

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	CV No. 17-2511
)	
vs.)	Washington, D.C.
)	February 16, 2018
AT&T, INC. ET AL.,)	4:00 p.m.
)	
Defendants.)	
)	

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES SENIOR DISTRICT JUDGE

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P R O C E E D I N G S

DEPUTY CLERK: All rise. The United States District Court for the District of Columbia is now in session, the Honorable Richard J. Leon presiding. God save the United States and this Honorable Court. Please be seated and come to order.

Good afternoon, Your Honor. This afternoon we have Civil Action Number 17-2511, the United States of America v. AT&T, Inc., et al.

Will counsel for the parties please approach the lectern and identify yourself for the record.

MR. CONRATH: Good afternoon, Your Honor. Craig Conrath for the United States.

THE COURT: Welcome back.

MR. CONRATH: Thank you, Your Honor.

MR. SCHWINGLER: Good afternoon, Your Honor. Peter Schwingler for the United States.

THE COURT: Welcome back.

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

THE COURT: Welcome back.

MR. FINCH: Good afternoon, Your Honor. Andrew Finch for the United States.

THE COURT: Welcome back.

MR. PETROCELLI: Good afternoon, Your Honor.

1 Daniel Petrocelli for all of the defendants.

2 THE COURT: Welcome back.

3 MS. ROBSON: Good afternoon, Your Honor.

4 Katrina Robson for all of the defendants.

5 THE COURT: Welcome back.

6 MR. WALTERS: Good afternoon, Your Honor.

7 Rob Walters here for AT&T and DirectTV.

8 THE COURT: Welcome back.

9 MR. ORSINI: Good afternoon, Your Honor.

10 Kevin Orsini for Defendant Time Warner.

11 THE COURT: Welcome back.

12 All right, Counsel, we're here for a periodic
13 update on how the discovery process is proceeding. And
14 then, of course, I know you've submitted a letter to the
15 Court, consistent with the procedures that the Court has
16 adopted and which are public, to bring to the Court's
17 attention a potential need to file motions in the case and
18 the competing difference of opinion over that.

19 So let's start with kind of an overview of the
20 discovery, and then we can turn to the potential motions
21 issue afterwards.

22 MR. CONRATH: Very well, Your Honor.

23 I think there's relatively little new to report.

24 Discovery has been proceeding. Today is the
25 official close of regular fact discovery, although some

1 things have been rescheduled out. And then, of course,
2 there is the supplemental discovery, but that has been going
3 on.

4 The parties have exchanged expert reports.

5 THE COURT: Fact witnesses?

6 MR. CONRATH: Exchanged fact witness lists, yes,
7 that's correct, the final fact witness lists, Your Honor.

8 THE COURT: Yes.

9 MR. CONRATH: Thank you for the trial procedures
10 meeting that we had earlier this week where we discussed a
11 number --

12 THE COURT: Some people were mischaracterizing
13 that as some kind of a hearing. It wasn't a hearing. It
14 was a conference with counsel, which, by the way, are
15 standard operating procedure for most judges all over the
16 country. So I don't -- there seems to be a misunderstanding
17 about how this process works here.

18 MR. CONRATH: I've done them many times,
19 Your Honor, and I concur. But the discussion of dates for
20 exhibit lists and possible motions -- or filings on burden
21 were pretty standard from our perspective. Those were the
22 two topics that I think came out of that discussion.

23 And we have been in consultation, the parties, on
24 that. And we will -- I'm sure we will get to something to
25 accommodate the suggestions of Your Honor on a new date for

1 exhibits and a separate filing on burden. We haven't
2 exactly settled on the details, but we're in consultation on
3 that.

4 THE COURT: Well, hopefully, it can be a joint
5 filing.

6 MR. CONRATH: Yes.

7 THE COURT: That would be the ideal, if both sides
8 had a mutual agreement on what needs to be proved and what,
9 if any, defenses are out there affirmatively to be advanced
10 by the defense.

11 MR. CONRATH: Right.

12 I hope we can, and we'll make it joint to the
13 extent we can. And to the extent there's any disagreement,
14 we'll set it out within the same document, if that makes
15 sense, Your Honor --

16 THE COURT: Sure.

17 MR. CONRATH: -- as a way to proceed, our
18 position, the other side's position.

19 THE COURT: It makes sense. Makes sense.

20 MR. CONRATH: I think that's where we are. And we
21 are on track for March 19th trial, assuming there's no
22 distraction, which is the subject of our proposed letter
23 motion, Your Honor.

24 THE COURT: We'll come back to that in a minute.

25 MR. CONRATH: Yep.

1 THE COURT: Thank you, Mr. Conrath.

2 Mr. Petrocelli.

3 MR. PETROCELLI: Thank you, Your Honor. As usual,
4 Mr. Conrath has accurately given you a description of where
5 things stand. We are getting close to the finish line on
6 the discovery process. Now we're going to be hurdling into
7 expert discovery at warp speed.

8 THE COURT: Just to refresh my recollection, how
9 many experts do you think will need to be deposed from each
10 side?

11 MR. PETROCELLI: I think about 15 altogether.

12 THE COURT: Total?

13 MR. PETROCELLI: Yeah, I think so.

14 THE COURT: Okay.

15 MR. PETROCELLI: Hopefully -- maybe a little fewer
16 than that, but around that number.

17 You're right, Your Honor, we didn't have a
18 hearing. The conference, just to go over the mechanics of
19 the trial, was extremely helpful.

20 THE COURT: Yes.

21 MR. PETROCELLI: And it really cleared the path
22 out of a lot of issues, and we just have to get together on
23 a few others. And then I think we'll be set.

24 THE COURT: Very good.

25 MR. PETROCELLI: Thank you.

1 THE COURT: All right. Thank you.

2 Well, then let's give the government a chance to
3 express its thoughts on this issue that's out there that it
4 brought to the Court's attention. It's a joint letter.
5 But, of course, it's pretty obvious from reading it that the
6 letter is a letter where the government is advancing an
7 interest in filing a motion to quash and a motion to
8 basically strike what they perceive to be a defense of
9 selective enforcement by the government. And, of course,
10 they would be cautioning any related discovery to that.

11 So that's set forth, as was the procedures agreed
12 to and set forth by the Court at the beginning in a
13 four-page letter. And both sides had a chance to articulate
14 its concerns as to what the government would seek to file a
15 motion on.

16 And, frankly, I thought it was so well-done that I
17 don't see the need, frankly, for filing more motions.
18 I mean, I think both sides know their positions. They've
19 cited key precedent in the letter. And they've articulated
20 arguments that they believe are winning arguments for their
21 position.

22 So I thought what I'd do today is have a chance to
23 hear from both sides on it and either issue a decision on
24 the spot or take the weekend to reflect on it.

25 But in either event, you'll get a decision --

1 Monday is not a court date technically. So you'll get a
2 decision no later than Tuesday, because the Court is very
3 mindful that we don't need to do anything to slow down or
4 sidetrack a discovery process that's already very
5 accelerated and that needs to be accelerated if we're going
6 to meet the deadline of March 19th to start the trial.

7 So let's give the government a chance to express
8 its thoughts, and then we'll hear from Mr. Petrocelli for
9 the defense.

10 Mr. Conrath.

11 MR. CONRATH: Thank you, Your Honor.

12 We are, as we've talked about, on track for a
13 March 19th trial, and we should be able to make that if we
14 don't have an unnecessary distraction, a sideshow.

15 But there is a risk of a sideshow, and that's why
16 we asked permission to file a motion or to go ahead and
17 argue it today, of course, as the Court --

18 THE COURT: Yeah.

19 MR. CONRATH: -- lays out.

20 The issue is this: The defendants want discovery
21 in support of their selective prosecution defense. That's
22 discovery they're not entitled to under controlling
23 Supreme Court and D.C. Circuit precedent, and that's why
24 that discovery would be a sideshow.

25 Their claim, their claim is that this litigation

1 is politically motivated, designed to hurt CNN, which is a
2 company of Turner, which is a part of Time Warner. But
3 that's not true.

