ORAL ARGUMENT SCHEDULED FOR DECEMBER 6, 2018

No. 18-5214

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

AT&T INC., DIRECTV GROUP HOLDINGS, LLC,
AND TIME WARNER INC.,

Defendants-Appellees.

On Appeal from the
United States District Court for the District of Columbia
No. 1:17-cv-2511 (Honorable Richard J. Leon)

FINAL BRIEF OF AT&T INC., DIRECTV GROUP HOLDINGS, LLC, AND TIME WARNER INC.

October 18, 2018

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), appellees certify:

A. Parties and Amici. In addition to the parties and amici listed in Appellant's Brief, amicus briefs were filed in this Court by the American Antitrust Institute, Consumers Union, Public Knowledge, Open Markets Institute, Cinemoi North America, William P. Rogerson and the American Cable Association, and 27 Antitrust Scholars.

B. Ruling Under Review. References to the rulings at issue appear in Appellant's Brief.

C. Related Cases. Appellees are not aware of any related cases.

/s/ Peter D. Keisler
Peter D. Keisler

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Appellees respectfully submit the following Corporate Disclosure Statements:

AT&T Inc., a Delaware corporation, is a publicly traded corporation that, through its wholly-owned affiliates, is principally engaged in the business of providing communications, media, and entertainment services and products to the general public. AT&T Inc. has no parent company and, to the best of its knowledge, no publicly held company owns ten percent or more of its stock.

DIRECTV Group Holdings, LLC is a Delaware limited liability company that, through its wholly-owned affiliates, is principally engaged in the business of providing digital television entertainment services and products to the general public. DIRECTV Group Holdings, LLC is a wholly-owned subsidiary of AT&T Inc.

Time Warner Inc. was a Delaware corporation that was acquired by AT&T Inc. on June 14, 2018. The successor to Time Warner Inc. is Warner Media, LLC, a Delaware limited liability company. Warner Media, LLC is a media and entertainment company and is a wholly-owned subsidiary of AT&T Inc.

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PRELIMINARY STATEMENT

Three months ago, AT&T and Time Warner merged. Because they were not competitors, the merger was "vertical," combining a creator and aggregator of television programming (Time Warner) with a distributor of television programming (AT&T).

The Department of Justice's suit to block the transaction was the United States' first litigated challenge to a vertical merger in four decades, prompting many press outlets to question whether the White House had improperly influenced DOJ's decision to bring the case.[1] The district court, however, quashed discovery into that issue, effectively limiting the trial to the fundamental question of whether DOJ had met its burden to prove that the proposed combination violated Section 7 of the Clayton Act.

In the crucible of litigation, DOJ's claims were exposed as both narrow and fragile. First, DOJ conceded that the merger would result in AT&T charging its

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[1] *E.g.*, *Justice Dep't sues to block AT&T's purchase of Time Warner*, LA Times (Nov. 20, 2017). The day the merger was announced, then-candidate Donald Trump stated: "As an example of the power structure I'm fighting, AT&T is buying Time-Warner, and thus CNN, a deal we will not approve in my administration[.]" http://money.cnn.com/2016/10/22/media/donald-trump-att-time-warner/. His campaign elaborated: "AT&T … is now trying to buy Time Warner and thus the wildly anti-Trump CNN. Donald Trump would never approve such a deal." https://web.archive.org/web/20161102024656/https:/ www.donaldjtrump.com/press-releases/statement-on-monopoly-power-of-new-media-conglomerates.

customers *lower* retail prices than it otherwise would. As a result, DOJ did *not* attempt to prove that the merger would lead to consumers paying higher prices for AT&T's pay-TV services. Second, DOJ conceded that, in an ecosystem marked by intense competition between programmers and distributors alike, it would make no economic sense for AT&T to withhold Time Warner's programming from its cable and satellite rivals. Constrained by these concessions, DOJ's primary claim at trial—and the only claim that DOJ has not abandoned on appeal—offered the government little, if any, margin for error.

Relying primarily on a theoretical model that purports to simulate the bargaining dynamics between programmers and pay-TV distributors, DOJ sought to prove that the merger would likely cause two things to happen: (1) AT&T would charge its rival pay-TV distributors higher wholesale prices for certain Time Warner networks, and (2) rival distributors would in turn increase their retail prices by a collective amount greater than the price savings that millions of AT&T customers would enjoy as a result of the merger. To justify blocking the transaction on that theory of "net consumer harm," DOJ had to prove *both* the wholesale price increase *and* the follow-on consumer price increase in an amount sufficient to swamp the conceded savings to AT&T customers. When DOJ ran its model, however, its lead expert reported that, even under his calculations, the alleged net price increase amounted to only about 0.2% of a typical customer's pay-TV bill.

Together, DOJ's two-step theory of liability and razor-thin estimate of alleged consumer harm underscored the critical role the district court would play as the finder of fact, tasked with evaluating the model's inputs, weighing the competing evidence, and judging the credibility of the 31 witnesses called by the parties. With the model's sensitivity and DOJ's own prediction of minuscule harm, slight differences in data inputs could just as easily show that, like most vertical mergers, the transaction would result in net *benefit* for consumers, not net harm. From the outset, then, DOJ's claims were entirely dependent on the weight the district court assigned not only to DOJ's evidence, but to the extensive contrary evidence proffered by defendants, much of it from the testimony of DOJ's own witnesses.

After a six-week trial that generated over 4,000 pages of transcript, the district court issued a detailed, 172-page opinion that meticulously evaluated the evidence and rejected the factual underpinnings of DOJ's case. DOJ, the district court concluded, had simply failed to establish a violation of the Clayton Act under the legal standards articulated by the government. Now, to prevail in its request for a remand, DOJ acknowledges that it must demonstrate "clear error" in the district court's battery of factual findings. This is another burden that DOJ cannot meet.

Contrary to the caricature that DOJ paints, the district court well understood the economics underlying DOJ's hypothetical bargaining theory. Among other things, the court agreed with *DOJ's own expert* that the predictions generated by the theory must, in a given context, be tested by and proven with evidence rather than assumed. The court also credited a detailed analysis of prior comparable transactions showing that, in the pay-TV industry, vertical integration has *not* caused prices to increase. That empirical showing, which DOJ now ignores, comported with testimony from distributors and programmers. This and substantial other evidence, not a supposed failure to apply the principle of corporate-wide profit-maximization, led the court to reject DOJ's prediction that Time Warner would command a higher wholesale price for its most popular networks simply by being affiliated with AT&T.

Then, in a series of independent findings equally fatal to DOJ's case, the court *accepted* DOJ's bargaining model but determined that DOJ had failed to show that the model, properly applied, predicts a net increase in retail prices. Importantly, the model's prediction of retail price effects turned not only on theory, but on highly disputed real-world facts, such as how many customers would switch pay-TV providers once certain programming is dropped, where they would go, and how much profit margin a pay-TV provider earns on each subscriber. To justify its prediction of a 0.2% retail price increase, DOJ had to persuade the court that its witnesses were more credible than defense witnesses on *each* of several such facts. Yet, as the court found, DOJ relied on figures that were outdated, inflated, or, in some cases, manipulated in ways that its expert could not explain and had not even known about. DOJ's model also ignored important aspects of the pay-TV market, including distributors' existing contracts with Time Warner, Time Warner's contractual obligation to arbitrate carriage disputes, and the program access rules that the FCC applies to integrated pay-TV providers. In each instance, the result was dispositive in its own right. Even accepting DOJ's theoretical model, the district court made a series of detailed factual findings that rejected, on multiple independent levels, the inputs and assumptions necessary for the model to generate a result that could sustain DOJ's theory of net consumer harm.

On each of these independent grounds, the judgment of the district court should be affirmed.

STATEMENT OF THE CASE

DOJ acknowledges that its challenge is entirely factual and is thus subject to a "clear error" standard. Br. 3. A party cannot show clear error, however, simply by "favor[ing this Court] with its version of the facts based on selected portions of the transcript, in disregard of the findings" of the district court, and this Court may "disregard fact assertions that overleap or ignore the findings" below. *Pendleton v. Rumsfeld*, 628 F.2d 102, 106 (D.C. Cir. 1980). Yet DOJ ignores many key findings and mischaracterizes others.

A. The Transaction And Its Competitive Market Context.

Time Warner creates and aggregates video programming through three business units: (1) Warner Bros., a studio; (2) HBO, a premium subscription-based network; and (3) Turner, which operates basic cable channels.[2] The pre-merger Time Warner did not distribute video content itself and thus operated as a "trapped wholesaler," selling its content to other businesses and not directly to consumers. JA55, 78, 80 (Op.8, 31, 33).

Turner, the focus of DOJ's appeal, offers a mix of general entertainment, news, and other programming through channels such as CNN, TNT, and TBS. Turner earns money mainly by licensing these channels to distributors and selling advertising on its programs. While popular, Turner's networks account for only 8% of pay-TV viewership, down from 10% in 2011, and only 6% of viewers when internet-based distribution is included. JA79 (Op.32). Despite the government's

[2] These companies are now contained within "Warner Media, LLC," a wholly-owned AT&T subsidiary. For simplicity, we refer to them collectively as "Time Warner" and to the merged firm's distribution operations (including DIRECTV) as "AT&T."

focus on Turner's rights to various sports events (Br. 12), Turner's share of sports programming is very small compared to that of ESPN and the broadcast networks. For example, it has rights to only 1% of Major League Baseball games, less than 8% of professional basketball games, well under 3% of college men's basketball games, and no football rights at all. JA407:17-408:5, 411:20-412:1, 440:19-441:13 (Martin).

