this Monday, any. And none of
4 this will be admitted by Monday, so you can't use it Monday.

5 I'll leave open the question of whether it can be
6 admitted by Thursday when your findings of fact are
7 submitted and your trial brief.

8 But I might have to have a hearing on some of
9 these things that you're seeking to admit here.

10 MR. CONRATH: We'd be fully prepared to proceed
11 that way, Your Honor.

12 THE COURT: Okay. I'll take a look at it.

13 MR. CONRATH: Okay. Thank you.

14 THE COURT: Mr. Petrocelli.

15 MR. PETROCELLI: As I also pointed out when we
16 argued about this over a month ago, expert --

17 THE COURT: I didn't have this pleading, though.
18 I didn't have this memo back then and all that.

19 MR. PETROCELLI: No, you didn't.

20 THE COURT: This is a dump on the Court right now
21 at the 11th hour and 55th minute.

22 MR. PETROCELLI: Well, not only on the Court, but
23 it's extremely prejudicial to us.

24 I just want to correct something that Mr. Conrath
25 said.

1 THE WITNESS: The law is quite clear that expert
2 reports are not admissions and are not adoptive admissions
3 of parties. That's *Kirk v. Raymark Industries*, 61 F.3d 147,
4 Your Honor.

5 THE COURT: Yeah.

6 So as far as I'm concerned, anyway, this is all
7 off the table for Monday. So don't be planning on including
8 it anywhere in your arguments.

9 And then we'll figure out what we're going to do
10 about it before you get your stuff in on Thursday.

11 All right. Now, let's talk about Monday.

12 I think two hours is too much, counsel,
13 I don't think you need two hours each.

14 I'm going to have trial briefs and, obviously,
15 findings of fact. So I think right now my inclination is to
16 limit each side to an hour and a half and allow the
17 government to take a portion of it, say, 15 minutes, to do a
18 rebuttal since you have the burden of proof.

19 So what I was thinking is starting Monday at 11:00
20 and going until 12:15. You can go till 12:30 and use your
21 whole hour and a half. That's your choice.

22 But whatever time you choose between the two, then
23 we'll break for lunch and we'll come back at 2:00.

24 And then the defense will do their hour and a
25 half, and we'll take a 15-minute break for my reporter,

1 especially.

2 And then we'll do whatever rebuttal you want to
3 do. You only have up to 15 minutes to do it. And that'll
4 take care of the closing arguments for Monday.

5 Can you live with that?

6 MR. PETROCELLI: That is acceptable, Your Honor.

7 MR. CONRATH: Yes, certainly, that works for us,
8 Your Honor.

9 THE COURT: Okay.

10 Now, in terms of the closing arguments, if you
11 want to use posterboards or whatever, you're welcome to do
12 that. That's fine.

13 Don't do slide decks. I don't want any more slide
14 decks. I've got plenty of slide decks here. I don't want
15 any more slide decks.

16 And I think that's pretty much the only other
17 issue I had.

18 Do you have any questions, counsel?

19 MR. PETROCELLI: May I approach?

20 THE COURT: Yes.

21 (Sealed bench conference)

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(Open court)

THE COURT: All right. So --

MR. CONRATH: I just wanted to say one brief word, Your Honor, which is, we know when a case like this comes to a Court, that it's an imposition, in a sense, on the Court and all of its personnel. And I just want to express our thanks to the Court and its personnel who have offered as many courtesies in every way.

THE COURT: That's very kind of you.

MR. CONRATH: We appreciate it.

THE COURT: That's very kind of you. Thank you.

MR. PETROCELLI: Your Honor, we echo that on behalf of Time Warner and AT&T and everybody. It's been an absolute privilege and honor to have presented this case in your courtroom with your staff, who's been extraordinarily courteous and professional. And Your Honor has gone to

1 great lengths to accommodate the parties, and we truly,
2 truly appreciate it.

3 Thank you very much.

4 THE COURT: All right. Well, thank you also. And
5 it's not necessary, Counsel.

6 It's not every day one has a case of this
7 importance. And it's not very often that, if ever, we have
8 a case that's as well prepared and well tried.

9 So it's a great compliment to both sides, and
10 we'll see what Monday brings.

11 But, you know, based on everything up until today,
12 it's pretty exemplary.

13 So thanks for all your hard work, and I think both
14 sides deserve a round of beers, at a minimum.

15 11:00 Monday.

16 DEPUTY CLERK: All rise.

17 This Honorable Court now stands in recess until
18 the return of court.

19 (Proceedings concluded at 3:48 p.m.)
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C E R T I F I C A T E

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

Date: April 26, 2018 /S/ William P. Zaremba

William P. Zaremba, RMR, CRR