4 If we were permitted to file this motion, we would
5 attach to it an affidavit for Makan Delrahim, the Assistant
6 Attorney General in charge of the Antitrust Division, that
7 explains there was no political motivation -- he's the one
8 who made the decision. There was no political motivation,
9 he didn't receive any directions or instructions from
10 outside the antitrust division. He made the decision based
11 on the information he obtained within the Antitrust
12 Division.

13 THE COURT: By any chance, has that affidavit been
14 shared yet with the defense or not yet?

15 MR. CONRATH: It has not. We're prepared to do
16 it. We're prepared to hand it up to Court today if that
17 would be helpful if the Court is going ahead towards a
18 decision.

19 THE COURT: I certainly think it would be helpful
20 for the Court to see it; and, of course, therefore, the
21 defense definitely should see it.

22 You can give it to -- if you have an extra copy.

23 MR. CONRATH: We have copies for everyone,
24 Your Honor.

25 THE COURT: If you have an extra copy, that's

1 fine.

2 MR. CONRATH: Sure. Sure. I do.

3 THE COURT: Thank you, John.

4 MR. CONRATH: So the Supreme Court and the
5 D.C. Circuit established a principle for when it's
6 permissible to give discovery into a claim that there's been
7 selective prosecution.

8 And the Supreme Court said they have to meet a
9 rigorous standard of evidence in order to establish that.

10 And the reason for that, as
11 Chief Justice Rehnquist said in the *U.S. v. Armstrong*
12 decision, is that there's -- this kind of discovery risks
13 distraction and interference with prosecutorial policy. And
14 both of those are at risk here.

15 So in order to get this kind of discovery, the
16 Supreme Court set forth, they have to show rigor -- make a
17 rigorous showing of evidence on two things, and they have to
18 meet both prongs.

19 The first one is that the defendant was singled
20 out for prosecution from among others similarly situated.
21 I'm quoting here from the *Branch Ministries* case in the
22 D.C. Circuit.

23 The second prong was that the government was
24 improperly motivated. They cannot show either one.

25 So the first prong, they were not singled out from

1 among others similarly situated.

2 They make two claims in this regard. They make a
3 comparison to the Comcast-NBCU merger, and they make a claim
4 compared to all vertical mergers generally. I'd like to
5 them take them one at a time.

6 As to the first comparison, the *Comcast* case,
7 well, first of all, there was an enforcement action in that
8 case. We brought a case alleging a violation. The Court
9 may remember because we brought it here.

10 THE COURT: I remember it.

11 MR. CONRATH: All right.

12 So there was no selective enforcement; we enforced
13 the law in that case.

14 They go on to say, not that there was selective
15 enforcement, but that they wish that we would have offered
16 them the same settlement in this case that was used to
17 resolve or a similar settlement that was used to resolve the
18 *Comcast* case; whereas, in this case, what we have offered
19 them is a structural settlement, not a behavioral remedy
20 like in *Comcast*, but a structural -- that is, a
21 divestiture -- remedy.

22 But there are meaningful differences between the
23 *Comcast* case and this case when it comes to the question of
24 settlement, of remedy.

25 The *Comcast* case was a case where Comcast is a

1 regional company.

2 In this case, AT&T is a national company. That's
3 a big difference for whether a behavioral remedy can be
4 supervised properly because if you're looking at regional, a
5 regional company, you can look at areas where Comcast isn't
6 for a competitive benchmark for something to compare to
7 where the merger hasn't had any effect.

8 AT&T/DirectTV is national, so there is no potential
9 competitive benchmark.

10 Second, *Comcast* was a case where there was
11 substantial FCC review and supervision. That was an
12 important factor in our decision to settle that case with
13 behavioral remedy.

14 This, too, the Court might recall because it was a
15 subject of discussion in our hearing before the Court and
16 the Court's eventual order approving the case.

17 In this case, there is no FCC review, no FCC
18 supervision.

19 So those are two of the important distinctions
20 between the *Comcast* case and this case. They can't meet the
21 prong that there were -- that there was a similarly situated
22 party who was treated differently.

23 Their other comparison is, in general, vertical
24 mergers. They say there hasn't been a ligated vertical
25 merger in 40 years. Well, the fact there hasn't been a

1 litigated one doesn't mean there hasn't been enforcement.
2 There's been enforcement.

3 So a professor over here at Georgetown,
4 Steven Salop, wrote an article summarizing vertical merger
5 enforcement and did a catalog of it over the last 24 years.
6 He reported that there were 52 cases in those 24 years,
7 vertical merger cases. So bringing a case in a vertical
8 merger is not out of the ordinary.

9 About a quarter of those were resolved with the
10 structural resolution; about three quarters were behavioral.
11 So there's -- it's not out of the ordinary to insist on
12 structural relief in a vertical merger case.

13 Moreover, prosecutorial policy toward behavioral
14 relief -- and generally, not just in this case, not
15 selectively, but generally, may be something that changes
16 over time.

17 So behavioral relief, the kind of, don't do
18 this -- "You can do the merger, but don't do this," that
19 behavioral relief. That has been disfavored in antitrust
20 enforcement for a long time, as long as I can remember,
21 which goes back 42 years.

22 For example, William Baxter, under whom I served
23 in the first part of the Reagan administration, when he
24 brought the case -- when he settled the case to break up the
25 original AT&T monopoly, he insisted on structural relief, in

1 part to resolve vertical problems.

2 So that principle that you need structural relief
3 to solve vertical problems goes back at least that far.

4 Now, it's true that under Assistant
5 Attorney General Varney, which -- who was assistant
6 Attorney General when the *Comcast* case was settled, there
7 was a little more openness, as matter of policy, towards
8 behavioral relief. She issued a statement talking about the
9 policy.

10 But that approach was already called into question
11 by her successor in the Obama administration, William Baer.
12 Mr. Baer gave a speech on this very topic, said, "The remedy
13 almost always needs to be structural, preserving an
14 independent competitive force in the marketplace, rather
15 than behavioral, simply placing limits on the merged firm's
16 ability to use or to profit from increased market power."
17 That was in the last administration.

18 Assistant Attorney General Delrahim has given a
19 speech on this topic as well that says a very similar thing.
20 He's going to be very strongly inclined to favor structural
21 rather than behavioral relief.

22 But that policy is a general policy. It is not a
23 selective policy.

24 And you can see that from the five most recent
25 cases that have been settled under his leadership, all of

1 which were settled with structural relief.

2 So defendants fail to make a rigorous showing of
3 evidence on the first point, that they were singled out for
4 prosecution from among others similarly situated.

5 Let me turn to the second prong. They also make
6 a -- fail to make a rigorous showing of evidence, not
7 innuendo, but evidence of improper motive. First,
8 we will -- we have submitted the declaration from Assistant
9 Attorney General Delrahim.

10 And just to be clear about what that says, among
11 other things, in paragraph 7, "At no time did I receive
12 orders, instructions, or directions relating to the
13 transaction or the decision to file the complaint from any
14 of the following people or entities."

15 And I won't read the entire list, but it's
16 President Trump, Executive Office of the President, the
17 Attorney General, the Deputy Attorney General, the Associate
18 Attorney General, anyone else in the Department of Justice
19 outside of the antitrust division.

20 He also says, paragraph 6, "My consideration of
21 this transaction took no account of the views of anyone
22 else, including then-candidate or President Trump or anyone
23 at the White House as to CNN's editorial content or exercise
24 of First Amendment rights. Those were not factors that
25 played any role in my consideration of the transaction, and

1 any suggestions of the contrary are false." So that's the
2 first bit I wanted to submit to the Court.

3 The second two reasons why it's clear that there's
4 no improper motive is that the defendant's theory of
5 improper motive just doesn't make sense. It doesn't hold
6 water.

7 Their theory is that the reason for this case was
8 filed was to hurt CNN because the President doesn't like
9 CNN.

10 Well, that ignores a critical fact, the relief
11 that we are asking for. What we want from the Court is an
12 injunction that will leave CNN right where it is, doing just
13 what it's doing, just not under the control of AT&T. So the
14 logic shows that their theory of improper motive doesn't
15 hold water with what relief we're seeking in this case.