AT&T distributes subscription-TV services directly to consumers, primarily through satellite-delivered DIRECTV. JA75, 78-79 (Op.28, 31-32). Because satellite transmission gives AT&T a nationwide footprint, it is "the largest provider of traditional [subscription-TV] services," with approximately 25 million customers. JA75 (Op.28). But subscription-TV markets are local, not national, and "in any given local area, … the incumbent cable operator [not AT&T] is typically the dominant [subscription-TV provider]." JA59 (Op.12). Moreover, "roughly twenty percent of American households have cut the cord"—*i.e.*, canceled traditional pay-TV service in favor of online video alternatives such as Netflix and Hulu—and "[t]his number, high as it is, continues to grow." JA69 (Op.22).

This merger is "vertical" in that AT&T and Time Warner are in complementary businesses and do not compete with each other. JA102 (Op.55). Vertical integration has become increasingly common in this industry. For example, Netflix is now the world's largest video distributor, with more than 100 million subscribers, and one of the world's preeminent content creators. The "dramatic growth" of Netflix and other online giants like Amazon and Google "can be traced in part to the value conferred by vertical integration." JA65-66 (Op.18-19). Even before the rise of online video, the government approved several vertical transactions in this industry: Time Warner owned both Turner and Time Warner Cable from 1996 until it spun off the latter in 2009; News Corp./Fox owned a major stake in DIRECTV from 2004 to 2008; and Comcast acquired NBCUniversal in 2011.

This merger, too, is designed to unlock the consumer benefits generated by combining content creation with direct consumer relationships. JA83-87 (Op.36-40). For example, it enables the combined company to develop more innovative video products for mobile users and make content more responsive to viewer preferences. JA85-87 (Op.38-40). The merger also enables the combined company to build a national platform for targeted video advertising that will challenge the digital-advertising duopoly of Google and Facebook. JA86 (Op.39). The merger will thus enable AT&T and Time Warner to "stop 'chasing taillights'" in an industry that is "more intense[ly]" competitive at all levels than ever before. JA50, 68 (Op.3, 21).

B. Litigation And Trial.

DOJ sued to block this merger in November 2017, alleging that its likely effect was "substantially to lessen competition" in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Before this Court, DOJ does not assert the traditional bases for challenging vertical mergers, such as "foreclosure" (withholding inputs from distribution competitors). *See Fruehauf Corp. v. FTC*, 603 F.2d 345, 352 & n.9 (2d Cir. 1979); Br. 25-26 n.3 (noting DOJ's abandoned claims). In particular, DOJ does not claim that the merged firm will withhold Turner programming from its distribution rivals—traditional or online—in hopes of winning customers from them or limiting their growth. DOJ's economic expert, Professor Carl Shapiro, agreed that withholding would make no sense because the merged firm would suffer enormous losses in licensing and advertising revenues that would dwarf any additional distribution revenues. *See* JA119-20 (Op.72-73).[3]

[3] DOJ initially alleged that the post-merger company "could very well withhold" programming from certain online video distributors. JA43-44. But Professor Shapiro repudiated that claim at trial. JA729:14-16, 765:2-17; *see also* JA197-211 (Op.150-64). DOJ has now abandoned the claim and notes that its only remaining theory of harm applies in the same way to online and traditional distributors. Br. 25-26 n.3. It is thus inappropriate for DOJ to suggest, through misleading quotation of company documents, that there could be some unique harm to online distributors. *E.g.*, Br. 14-15; *see also* JA133-35 (Op.86-88) (finding documents entitled to only limited weight). Finally, although DOJ also asserts (Br. 36-37) that Turner might try to sell *too much* programming to online

Instead, DOJ claimed that this merger would alter bargaining dynamics in a manner that would raise wholesale prices for Turner programming to distribution rivals, and in turn harm consumers by raising the overall retail price of pay-TV services by about 0.2%. *See* JA167 (Op.120 n.38); *see also* JA1195:6-15 (Shapiro projects 13-to-27-cent average increase on monthly cable bill, which typically is more than $100). DOJ had to prove two propositions to substantiate that prediction: First, that vertical integration would enable Turner to force AT&T's distribution rivals to pay higher wholesale rates for Turner programming than they otherwise would; *and*, second, that those rivals would then likely raise their *retail* rates enough to more than offset the significant retail price benefits that DOJ conceded this merger would create.

1. Evidence concerning bargaining and wholesale prices.

Video content negotiations are complex. Licensing ("affiliate") agreements between programmers and distributors can be hundreds of pages long, typically last 5-8 years, and have staggered starting dates. *See* JA61-62 (Op.14-15). "Although the 'rate' or payment amount is an important feature of any affiliate agreement, 'these deals are complicated' and 'start with a hundred plus open issues,'" including when certain content can be aired, whether it can be accessed

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distributors offering "skinny bundles," the district court properly found this assertion both meritless and non-merger-specific. JA203-04. DOJ offers no response.

away from home, and "most-favored-nation" clauses that are significant because any distributor has separate agreements with many different programmers. JA61-62 (Op.14-15). These negotiations occur against the backdrop of legal and regulatory constraints, including administrative remedies, that limit a vertically integrated programmer's right to withhold programming or increase price. *E.g.*, 47 U.S.C. § 548 (program access requirements).

Despite the many complex factors that affect licensing negotiations and programming prices, DOJ argued that the fact that Turner is now affiliated with DIRECTV will necessarily influence negotiations such that rival distributors will agree to pay higher rates for Turner programming than they otherwise would have paid. Relying on the Nash bargaining model presented by Professor Shapiro, DOJ claimed that, although Turner would not actually withhold programming from a rival, the merger would improve Turner's bargaining leverage because, if it *did* permanently withhold programming, some retail customers would drop the rival's service, and some of *those* customers would subscribe to AT&T's distribution business instead. DOJ contended that the resulting marginal improvement in the merged company's theoretical "walkaway" position would enable Turner to obtain higher wholesale prices from distributors.

Much of the trial involved DOJ's efforts to prove that this "bargaining theory" accurately predicts real-world behavior in this industry and that—as its model predicts—any vertical merger inevitably results in higher wholesale programming prices for rival distributors. *See* JA724:2-25, 787:16-18 (Shapiro). But several industry witnesses called by DOJ itself contradicted that claim. For example, DOJ called a negotiator for Cable One, a distributor, who testified "it doesn't matter to us who owns the network" when negotiating to carry programming, JA140 (Op.93); the chief negotiator for NBCUniversal, who "never once took into account the interest of [NBC's affiliate] Comcast cable in trying to negotiate a carriage agreement," JA153 (Op.106); and Comcast's lead negotiator, who testified he did not "believe that [this merger] will impact my negotiations with Turner," JA140 (Op.93). *See also* pp. 28-29, *infra* (discussing additional testimony). No third-party distributors testified that the merger would cause them to accede to a Turner demand for higher prices. JA145 (Op.98). This testimony comported with Professor Shapiro's concession that his model does not "capture all of the uncertainties and personalities and unpredictable factors and hairy stuff that might [a]ffect negotiations." JA767:2-6.

DOJ could have tested its model's predictions by using its extensive compilation of historical wholesale-pricing data (obtained in its review of prior transactions) to analyze whether, in fact, vertical integration materially affects programming prices. Yet DOJ failed to conduct that analysis and, in an interrogatory response, took no position on whether the pricing data in its possession showed that "prior vertical integration" had "resulted in higher video programming fees." JA147-48 (Op.100-01 n.28). DOJ also initially refused to produce the data, which defendants received only after obtaining relief from the court. JA91-92, 148 (Op.44-45, 101).

Professor Dennis Carlton, a defense expert, then used these and other data to analyze the effects of vertical integration on wholesale prices, and the results contradicted DOJ's position. Professor Carlton analyzed the price effects of the recent episodes of vertical integration (or dis-integration) described above: Time Warner Cable/Time Warner, DIRECTV/Fox, and Comcast/NBCUniversal. He explained that, if vertical integration between programmers and distributors had the effects DOJ claims, those effects should appear in the form of actual wholesale price changes following these episodes. JA837-40. Professor Carlton found, however, that the data show no statistically significant price effects. *Id.;* JA148-49 (Op.101-02).

Finally, Professor Carlton and Professor Michael Katz explained that Professor Shapiro had, in any event, modeled the wrong post-merger bargaining environment. Shortly after DOJ filed its complaint, Turner extended, to all of its distributors, irrevocable offers to submit to an "arbitration/no-blackout" mechanism based on the same mechanism DOJ designed for the Comcast-NBCUniversal merger in 2011. JA58-59, 88, 196-97 (Op.11-12 n.3, 41, 149-50 n.51). Once a distributor accepts that offer—as it can do whenever negotiations reach impasse—Turner cannot even threaten a blackout; the distributor is legally entitled to carry the Turner networks on the same terms as before, subject to a retroactive true-up based on the arbitrator's award. JA88 (Op.41). This binding commitment thus removes the premise underlying Professor Shapiro's theory of increased bargaining leverage. JA822:19-20 (Carlton); JA899:17-25 (Katz). Professor Shapiro never contested this mechanism's efficacy, and DOJ failed to call the expert witness it had designated to do so.

2. Evidence concerning net consumer impact.

DOJ volunteered that merger-specific efficiencies, combined with continuing competition, would lead the post-merger AT&T to *reduce* its retail prices below what it would charge if the merger were blocked. *See*, *e.g.*, JA775:3-9 (Shapiro). It agreed that, post-merger, AT&T will "no longer need to pay Turner's profit margin to display Turner content," that AT&T will thus save $352 million in marginal costs annually, and that these cost savings will exert downward pressure on AT&T's retail prices. JA114 (Op.67); *see* Br. 62-63. DOJ quantified this conceded benefit (known as "elimination of double-marginalization"), estimating that AT&T's subscribers would pay $78 million less annually than if the merger were blocked. *See* JA774:11-775:5 (Shapiro).[4]

Given that concession, DOJ accepted that it had to prove that the merger would likely cause *net* harm to consumers in the form of higher *average* retail rates, even after accounting for these price benefits. JA114-15, 158 (Op.67-68, 111 n.32).[5] DOJ sought to discharge that burden by using Professor Shapiro's model to predict the magnitude of the alleged wholesale price increases. JA156, 166 (Op.109, 119). Under DOJ's analysis, the larger these projected wholesale price increases were, the larger the projected *retail* price increases would be for those distributors' customers—and thus the more likely that consumer prices would rise *on average*, after accounting for the downward pressure on AT&T's retail rates. JA165 (Op.118 n.37).

