

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, :
 :
 : Plaintiff, : CV No. 17-2511
 vs. :
 : Washington, D.C.
 : Thursday, March 22, 2018
 AT&T, INC., ET AL., : 2:55 p.m.
 :
 : Day 1
 Defendants. :
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AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT SENIOR JUDGE

APPEARANCES:

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On behalf of the Defendant:

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

4 THE COURT: All right, Mr. Conrath, ready to call
5 your first witness?

6 MR. CONRATH: Good afternoon, Your Honor.

7 The government's first witness is Suzanne Fenwick from Cox
8 Communications. She negotiates agreements with programmers
9 like Turner, she's going to testify about --

10 THE COURT: She'll tell us, all right.

11 MR. CONRATH: Thought you would like a little
12 preview. For those who don't, I don't give it.

13 My colleague Lisa Scanlon will be handling Ms. Fenwick,
14 Your Honor.

15 THE COURT: All right.

16 MS. SCANLON: Good afternoon, Your Honor. Lisa
17 Scanlon for the United States.

18 The United States calls Suzanne Fenwick of Cox
19 Communications.

20 THE COURT: All right. Okay.

21 MS. SCANLON: Your Honor, I'd like to hand up some
22 binders if I may.

23 THE COURT: All right.

24 GOVERNMENT WITNESS SUZANNE FENWICK SWORN

25 MS. SCANLON: May I proceed, Your Honor?

1 THE COURT: You may.

2 MS. SCANLON: Your Honor, before I begin, I wanted to
3 state that as Mr. Conrath explained I think on Tuesday --

4 THE COURT: No speech. Question the witness.

5 MS. SCANLON: All right.

6 DIRECT EXAMINATION

7 BY MS. SCANLON:

8 Q. Good afternoon, Ms. Fenwick?

9 A. Good afternoon.

10 Q. Are you, do you understand you're here pursuant to a trial
11 subpoena?

12 A. I do.

13 Q. Okay. Ms. Fenwick, where do you work?

14 A. I work at Cox Communications.

15 Q. What is Cox's business?

16 A. We sell, from a product standpoint, we sell video
17 services, we sell high speed data, we sell telephone and home
18 security.

19 Q. Okay, where does Cox operate?

20 A. Our corporate headquarters are in Atlanta.

21 Q. Are you here from Atlanta today?

22 A. I am.

23 Q. Where does Cox operate around the country?

24 A. So we are in several areas of the country. We're not a
25 national player. But we're in Fairfax, Virginia, we're in

1 Louisiana, Phoenix, San Diego, a number of markets.

2 Q. How long have you worked at Cox?

3 A. Nineteen years.

4 Q. Would you describe the jobs that you've had at Cox?

5 A. Sure. So I started in mergers and acquisitions. I've
6 done corporate development. I've done, I led our commercial
7 business in finance. And then I started in content acquisition
8 about six years ago.

9 Q. What is your current title?

10 A. Vice chairman of content acquisition.

11 Q. What do you do in that job?

12 A. I negotiate for the rights to put cable networks or
13 channels on our TV platform. And a good example would be like
14 an ESPN.

15 Q. How many contracts have you negotiated in your time in
16 that position?

17 A. Easily hundreds. We are constantly going through and
18 opening up agreements and doing amendments.

19 Q. Ms. Fenwick, you're in the content acquisition department;
20 is that right?

21 A. That's correct.

22 Q. Okay, and how many people are in that department at Cox?

23 A. It's small. There's six or seven of us.

24 Q. Who do you report to?

25 A. I report to Andy Albert. He's the senior vice-president

1 of content acquisition.

2 Q. Are there other departments in Cox?

3 A. Yes, many. Our department is actually part of our finance
4 organization and reports up through the CFO. But certainly
5 we've got marketing and IT and product to name a few.

6 Q. Do you interact with employees of Cox that work for other
7 departments?

8 A. Yes, absolutely on a regular basis. I spend a lot of time
9 with our marketing and product teams to make sure I understand
10 what new products they may be developing or new functionality.

11 I spend time with our technology group to make sure I
12 understand changes in technology and how that may influence the
13 products so I can negotiate for those rights.

14 And then certainly I spend a lot of time with my counter
15 parts at monthly and quarterly meetings discussing issues in
16 the business, competition, financial results, that sort of
17 thing.

18 Q. So you mentioned monthly meetings. Can you describe the
19 monthly meetings you have with your colleagues at Cox?

20 A. Sure. As an officer group we get together once a month to
21 talk about issues, maybe in the industry, it may be in the
22 business, competitive threats that we have concerns about.

23 And so it's sort of a regular meeting for us to get
24 together and make sure we are all apprised of what is changing
25 in the business and in the industry.

1 Q. Is that a meeting of who works at Cox?

2 A. No, it's just officers. So there's probably about 80 to
3 90 officers in the company.

4 Q. Ms. Fenwick, how does Cox get the programming that it
5 offers to consumers?

6 A. So we actually are negotiating with either a single
7 network or a network group which, you know, includes several
8 networks or several channels, and we will license that content
9 to put it on our cable system.

10 Q. Do you have an understanding of how the network groups get
11 the content that they in turn resell to companies like Cox?