16 The second thing is the four settlement offers
17 that we made to them to give them an opportunity to settle
18 this case all were structural. Some of them would have
19 allowed AT&T to acquire all of Time Warner, including CNN,
20 if they made a divestiture of another part of their company
21 to eliminate the competitive problem.

22 Another offer would have allowed them to acquire
23 the two divisions of Time Warner but leave the
24 Turner Broadcasting division as a separate stand -- which is
25 a separate, stand-alone company, to leave that as a

1 stand-alone, independent company. So, in other words, leave
2 CNN in an independent company, apart from the control of
3 AT&T.

4 Another one would have allowed a partial --
5 allowed AT&T a partial ownership of the parent company of
6 CNN.

7 What all of our settlement proposals had in common
8 was that they would have resolved the problem structurally
9 of combining really important content with very important
10 distribution.

11 What they don't have in common is the treatment of
12 CNN. We were winning willing to let them acquire CNN, not
13 acquire CNN, acquire a part of CNN. The one thing that is
14 common is CNN doesn't matter. So, again, their theory
15 doesn't matter.

16 I should add, we invited them, in the course of
17 those settlement discussions, if they had any other ideas
18 for settlement negotiations. We started -- for structural
19 settlement solutions. We invited them to submit structural
20 settlement solutions as early as August 2nd, I think, long
21 before Mr. Delrahim came to the antitrust division.

22 We said, "We're not sure this behavioral remedy is
23 going to fly. You ought to think seriously about a
24 structural remedy, and we invite you to come back and talk
25 to us about it." They totally ignored that.

1 And then when Assistant Attorney General Delrahim
2 got there and we did have serious discussions, we put those
3 four settlement offers on the table. They -- and asked them
4 to respond with more. They said, "No. We're done talking
5 about this. We're out of here. We're not discussing
6 settlements anymore."

7 So the second showing, the second argument that
8 there was an improper motive falls on the basis of the
9 affidavit of the person who made the decision. It falls on
10 its own internal logic. It just doesn't hold water.

11 So the discovery that they're seeking would be a
12 fishing expedition. The defense they're offering is
13 unwarranted. Their defense doesn't make any sense. They
14 don't meet the Supreme Court standards.

15 This is an important case, Your Honor. It's one
16 that could determine the future of this industry. If this
17 merger can go forward, who knows what's going to happen next
18 by way of consolidation in this industry?

19 We want to focus on those important issues. Where
20 those need to be decided is right here in a Court of Law on
21 the facts and on the law. We're prepared to do that. We're
22 prepared to prove our case. We just would like to be able
23 to do it without distraction, and that's why we're making
24 this request of Your Honor.

25 THE COURT: All right.

1 So in order to grant the relief you're seeking,
2 the Court would have to essentially grant two motions, the
3 motion to strike --

4 MR. CONRATH: Yes.

5 THE COURT: -- the selective enforcement
6 defense --

7 MR. CONRATH: That's right.

8 THE COURT: -- and a motion to quash any related
9 discovery?

10 MR. CONRATH: That's right.

11 And to do the first one, I think we are, if
12 practically asking the Court to exercise its discretion for
13 a motion to strike, which normally would have been done
14 earlier, but we were not -- we didn't see the --

15 THE COURT: It would be premature; but under the
16 current discovery process that we are all agreed to be
17 engaged in in order to try to bring this trial off on
18 March 19th, it would be an exercise of discretion consistent
19 with the current structure of our discovery process?

20 MR. CONRATH: Yes, that's right.

21 And within the power of the Court under
22 Rule 12(f)(1), I believe.

23 THE COURT: Thank you, Mr. Conrath.

24 MR. CONRATH: Thank you, Your Honor.

25 THE COURT: Mr. Petrocelli.

1 MR. PETROCELLI: Thank you, Your Honor.

2 Your Honor, let me be the first one to
3 acknowledge -- and this is an uncomfortable subject. This
4 is not something that we relish getting into. But we have
5 an obligation to our clients. The companies have an
6 obligation to our shareholders to confront circumstances
7 that are facing us.

8 This -- in many respect, if not most respects,
9 Mr. Conrath's argument was directed to the litigation of the
10 merits of the defense, of selective enforcement, which is
11 putting the cart before the horse.

12 We served way back in December, following the
13 filing of a complaint, very narrow, limited discovery
14 requests, asking for communications and documents relating
15 to the White House's views of this merger to ascertain
16 whether and to what extent it influenced the decision to
17 bring this case.

18 We received objections. I had countless
19 meet-and-confer exchanges, all very professionally
20 conducted, with counsel for the government. And,
21 eventually, they asked if we would make a showing of good
22 cause under the *Armstrong* case.

23 Now, to be clear, the *Armstrong* case, which is the
24 Supreme Court case on this issue, requires that in order to
25 obtain discovery with respect to this defense, you need not

1 litigate the merits of the defense. That's for summary
2 judgment or for trial. But you need to have some evidence
3 tending to show the elements of the defense, discriminatory
4 intent, discriminatory effect, some evidence tending to
5 show.

6 And there have been other cases, including right
7 here in this District, in which the Courts have permitted
8 discovery unto this issue upon some evidence tending to show
9 those elements.

10 Now, I then provided that showing to the
11 government first over the phone, and then they asked for it
12 in writing. So then I sent them -- and, again, we only had
13 the two pages, Your Honor. So we were not able to lay all
14 this out for Your Honor in the two-page letter.

15 But I then sent him a long letter laying out our
16 bases to justify the discovery into this issue.

17 And to be clear, all we were asking for,
18 Your Honor, is for a privilege log, because the government
19 was not denying that documents existed responsive to these
20 very narrow requests. They were contending that based on
21 their objections -- and it's principally one objection, they
22 delivered a process objection, that they didn't even have to
23 provide a log.

24 There isn't a lesser form of discovery. There
25 isn't a least intrusive form of discovery than a privilege

1 log. They don't have to turn over documents. They don't
2 have to give depositions. All we wanted was initially a log
3 so we could see what the documents -- how they were
4 identified and perhaps ask Your Honor to review them
5 in camera.

6 We don't know whether there's three documents. We
7 don't know whether there's 30 documents. I mean,
8 ostensibly, there shouldn't be any documents responsive to
9 this request. But that's not the answer that we were
10 receiving. We were being told, "We're not going to give you
11 anything, not even a log."

12 Now, they then backed off that to an extent and
13 gave us a log of some documents. It turned out there were
14 about 20, 30, or maybe even 40 documents that they gave us
15 on a privilege log, which they told us had to do with the
16 senate confirmation process, okay?

17 And I said, "Well, what about the other documents
18 that you have? Can you just at least present those on a
19 log?"

20 And they have declined to do that.

21 And what they have done instead now is come in and
22 filed this letter asking the Court to strike the defense.
23 Of course, the time to do so, at least on a motion based on
24 the pleading, was 21 days after the filing of the complaint
25 under Rule 12(f). That came and went, and they didn't make

1 that motion, even though this issue was ripe at that time.

2 And there is no summary judgment here. I'm not
3 quarreling that Your Honor doesn't have the discretion, by
4 the way; but I'm just sort of giving you the timeline, that
5 they had ample opportunity, after they raised this issue,
6 and they didn't move.

7 THE COURT: Well, what precipitated the issue is
8 probably recent events where you had to file lists of
9 witnesses --

10 MR. PETROCELLI: Exactly.

11 THE COURT: -- and lists of exhibits, right?

12 I mean, that's what precipitated probably this
13 situation.

14 MR. PETROCELLI: Exactly.

15 And that's what I want to go to because we had to
16 exchange a final witness list on February 2.

17 THE COURT: Right.

18 MR. PETROCELLI: And we were still talking to the
19 government about getting this privilege log. And they had
20 not filed anything with the Court, and we were still in
21 discussions.