[4] Apart from these benefits, defendants presented evidence that the merger will produce more than $2 billion annually in additional cost and revenue synergies. JA101-02 (Op.54-55 n.17). Although DOJ refused to credit *any* of those additional savings, the district court expressed "confiden[ce] that defendants will achieve considerable efficiencies beyond those conceded by the Government." *Id.* The court emphasized, however, that its "ruling d[id] *not* turn on efficiencies offered by defendants in their affirmative case." *Id.*

[5] *See also* n.9, *infra*. This is thus unlike a horizontal merger case, where the government first establishes competitive harm without conceding efficiencies, and the burden then shifts to the defendants to prove countervailing efficiencies. *E.g.*, *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017).

Professor Shapiro's bargaining model (and thus his calculation of net consumer impact) rested primarily on three inputs: (1) how many customers a distributor would lose if it stopped carrying Turner channels (the "subscriber-loss rate"); (2) how many of *those* customers would instead subscribe to AT&T rather than some other option (the "diversion rate"); and (3) what profit margins AT&T would earn on these incremental customers. Evidence concerning these inputs occupied much of the trial and was distinct from the evidence, discussed above, concerning whether vertical integration even affects bargaining dynamics in a material way. Based on the values it assigned to these three inputs, DOJ projected that the merger would cause consumers on average to pay 0.2% more than otherwise for pay-TV services. JA167 (Op.120 n.38) (27 cents monthly); *see also* JA1195:6-15 (13 cents monthly) (Shapiro).

Because DOJ projected such a tiny net increase, even modest adjustments to individual inputs negate DOJ's projected overall harm to consumers. JA167 (Op.120 n.38). For example, a subscriber-loss rate of 5% or below nullifies any projected increase in average retail prices even if DOJ's other input assumptions remain intact. JA175-76 (Op.128-29); JA788:4-7 (Shapiro conceding this point). And the trial evidence showed that the correct value for this input is well below 5% and perhaps as low as 2%. JA176-78, 184 (Op.129-31, 137 n.45). Professor Shapiro nonetheless used a value of 9%. As his "single best" support for that figure, JA169 (Op.122), he relied on a survey-based study created by consulting firm Altman Vilandrie. But Professor Shapiro was unaware that Altman Vilandrie had originally calculated a lower value (5%) for the figure he relied upon and then raised it, without any further empirical work, to 9% after a meeting with Charter, a merger opponent that had commissioned this study. JA791:21-792:10 (Shapiro). DOJ also cited other evidence to support its high subscriber-loss figure, including testimony from Professor John Hauser. But the district court rejected that evidence as unreliable, JA178-83, and DOJ's brief does not mention it.

C. The District Court's Opinion.

The district court noted the broad legal issues briefed below and concluded it did not need to address them. *See* JA1361-63. For example, the court "harbor[ed] serious doubts" that DOJ's claimed 0.2% consumer price increase "would, if proven, constitute a '*substantial* lessening of competition' for purposes of Section 7." JA117-18 n.23 (emphasis added); *see also* JA99 n.16 (declining to resolve dispute over DOJ's burden to prove "likely" harm because DOJ had not met even its proposed, less stringent standard; citing *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990) (merger review is concerned with "*probabilities*, not certainties or possibilities")). But the court found that DOJ had not substantiated a reasonable probability even of that minuscule price effect.[6]

The court first found that DOJ had not met its initial burden of showing that the merger would enable Turner to raise its wholesale prices. The court found that Professor Carlton's empirical analysis "definitively shows that prior instances of vertical integration in the video programming and distribution industry have had no statistically significant effect on [wholesale] content prices." JA152. The court also credited the testimony of several industry witnesses called by DOJ itself that vertical integration never materially affected their content-licensing negotiations. JA153-55. And the court noted that "the record is barren of any contentions by the third-party competitors that they would actually give in to any price increases demanded by Turner as a result of its purported increase in post-merger leverage." JA145. The court thus concluded that DOJ had failed to substantiate its "specific prediction that a *marginal* improvement in Turner's (still unprofitable) position in a blackout would *meaningfully* alter Turner's bargaining leverage." JA164-65 n.36 (emphases added).

Then, for the ensuing 32 pages of its opinion, the district court put aside these threshold problems with DOJ's theory. The court assumed *arguendo* that

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[6] Defendants preserve for any further proceedings all legal positions presented below, under which DOJ's case would fail even on its view of the facts.

DOJ's bargaining model *does* accurately capture industry bargaining dynamics and that a marginal improvement in a programmer's walkaway position *does* inevitably result in higher wholesale prices. Accepting the model on its own terms, the court analyzed each of the fact-based disputes about input assumptions to determine the likely net impact on average retail prices. JA165-96.

The district court found that DOJ had, in multiple respects, fed inflated or unreliable numbers into the model to generate an overall retail price increase (though even then, a minuscule and statistically meaningless one). Several of these input errors were independently dispositive, in that correcting *any* of them completely eliminated DOJ's projected increase. JA167 n.38. The court further noted that, as "extra icing on a cake already frosted," Turner's irrevocable offer to submit to an arbitration/no-blackout mechanism will "be accepted by Turner's counterparties" and will have "real-world impact." JA196-97 n.51.

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DOJ criticizes the district court in passing for various evidentiary and procedural rulings, such as setting "narrow time limits" on Professor Shapiro's testimony and "declin[ing] to close the courtroom" a few of the many times DOJ asked. Br. 23. But DOJ does not develop these criticisms into any appellate challenge, presumably because it *agreed* to the time limits, *see* JA1153:5-12, 671:3, 762:19-763:17, 803:5-16, and because the court acted well within its discretion in honoring the presumption that judicial proceedings will be open to the public, JA96-97 (Op.49-50 n.15).

DOJ also wrongly implies that the court systematically ruled against it on procedural issues. The court's rejection of defendants' selective-enforcement defense (in addition to many other rulings) shows otherwise. Defendants sought discovery on whether political animus against CNN unconstitutionally influenced DOJ's decision to sue rather than negotiate a consent decree like the one DOJ found sufficient in Comcast-NBCUniversal. *See supra* n.1. But the district court barred that discovery at DOJ's behest. JA92-93 (Op.45-46).

STANDARD OF REVIEW

This appeal solely involves district court factfinding subject to the "clearly erroneous" standard. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985). Findings based on the district court's weighing of trial witnesses' (including expert witnesses') credibility are entitled to the highest deference on appeal. *Coleman v. District of Columbia*, 794 F.3d 49, 63 (D.C. Cir. 2015). Finally, DOJ must show that any error was "prejudicial"—*i.e.*, it "affected the outcome of the district court proceedings." *Czekalski v. LaHood*, 589 F.3d 449, 453 (D.C. Cir. 2009).

SUMMARY OF ARGUMENT

DOJ bore the conceded burden of proving both (1) that the merger will increase the wholesale price for Turner programming and (2) that this wholesale price effect will be so significant that *retail* rates overall will likely be higher than otherwise, even after the merger's conceded consumer price benefits—$78 million annually—are taken into account. The district court committed no error in concluding that DOJ failed to make either of these factual showings.

I. The district court properly credited Professor Carlton's empirical analysis of prior vertical transactions, which showed no statistically significant effect on wholesale programming rates. DOJ does not address that analysis in its opening brief, thus forfeiting any challenge to it. The court also properly relied on corroborating testimony from multiple third-party witnesses—several called by DOJ—who confirmed that vertical integration had no material effect on their historical bargaining experiences.

The court's findings on these points reflect no misunderstanding of either Nash bargaining theory or the principle of corporate-wide profit maximization. Instead, the court found that DOJ had not sustained its burden of showing that an incremental improvement in Turner's "walkaway" position would materially affect wholesale programming prices. DOJ offers no basis for second-guessing that conclusion.

In any event, DOJ never accounted for real-world constraints that eliminated the predicate for its bargaining theory. Professor Shapiro himself acknowledged that "it would take a completely different model" to account for Turner's irrevocable arbitration/no-blackout commitment, which precludes Turner from threatening blackouts and thus from exercising any increased "bargaining leverage." DOJ never provided that "completely different model" or showed how the merger could possibly enable Turner to increase prices in this circumstance, and it failed to call the separate expert who Professor Shapiro said would plug this hole in its model.

II. Even if the government's bargaining model is accepted on its own terms and the arbitration/no-blackout mechanism is ignored, DOJ still failed for multiple reasons to satisfy its additional burden of showing that net *retail* prices will likely be higher than otherwise. For example, the district court found that DOJ had used inflated (1) subscriber-loss rates, (2) diversion rates, and (3) margins, and (4) had improperly disregarded the impact of pre-existing licensing agreements between Turner and distributors. DOJ has no plausible basis for challenging the court's ruling on the first three of those input errors and ignores the fourth altogether, thereby waiving any objection to it.