12 A. Sure. So networks will either produce content for
13 themselves or they will buy it from third parties like a studio
14 such as Warner Studios or Lions Gate. They will, if they are
15 carrying sports, they will license sports rights from the
16 actual sports leads like the NFL.

17 Q. And you use the term network group a moment ago. What is
18 a network group?

19 A. I just mean a company that owns multiple networks. Good
20 example is Turner owns multiple network. ESPN owns multiple
21 networks, so it's a group of them.

22 Q. Are there major network groups that Cox licenses content
23 from?

24 A. Sure. There's probably at least eight large network
25 groups that certainly includes a big chunk of our content.

1 Q. Beyond a major network groups, are there other networks
2 that Cox negotiates for content?

3 A. Sure. So I mentioned independent networks, but we also
4 negotiate for premium channels like in HBO or Showtime or
5 Stars.

6 Q. You mentioned earlier that Cox doesn't operate nationally.
7 Is Cox known as a regional cable distributor?

8 A. We are.

9 Q. Are there other regional cable distributors in the
10 country?

11 A. Sure. So Comcast or Charter or Cable One, they are all
12 regional players as well.

13 Generally we do not compete in the same markets.

14 Q. Are you familiar with the term linear television?

15 A. I am.

16 Q. What does that term mean to you?

17 A. It's really just live TV.

18 Q. Does Cox offer linear television?

19 A. We do.

20 Q. Do the other regional cable companies offer linear
21 television?

22 A. They do.

23 Q. Are there other pay-TV distributors beyond the regional
24 cable companies?

25 A. Sure. So there are certainly national satellite providers

1 like DirecTV or DISH that offer services in every single
2 market. It's a little bit different technology, but it's the
3 same kind of broad portfolio video content.

4 Q. Do you understand whether those companies offer linear
5 television?

6 A. They do.

7 Q. Do you Cox compete with DISH and DirecTV?

8 A. We do.

9 Q. Beyond the regional companies and the national satellite
10 companies, are there other types of pay-TV companies out there
11 in the market?

12 A. Sure. So more that's developed over the last few years,
13 there's a category, a larger category called OTT which is over
14 the top. And I think there are probably sub categories within
15 that.

16 There's a large universe. DirecTV has their own OTT
17 product called DirecTV Now that competes with a full portfolio
18 product and is a direct competitor for Cox.

19 DISH offers a OTT service called Sling which offers
20 skinnier bundles. It's a subset of the overall portfolio that
21 we would offer and certainly smaller packages that are
22 available to customers.

23 Q. You mentioned DirecTV Now. Is that a company that offers
24 linear television?

25 A. Yes, they do.

1 Q. And the other one you mentioned was Sling. Do you
2 understand whether Sling offers linear television?

3 A. They do.

4 Q. Are there other OTT companies offering linear television
5 services?

6 A. Sure. So there's another category of well, I see them as
7 categories of OTT providers like Netflix or in Amazon that
8 don't traditionally have linear networks but they have a lot of
9 video content.

10 A lot of that content is content that they have produced
11 for themselves. It's original content that's not available
12 elsewhere, but they also have some movies or older TV shows
13 that may have been available in the eco system at some point in
14 time.

15 Q. Does Cox compete with Netflix?

16 A. We do not view Netflix as a competitor. We have actually
17 recently partnered with Netflix in order to bring our customers
18 a full portfolio of product. So that when a customer comes to
19 Cox, they can, they can bring up our guide and they can search
20 for content across Netflix and the Cox networks as well.

21 So we think it's really more of an adjunct to our overall
22 portfolio.

23 Q. Do you know, Ms. Fenwick, if Facebook is a paid TV
24 provider?

25 A. I'm not aware that they are. It's certainly not one that

1 we worry about.

2 Q. We have talked about several different kinds of
3 distributors who sell television packages to the public. Are
4 there some of those that Cox competes closely with?

5 A. In terms of the biggest competitors?

6 Q. Yes?

7 A. Yes. So DirecTV, AT&T and DirecTV Now are all part of
8 really the same portfolio is our biggest competitor. They're
9 in more of our markets more than anyone else. I shouldn't say
10 anyone else. DISH is also national, but they are our biggest
11 most, they are our toughest competitor I should say.

12 Q. Is DISH a tough competitor?

13 A. They are, but we don't, we don't worry about them as much
14 as we do DirecTV.

15 Q. Why is that?

16 A. Because DirecTV has several platforms to offer similar
17 services to Cox. They're very aggressive in their marketing
18 campaigns and from a overall market share perspective we think,
19 you know, there are a lot of customers that we lose to them.

20 Q. Ms. Fenwick, I want to ask you about the products that Cox
21 sells to consumers. Does Cox offer different video packages to
22 customers?

23 A. Sure, absolutely. So we offer a number of packages but
24 just as examples, we'll offer a broadcast basic package. We do
25 have an economy package. It's, we are limited in terms of how

1 much we can sell. And then we also have, probably our largest
2 which is called expanded basic that has 50 plus networks in it.

3 Q. Why does Cox offer different packages to consumers?

4 A. So we are trying to make sure we're appealing to all of
5 our customer needs. Some customers are more price sensitive,
6 some like sports, some are into entertainment.

7 I should have added too that we also offer tiers as well
8 that are a little more genre specific like a movie tier or
9 sports information tier.