22 I made the decision to put Makan Delrahim's name
23 on that final witness list just in case we were able to
24 obtain these documents, just in case the documents were
25 relevant to our defense, and just in case we needed

1 testimony from him.

2 We did not notice his deposition, Your Honor. In
3 fact, as a courtesy, I discussed with Mr. Conrath, "What
4 would your position be about his giving testimony?"

5 He said, "We would object to it."

6 And I didn't push the issue, because I wanted to
7 proceed in a --

8 THE COURT: Well, it would be rather unusual,
9 wouldn't it?

10 MR. PETROCELLI: Unusual, but we have some unusual
11 circumstances, Your Honor. But, yes, it would be unusual.

12 And, by the way, there's plenty of authority in
13 the cases for ordering the deposition or trial testimony of
14 a government official. And we can, if we had to, we could
15 brief that for Your Honor.

16 But we're not even there yet.

17 THE COURT: But I think -- and Mr. Conrath will
18 speak for himself, of course, in rebuttal if he wishes.
19 I think that the kernel with his argument is that the only
20 relevancy that having Mr. Delrahim on the stand for is a
21 selective enforcement theory or defense, however you want to
22 put it. But for that, there would be no basis whatever to
23 be calling him to the stand.

24 So really, the real issue is: Should you be able
25 to pursue -- based on the current state of the record,

1 et cetera, should you be able to pursue this selective
2 enforcement theory?

3 MR. PETROCELLI: So following up on that
4 Your Honor -- because you are correct. That's what
5 precipitated the bringing of this, when we put his name on
6 the witness list as a precaution.

7 On Monday, February 6th, Mr. Conrath took the
8 deposition of the chairman and CEO of AT&T,
9 Randall Stephenson, and that was before they filed this
10 letter with the Court. And they questioned Mr. Stephenson
11 about this subject at his deposition. So they took their
12 own affirmative discovery on it.

13 Then they filed the letter with the Court, and we
14 respond.

15 And then yesterday, Mr. Conrath took the
16 deposition of the chairman and CEO of Time Warner, Inc., and
17 they questioned Mr. Bewkes about that subject, even after
18 submitting the letter.

19 And so we have a situation where the government
20 has sought affirmative discovery on this issue but is
21 blocking us from getting even a privilege log on this issue.

22 And, of course, Your Honor, these are documents --

23 THE COURT: Did you object to those questions?

24 MR. PETROCELLI: Of course not, Your Honor,
25 because he was questioning the witnesses about this defense

1 in our answer, and I would have had no basis to object.

2 I gave them free rein on both occasions.

3 I did point out to him yesterday, however, that he
4 was obviously questioning the witness about this in the face
5 of already having sought this relief from the Court. And I
6 didn't think that was fair or appropriate.

7 But he -- and then I followed up and I questioned
8 the witness. And the witness gave about, frankly, 30, 40
9 pages of testimony on this subject, which I would be pleased
10 to submit to Your Honor -- the transcripts are under seal.
11 I would be pleased to submit to you his full explication of
12 all of the information that has come into his possession
13 that would more than satisfy this.

14 THE COURT: Well, I'm kind of proceeding on an
15 assumption that Mr. Conrath's questions were prophylactic
16 because he didn't know how this would all spill out with the
17 Court. I mean, the Court could rule in his favor; it could
18 not rule in his favor.

19 MR. PETROCELLI: Correct.

20 THE COURT: And so he probably figured -- and,
21 again, he'll correct me if he disagrees. But he probably
22 figured that, you know, this is my one bite at the apple,
23 and I better get this -- I better get something down right
24 now or I won't have anything for a later time.

25 MR. PETROCELLI: Oh, I'm not faulting him for it,

1 Your Honor. I'm pointing out, though, that there is a basic
2 unfairness here where the government is seeking to strike a
3 defense after having examined our witnesses about it. That
4 that's number one.

5 Number two, relying on the testimony of
6 Mr. Delrahim, that they're affirmatively putting into issue
7 by proffering an affidavit, which I haven't had a chance to
8 review.

9 But also in the letter proffering the testimony
10 that he gave to the Senate.

11 Now, Your Honor, just looking at this deposition,
12 at no time did I receive orders.

13 THE COURT: You mean affidavit?

14 MR. PETROCELLI: Excuse me.

15 THE COURT: It's all right.

16 MR. PETROCELLI: Thank you.

17 Looking at this affidavit, paragraph 7, "At no
18 time did I receive orders, instructions, or directions."

19 What about conversations? Mr. Delrahim was in the
20 White House.

21 And the background of this, Your Honor, is that
22 Mr. Trump became very unhappy with CNN as a result of
23 coverage of the campaign, including sending an email that
24 was published in the *New York Times* to the President of CNN,
25 Jeff Zucker, indicating that he was very unhappy and words

1 to the effect that he would get even with him. Okay?

2 Now, that's right before the election, sometime in
3 September, I think, in 2016.

4 Then this merger is announced on October 22nd,
5 2016. That day Then-Candidate Trump issues a statement in a
6 speech that he was going to oppose the merger and expressed
7 his extreme displeasure with CNN's news coverage and also
8 indicated that he thought it was too much power in the hands
9 of few, I think is the way it was put.

10 The next day, his campaign put a prepared
11 statement to the same effect on their Website.

12 The next day, Mr. Delrahim, who was a private
13 citizen, teaching -- practicing law and maybe even as a law
14 professor, I think, back in Los Angeles, was interviewed and
15 asked about Candidate Trump's statements opposing the
16 merger.

17 And Mr. Delrahim indicated that he didn't see any
18 major problems with this, and obviously, the government
19 would have to take a look at it. And the President can't
20 dictate what would happen to a merger; it has to go to a
21 court.

22 And, thereafter, he goes to work for -- into the
23 White House for a number of months.

24 And, meantime, we're now in the regulatory
25 process.

1 And after intensive review by the government, the
2 parties had a long series of discussions and negotiations
3 last summer, negotiating on a parallel track to continuing
4 the investigation, a Consent Decree, a Consent Decree that
5 ended up being negotiated in quite extreme detail,
6 Your Honor.

7 And it called for the same type of provisions that
8 were in the Comcast-NBCU consent decree, because, after all,
9 that was somewhat of a comparable precedent transaction,
10 except, Your Honor, that in the case of Comcast-NBCU, that
11 presented far more challenges than this case, than this
12 merger presented, because with respect to that transaction,
13 Your Honor, a couple of distinguishing factors that are very
14 important, NBCU, national broadcast network. No national
15 broadcast network here.

16 They had extensive sports rights. In fact,
17 they're, you know, broadcasting the Olympics right now.
18 Turner doesn't have those kinds of sports rights. They have
19 some, but they don't have the quality and the -- or I should
20 say the extensive sports rights that NBC has.

21 And, above all, Your Honor, at the time, back in
22 2010 is when that transaction was being reviewed. And it
23 was presented to Your Honor, I think, in January 2011. The
24 main concern of the government were these online video
25 distributors, what they called nascent video distributors.

1 Those nascent video distributors are now
2 dominating the industry, companies like Netflix, companies
3 like Amazon. We have Facebook, Google. They are dominating
4 this industry, both from a video and an advertising
5 standpoint.

6 So those -- this transaction occurring today
7 presents none of the difficulties that happened back in
8 2010, 2011; yet we were offering the same protections,
9 including mandatory arbitration, no ability whatsoever to
10 withhold programming. All of that was provided to the
11 government.

12 And we were going along with this Consent Decree.

13 And then when Mr. Delrahim ultimately was
14 confirmed and came to head up the division, those Consent
15 Decree discussions stopped. And suddenly now they were
16 asking for drastic divestitures: Either divest the entire
17 Turner company or divest the entire DirecTV company, both of
18 which would have eviscerated the basis of this merger, made
19 no economic sense whatsoever. And they understood that
20 those were not viable proposals.

21 In other words, no more discussion, no more
22 conversation whatsoever about the Consent Decree, conditions
23 that we had spent a long time negotiating, including,
24 Your Honor, this critical agreement that Turner would not,
25 under any circumstance, withhold its programming.