Each DOJ input error is an adequate and independent basis for affirmance. Correcting *any* of those errors nullifies (or all but nullifies) DOJ's projected 0.2%

increase in overall retail prices. Correcting them all produces a predicted overall retail price *decrease* greater than DOJ's projected increase. Indeed, the court concluded that the sensitivity of DOJ's tiny projected retail rate increase to modest adjustments in modeling inputs was an independent basis for finding DOJ's results statistically insignificant and its modeling evidence non-probative. DOJ ignores the court's ruling on that point as well.

ARGUMENT

Until this case, DOJ had not taken a vertical merger to trial in four decades. As it has long recognized, vertical mergers are "less likely than horizontal mergers to create competitive problems," DOJ, *Non-Horizontal Merger Guidelines* § 4 (1984), and most "are indeed procompetitive or competitively neutral," Br. 2.[7] Of course, some vertical mergers may present competitive concerns, and DOJ describes an economic theory that, in appropriate circumstances, might support a challenge. But DOJ's burden is not simply to describe an economic theory. DOJ had to prove, with facts, that the theory fits the relevant industry setting and that proper application of the theory demonstrates a likelihood of substantial competitive harm. DOJ failed in both respects.

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[7] *See Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 840 (D.C. Cir. 2006); *Republic Tobacco Co. v. North Atl. Trading Co.*, 381 F.3d 717, 737 (7th Cir. 2004); *Alberta Gas Chems. Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235, 1244 (3d Cir. 1987); *Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273, 278 (1st Cir. 1981).

Analysis of this case must begin with a critical fact that DOJ acknowledged in its affirmative case: by saving money on Turner programming, the post-merger AT&T will charge its customers at least $78 million less annually than it would charge them if the merger were blocked. JA114 (Op.67); Statement § B.1, *supra*.[8] Having acknowledged that benefit, DOJ also recognized "that to perform a valid 'vertical merger analysis' under the applicable 'consumer welfare' standard, it is necessary to 'balance' or 'tradeoff' the merger's proconsumer benefits with any predicted consumer harms." JA158 (Op.111 n.32) (quoting Shapiro).[9] Thus, DOJ itself conceded that it would not be enough to show that this merger will likely produce *some* increase in the wholesale price that unaffiliated distributors pay for Turner programming.

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[8] Because many factors affect price, the question in any merger case is not whether prices will be higher or lower after a merger than before, but whether they will be higher or lower *than they would be absent the merger*. That is one of several reasons why DOJ's drive-by allegation (Br. 60 n.5) of a post-judgment price increase for a single AT&T service is legally and factually irrelevant. In addition, the cited price increase is not in evidence; relates solely to a nascent streaming video service, not DIRECTV's satellite service; and reflects greater value to AT&T's customers from expanded programming options.

[9] At trial, government counsel repeatedly acknowledged DOJ's burden to show that, "on the balance," the harms DOJ asserted would outweigh the merger's conceded consumer benefits. JA308; *accord* JA304. The district court likewise noted this concession, JA114-15, 158 (Op.67-68, 111 n.32), which DOJ repeats here, Br. 63 (describing claim of "net harm to consumers"). *See also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("[t]he antitrust laws ... were enacted for the protection of *competition* not *competitors*") (emphasis added).

DOJ failed to make even that threshold showing. Section I, *infra.* Equally important, DOJ also failed to prove that this merger will likely lead to a wholesale Turner price increase of sufficient magnitude that the corresponding retail price effects for other distributors' subscribers would exceed the price benefits that DOJ concedes AT&T subscribers will receive. Section II, *infra.*

I. The District Court Properly Found That DOJ Failed To Prove That The Merger Would Enable Turner To Raise Its Prices.

A. Ample Evidence Supports The District Court's Finding That DOJ Failed To Prove That The Merger Will Enable Turner To Charge Higher Prices.

A wealth of evidence at trial—much of it from DOJ's own witnesses—refuted DOJ's prediction that the merger would enable Turner to raise its wholesale prices. DOJ therefore portrays a prediction based on Nash bargaining theory as an ineluctable fact compelled by the laws of economics and ignores key evidence disproving that prediction. These tactics provide no basis for overturning the district court's finding on this point.

DOJ asserts that, because "*[a]nything* making one party better off in the event no deal is struck makes it easier for that party to walk away *and thus get better terms*," the merger "*necessarily will make a difference* in [Turner's] negotiations" with distributors. Br. 19, 38 (emphases added). Similarly, Professor Shapiro's bargaining model generates a prediction of higher programming prices after *any* vertical merger between *any* programmer and *any* distributor. JA724:2-

25, 787:16-18 (Shapiro). But sound economic logic recognizes that bargaining-theory predictions of price increases are not invariably correct, and instead must be evaluated in light of real-world evidence. As another court has recognized, the "Nash theorem arrives at a result that follows from a certain set of premises," but the theory itself "asserts nothing about what situations in the real world fit those premises." *VirnetX Inc. v. Cisco Systems Inc.*, 767 F.3d 1308, 1332 (Fed. Cir. 2014). Accordingly, those "seeking to invoke the theorem as applicable to a particular situation must establish that fit." *Id.*; *see NRDC v. Jackson*, 650 F.3d 662, 665-66 (7th Cir. 2011) (surest way to test an application of a theory "is to compare its projection against real outcomes"); *City of Charlottesville v. FERC*, 661 F.2d 945, 954–55 (D.C. Cir. 1981) (Wald, J., concurring) ("predictive economic models" must "take into account ... past experience" to ensure "the model's assumptions work in practice").

Professor Shapiro himself has emphasized the need for "empirical evaluation" of bargaining theory in this very context. JA1207:25-1208:5. In proceedings involving a prior merger in this industry, he criticized a challenge advanced by Professor Rogerson (one of DOJ's *amici* here) because Rogerson had failed to evaluate the price increases he predicted (based on bargaining theory) through an empirical evaluation "of the significant vertical acquisitions that have occurred in this industry." JA1208:21-1209:1 (Shapiro). Here, Professor Shapiro failed to perform the same type of empirical analysis that he had previously criticized Professor Rogerson for not conducting.

Defendants' expert—Professor Carlton—did conduct that empirical analysis. He examined the DIRECTV/News Corp., Time Warner Cable/Time Warner, and Comcast/NBCU transactions, which also involved vertical integration (or dis-integration) between a video distributor and a video programmer. As the district court found, that analysis demonstrated that "[t]here's absolutely no statistical basis to support the government's claim that vertical integration in this industry leads to higher content prices." JA148. Indeed, "many" of his analyses "show[ed] a *decrease*" in programming prices as a result of vertical integration. JA148 (Op.101).

The district court properly concluded that this "real-world evidence" should be "afforded probative weight in predicting the potential pricing effects of the challenged merger." JA146-47, 152.[10] DOJ barely mentions Professor Carlton's analysis, does not reprise any of the baseless challenges it raised to that analysis

[10] Although antitrust scholars have weighed in on all sides of this case, even those who do not support defendants on appeal acknowledge that the merger would increase wholesale prices only if it "makes a blackout *substantially* less costly to" Turner. 27 Antitrust Scholars Br. 6 (emphasis added). That statement recognizes that not every improvement in a party's walkaway position will make a difference in bargaining outcomes and that the validity of a predicted price increase depends on real-world facts.

below, JA146-52, and nowhere contests the district court's acceptance of it as highly probative.[11] By failing "to make [such] challenge[s] in its opening brief," DOJ has forfeited any basis for challenging the district court's reliance on this empirical study. *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1160 (D.C. Cir. 2002).

Professor Carlton's conclusion—that vertical integration has not correlated with higher wholesale programming prices—also reflected the accounts of industry participants, including some of DOJ's own witnesses, who "consistently testified that they never considered the identity of the programmer's owner in the course of affiliate fee negotiations." JA160-61 (Op.113-14). These DOJ witnesses included high-level executives who have negotiated contracts for Cable One, JA140 (Op.93), NBCUniversal, JA153 (Op.106), and Comcast, *id.* Similarly, Time Warner executives testified that they had never heard any company negotiator express the view that the company could charge higher prices when it was integrated with Time Warner Cable. JA154 (Op.107).

All of this testimony confirms that, in an industry known for hard bargaining, mergers do not typically enable programmers to extract higher prices,

[11] For example, DOJ argued that conditions imposed on the prior transactions might have negated pricing effects. But only one of the three transactions (Comcast/NBCU) involved relevant conditions during the applicable period, and it involved the same arbitration mechanism to which Turner bound itself here. *See* JA842:1-3, 867:17-21 (Carlton).

in part because there are too many other variables that are far more important than whether a programmer has a distributor affiliate. *See* pp. 10-13, *supra*; John Nash, *Two-Person Cooperative Games*, 21 *Econometrica* 128, 130 (1953) (bargaining theory relies on simplifying assumptions that "are not generally perfectly fulfilled in actual situations."). Professor Shapiro himself acknowledged that "the real world is messy," and economic models "cannot capture all of the uncertainties and personalities and unpredictable factors and hairy stuff that might [a]ffect negotiations." JA721:22-23, 766:18-767:6. Indeed—although DOJ suggests otherwise without citation (Br. 47)—none of its witnesses testified "that they would actually give in to any price increases demanded by Turner." JA145 (Op.98). The district court thus did not err in rejecting DOJ's supposed "proof 'that the identity of a programmer's owner influences negotiations.'" Br. 50 (quoting JA162 (Op.115)). That "proof" was simply Professor Shapiro's "opinion," JA162 (Op.115), which was contradicted by real-world evidence.[12]

The district court also credited the testimony of Time Warner's CEO, Jeff Bewkes, as "particularly persuasive" on these points. JA164-65 n.36. Bewkes explained that the merger would not *meaningfully* reduce the costs of a blackout to

[12] Although DOJ notes that distributors analyze the number of customers they might lose during a blackout, Br. 46-47, these "drop analyses" demonstrate only that distributors track the *value* their subscribers attach to particular programming; they do not show that distributors will pay more for that programming if the programmer is affiliated with a distributor.