10 Q. Switching topics a little, Ms. Fenwick.

11 Do you know if customers sometimes leave Cox?

12 A. They do, yes.

13 Q. Does Cox track that information?

14 A. So we certainly understand at a high level where we're
15 losing market share and where others are gaining market share.
16 We do try to understand when customers leave where they're
17 going. We don't always get the best information but we do have
18 a general sense of where they're going.

19 Q. I want to ask you now about the networks that Cox carries.
20 Does Cox carry every network that's available in the market?

21 A. So certainly not every network, but our strategy is
22 certainly to provide a very fulsome video product for our
23 customers. And we have to make decisions based on content
24 that's important to our customers and weigh that with price.

25 Q. Does Cox look at what it's competitors are offering in the

1 market when it's thinking about what networks to offer?

2 A. Sure. We want to make sure we're competitive and it's
3 super important that we have the most important content
4 available to our customers that our competitors do.

5 Q. Ms. Fenwick, you use the term must have in your work at
6 Cox?

7 A. Sure, absolutely.

8 Q. What does that mean to you, what does must have mean to
9 you?

10 A. It's exactly as it sounds. It is, must have is content
11 that truly we believe as a company we have to have to serve
12 the needs of our customers. From a customer standpoint it is,
13 it's their favorite shows, their favorite channels that they
14 watch on a regular basis.

15 Q. Could you give the Court some examples of programming that
16 Cox considers to be must have?

17 A. Sure. So we certainly consider most of the Turner
18 Networks as must have. We certainly consider ESPN and Disney
19 as must have. A lot of NBC and Fox Networks, broadcast
20 channels.

21 Q. Does Cox consider any of the premium networks to be must
22 have?

23 A. We do. So while they all serve an important part of our
24 portfolio HBO is by far one of the most popular networks for
25 our customers.

1 Q. Ms. Fenwick, I want to talk to you about the job that you
2 do for Cox as the VP of content acquisition?

3 A. Sure.

4 Q. Without getting into confidential information, I want to
5 ask you about the negotiation process.

6 Do you typically negotiate for the content that you get
7 from programmers?

8 A. Yes, I do.

9 Q. How long does an agreement once it's signed usually run
10 for?

11 A. Somewhere between five and eight years on average.
12 Sometimes they're a little bit longer, sometimes a little bit
13 shorter.

14 Q. How long does it typically take you to negotiate an
15 agreement?

16 A. Frankly, it depends on the complexity of the deal.
17 Certainly more networks is more time consuming, depending on
18 what issues are of concerns to both us and the network group.
19 But on average I would say three or four months.

20 Q. Do you prepare for these negotiations?

21 A. Yes, definitely.

22 Q. What do you do?

23 A. So we will certainly review our existing contract to
24 understand do we have any issues there? Is there any new
25 technology? You know, new regulation that we need to be aware

1 of.

2 We will spend time with our marketing and product teams to
3 make sure that we are asking for rights and functionality to do
4 things that we know we plan to launch in the future.

5 We will, if we have concerns about whether the content is
6 really that popular, we will spend time with our marketing and
7 finance teams to look at is the, how popular really is the
8 content and we can do that in a variety of ways looking at
9 Nielsen Third Party information and looking at some internal
10 data.

11 Q. You mentioned trying to determine how popular the content
12 is. Why is that something that you do prior to that
13 negotiation?

14 A. Well, certainly to the extent it's content that we feel
15 like may not be as popular, we want to, we want to validate
16 that and then it's certainly, it has an impact on how we think
17 about price and where we think we will end up in the
18 negotiations.

19 Q. Does Cox set goals prior to entering into negotiation?

20 A. So yes. What we will do is put together a list of things
21 that we have concerns about. It can be rates or penetration.
22 There are a variety of factors.

23 And we'll put our proposal together or our notes together
24 on what we're looking for and then typically a network will
25 give us their first, the first proposal and we will respond

1 from there.

2 Q. Before you go into the negotiation, do you think about
3 what the network group might be looking for in the negotiation?

4 A. Sure. To the extent we're dealing with a group that has a
5 lot of must have content, we know that they're going to have
6 quite a bit of leverage in negotiations and then we try to
7 think through what their paying points may be versus what our
8 paying points may be.

9 We'll spend some time looking at publicly available
10 information to get a feel of what they may be expecting in
11 license fees or what functionality they have issues with.

12 Q. How does that information help you get ready for
13 negotiation?

14 A. It just gives us some insight on what to perhaps expect in
15 terms of a proposal so that we're thinking about what, frankly
16 where we may end up.

17 Q. Do you think about whether the content is must have as you
18 go into a negotiation?

19 A. Yes, absolutely. The more must have the content is and
20 the more networks of must have content, certainly we know that
21 that group is going to have more leverage in those negotiations
22 and we know it's going to be a tough negotiation.

23 But at the end of the day even for those networks that have
24 must see content, we really believe that both parties are
25 incentivized to get something done.

1 We are dealing with network groups where their goal a
2 hundred percent distribution. Our goal is to keep continuity
3 in content for our customers. There's no benefit for anyone to
4 walk away.