1 The government came in to Your Honor in 2011, two
2 thousand and -- yeah, January 2011 to get approval assured
3 Your Honor that that provision -- that protection would be
4 more than sufficient to address any competitive concerns.

5 And Your Honor questioned the government about
6 that and took it under submission. And they filed
7 competitive impact reports and assured Your Honor there
8 would be no problem.

9 And Your Honor actually asked for a reporting
10 mechanism, where they had to come back like once a year for
11 a couple of years.

12 At no time did the government ever come back and
13 suggest to Your Honor that there was any problem whatsoever
14 with respect to that transaction or with respect to the
15 efficacy of the arbitration mechanism, as well as the
16 agreement that NBCU would not withhold its programming; the
17 same agreement that we provided.

18 And, yet, rather than complete this Consent Decree
19 process, all of a sudden, we're being asked to divest large
20 chunks of the merger or else they're going to block it
21 entirely.

22 In addition to that -- and I don't want to get too
23 much into the merits, but Your Honor pointed out a couple of
24 weeks ago that we would learn a lot about this case once the
25 expert submissions were exchanged.

1 And Your Honor was correct, because when we got
2 the government's chief report from its economist, it just
3 confirmed that there's no "there" there. The government's
4 economist concluded that, as a result of the merger, the
5 prices to consumers of DirecTV would not go up but would go
6 down. That's their own economist's conclusion.

7 The economist then concluded that the prices to
8 the consumers of other distributors, like Comcast or some of
9 the other competitors, would go up by a very small amount,
10 so small, Your Honor, so small that, on an annual basis, a
11 person's cable bill would go up less than it would cost to
12 buy a fancy coffee at Starbucks. That's how tiny the
13 alleged price increase to consumers, other than DirecTV's
14 consumers.

15 Now, that's crediting the government's position
16 100 percent. We, of course, during the course of the trial,
17 are going to point out that their expert made several
18 critical mistakes. And as soon as you correct for the
19 mistakes, there is zero price increase anywhere.

20 So I only mention that to you because one of the
21 factors here, Your Honor, is also the emergence of how weak
22 this case is, and yet the government is seeking drastic
23 relief to block the merger in its entirety.

24 So all we are asking for is a privilege log. This
25 isn't going to distract the case. This isn't going to take

1 the case into a different and new direction.

2 That privilege log could have been prepared in
3 five minutes or an hour or a couple of hours and probably
4 already is prepared.

5 And all that needs to be done, Your Honor, is to
6 be shown to us. And maybe we'll ask Your Honor to take a
7 look at the documents in camera; we don't see them; you see
8 them, and you can judge whether there's anything there.

9 If there's something in those documents,
10 Your Honor, the existence of which they have not denied or
11 disputed, then it's incumbent upon us to pursue this,
12 because it's an important issue.

13 We have at stake here a trans- -- we're in the
14 midst of a transformation in this industry. We have two
15 companies that are merging, frankly, to try to keep up. As
16 Randall Stephenson just testified, we're chasing taillights
17 right now. This is a transaction that's critical for the
18 benefit of consumers.

19 And I agree. There's a lot at stake here. But
20 there's also something else at stake here that goes far
21 beyond the interests of the litigants of this case, and
22 that's the public's trust and confidence in the integrity of
23 the government's enforcement decisions.

24 And, yes, I understand they don't want to get into
25 this area. They've been battling me for two months on this.

1 But we have proceeded in about as measured a way as
2 possible, and all we've asked for is a privilege log. And
3 if we get the privilege log, this could end right there.

4 THE COURT: What do you think that privilege log
5 is going to show you.

6 MR. PETROCELLI: It's going to identify documents
7 responsive to our request, which is documents reflecting the
8 views of the White House, statements of the White House,
9 conversations of people in the White House, statements of
10 people within DOJ about what folks in the White House have
11 said, about what they would like to do with this merger.

12 After all, the then-candidate, now-President Trump
13 made a campaign promise on the eve of winning the election
14 that he was going to block this merger. And in part, he
15 expressed his deep disfavor with CNN.

16 He's the chief law enforcement officer now. You
17 would expect that the Antitrust Division would carry out the
18 policies that the President has set out. And that policy is
19 to block this merger, we say, for a reason that's not
20 permitted.

21 And to the extent the documents show that there's
22 been any consideration of those views in this process, then
23 we would be at least entitled to have the Court view those
24 documents if they exist.

25 I mean the government could have literally said to

1 me, "No such documents exist whatsoever." They could have
2 said that to me two months ago, and this would have been
3 done with. But they haven't said that to me, and so here's
4 where we are.

5 So I think it's premature for them to ask the
6 Court to strike the defense on the merits, especially when
7 they are relying on a factual record, including
8 Mr. Delrahim's affidavit, and at the same time, without even
9 providing any discovery whatsoever. That's a matter that
10 can be addressed later on if it becomes necessary.

11 THE COURT: Would you be -- the questions that you
12 propounded that you say necessitates privilege log, were
13 those objected to?

14 MR. PETROCELLI: Yes, all of them.

15 THE COURT: All of them? Okay.

16 MR. PETROCELLI: Yeah.

17 THE COURT: And would you say that -- would you be
18 open to striking Mr. Delrahim from the witness list under
19 circumstances where you could, just like the government
20 could, seek leave of the Court to add someone to the witness
21 list later for good cause shown?

22 MR. PETROCELLI: Yes, including him, you mean,
23 yes. If there was good cause shown, yes.

24 I only needed to add him to the witness list now
25 because we faced a deadline and if turned out I wanted to

1 add him later on, it would have been too late. But I'd be
2 happy to take him off now with the ability to add him if it
3 became necessary upon a showing of good cause under the
4 cases.

5 THE COURT: And are these the only documents for
6 which you believe you're entitled to a privilege log that
7 have still not been provided?

8 MR. PETROCELLI: Yes, Your Honor.

9 THE COURT: Are there any other documents that
10 fall in that category?

11 MR. PETROCELLI: Not with respect to this issue,
12 no. I can give you --

13 THE COURT: Well, how about in general? Are there
14 any other issues?

15 MR. PETROCELLI: Yes.

16 THE COURT: Any other documents that you've, at
17 this point, not received from the government which you
18 believe you're entitled to, that they are claiming you're
19 not entitled to and that they're not even willing to give
20 you some kind of a privilege log for?

21 MR. PETROCELLI: The -- there's another category
22 that has absolutely nothing to do with this issue that has
23 to do with whether the other networks besides Turner are
24 considered, just -- related to other networks besides
25 Turner.

1 They've objected on relevance grounds, and we are
2 in the process of meeting and conferring on that. So it's
3 actually not ripe to bring to Your Honor.

4 But there's no other category of documents on
5 which a privilege is being asserted, other than this
6 deliberative process privilege.

7 And, again, the -- we only -- we asked them two
8 document requests and one interrogatory, maybe two
9 interrogatories. And the interrogatories simply said, A,
10 identify the documents; or, B, if there were verbal
11 communications on this subject, identify the verbal
12 communications.

13 And so for now, however, all we're asking for is
14 the privilege log on the documents, to the extent they have
15 documents responsive to these specific requests.

16 THE COURT: What about the verbal communications?

17 MR. PETROCELLI: Well, I'm prepared to proceed in
18 an incremental, measured basis on that. I would ask them to
19 answer yes or no. And if the answer is yes, to at least
20 identify the date of the communication and the participants
21 to the communication.

22 And so the discussion that Mr. Conrath was having
23 with the Court is one that I submit is premature, because it
24 goes to the merits of the defense. And we're not there yet.
25 And we may never get there, depending on what we can see if

1 Your Honor will require at least the submission of a
2 privilege log.

3 THE COURT: All right.

4 MR. PETROCELLI: Thank you.

5 THE COURT: Mr. Conrath.

6 What's the, give me your argument that you think's
7 most important and compelling on this privilege log issue.

8 MR. CONRATH: Yes. Yes.

9 THE COURT: I mean, he's --

10 MR. CONRATH: Well, let me take back through the
11 events, because I think what the demand has been is actually
12 substantially broader than has been suggested.