Turner and thereby enable it to raise wholesale prices. Instead, the reduction in costs was equivalent to the difference in being hit by "'a 950-pound weight instead of a thousand pounds.'" JA164-65 (Op.117-18 n.36). As he explained: "[A]re you going to think about it differently, feel differently? Are you going to take more risk…? Absolutely not." JA1073:23-1074:7 (Bewkes). This testimony comports with other undisputed testimony showing that, if it withheld programming, the merged company would suffer "catastrophic" and "massive" losses that would not be meaningfully offset by any "gain" from even a permanent blackout. JA163-64 (Op.116-17 & n.34).

For all these reasons, the district court's finding that DOJ failed to substantiate its prediction of wholesale price increases—*i.e.*, that it failed to establish that "the real world fit th[e] premises" underlying those predictions, *VirnetX*, 767 F.3d at 1332—is hardly erroneous, let alone clearly so. That finding, standing alone, warrants affirmance.

B. The District Court Properly Evaluated The Evidence Concerning Bargaining Leverage.

DOJ tries in vain to manufacture "clear error" by ignoring the foregoing evidence and distorting various aspects of the decision below.

1. DOJ claims that the district court failed to recognize that "a party's leverage does not depend upon the actual breakdown of negotiations and ensuing blackouts." Br. 45. In fact, the court recognized that what matters under Nash bargaining is whether one party's "alternative to striking a deal improves," because a party that "faces less downside risk if the deal implodes" is "more willing and able to push harder for a better deal." JA163 n.35. DOJ fixates on the court's reference to evidence that "a blackout would be infeasible," Br. 25, 31, 42-43, but that reference reflects no error.

Preliminarily, DOJ's premise is wrong. To the extent DOJ contends (Br. 43) that bargaining theory requires ignoring whether a threat is infeasible, Nash himself disagreed: a "threat" is relevant only where a negotiating party is "convinc[ed]" the other party will "carry out his threat. … Otherwise it will have little meaning." Nash, *supra*, at 130. Because negotiators consider only threats that are "convincing," an infeasible threat cannot produce a price increase under bargaining theory. Here, DOJ insisted, and its model assumed, that a permanent blackout was the relevant threat the post-merger Turner could more credibly make. *E.g.*, JA730:3-731:3 (Shapiro); *see also* p. 33, *infra*. But industry participants recognized that a permanent blackout of Turner programming is, in fact, infeasible. JA162-64 (Op.115-17).

In any event, the court's reference to the "infeasibility" of a permanent blackout is part of a broader analysis that does precisely what the *amicus* scholars supporting neither side say economists should do under Nash bargaining—*i.e.*, "analyz[e] what the *consequences* for the parties would be if there were, for any reason, a prolonged disagreement." 27 Antitrust Scholars Br. 21 (emphasis added). Thus, after making the statement DOJ fixates on, the court explained that a post-merger blackout would inflict "catastrophic" and "massive" losses on Turner that would not be *meaningfully* offset by any "gain." JA163-64 & n.34.

The critical "assumption" the district court found DOJ had failed to support, therefore, was not that Turner's post-merger walkaway position would improve, Br. 43, but that it would improve *enough* to enable Turner to "drive up prices by threatening distributors with long-term blackouts," JA163 (Op.116) (emphasis deleted). DOJ thus failed to substantiate its "prediction that a *marginal* improvement in Turner's (still unprofitable) position would *meaningfully* alter Turner's bargaining leverage." JA164-65 (Op.117-18 n.36) (emphases added); *see* JA125-26 (Op.78-79) (DOJ failed to show that the merger would "*materially* increase" Turner's leverage such that higher prices would result) (emphasis added).

DOJ had the burden of proving that prediction—not merely invoking bargaining theory and asserting that the prediction must be accepted as a matter of "basic economics." Br. 43. The evidence discussed above demonstrated that DOJ did not remotely show that its prediction was valid here. Indeed, the evidence showed the opposite. The district court's factual finding that DOJ failed to meet its burden does not "contradict[] basic economic logic," Br. 39; it reflects only that its theory-based prediction cannot be automatically accepted in this particular industry context. *See, e.g.*, *Oracle Am., Inc. v. Google, Inc.*, 798 F. Supp. 2d 1111, 1119 (N.D. Cal. 2011) (expert "did not provide an adequate justification for applying the Nash solution to the facts of this case"); *Numatics, Inc. v. Balluff, Inc.*, 66 F. Supp. 3d 934, 960 (E.D. Mich. 2014) (excluding testimony based on Nash bargaining that "failed to account for the particular facts of the case").

Finally, *amici* suggest that the district court should have focused on the merged company's ability to threaten short-term rather than long-term blackouts. 27 Antitrust Scholars Br. 29. But that is a criticism of the government's case, not the district court's analysis. Again, DOJ insisted that "the proper place to look is at long-term blackouts," and "*not* a temporary one," which explains why DOJ's witnesses were "trying to measure … the subscriber loss rate from a long-term blackout." JA730:3-731:3 (Shapiro) (emphasis added); *see also* JA804:4-7 (Shapiro) ("permanent blackout"). Any approach based instead on short-term blackouts would have required a different model and different evidence. And the result would have been even more unfavorable to DOJ because any temporary blackout imposes "immediate" revenue losses on programmers but only "minuscule" subscriber losses on distributors. JA64, 184 (Op.17, 137 n.45). To the extent DOJ is trying to revise its litigation position by analogizing to temporary labor strikes, in which a party can gain leverage by "hold[ing] out longer," Br. 44, the analogy is therefore both waived and baseless.

2. There is likewise no merit to DOJ's suggestion that the district court ignored the principle of corporate-wide profit maximization. Br. 49-53. In fact, after spending many pages to show that the principle is well-established, DOJ concedes that the court *accepted* that "'a firm with multiple divisions will act to maximize profits across them.'" Br. 53 (quoting JA161 (Op.114)). And the court committed no error in applying that principle to the trial evidence.

Indeed, all of the evidence discussed above demonstrated that affiliation with DIRECTV would *not* allow Turner to raise its prices to distributors above the levels it could charge absent the merger. *See* § I.A, *supra*. Accordingly, the court found that the combined company *could not* maximize profits by attempting to pursue that fruitless approach. That finding reflects a proper application of the principle of corporate-wide profit-maximization, and it destroys DOJ's theory of harm.

It also explains why witnesses from vertically integrated firms testified that programmers do not consider the interests of distributor affiliates when seeking to maximize programming revenues. DOJ dismisses this testimony because these witnesses did not go on to say that their approach to maximizing programming revenues thereby "maximizes *corporate-wide* profits." Br. 54 (emphasis added). But there can be no other explanation for their companies' approach to negotiations.

Nor is there any inconsistency between the court's acceptance of this testimony and its acceptance of DOJ's concession that the merged firm *can* reduce the costs of AT&T's distribution business by eliminating double marginalization—*i.e.*, "eliminating the cost associated with Time Warner's charging the upstream margin with DirecTV." Br. 55-56. A company can *unilaterally* maximize corporate-wide profits by eliminating double marginalization, even if it has no ability to secure higher prices *from other companies*. Here, DOJ conceded that the merged firm would eliminate double-marginalization yet failed to show that the merger would enable it to force others to pay more. That is not a "contradiction," but a simple failure of proof.[13]

3. The district court's treatment of defendants' prior regulatory filings, such as DIRECTV's 2010 FCC filing on the Comcast/NBCUniversal merger, was

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[13] DOJ badly mischaracterizes a district court colloquy on this point. Br. 52-53. After Professor Shapiro referred to corporate profit-maximization as one of his "assumptions," he stated:

> [A]: So what I'm saying is that it will be in AT&T's interests to play this—to *use this leverage* in the negotiations. It will be in their interests—
>
> The Court: So *that's* an assumption that you're making?

JA161 (Op.114) (emphases added). The "assumption" here is DOJ's prediction that the merger will give Turner new leverage, not Shapiro's separate assumption that corporations maximize overall profits. *See also* JA163 (Op.116) (merger will not enable Turner to "drive up prices").

also proper and consistent with its factual findings. The court did not improperly limit admission of those filings, Br. 22-23—a claim DOJ waived below by agreeing to those limits. *See* JA128 (Op.81 n.26). And the court *did* give "some probative weight" to the filings insofar as they endorsed use of Nash bargaining to assess vertical mergers. JA130-32.

The court declined, however, to give defendants' prior predictions dispositive weight, because the "state of the market at the time of the [prior] proceeding"—*e.g.*, before the enormous growth of Netflix, Amazon, Hulu, and streaming cable-substitute services—necessarily influenced those predictions. JA130. Even in that different context, moreover, DIRECTV had not argued that the Comcast/NBCU merger should be blocked, only that the FCC should mandate an arbitration/no-blackout procedure like the one to which Turner has now bound itself. *See* JA1243. Most fundamentally, Professor Carlton's subsequent empirical analysis confirms that past instances of vertical integration did not lead to higher programming prices. JA131 (Op.84). The court did not err in giving more weight to that empirical evidence than DIRECTV's pre-merger prognostications.

4. Finally, DOJ's complaints concerning the district court's credibility determinations, Br. 58-60, are groundless and cannot overcome the great deference owed to those findings. *See Coleman*, 794 F.3d at 63. After (properly) noting that competitor self-interest called for "[c]aution" in evaluating third-party testimony, JA139 (Op.92), the court relied on *other* factors in discounting competitor testimony favorable to DOJ. Some competitor witnesses contradicted DOJ's prediction that the merger would influence negotiations; others relied on speculation without any underlying factual evidence; and all undercut their concerns by admitting that they would not yield to any Turner price increases. JA140-45 (Op.93-98). DOJ does not mention, much less challenge, these findings.