5 Q. Are there specific terms that come up again and again in
6 negotiations with network groups?

7 A. Sure, and I can give you a handful of some of the larger
8 terms. I mentioned a little bit licensing fees. This is the
9 per subscriber cost that we will pay a network to license their
10 content.

11 Penetration is increasingly becoming a big issue in the
12 industry. When I talk about penetration I mean how many, how
13 many tiers and do we have to carry those networks or the
14 network groups or individual networks in.

15 So if we've got a 90 percent penetration requirement, that
16 means we have to deliver the content to 90 percent of our
17 customers. And we're being charged for 90 percent.

18 It's a bad thing for us and frankly for customers because
19 it gives us less flexibility to offer smaller packages, genre
20 specific packages because we have to put everything in most of
21 our packages. And it really does handcuff our ability to be
22 more versatile in our content offering.

23 Q. Going back to the rates. In a negotiation which side
24 typically proposes the rate?

25 A. Typically the network will make the first proposal which

1 includes rate, but it can include a number of other terms or
2 they can just simply send us a full agreement.

3 Q. How does the rate that's typically proposed compare to the
4 rate in the prior contract?

5 A. It is always higher, that I know.

6 Q. Are the rates in these contracts constant over the term of
7 the contract?

8 A. No, they increase year over year.

9 Q. Is that called an escalator?

10 A. Yes, that's one word for it, yes.

11 Q. What do you call it?

12 A. We just call it rate increases every year.

13 Q. Okay.

14 Does Cox negotiate over these escalators or year over year
15 rate increases?

16 A. Yes, definitely. We go back and forth. We burn a lot
17 paper frankly on all of the terms of the agreement.

18 And I had talked a little bit about license fees and
19 penetration. But certainly there are other really big factors.

20 One of them that we haven't talked about is what we like to
21 call content parity. So that really is about making sure that
22 we have access to the same content that other distributors
23 have.

24 We want to make sure that we're on a level playing field
25 and that we can deliver the same experience to our customer

1 that others can. But it also can be a round window parity. So
2 meaning that we want to make sure that we're not disadvantaged
3 in when the content is available.

4 So if Game of Thorns was available to a distributor 30 days
5 earlier than for our customer base, that would put us at a
6 definitive disadvantage and we'd have customers leave.

7 Q. One more question about rate?

8 A. Sorry.

9 Q. Does the rate that you sign the contract, the contract
10 rate, is it generally higher than what Cox is trying to pay?

11 A. Almost, most always, yes.

12 Q. We talked about rate penetration, content parity. Are
13 there other terms that often come up in these negotiations?

14 A. Sure. We talk about advertising, you know, making sure we
15 have a certain share of advertising, minutes in the content.

16 We talk about a lot of technical rights in terms of how
17 content gets delivered, who pays for it, what the security
18 looks like. Is the content rated or not rated.

19 One of the increasingly bigger issues that we've been
20 focused on is the requests from networks for data. And so
21 they're looking to understand more and more about what our
22 customers watch, how long they watch it, and they're looking,
23 they have an endless appetite for that information. They're
24 certainly looking for that on almost a daily basis.

25 THE COURT: Let me see counsel, please.

1 Step down and sit in that chair over there, please.

2 (Witness leaves the stand.)

3 (Bench conference.)

4 THE COURT:

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6 MS. SCANLON:

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9 THE COURT:

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MR. PETROCELLI:

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MS. SCANLON:

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MR. PETROCELLI:

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3 MR. PETROCELLI:

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6 MS. SCANLON:

7 THE COURT:

8 (Open court.)

9 THE COURT: Ma'am, will you come up, please?

10 (Witness resumes the stand.)

11 THE COURT: A legal issue has come up that I wanted
12 to discuss with counsel obviously. I'm going to ask counsel,
13 we'll take a brief recess for counsel to discuss among
14 themselves.

15 THE WITNESS: Okay.

16 THE COURT: Hopefully, we'll get it all resolved. It
17 relates not only to the law, but logistics. So that's a little
18 bit -- there's a lot to it.

19 You are a witness under oath now in the case, so here's
20 the rules.

21 THE WITNESS: Okay.

22 THE COURT: You're not allowed to discuss your
23 testimony so far.

24 THE WITNESS: Okay.

25 THE COURT: Or what it might when we return with

1 anyone, with anyone, even lawyers for the government. You
2 can't discuss it with anyone.

3 THE WITNESS: Understood.

4 THE COURT: You have to be able to answer the
5 question under oath if you're asked; have you discussed your
6 testimony so far with anyone? You have to be able to answer
7 honestly no.

8 THE WITNESS: Understood.

9 THE COURT: Stay independent of all others until your
10 testimony is completed.

11 THE WITNESS: Okay.

12 THE COURT: You can step down.

13 THE WITNESS: Okay.

14 (Witness excused.)

15 THE COURT: We'll take a ten minute recess and the
16 parties have their direction.

17 (Recess at 3:35 p.m.)

18 (Proceedings resumed at 4:00 p.m.)

19 (Witness resumes the stand.)

20 THE DEPUTY CLERK: Your Honor, recalling civil action
21 number 17-2511, the United States of America v. AT&T, et al.

22 (Bench conference.)