13 THE COURT: Well, but I would hold him to his --
14 I mean, if we're going to go forward in a direction that he
15 would regard as being favorable, it would be on a very
16 limited basis. So assuming that --

17 MR. CONRATH: Let me explain what the state of
18 play is, Your Honor.

19 They submitted to us initial discovery requests
20 that went to this topic. We objected in the ordinary
21 course. But we said, We will produce you a log of all
22 written communications between the White House and the
23 Antitrust Division that relate to the subject of this
24 merger, all written communications between the White House
25 and the Antitrust Division that relate to the subject of

1 this merger.

2 We produced that log.

3 All of those documents related to the confirmation
4 process of Mr. Delrahim, who was working in the White House
5 and needed to communicate with the antitrust division as
6 part of preparing him for his nomination, answering
7 questions --

8 THE COURT: Okay.

9 MR. CONRATH: -- and so on, all of those are
10 subject to a deliberative process privilege, but they all
11 related to that topic.

12 So in short, what that means is the -- we gave
13 them the log; there was nothing there that's the kind of
14 thing they're looking for.

15 There are no documents --

16 THE COURT: So the demand was written, if I
17 understand correctly, in such a way, as to include or
18 capture -- if there had been communications in writing about
19 this merger --

20 MR. CONRATH: Yes.

21 THE COURT: -- they would have been captured by
22 the demand?

23 MR. CONRATH: Right.

24 THE COURT: Okay.

25 MR. CONRATH: By the log that we did; that's

1 right.

2 THE COURT: Right.

3 MR. CONRATH: So they found -- so the answer was,
4 there's nothing untoward, nothing of the kind that they're
5 imagining might exist.

6 THE COURT: Right.

7 MR. CONRATH: We gave them that log. There's
8 nothing untoward there.

9 So they said, Oh, okay, a letter. We're going to
10 ask you a bunch of more stuff.

11 And then they started to ask for all
12 communications between the White House and the Deputy
13 Attorney General, the Attorney General; all --

14 THE COURT: About what?

15 MR. CONRATH: About --

16 THE COURT: This case?

17 MR. CONRATH: About AT&T, not about this case.

18 About AT&T, about Time Warner, or about this case
19 or about CNN. Way too broad.

20 Then they sent us a demand for every document in
21 the Department of Justice, which is about 100,000 people, in
22 which someone has discussed AT&T, Time Warner, CNN, or the
23 President's views or anyone in the White House's views about
24 any of those things, sweeping discovery.

25 And so we said, Look, we gave you what might

1 plausibly be relevant, which is written communications
2 between the Antitrust Division and the White House that
3 touch on the subject of the merger. There wasn't anything
4 there.

5 Now, if you want to go forward, there is a
6 standard under the law for what it takes to get discovery on
7 the selective prosecution defense. It's set forth by Chief
8 Justice Rehnquist in the *Armstrong* decision. We don't see
9 that you meet it. You didn't make any allegations. Your
10 answer is a naked assertion with no facts, doesn't even meet
11 probably normal pleading standards. Tell us what you've
12 got.

13 They sent us a six-page letter, which, frankly,
14 was a long letter, long on assertions and very short on
15 evidence.

16 So that's where we are. We've said to them, No.
17 What you're asking now -- I mean, literally what they're
18 asking would not be accomplished. We'd be talking about a
19 trial in July, Your Honor, to track down everything that
20 they've asked us for.

21 But more important -- but that's not the most
22 important point. The most important point is they're not
23 entitled to this discovery without making a first showing, a
24 rigorous showing that there's been selective prosecution and
25 an improper motive. And they can't meet either one of those

1 accounts.

2 I mean, essentially what their argument consists
3 of is saying, Look, the President unhappy with CNN. We
4 don't dispute that.

5 But AT&T wants to turn that into a "get out of
6 jail free" card for their illegal merger. And the law
7 doesn't allow them to do that without going through --
8 without going through the steps.

9 I can touch on a couple of the other points. I'm
10 glad to address any of them, but I'm glad to discuss --

11 THE COURT: Look it. Let's stay focused on the,
12 for the moment anyway, on the two problems: One, to what
13 extent, if any, you need to produce any further privilege
14 log; and, second, to what extent, if any, should
15 Mr. Delrahim's name appear on their final witness list?

16 Now, as to the second one, there seems to be a
17 pretty readily, easily available solution to that problem
18 right away.

19 If both sides are under the understanding and
20 impression, per the Court's direction, that they will each
21 have the opportunity at a later time to seek leave to add a
22 witness for good cause shown to the final witness list, then
23 strike Mr. Delrahim right now, until such time as there is a
24 basis for good cause to seek to add him, at which point, of
25 course, the government can object to that. If it has a

1 basis to object to it, it would -- it will. And the Court
2 will have to decide whether to add him or anyone else, for
3 that matter, whoever they might to seek to add.

4 Vice versa, you might want to add someone to a
5 list.

6 MR. CONRATH: That's true, Your Honor.

7 THE COURT: And for good cause shown, they can
8 object to it and then et cetera, et cetera.

9 So it seems to me the second prong is easily,
10 readily solvable immediately. Just strike him from the
11 list, with the understanding that there's always the option
12 to leave -- to seek to add him later.

13 Now, as to the first problem, it's your position,
14 as I understand it, that you don't owe him any more
15 privilege log based on the sequence of events that have
16 already unfolded.

17 MR. CONRATH: That's correct, Your Honor.

18 THE COURT: I think his position is a little bit
19 different, although we didn't sort of argue it from that
20 perspective. So I'll give him a chance to say a little bit
21 more on that subject.

22 But if that were to be resolved, the privilege log
23 issue, then I don't know if I'd have to get to the motion to
24 strike right now, because I don't see any discovery that's
25 going to be taking place on the motion to strike on the

1 selective enforcement front. With Delrahim off the list,
2 you're not going to be deposing -- he's not going to be
3 deposing Delrahim, obviously. And I don't know what the
4 related discovery would be at this point.

5 MR. CONRATH: They have -- so, look, they have
6 pending five discovery requests, including requests -- the
7 request for all documents that were -- literally, if someone
8 at the Department of Justice sent an email to a colleague
9 saying, "Hey, did you see the latest presidential tweet on
10 this topic?" that would be called for by their document.

11 And to search for, to log that kind of thing is
12 not literally possible within the time frame we're talking
13 about.

14 The question of seeking documents within the
15 office of the Deputy Attorney General or the
16 Attorney General raise very important policy decisions
17 beyond my ability to --

18 THE COURT: Oh, I understand.

19 MR. CONRATH: -- to address, and the principles
20 of -- those offices have with regard to their future
21 functioning and how they would treat previous cases.

22 We looked for -- we said, You may not have
23 established a basis, but we will look for the kind of thing
24 that might be relevant, which is written communications
25 about the merger between the Antitrust Division and the

1 White House.

2 We gave them a list. We explained that there was
3 nothing untoward with any of them. We believe that more
4 than complies with our obligations under discovery, and
5 especially in a situation where they can't offer -- meet
6 either prong of the standard for this kind of discovery.

7 THE COURT: Is there an outstanding request
8 pending of oral communications between the White House and
9 the Antitrust Division with regard to the AT&T merger that
10 is outstanding but you haven't responded to yet or you've
11 claimed privileges to?

12 MR. CONRATH: I think the answer -- I think the
13 answer is that it's broad enough. Some of their
14 communication -- their requests were broad enough, but give
15 me -- will you give me a second to consult with
16 Mr. Schwingler, who's the actual expert in those regards?

17 THE COURT: Absolutely. Go right ahead.

18 (Government counsel conferred off the record.)

19 MR. CONRATH: So there are requests broad enough
20 to encompass that, Your Honor. And we object to them for
21 the reason that they haven't met the standard for such
22 discovery.