Instead, DOJ claims that the district court improperly discounted testimony from Charter and DISH witnesses based on its (supposedly mistaken) view that they contradicted Professor Shapiro's opinion that the merged company would continue licensing Turner content. Br. 47-49. But DOJ mischaracterizes these witnesses' testimony. JA143-44 (Op. 96-97). The Charter witness worried that Turner sports programming would "no longer [be] made available" to Charter, thereby contradicting Shapiro. JA586:25-587:4. And the DISH witness cited an unspecified study for the proposition that "it would be profitable" for Turner to withhold programming, also contradicting Shapiro. JA383:17-18. By contrast, defense witness testimony that the merger would not affect wholesale prices comported with testimony by some of DOJ's own witnesses and with Professor Carlton's empirical analysis, among other evidence. *See* § I.A, *supra*. Thus, substantial corroborating evidence—not bias or irrationality—led the court to accept testimony from Time Warner officials, while rejecting (for other reasons) testimony from some competitors.[14]

C. DOJ's Claims Of Fundamental Economic Errors Are Not Only Wrong, But Ultimately Irrelevant In Light Of Turner's Arbitration/No-Blackout Commitment.

As discussed, the district court properly found that any marginal improvement in Turner's walkaway position is too immaterial to affect wholesale prices. But independently, and just as fatal to DOJ's arguments, Turner's arbitration/no-blackout commitment to distributors keeps its walkaway position from improving at all—and thus undermines the foundational premise of DOJ's bargaining model. As the district court found—and as Professor Shapiro conceded—DOJ had not accounted for that reality. JA88, 151-52, 196-97 (Op.41, 104-05, 149-50 n.51); JA778:6-16 (Shapiro); *see also* JA58-59 (Op.11-12 n.3).

DOJ's model is irrelevant where a programmer *cannot* withhold programming. JA822:19-20 (Carlton) ("Blackouts are what are driving [Shapiro's] model"); JA899:17-25 (Katz) (if there can be "no blackout during the

[14] DOJ cites other portions of the opinion crediting defendants' testimony, Br. 60-61, but identifies no flaws in the district court's assessment. Most of these passages concern theories regarding foreclosure and harm to online competition that DOJ has abandoned. Br. 25-26 n.3. The other two passages address testimony regarding how a blackout would harm Turner (which was uncontested) and how new distribution revenues could not materially offset that harm (a point the court found "particularly persuasive"). JA164-65 n.36. Finally, DOJ identifies no basis for quarreling with the court's conclusion that AT&T's CEO credibly interpreted ambiguous documents. JA135-37.

negotiations … it takes away the whole mechanism" driving DOJ's theory). Indeed, DOJ acknowledges that, "[i]f Time Warner truly could not walk away and [distributors] knew that, it would have no leverage at all." Br. 43. Yet the arbitration/no-blackout commitment to which Turner has irrevocably bound itself precludes the merged firm from credibly threatening to withhold programming. *See generally* JA889-990, 992-99 (Katz); pp. 13-14, *supra* (describing commitment).

Professor Shapiro's failure to reflect this fact in his model means that the "model does not apply to this transaction." JA822:25-823:7 (Carlton). Professor Shapiro himself conceded that "it would take a completely different model" to account for effective post-merger constraints on AT&T's behavior. JA778:9-16. He deferred to a different expert, Professor Kwoka, whom he thought would explain why this arbitration/no-blackout commitment would be ineffective even though it is materially identical to a consent-decree provision DOJ deemed effective for Comcast/NBCUniversal. JA777:19-778:5; *see* p. 14, *supra*. But DOJ *never called Professor Kwoka*.

On this record, the district court reasonably found that the arbitration/no-blackout commitment provides distributors with meaningful "real-world" protections because it prevents Turner from going dark on distributors pending binding arbitration. JA88, 151-52, 196-97 n.51; *see also* JA58-59 (Op.11-12 n.3).

Rejecting DOJ's contrary arguments, the court further found that distributors would be likely to accept the arbitration offer and that the merged firm would stand by that commitment post-merger. JA196-97 n.51.[15] Here, too, DOJ has forfeited any challenge to these findings by omitting them from its opening brief.[16]

II. The District Court Appropriately Found That, Even If DOJ's Bargaining Model Were Accepted, It Yielded No Reliable Projection That Could Support DOJ's Claim Of An Overall Retail Price Increase.

In a detailed 32-page discussion (JA165-96), the court took Professor Shapiro's bargaining model on its own terms and yet found that DOJ's *application* of that model to marketplace facts "lack[ed] both 'reliability and factual credibility,' and thus fail[ed] to generate probative predictions of future harm." JA196 (quoting *United States v. Anthem, Inc.*, 855 F.3d 345, 363 (D.C. Cir. 2017)); *see* JA167 (Op.120). Specifically, the district court found that DOJ had used inappropriate inputs that inflated the model's projected wholesale price increase,

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[15] Although DOJ notes that only 20 distributors had accepted the offer *as of the trial* (Br. 21 n.1), that is unsurprising because the offer was contingent on the merger closing, which had not yet happened then, and the offer is irrevocable and can be invoked by a distributor the moment negotiations break down. *See also* JA196 (Op.149 n.51) (noting "confidence" that arbitration offer will "be accepted by Turner's counterparties" and honored by Turner).

[16] DOJ also waived any challenge to the court's finding that its theory ignores "the FCC's program access rules," which "are calculated to prevent precisely the kind of harm predicted" here. JA196-97 (Op.149-50 n.51) (citing regulations). Here, too, Professor Shapiro disregarded the effect of these rules on his model, JA196-97 (Op.149-50 n.51), deferring to yet another expert, Professor Willkie—whom DOJ also failed to call. JA779:21-780:13 (Shapiro).

whose ultimate retail price effects must then be balanced against the $78 million annual consumer benefit that DOJ conceded.[17] Thus, even when the model is applied and the effects of the arbitration/no-blackout mechanism are assumed away, DOJ still failed to carry its conceded burden of proving "*net* harm to consumers." Br. 63 (emphasis added); *see* JA196 (Op.149).

DOJ asserts that this conclusion rests "on the same errors of logic and economics" that led the court to reject DOJ's threshold assumption that vertical integration always affects bargaining outcomes and always leads to a wholesale price increase. Br. 61. In fact, the court did not err in rejecting that assumption, *see* § I, *supra*, and even if it had, the error would have had no effect on the court's separate analysis of the model's inputs and thus ultimate retail price effects. For purposes of that analysis, the court *applied DOJ's model*, which *assumes* DOJ's positions regarding bargaining theory and profit maximization. And the court found that DOJ's claim of a net retail price increase failed under that very model, for reasons relating to such independent factual issues as subscriber-loss rates, diversion rates, and margins. Those fact-specific findings provide several adequate and independent bases for affirming the judgment below.

[17] DOJ quibbles (Br. 64) with language in the opinion suggesting that AT&T customers, rather than AT&T, would see $350 million in annual savings. But nothing in the court's decision turned on that distinction, and Professor Carlton's analysis of the retail price effects of various input changes (see below) was based on Professor Shapiro's lower consumer-benefit assumption.

A. The District Court Properly Found That Professor Shapiro's Predictions Were Statistically Unreliable.

The output of Professor Shapiro's model turns largely on three inputs: (1) the *subscriber-loss rate* (what percentage of subscribers a blacked-out distributor would lose if it does not carry Turner); (2) the *diversion rate* (what percentage of those "lost" subscribers would instead subscribe to AT&T's pay-TV service); and (3) the *profit margin* AT&T would earn on those subscribers. The values assigned to these inputs determine how much less catastrophic a blackout of Turner programming would be for the merged firm than for Turner standing alone—and thus, according to DOJ, how much incremental "leverage" Turner could use to force third-party distributors to pay more for its programming. As discussed below, the district court found that DOJ had inflated each of these three inputs (*see* § II.B, *infra*) and had improperly ignored a fourth and equally relevant factor: preexisting long-term contracts that protect major distributors from any rate increase for the foreseeable future (*see* § II.C, *infra*).

These failings were highly material. In arithmetical calculations that DOJ has never contested, Professor Carlton showed that making the modest but necessary corrections he described to *any* of DOJ's input errors nullifies or dramatically reduces DOJ's projected retail price increase, and correcting them all flips DOJ's projection of an average retail price increase into a substantially larger projected price decrease:

DEFENDANT'S EXHIBIT DXD0115

	INPUT	SHAPIRO	REAL WORLD	EFFECT
1	Departure Rate	9%	5%	+.27 ➡ -.01
2	Diversion Rate	10% (cord cutting)	20% (cord cutting)	+.27 ➡ -.06
3	Customer Margin	$41.50 (2016)	$25.38 (2017)	+.27 ➡ +.05
4	Contract Status	Ignores	Actual	-.20 (2018)
	Four Corrections Together			-.52
5	Bargaining Split	50/50	72/28	-.01
	Four Corrections + Split			-.54

DXD0115

JA1350; JA167 (Op.120 n.38).[18] Professor Shapiro's results were so fragile and sensitive to input corrections—what DOJ calls "nitpick[ing]" (Br. 32)—because he had predicted only a minuscule price increase in the first place: 27 cents per monthly $100+ cable bill, which he lowered to 13 cents after acknowledging the need to update his stale margin data. JA1195:6-20 (Shapiro); *see* § II.B.3, *infra*.[19]

The district court found that the model's extreme sensitivity to modest input changes illustrated its unreliability. "Professor Shapiro performed no 'statistical

[18] The "bargaining split" referenced here concerns a separate challenged input the district court did not reach because it ruled against DOJ on other grounds. JA858:21-22, 859:4-6 (Carlton); *see, e.g.*, *VirnetX*, 767 F.3d at 1332 (rejecting reliance on Nash bargaining theory where expert failed to justify his "bargaining split" values).