23 MS. SCANLON:
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THE COURT:

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MS. SCANLON:

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MR. PETROCELLI:

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MR. PETROCELLI:

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MR. PETROCELLI:

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(Open court.)

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THE COURT: All right counsel, consistent with the discussion at the bench, you may proceed.

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MS. SCANLON: Thank you, Your Honor.

7

BY MS. SCANLON:

8

Q. Ms. Fenwick, I just want to ask about one more contract term.

9

10

Does Cox negotiate for the right to share content on mobile devices?

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A. Share Cox's content?

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Q. The content that it buys from programmers on mobile devices?

14

15

A. No, we do not.

16

Q. Does Cox look for digital rights to, in order to enable its customers to take their content with them?

17

18

A. So we certainly negotiate for what we call TDE rights which is TV everywhere and those would be rights for customers to take their content from their home when they travel. If they were in New York come to Los Angeles and they can watch it there.

19

20

21

22

23

Q. Why does Cox negotiate for that right?

24

A. That is increasingly how customers want to view their

25

1 content. They want to be able to view it wherever they are.

2 While viewership has been rather low for TDE at its origin, it
3 is certainly growing.

4 Q. Ms. Fenwick, what if Cox does not reach an agreement with
5 a network?

6 A. Then what happens is we go, the industry term is to go
7 dark. Meaning we no longer have the content available for our
8 customers.

9 Q. Has Cox done any analysis to determine the impact of going
10 dark with any particular network?

11 A. Yes, we have before.

12 Q. Without naming that network could you describe the
13 analysis Cox undertook?

14 A. Sure. So we, there was a network or series of networks
15 where we had concerns about how valuable the content still was.
16 We had seen a decline in ratings and we, several other
17 distributors had dropped them in the past.

18 And so we took a hard look at our set top box data to
19 understand from our customer base who was really watching. And
20 certainly we wanted a sense of this because there had been a
21 lot of discussion in the press by this network group that they
22 were looking for very high license fees.

23 So we really wanted to understand what kind of negotiation
24 leverage we had in going through this process.

25 Q. Did you use that information as you entered the

1 negotiation with that network?

2 A. So it certainly, we did this analysis before we started
3 negotiations and it definitely gave us a starting point.

4 We knew that this content while it was important to some
5 customers, it wasn't important to every one, but we knew
6 without it we would lose customers.

7 Q. Do you do a similar negotiation for all your negotiations
8 with networks?

9 A. No. Typically well, I shouldn't say that. We definitely
10 look at Nielsen data if it is available.

11 We don't typically go through all of the set top data at an
12 aggregated level to look at usage unless we have a concern
13 about how popular or how the network may be.

14 Q. Does Cox try to avoid going dark?

15 A. Absolutely, it's not good for your customers.

16 Q. In your experience do networker groups try to avoid not
17 going dark?

18 A. Yes.

19 Q. What is your experience?

20 A. Because at the end of the day, we both have the same
21 incentive to get a deal done. A network group wants full
22 distribution, they want their license fees, advertising dollars
23 and we certainly want, you know, the right deal for our
24 customers, so content is important to us.

25 Q. Ms. Fenwick, does Cox have an agreement with Turner?

1 A. Yes, we do.

2 Q. Were you involved in negotiating that agreement?

3 A. I was.

4 Q. What was your role?

5 A. I was the lead negotiator on that transaction.

6 Q. Is Turner must have content for Cox, Ms. Fenwick?

7 A. It absolutely is.

8 Q. Did you prepare for that negotiation with Turner?

9 A. Yes, we did.

10 Q. What did you do in preparation?

11 A. So similar to as we discussed before looking at the
12 contract, looking at publicly available information, looking at
13 Nielsen ratings.

14 We didn't spend time on set top box data because we knew
15 these were very important networks to our customers. And
16 really we knew how important they were and that at the end of
17 the day we really needed to get a deal done.

18 Q. Did you get a deal done with Turner?

19 A. We did.

20 Q. Did Cox make concessions to get that deal done?

21 A. Yes, we did.

22 Q. Did Turner make concessions to get that deal done?

23 A. Yes, they did.

24 Q. Ms. Fenwick, I'd ask you to look at your binder that's in
25 front of you.

1 The first tab is marked PX 0422?

2 A. Yes.

3 Q. Do you know what PX 0422 is?

4 A. Yes. This is our affiliation agreement with Turner.

5 Q. This is the agreement you were involved in negotiating?

6 A. Yes, it was.

7 Q. And this is an agreement, does Cox keep these types of
8 agreements in the ordinary course of its business?

9 A. Oh, yes.

10 Q. I'm going to ask you to take a look at the very first
11 line?

12 THE COURT: You've got to admit it first before you
13 go into a big discussion of it.

14 MS. SCANLON: Sorry, Your Honor.

15 Your Honor, I move for admission of Plaintiff's Exhibit
16 0422 into evidence under seal.

17 THE COURT: Mr. Petrocelli, any issues?

18 MR. PETROCELLI: No objection to admission under
19 seal.

20 MS. SCANLON: Thank you.

21 THE COURT: Be admitted.

22 (Government's Exhibit Number PX 0422 received into
23 evidence under seal.)

24 BY MS. SCANLON:

25 Q. Ms. Fenwick, would you look at the first line that states

1 a date called the effective date, do you see that?