23 THE COURT: Okay.

24 So as to those, there's not a privilege log that's
25 been created as to those, right?

1 MR. CONRATH: If there are any, no. That's
2 correct.

3 THE COURT: If there are any?

4 MR. CONRATH: Right.

5 THE COURT: Would you object to doing a privilege
6 log for them and claiming the privilege that you believe is
7 apposite as to each?

8 MR. CONRATH: Yes, for the reason that they
9 haven't established any justification for this discovery.

10 THE COURT: All right.

11 MR. CONRATH: I should be clear: I have no idea
12 whether there is such a communication. I don't. I'm not
13 aware of any.

14 THE COURT: Well, as of right now, you're not
15 aware. Obviously, Mr. Delrahim has stated in this affidavit
16 that you've submitted to the Court that he has not had any
17 such indication.

18 MR. CONRATH: That's correct, Your Honor.

19 THE COURT: So although Mr. Petrocelli says that
20 it's not quite clear as to whether there had been a
21 conversation, there may have been no direction or order, but
22 there may have been a conversation or something like that.

23 MR. CONRATH: Well, Mr. Delrahim has said quite --
24 says in his affidavit quite clearly he didn't receive any
25 instructions and, second, that his decision had nothing to

1 do with the President's views about the transaction.

2 THE COURT: That part --

3 MR. CONRATH: You know, let me put a couple of
4 other facts out here that are important, because they should
5 be remembered.

6 This investigation started in October 2016,
7 October 27th, 2016, as soon as the thing -- the transaction
8 was announced under the prior administration, obviously. It
9 was staffed up from an early -- from an early stage.

10 It proceeded in the normal course of the way these
11 investigations proceed, with an investigation done by the
12 career staff, resulted in a complaint, signed by, as the
13 Court has pointed out, a couple dozen of the career staff --

14 THE COURT: 29.

15 MR. CONRATH: -- who worked on this matter.

16 And we know that we are here to be judged on the
17 facts and the law. And we're prepared to establish the
18 proof on that. And the proof of the pudding is in the
19 eating, Your Honor.

20 That's what this case is about. It's about the
21 merits. It's about the risk to competition and the
22 possibility that this industry becomes concentrated and
23 competition gets hurt.

24 You know, it's true that the President issued a
25 statement saying -- when a candidate, saying, you know, I'm

1 against this merger because it would result in too much
2 concentration in the hands of too few.

3 Approximately the same statement was made by
4 Senator Sanders, Senator Warren, a long list of other people
5 have observed. And it is really -- I mean, at the very
6 broadest level, that's what antitrust is about: too much
7 concentration in the hands of too few.

8 That kind of high-level comment about what -- that
9 the antitrust laws should be enforced really isn't a
10 justification for the kind of intrusive discovery that
11 they're seeking in this case.

12 I want to spell another suggestion that was made,
13 because you heard the suggestion from my distinguished
14 counsel that there was a sudden change when Mr. Delrahim
15 showed up.

16 Mr. Finch, who was running the Antitrust Division
17 before Mr. Delrahim showed up, in an acting capacity, had
18 asked the defendants to focus on structural relief in
19 August. And they didn't engage -- they refused to engage on
20 that topic. But that proceeded a long time ago.

21 And if I may, I'd like to hand up also a
22 declaration for Mr. Finch that goes to the question of
23 whether there was some kind of abrupt change when
24 Mr. Delrahim arrived.

25 THE COURT: Make sure you give a copy to everyone,

1 the defense.

2 MR. CONRATH: It was a little -- so we did, it is
3 true that we did listen to their proposal and have long
4 discussions with them about the possibility of behavioral
5 remedy. But we were clear throughout that litigation,
6 blocking the merger was and always an option that we were
7 considering at every step of the way. So it is improper to
8 suggest that there was -- that that was a surprise to them.

9 And, indeed, the chairman of AT&T, Mr. Stephenson,
10 has said in a press account in the Los Angeles Times that
11 from day one of this merger, he says, we have been preparing
12 to litigate.

13 Well, why were they preparing to litigate if they
14 didn't think that it was possible that the government was
15 going to sue to challenge them?

16 So they have been aware from day one that the
17 possibility of this merger is just too much to get by under
18 the antitrust laws, is quite real, and they have been
19 preparing for that. And they can't really complain to have
20 been surprised that Mr. Delrahim made a decision in
21 accordance with that.

22 We had a little detour, if I can, to talking about
23 our case. They referenced the evidence of our chief
24 economist, who had submitted a report that candidly
25 considers all the possible effects of this merger, giving

1 credit to possible -- the possibility that there are
2 beneficial effects and asking on balance, "Will this merger
3 be harmful?"

4 He says, It will. I should renew the offer that
5 we're prepared to offer that expert report if the Court
6 wants it in advance, but he'll be ready to testify at trial.

7 And what the Court will understand after his
8 testimony is that, on balance, this merger will cause
9 hundreds of millions of dollars of damage, because as is the
10 nature of antitrust effects, market power in markets like
11 this one, relatively modest increases in the price that
12 competitors have to pay can be translated, because there are
13 almost 100,000,000 consumers, into very large amounts of
14 money in the economy as a whole. That's why this case is
15 important. That's why we're moving to challenge it.

16 And it's also important to remember that part of
17 our allegation is not only the immediate price increase
18 that'll be applied to consumers of traditional cable, but
19 that there may be -- that the merger may give the combined
20 company the incentive to slow down the growth of the kind of
21 a new competitor who could be disruptive by bringing sort of
22 a skinny bundle where you only have to buy so many packages.
23 That's very threatening to a status quo company like AT&T.

24 The evidence will show that their internal
25 considerations of this was that what they want to do -- and

1 if they're able to go ahead with this merger, what they want
2 to do is be able to continue to milk the cash cow and then
3 only slowly pivot to the new forms.

4 Well, if the new forms of competition are
5 permitted to proceed without interference or impedance by
6 the established incumbents like AT&T, that might not be so
7 slow, because competition has a way of bringing discipline
8 to the markets.

9 This merger threatens that, and that's the second
10 reason beyond the immediate price increases. That's a
11 long-run competitive effect that we're all also trying to
12 seek to protect by challenging this merger.

13 Finally, they mentioned Mr. Delrahim's interview
14 with the Canadian television station in which he said a
15 couple things that are pretty straightforward, that
16 anybody -- I would have said if anybody bothered to ask me:
17 Yeah, look, on average, vertical merger is less problematic
18 than horizontal mergers. Every antitrust lawyer knows that.
19 Everyone would say that.

20 The important thing is what else Mr. Delrahim said
21 in that interview, which is, "This will get an ordinary
22 government review by the Antitrust Division."

23 That happened.

24 "If the Antitrust Division finds a problem,
25 they'll bring a case."

1 That happened.

2 :And if that happens, they'll have to prove their
3 case before an independent Federal Judge."

4 And that's why we're here, Your Honor.

5 Thank you.

6 THE COURT: Thank you.

7 MR. PETROCELLI: Very briefly, Your Honor.

8 Again, I don't think, for the purpose of getting a
9 privilege log, the government can put in evidence of
10 Mr. Finch, evidence of Mr. Delrahim, and have the Court have
11 just one side of the evidence in order to refute the merits
12 of the defense.

13 I have 40 pages of testimony from Mr. Bewkes
14 yesterday laying out the bases why we believe there is ample
15 good cause to suspect the decision-making process and
16 whether it's been influenced by political considerations, 40
17 pages, Your Honor.

18 Now we haven't had an opportunity to submit this
19 to Your Honor because we were just in this two-page letter
20 process. But, you know, counsel has come in here. He put
21 in Mr. Delrahim's affidavit, Mr. Finch, neither of them
22 says -- neither of them says they have had no conversations.

23 Again, orders, instructions, and directions.

24 The privilege log, the requests, Your Honor, are
25 quite specific. And I had extensive discussions with the

1 government's counsel to narrow them. And what we agreed,
2 essentially, is all we want to know is: Are there any
3 documents in your files that discuss this merger -- not
4 anything about AT&T, not anything about Time Warner --
5 discuss this merger with respect to the views of the
6 White House, the views of the executive office? Is there
7 any document that you have, an email between the White House
8 and anybody at DOJ?