[19] This figure is, if anything, skewed in DOJ's favor because it assumes away all synergies apart from the $78 million annually in consumer benefits that DOJ conceded. *See* n.4, *supra*.

tests' to demonstrate that the 'tiny percentage' increases in harm predicted by his model are 'any different from zero' statistically speaking." JA167 (Op.120 n.38) (quoting Carlton). Therefore, "the fact that Professor Shapiro's model 'cannot be proven to any statistical significance' provides this Court with additional cause to reject the model's conclusions as 'persuasive evidence.'" *Id.* (quoting *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 161 (D.D.C. 2000)).

DOJ identifies no flaw in the district court's assessment of the reliability of Professor Shapiro's modeling results and thus has waived any factual challenge to the court's finding of unreliability. *See World Wide Minerals*, 296 F.3d at 1160.[20] DOJ erroneously suggests (Br. 65 & n.6) that Clayton Act Section 7 somehow excused Professor Shapiro from having to show that his predictions were reliable. But a district court may of course reject unreliable expert analysis in merger cases, just as in any other case. *See, e.g.*, *Swedish Match*, 131 F. Supp. 2d at 161.

Against this backdrop, DOJ's contention that the district court "made no findings on the savings to consumers against which proven harm would have to be balanced" (Br. 64) makes no sense. Again, DOJ *conceded* that this merger

[20] In a half-sentence in a footnote, DOJ alleges that Professor Shapiro need not have shown that his results had statistical significance because he "used a standard, non-statistical methodology." Br. 65 n.6. This inscrutable statement, presented without citation or elaboration, is insufficient to preserve any challenge to the district court's ruling, which reflected the expert opinion of Professor Carlton. *See* JA828:1-829:25 (Carlton).

provides $78 million in annual "savings" to customers, and that the burden fell *on DOJ* to prove and quantify consumer "harms" that exceeded those conceded benefits. *See supra* p. 24 & n.9. DOJ's assertion that it has a theory showing *some* unspecified increase in wholesale programming prices, with *some* alleged effect on retail prices, does not remotely carry that burden. *Cf.* Br. 63-64 (contending that, under its model, *wholesale* prices must rise if model inputs are not "zero").

B. The District Court Properly Found That DOJ's Case Rested On Inflated Input Values.

Quite apart from Professor Shapiro's failure to conduct statistical testing, the district court correctly rejected his projection of a 0.2% retail price increase because it rested on multiple, independently flawed inputs. Several of those errors resulted from Professor Shapiro's failure to examine his data sources. The district court thus found, as discussed below, that Professor Shapiro had "undermine[d] the credibility of his presentation," (JA192 n.49), first by repeatedly "demonstrat[ing] a lack of familiarity with the materials he presented to the Court," (JA177 n.41), and then, once those materials were discredited, by "belated[ly]" offering equally unpersuasive evidence to patch the ensuing holes in his analysis, (JA192 n.49); *see also* JA174-76, 184, 186-87 (Op.127-29, 137 nn.45-46, 139-40). Indeed, the court concluded that "Professor Shapiro's lack of familiarity with the contents of his report and with his own data analysis presents a credibility problem *separate from the problems with key inputs*[.]" JA177 n.41 (emphasis added). DOJ offers no response to these credibility findings, and it likewise identifies no "clear error" as to specific inputs.

1. Inflated subscriber-loss rate.

As noted, the "subscriber-loss rate" is the projected net percentage of subscribers a distributor would lose if it did not carry Turner programming. As Professor Shapiro acknowledged, a subscriber-loss rate of 5% or less fully negates any projected overall retail price increase under his model even if his other input assumptions are accepted. JA175-76 (Op.128-29); JA788:4-7. And a variety of evidence credited by the district court showed that the correct value for this input is substantially below 5%. For example, the court credited evidence that long-term blackouts of comparable programming on two cable systems produced, respectively, subscriber-loss rates of "2 to 2.5%" and "2%." JA176-78; *see also* JA732:17-22 (Shapiro agreeing that "Viacom content" is "comparable" to Turner content). And the court found that 30-day Turner blackouts on Cable One and DISH produced, respectively, subscriber-loss rates of ".6%" and "less than 1%," figures that "cannot be squared" with Professor Shapiro's analysis. JA184 n.45. DOJ does not address these dispositive findings.

Instead, DOJ tries to defend Professor Shapiro's primary evidentiary basis for assuming a 9% subscriber-loss figure—namely, a report prepared by consulting firm Altman Vilandrie. Br. 66. DOJ focuses entirely on the Altman Vilandrie study; it does not challenge the district court's basis for discrediting all of its other highly flawed evidence regarding the subscriber-loss rate, *see* JA176-84 (Op.129-37), and any such challenge is thus now waived.

Yet DOJ also ignores the many reasons why the district court rejected Professor Shapiro's reliance on the Altman Vilandrie study. That study, which projected subscriber responses to hypothetical blackouts of various programmers, was commissioned by Charter, a cable competitor of AT&T that opposed this merger. JA169 (Op.122); JA586:4-10 (Montemagno). Professor Shapiro lauded this study as his "single best" source for predicting a 9% subscriber-loss rate. JA169 (Op.122). When he made that statement, Professor Shapiro was unaware of a critical problem. In its "final" report to Charter, Altman Vilandrie had included not the 9% figure Professor Shapiro later relied on, but instead a much lower projection of *5%*, a figure it based on the same methodology it had used to calculate corresponding subscriber-loss rates for other programmers. JA170, 174-75 (Op.123, 127-28). An Altman Vilandrie executive then selectively raised that figure to 9%—shortly after presenting the "final" report to Charter executives, but before Charter submitted the report to DOJ. JA556:6-7, 563:22-565:19 (Bewley). This change was specific to Turner; the predictions for all other programmers remained the same until a second round of changes months later. JA174 (Op.127). And without performing any further empirical work, the executive made this "edit" by emailing it to his team while boarding a return flight after meeting with Charter. JA565:24-568:15 (Bewley).

Although Professor Shapiro stressed that "he usually does not accept data without looking into it more and figuring out how reliable it is," he expressed complete surprise when confronted with these facts at his deposition and conceded at trial that he had "not take[n] steps to evaluate the reliability of the Altman Vilandrie data before he relied on it." JA170 (Op.123); *see also* JA791:21-792:10 (Shapiro). The district court noted the dubious provenance of the Altman Vilandrie study and provided several additional, detailed reasons for discrediting it and Professor Shapiro's reliance on it. JA169-76 (crediting testimony of defense expert Professor Rossi on numerous methodological flaws).[21]

DOJ ignores virtually all of the court's lengthy analysis. Instead, DOJ contends for the first time that the study's altered 9% subscriber-loss figure should have been credited simply because Charter's negotiators "subjective[ly]" believed it was valid. Br. 67. That claim is both waived and baseless. DOJ never argued

[21] While Professor Shapiro claimed his analysis was conservative, the district court found that he had failed to provide credible support even for his "conservative" "low end" figure and that his "high-end" figure "is also unsupported." JA184 n.46. The court's findings on those high-end figures were exhaustive and are unchallenged by DOJ on appeal. *See, e.g.*, JA171-73 (rejecting flawed "internet survey" and set-top-box analysis); JA176-78 (finding that DOJ grossly overstated effects of comparable blackouts); JA178-84 (finding Hauser survey unreliable).

and Professor Shapiro never testified that subscriber-loss figures should be calculated on the basis of each distributor's own "subjective understanding," *id.*, no matter how inconsistent with reality. To the contrary, Professor Shapiro used the same subscriber-loss rate (9%) for *all* distributors, not different rates based on each distributor's own individual expectations. JA740:3-5 (Shapiro). Indeed, he refused to rely even on the subscriber losses reported by distributors following actual blackouts—losses that were uniformly much lower than the manipulated 9% figure. *See*, *e.g.*, JA176-78 (Op.129-31).

There is also no evidence that Charter's negotiators believed that Altman Vilandrie number.[22] DOJ called none of the Charter executives who had contact with Altman Vilandrie. Instead, DOJ called only Charter negotiator Tom Montemagno, who confirmed that he had "no involvement in commissioning or generating" the Altman Vilandrie study and "never spent much time" with it. JA591:4-7, 593:15-23, 594:15-17, 595:5-596:15. He admitted he did not even know until his deposition that the study was supposedly "for content negotiations,"

[22] DOJ argues (Br. 67) that Professor Rossi "admitted that the fees Charter was paying for Turner programming made sense only if the subscriber-loss rate exceeded 9%." He did not. *Altman Vilandrie* had suggested that conclusion. JA1026:23-24 (Rossi). DOJ then *tried* to get Professor Rossi to admit that Charter's failure to drop Turner suggested that "the subscriber loss rate is unlikely to be any lower than the nine percent that Altman Vilandrie recommends." JA1028:7-9. Professor Rossi rejected that inference. JA1028:10 ("No.").

JA593:15-23, and he *could not say* whether the study was "accurate" or "reasonable," JA595:5-18, 596:7 (Montemagno).