2 A. I do.

3 Q. Was that the date this agreement was signed and made
4 effective?

5 A. Yes.

6 Q. I want to ask you to turn to page 16. And near the bottom
7 of the page, let me give you a minute to get there.

8 A. Yes.

9 Q. Near the bottom of the page there's a number 6 that says
10 term and rates. And A also has a date. Do you see that?

11 A. I do.

12 Q. Is that the date this contract will end?

13 A. It is.

14 Q. So after that date you won't have a contract with Turner
15 unless you renegotiate?

16 A. That's correct.

17 Q. Thank you.

18 Without stating when this contract will expire, have you
19 begun thinking about negotiating the next Turner agreement?

20 A. Sure, we have. We certainly know that Turner has a number
21 of networks that have important content for our customers must
22 have content. We know that Turner is a top negotiator and that
23 they do have a lot of leverage in pushing through terms that
24 are favorable to them.

25 But again we've had, in the past we've always been able to

1 reach an agreement and we do believe that Turner wants full
2 distribution. There's no benefit for them in going dark.
3 There's no benefit for us in going dark. I think that has
4 always kept both parties very focused on getting to a deal that
5 we can both live with.

6 Q. Ms. Fenwick, you're aware we're here about the merger of
7 Time Warner and AT&T?

8 A. Yes.

9 Q. Have you considered that possible merger when thinking
10 about your upcoming Turner negotiations?

11 A. Yes, absolutely. We are certainly very concerned about
12 what that will mean for us in our next negotiation because now
13 really there's a benefit that is created in this merger that
14 isn't there today. So essentially now instead of negotiating
15 with a company that it's sole job is to distribute its content,
16 it's now owned by a company who is also a distributor and they
17 want to gain customers.

18 We are very concerned that we are going to be presented
19 with a horribly ugly deal and that when faced with that deal,
20 we have to think about that if we do go dark, they have a
21 benefit in picking up Cox customers.

22 They're our biggest competitor. They're in all of our
23 markets and certainly we know going into these negotiations
24 that that additional leverage is there.

25 Q. Ms. Fenwick, have you considered whether the merger would

1 change the view of the Turner content to Cox?

2 A. The value is still the same. It's more a question of what
3 we would have to pay and what rights we may have in order to
4 keep the content.

5 Q. So if the view of the content doesn't change, what
6 changes?

7 A. So the leverage changes. So we believe Turner has, AT&T
8 has a different incentive now than they had before. There's a
9 benefit for them.

10 In looking at the negotiations they can really put a deal
11 together that they know they may be able to push through with
12 us that is egregious on license fees that may not give us the
13 same content that they give their own customers or may give it
14 to us in delayed windows.

15 And we know that if we don't agree to that, we're in a
16 position where we are going to lose customers. We think we're
17 going to lose a lot of customers and that they're going to pick
18 them up and grow their market share.

19 Q. Ms. Fenwick, when Cox loses customers, do they try to
20 retain them as the customer calls up to cancel?

21 A. Sure, of course.

22 Q. And would Cox do that if they lost Turner?

23 A. We can try but we can't replace the content. That's
24 really the issue. A discount isn't going to make it better for
25 our customers. If they don't have the content, they'll leave.

1 Q. Ms. Fenwick, are you aware that Comcast bought NBC
2 Universal several years ago?

3 A. I am.

4 Q. Did Cox have similar concerns about that merger?

5 A. No, not at all because Comcast is not a competitor.

6 Q. Comcast doesn't compete with Cox?

7 A. They do not.

8 Q. Ms. Fenwick, I would like you to turn to the second tab in
9 your binder which is PX 437.

10 Do you know what this document is, Ms. Fenwick?

11 A. Yes. This is the letter that went along with the
12 arbitration offer that Turner sent to us some time after the
13 litigation was announced.

14 Q. Would you look at the next tab, PX 491?

15 A. Yes.

16 Q. What is that document?

17 A. This is the Arbitration Agreement that they sent to us.

18 Q. When Cox received this did you review it?

19 A. We did.

20 Q. Did you personally review it?

21 A. I did. We weren't quite sure what to do with it because
22 from our perspective it seemed to be a little bit of
23 gamesmanship in the fact that it was thrown out there to
24 potentially mitigate the litigation.

25 When we looked at it, we viewed it as a very one sided

1 agreement in favor of Turner. It's really not something that
2 we viewed as a helpful tool.

3 MS. SCANLON: Your Honor, I'd like to move for
4 admission of PX 437 and 491.

5 MR. PETROCELLI: No objection.

6 THE COURT: Are either one under seal or not?

7 MS. SCANLON: No, Your Honor.

8 THE COURT: Okay, fine, it will be admitted.

9 (Government Exhibit Numbers PX 437 and PX 491 received
10 into evidence.)

11 BY MS. SCANLON:

12 Q. Ms. Fenwick, have you, what is your understanding of the
13 arbitration process that's laid out in PX 491?

14 A. Sure. So our understanding the way this is set up is a
15 baseball style arbitration. And what that means from our
16 perspective is that an arbitrator is instructed to pick one
17 proposal versus a second proposal.

18 So meaning Cox would put together a contract with all of
19 the terms and conditions that were critical for us. Turner
20 would do the same thing and the arbitrator would be asked to
21 choose between the agreements.