9 THE COURT: He tells me he's already given you the
10 written communications log, privilege log.

11 MR. PETROCELLI: No. This is all that he's gave
12 us, Your Honor, and this is what I tried to explain.

13 We broke the categories down into three buckets,
14 Your Honor, and they only would give us a log on one of the
15 three buckets.

16 Bucket No. 1, White House communications between
17 the Antitrust Division and the White House -- that is,
18 communications about this merger. Everything was limited to
19 about this merger. That's the predicate.

20 And the first category: Was there communications
21 between the antitrust division and the White House about
22 this merger?

23 THE COURT: Written, oral, or both?

24 MR. PETROCELLI: This was just written initially.
25 Just written.

1 And they came back and said that the only such
2 communications there are relate to the confirmation process,
3 and they gave us a log.

4 I said, "Okay. What about Bucket No. 2?"

5 Bucket No. 2 was communications between the
6 Antitrust Division and the Attorney General's Office in
7 which views -- in which the White House views are expressed
8 about the merger.

9 THE COURT: In writing?

10 MR. PETROCELLI: In writing.

11 They declined to give us a log on that category.

12 Category 3, documents between the
13 Attorney General's Office and the White House about this
14 merger. They declined to give us a log of those documents.
15 Okay?

16 And that's what we've been further discussing, and
17 that's when they asked me to give them a showing of good
18 cause. I gave them the four-page or five-page letter. We
19 have 40 pages of testimony yesterday.

20 But we haven't gotten documents related to
21 those -- to the rest of that request. They just carved out
22 one piece of it, the Antitrust Division to the White House,
23 but not the rest.

24 And, again, everything was limited to this
25 transaction; in other words, all we want to know is:

1 Do you have documents in your files, whether it's an email,
2 whether it's a memo, in which you are -- in which the
3 document is addressing the White House's views about this
4 merger? Okay? And we don't have clarity on that. And
5 that's the log we wanted.

6 So then, in the midst of this, we decided, well,
7 we'll be better send an interrogatory asking for the verbal
8 communications between the folks involved in this, including
9 Mr. Delrahim and anybody at the White House, about this
10 merger.

11 And they just give us an objection.

12 I said, well, can we just have a log, just say,
13 yes or no, were there any conversations? What are the
14 dates? And who are the participants? You don't have to
15 describe them for now, okay? Let's just do this in a very
16 measured way.

17 And I'm just trying to get to finality on this,
18 Your Honor. You know, I have -- I'm fond of an expression
19 that sometimes things are what they appear to be. And here,
20 we have a situation where we have more than satisfied the
21 showing required by *Armstrong* to get discovery.

22 And the discovery we're getting is the most
23 minimal discovery known to the law, which is just a log.

24 And the government won't give it to us.

25 Now, if they don't have any of these documents,

1 they can tell us, make a representation: None of these
2 categories exist. There are no verbal communications. Then
3 we're done.

4 But for them to argue their case on the merits by
5 submitting affidavits, taking our significant witnesses'
6 depositions on these subjects and blocking us entirely seems
7 fundamentally wrong. You can't have one-way discovery, and
8 that's what it's been so far.

9 And we have absolutely no intention of losing this
10 schedule, Your Honor. So we are not going to let this thing
11 get out of control, and it hasn't.

12 We've been dealing cooperatively and
13 professionally. But we've hit an impasse where I'm not
14 satisfied with the responses that we've gotten. I have an
15 obligation to the clients to run this to ground, and that's
16 all we're trying to do.

17 And if there's a log, they should give it us and
18 tell us. And that'll be -- I'll ask Your Honor to take a
19 look at the documents, and that'll be the end of it, I mean,
20 unless there's something there, in which case then we've got
21 a problem.

22 Thank you, Your Honor.

23 THE COURT: Mr. Conrath, the two buckets that he
24 just mentioned that are still -- there's no response to --
25 communications between the White House and the

1 Attorney General's Office, in writing, in writing, relating
2 to this merger, are you in a position to know, to the -- to
3 what extent, if any, if there are any such documents of that
4 kind?

5 MR. CONRATH: I have no reason to believe that
6 there are, but I do not know.

7 THE COURT: Okay.

8 MR. CONRATH: And, frankly --

9 THE COURT: Is there anyone on your staff who
10 would know the answer to that question?

11 If you know.

12 MR. CONRATH: No. No.

13 THE COURT: Okay.

14 MR. CONRATH: And I should say, Your Honor, that
15 that kind of -- the kind of discovery of communications
16 between the White House and the Attorney General's office
17 and, frankly, between the Attorney General's office and the
18 antitrust division, raise more issues of privileges than
19 have come before and, frankly, have not -- were not made a
20 part of the letter motion that we submitted to you.

21 These are materials that would surely be subject
22 to a deliberative --

23 THE COURT: Executive privilege.

24 MR. CONRATH: -- process privilege, potentially
25 executive privilege if we're talking about the one kind.

1 So there may be even more than the ordinary case
2 of selective enforcement question. The standard for
3 discovery into them is high.

4 But we don't need to reach that, because they
5 haven't established the standard under the reason for which
6 they're seeking it, which is the selective enforcement.

7 They can't establish that they were treated
8 selectively and there was selective enforcement compared to
9 someone else similarly situated. They can't establish an
10 improper motive because the Department's whole conduct in
11 what we're seeking for relief for the settlement we've
12 offered by itself puts a lie to the suggestion that there's
13 some animus towards CNN and that that was the basis for this
14 lawsuit.

15 Those two reasons -- those reasons alone are
16 enough not to go into the kinds of additional discovery.

17 Although we didn't -- we believe we didn't have an
18 obligation to, we looked for the place where there was
19 something potentially logical for what they're talking
20 about, which is communications between the White House and
21 the Antitrust Division, where the work was being done, where
22 the decision was being made. We looked for that. We gave
23 them what there was. There was nothing untoward, and there
24 was nothing else.

25 I really don't know what more we could do within

1 the realm of trying to be responsible and move this case
2 forward and yet protect the privileges and the governmental
3 policy of prosecution.

4 THE COURT: Well, I mean, obviously, we're doing
5 this without the benefit of briefs, but it seems to me that
6 in the final analysis, what this comes down to is not so
7 much a motion to strike a selective enforcement defense, but
8 a motion to strike the discovery demand --

9 MR. CONRATH: Right.

10 THE COURT: -- that is the focus of this last part
11 of discussion, of buckets 2 and 3, essentially.

12 And I think I'm just going to treat it as that and
13 reflect on it over the weekend, give you a ruling on
14 Tuesday.

15 But I don't think I need any more briefing.
16 I think the arguments have been extremely helpful and
17 extremely fulsome. And, I mean, obviously, I don't have the
18 time or the luxury to write up some 50-page opinion between
19 now and Tuesday. But I'll get you a ruling.

20 And we got -- because bottom line is the same, and
21 that is we have to keep this train moving down the track,
22 not get sidetracked, avoid sidetracks. I mean, obviously
23 you want it to be fair to both sides. It's critical that
24 each side get a fair shake.

25 But I'm very concerned about getting off on a

1 sidetrack that's going to really have a negative impact on
2 our ability to move this thing forward on March 19th.

3 And I know both parties feel the same way, by the
4 way, too. So I think it's really more a question at this
5 point of focusing on the issues you've raised today, both
6 sides, and get you a ruling Tuesday.

7 MR. CONRATH: All right. Thank you very much,
8 Your Honor.

9 MR. PETROCELLI: Your Honor, thank you very much.
10 I appreciate the Court's patience.

11 THE COURT: Okay. We'll stand in recess.

12 DEPUTY CLERK: All rise.

13 This Honorable Court now stands in recess until
14 the return of court.

15 (Proceedings concluded at 5:25 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: February 16, 2018 /S/ William P. Zaremba

William P. Zaremba, RMR, CRR