2. Inflated diversion rate.

The diversion rate turns in part on how many consumers "cut the cord"—*i.e.*, forgo traditional pay-TV in favor of online services such as Netflix and over-the-air broadcast TV. As Professor Shapiro acknowledged, "diversion to AT&T will be reduced," and so will whatever benefit the merged firm could derive from a blackout, to the extent consumers who cancel service with other distributors cut the cord. JA185 (Op.138). At least 20% of households are cord-cutters, according to (1) widely relied-upon industry statistics from SNL Kagan; (2) AT&T's ordinary-course surveys; and (3) testimony by a DOJ fact witness. JA187-88 (Op.140-41). And that 20% number is expected to grow. *Id.*

Even accepting all of DOJ's other input assumptions, adopting a 20% cord-cutting figure converts the projected retail price increase in DOJ's model into a projected *decrease*. *See* p. 43, *supra*. Professor Shapiro sought to justify slashing the cord-cutting number in half, to 10%. JA185 (Op.138). But his sole basis for that figure was the same "discredited" Altman Vilandrie study he used for subscriber-loss purposes. JA186 (Op.139). And this aspect of that study, too, collapsed at trial. After Altman Vilandrie conducted a consumer survey to estimate the extent of cord-cutting, it took the resulting number and reduced it by 40%, wholly "without justification." JA186 (Op.139) (quoting Professor Rossi).

Here, too, Professor Shapiro could not explain, let alone justify, Altman Vilandrie's arbitrary numerical manipulation. JA187 (Op.140). The district court accordingly concluded that "[t]he utter lack of explanation regarding Altman Vilandrie's methodology for generating the cord-cutting projection upon which Professor Shapiro relied, coupled with defendants' real-world evidence regarding the prevalence of cord cutting in the industry, leaves me with little confidence in the accuracy of Professor Shapiro's 10% cord-cutting figure." JA188.

On appeal, DOJ argues that the district court erred in "rely[ing] on" the SNL Kagan and AT&T consumer survey data that Professor Carlton discussed in criticizing Professor Shapiro's 10% assumption on the ground that those data were "not … admitted into evidence." Br. 68-69. That argument is untenable. First, the district court did not need to rely on Professor Carlton's testimony, let alone the data underlying it, to find that, "[i]n the final analysis, it is the Government's burden to adequately support … the model's inputs" and that DOJ had dropped the ball, given "[t]he utter lack of explanation regarding Altman Vilandrie's methodology" underlying Professor Shapiro's testimony. JA188 (Op.141).[23]

[23] The same observation answers DOJ's objection that "Professor Carlton offered no opinion on … the fraction of households that would cut the cord

Second, a district court does "not err—much less prejudicially err—in reciting potentially inadmissible facts" relied upon by an expert, because it needs to "engage with the underlying facts in order to explain why it … credited the experts' opinions." *Owens v. Republic of Sudan*, 864 F.3d 751, 790 (D.C. Cir. 2017).

3. Inflated margins.

DOJ's estimates of harm also rested on outdated and inflated margins, as Professor Shapiro himself finally admitted under cross-examination.

It was undisputed at trial that cord-cutting and intense competition are rapidly shrinking the profit margins that AT&T and other conventional pay-TV distributors earn on each video customer. JA191 (Op.144); JA827:2-4 (Carlton). As these distribution margins shrink, so does any theoretical silver lining for the merged firm in a blackout: Turner would still face catastrophic revenue losses, yet any offsetting benefit would decline sharply. It was thus essential to use the most current margin figures available. JA855:5-856:21 (Carlton).

Professor Shapiro, however, used AT&T's 2016 margins in his calculations, even though final margins as recent as June 2017 were available and showed that

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because of a Turner blackout." Br. 69. The court explained that the burden belonged to DOJ, not defendants, to provide that estimate, and DOJ defaulted on that burden too. JA187 n.47. In any event, Professor Carlton did testify that Professor Shapiro should have used at least a 20% cord-cutting rate. JA853:10-20, 854:1-24, 878:14-18, 879:7-9.

per-subscriber margins had fallen 40% since 2016. JA189 (Op.142). AT&T disclosed that data before Professor Shapiro submitted his rebuttal report, yet he initially chose not to use it. *Id.* Ultimately, however, Professor Shapiro conceded that "there is some validity to using the 2017 margins," that "it would be reasonable to use the 2017 margins," and that "now that we have had the trial … I could see using the 2017 data." JA191 (Op.144).[24] And Professor Shapiro further admitted that even using the average of all available months from the first half of 2017 (rather than the June 2017 figure) would slash his projected monthly retail price increase by more than half: from 27 cents (0.2% of a typical bill) to an even more trivial 13 cents (0.1%). JA191 (Op.144). And using the June 2017 figure would reduce the projected monthly increase to a nickel. *See* p. 43, *supra* (trial demonstrative). Again, these are the effects of correcting just this one input while accepting all of DOJ's other input assumptions.

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[24] Professor Shapiro's concessions moot whatever procedural objection DOJ might be intimating (Br. 71) to the court's finding that the 2016 figures were "outdated and too high." JA190 (Op.143). In any event, any objection would be meritless. As the court found, AT&T disclosed the June 2017 figure in the deposition testimony of AT&T witness David Christopher on February 14, 2018, *twelve days* before Professor Shapiro's rebuttal report was filed. JA189-90 (Op.142-43 & n.48). Christopher further explained that, whatever the short-term fluctuation in margins, ongoing industry "trends" "pressure general margins on the business" and reduce the value of new customers. JA1054:24-1055:15; *see* JA1056:4-1059:8 (Christopher) JA190-91 (Op. 143-44) (surveying evidence).

DOJ nonetheless complains that the district court "abused its discretion" when, on the last day of trial testimony, it precluded Professor Shapiro from offering a new calculation that reflected an entirely different approach to calculating profit margins, based on a theory that existing customers are more profitable to AT&T than are new customers. Br. 70-71. After objection, DOJ represented that "the only point of" this new calculation was "to explain why the attack on [Shapiro] ... is not justified because, in fact, his existing calculations [using 2016 data] are conservative." JA1164:10-12. The court then permitted Professor Shapiro to explain why he regarded his existing calculations as conservative. JA1174:3-18; *see also* JA743:19-746:2 (Shapiro).

Although the district court admitted the testimony for that limited purpose, it would have acted well within its discretion had it excluded that testimony altogether. Professor Shapiro alluded to a distinction between the profitability of new and existing customers, newly invoked in his rebuttal testimony, "only in footnote 414 of the ninth appendix to [his] 300-page expert report." JA192 (Op.145 n.49). That is insufficient to meet expert disclosure obligations. Fed. R. Civ. P. 26(a)(2)(B). *A fortiori*, the district court did not abuse its discretion by stopping Professor Shapiro from going even further and offering rebuttal testimony about a brand new calculation based on highly debatable numerical assumptions that he had never disclosed in his reports, his deposition, or his trial testimony.

JA857:20 (Carlton) (noting that Professor Shapiro had provided "absolutely no quantification of this effect" in his reports or testimony).

Professor Shapiro also had no reasonable basis for his assumption that existing customers would be more profitable than new customers. JA857:7-20 (Carlton). He admitted he did not "have the proper data on the value of the retained customers" to make this calculation. JA745:9-17. And as Professor Carlton explained, it is not clear "which way [this variable] affects margins." JA857:17-20. Customers who would *leave* AT&T absent a blackout on another distributor have an unusually "high churn" potential and are unlikely to be very profitable over the long run. JA857:11-16.

C. The District Court Properly Found That Pre-Existing Contracts Independently Precluded DOJ's Projected Retail Price Increases.

The district court also found that, even if all of the preceding input disputes were resolved in DOJ's favor, (1) pre-existing licensing contracts between Turner and distributors will by themselves preclude DOJ's projected retail price increases for the foreseeable future and (2) DOJ had no plausible basis for speculating about price effects in 2021 and beyond. DOJ does not address that finding in its opening brief and has thus waived any challenge to this independent basis for the judgment below. *See World Wide Minerals*, 296 F.3d at 1160.

The district court found that "Turner is currently party to long-term affiliate agreements with nearly all of its distributors"; that these agreements "will 'prevent

[Turner] from raising [its] fees for some number of years'"; and that "the real-world effect" of these agreements "will be rather 'significant' until at least 2021." JA193 (Op.146) (quoting Shapiro). Professor Shapiro admitted these points on the stand but had "curiously chose[n] to ignore" all of these agreements in his model. JA193 (Op.146). That omission was especially harmful to DOJ's case because "Professor Shapiro conceded that [] simply factoring in the presence of *one* such affiliate agreement with a large distributor … 'take[s] away *the vast majority* of the net effect' on [retail prices]." JA193-94 (Op.146-47) (emphasis added).

The court further noted that "accounting for all current affiliate agreements and *making no other changes* to Professor Shapiro's model, the model would generate a predicted net *benefit* to consumers rather than a net harm" in the near term, and "the level of post-merger harms predicted by Professor Shapiro's existing model would not begin to phase in *until at least 2021*." JA194 (emphasis added). And "even Professor Shapiro admits that it 'gets harder' to project what the industry—and thus actual, real-world harm—will look like that far down the road." JA195; *see* JA759:1-2 (Shapiro) ("My binoculars are pretty good, but [2021 is] getting out there a ways."). "For those reasons," the court concluded, "*even putting aside the various [other input-related] problems with the model*," its "predictions of harm are not 'sufficiently probable and imminent' to be probative in view of the facts of this case, especially 'in the context' of the ever-increasing competitiveness of this 'particular industry.'" JA195 (emphasis added) (quoting *United States v. Marine Bancorporation*, 418 U.S. 602, 623 n.22 (1974)).

The district court was thus quite clear that its findings about these long-term contracts, and Professor Shapiro's inability to make reliable predictions about events years in the future, formed an independent basis for its judgment. JA194-95. Because DOJ has forfeited any challenge to those findings, the judgment could be affirmed for that reason standing alone.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

This brief complies with the word-count limitation of Fed. R. App. P. 32(e) and this Court's July 19, 2018 scheduling order. This brief contains 12,909 words, not counting the parts excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

/s/ Peter D. Keisler
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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2018, I will cause the foregoing document to be electronically filed through this Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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