22 There's not the ability for the arbitrator to look at each
23 important critical condition in the agreement and make a
24 decision on it, on its merit. It's kind of an all or nothing
25 proposal.

1 Q. And does Cox, has Cox analyzed this agreement or this
2 offer?

3 A. We have. Certainly our biggest concern besides the
4 structure of the baseball style arbitration is that the way we
5 interpret this is that the arbitrator is instructed to pick a
6 deal based on fair market value and fair market value appears
7 to be very narrowly defined in this agreement.

8 It asks the arbitrator to look at subscribers and license
9 fees and Nielsen ratings which frankly never come into play in
10 a negotiation.

11 But it fails to ask the arbitrator to focus on all of the
12 other super critical, I can't express this enough, critical
13 components of the transaction. So content parity that we've
14 talked about TVE, set top box data, lots of technical terms and
15 conditions that would be involved.

16 Q. Do you understand what content is covered by this
17 arbitration offer?

18 A. So yes. This offer covers the Turner Networks. It does
19 not cover HBO.

20 Q. Is that a concern for Cox?

21 A. Yes. We would want certainly, if this was something that
22 we were going to utilize, we would want something that covers
23 all of the content.

24 Q. We talked earlier about the idea of going dark. Do you
25 understand whether the arbitration offer addresses going dark?

1 A. It certainly provides a standstill and a process for the
2 parties to work through an agreement. But again, based on the
3 narrow interpretation of fair market value and the structure of
4 picking one agreement over the other, it's a concern.

5 The other thing is that, you know, the arbitrator is and
6 each side is instructed to prepare three year terms. That's
7 really short in our industry and that just means that we're
8 going to be looking at really big rate increases in three years
9 instead of five or six years.

10 Then the other thing is that while a more balanced
11 agreement could be helpful, it's only seven years and once we
12 get through a renewal or two, we're frankly in the same place
13 again.

14 Q. Does Cox view the standstill we just talked about as a
15 benefit of the arbitration offer?

16 A. I think having a standstill would be a benefit for an
17 arbitration offer, but it alone does not, does not give this
18 agreement any weight for us.

19 Q. Does the arbitration offer as Cox understands it address
20 Cox's concerns about this merger?

21 A. No, it does not.

22 MS. SCANLON: Your Honor, I have two more questions
23 about the topic that if I may hand this to the witness?

24 THE COURT: You may.

25 BY MS. SCANLON:

1 Q. Ms. Fenwick, I've handed you what we call PX Exhibit 520,
2 it's got a term on it. I don't want to say it out loud.

3 I want to ask you is this a term that Cox negotiated for
4 with Turner when you signed your agreement?

5 A. It is something that we did discuss in our negotiation,
6 yes.

7 Q. Did Cox get the rights of those terms in its agreement?

8 A. Not at the time, but again, because, because it was a
9 relatively nascent space, we felt like we could, there were
10 other things that were more important at the time and that we
11 would ultimately be able to negotiate for, for this term at a
12 later date.

13 Q. Did Cox and Turner agree to do that after the contract was
14 signed?

15 A. We did and we have spent a lot of time trying to get
16 there. We have not been able to reach an agreement on this
17 term, but I think it's really because there wasn't the
18 incentive of a larger negotiation at play, but it's something
19 that we believe in the current environment we would be able to
20 obtain in the next negotiation.

21 Q. Does your thinking on that change if the merger goes
22 through?

23 A. Absolutely. I think that this is, this is a term that,
24 that Turner may unlikely be able to, will be unlikely to give
25 us in that kind of environment.

1 Q. Ms. Fenwick, does Cox have the rights encompassed in that
2 term from other programmers?

3 A. We have it from every other major network group and most
4 of the independents that we have negotiated recently with the
5 exception of Turner and HBO.

6 MS. SCANLON: Nothing further at this time, Your
7 Honor.

8 THE COURT: All right, cross examine.

9 CROSS EXAMINATION

10 BY MR. PETROCELLI:

11 Q. Ms. Fenwick, I'm Dan Petrocelli, how are you?

12 A. I'm great. How are you?

13 Q. We have never met before?

14 A. No.

15 Q. Never spoke before, right?

16 A. No, I don't recall.

17 Q. But you have met quite a few times with Department of
18 Justice in connection with this matter; is that correct?

19 A. That is correct.

20 Q. You met with him before and after the couple of
21 depositions that you gave; is that correct?

22 A. That is correct.

23 Q. You met with him in Atlanta, right?

24 A. That is correct.

25 Q. You met with them in their offices to propose conditions

1 to this merger, correct?

2 A. They asked us to come to Washington to discuss our
3 concerns.

4 Q. And you actually proposed conditions for this merger,
5 right?

6 A. Again, they asked us to talk about the things we were
7 worried about. So we were prepared to go through that with
8 them at the meeting.

9 Q. Well, my question was did you propose conditions for this
10 merger, yes or no?

11 A. We gave them a list of things that we believed would be
12 important to achieve if the merger went through.

13 Q. And some of those conditions included things that you were
14 unable to negotiate for back in 2013 when you had your last
15 negotiation with Turner, correct?

16 A. Can you be specific about, I'm not sure what you're
17 referring to.

18 Q. You don't remember?

19 A. I mean, there are a lot of components of it. I think a
20 list of the conditions that we had proposed were things that we
21 felt like would be new threats after the merger.

22 We also, there was actually a document that we put together
23 that had some other items on there that we wanted to discuss
24 while we were meeting with the Justice Department. But we
25 frankly didn't spend as much time on it.

1 Q. So when you said you were here under subpoena, I think in
2 response to the first question, you in fact had been meeting to
3 go over the testimony you would give today as well, right?

4 A. We have, I mean, I have met with the Department of Justice
5 to understand the themes and some of the things that they
6 wanted to ask me and discuss.

7 We also talked a little bit about confidentiality.

8 Q. Now with respect to the conditions that you folks asked
9 the government for when you met with them, one of them
10 concerned the thing that you wrote on that paper, correct?

11 A. I believe it did.

12 Q. Okay. Now on that particular item that involves a matter
13 of technical capability in whether certain files can be
14 delivered in the manner in which Cox has requested them,
15 certain video files; is that true?

16 A. So delivery is certainly a part of it, yes.

17 Q. Now you said you have this delivery in the matter that Fox
18 requires them from all other programmers, do you recall
19 answering that question?

20 A. Repeat the question?

21 Q. You said you have those rights from all of the other
22 programmers, right?

23 A. Oh, yes, yes, sir.

24 Q. Isn't it also true that Turner has provided that item to
25 all other distributors, correct?

1 A. I frankly don't know.

2 Q. You haven't checked?

3 A. I don't, I haven't checked to see what other groups they
4 have provided rights to.

5 Q. Well, it's a matter of public knowledge isn't it?

6 A. It may be.

7 Q. You can go right on the computer and you can find out,
8 can't you?

9 A. Not necessarily. They could have the rights and just not
10 have launched them.

11 Q. Now you have complained that you don't like volume
12 discounts, correct?

13 A. We certainly don't like volume discounts, we don't think
14 that they're equitable.

15 Q. But every programmer has volume discount arrangements with
16 distributors, correct?

17 A. I don't know if every one has it, but I do believe that
18 most do.

19 Q. And you testified in this case that in your past
20 negotiation with Turner you were unhappy because they have a
21 volume discount arrangement too, correct?

22 A. Sure, yes.

23 Q. And I think you --

24 A. It's a problem in the industry.

25 Q. I think you testified that you feel as a smaller

1 distributor that you don't have the same pricing advantages
2 that large distributors have, correct?

3 A. That's correct.

4 Q. And you said you don't like volume discounts, right?

5 A. That's correct.

6 Q. But you acknowledge that they are common in the industry,
7 correct?

8 A. I acknowledge that they're common. We don't like them.

9 Q. Now you actually asked the government to impose a
10 condition that Turner wouldn't give you, Turner would be
11 required to give you the same price that a distributor five
12 times larger than you would get, correct?

13 A. Well, I certainly don't think it makes a difference
14 whether they're larger.

15 But we didn't, we didn't necessarily propose that in our
16 discussion with the DOJ. We raised it as an issue in the
17 industry.

18 Q. Did you not suggest a condition to the DOJ that Cox be
19 able to get pricing without regard to the number of subscribers
20 that it has such that you would get the same pricing that
21 someone five times bigger would get? Did you not ask the DOJ
22 to do this as a condition to approving this merger?

23 Can you answer that yes or no?

24 A. I can't really because it mischaracterizes it.

25 Q. Let me show you a document.

1 MR. PETROCELLI: I'm going to mark this, they have
2 marked this as confidential, Your Honor, so I'm just going to
3 show it to her and give a copy to Your Honor, okay?

4 THE COURT: You're not going to seek to admit it.

5 MR. PETROCELLI: That's correct. I'm going to use it
6 for impeachment, okay.

7 THE COURT: So mark it for identification.

8 MR. PETROCELLI: Correct, mark it for identification
9 as Defendant 916.

10 (Defendant's Exhibit 916 marked for identification.)

11 MR. PETROCELLI: May I approach?

12 THE COURT: You may.

13 BY MR. PETROCELLI:

14 Q. Could you go to the page entitled suggested conditions?

15 It's Bates number 31819. Actually, strike that.

16 31817, Roman II, suggested conditions. Do you see that?

17 A. I do.

18 Q. And do you see the first condition that's listed there?

19 A. Yes.

20 Q. With no size base distinctions?

21 A. I do.

22 Q. And that's what you asked the DOJ, correct?

23 A. I think, I think what I had said earlier is that we
24 prepared this document as a, as a discussion point in the
25 meeting.

1 And we wanted to raise things that weren't just conditions
2 to the deal that we felt like were problems in the industry.
3 And this is something that we frankly didn't spend a lot of
4 time with.

5 Q. Well, it does say --

6 A. I agree it's in the powerpoint but it's not something that
7 we discussed.

8 Q. But you did ask the DOJ to impose this, correct?

9 A. Again, this is not something we gave them. This is
10 something we prepared to walk through in our concerns.

11 Q. Now you also look at the end, the last item in their
12 concerns the very condition that's written on that piece of
13 paper, right?

14 A. Yes, it does.

15 Q. Now you asked for these things. You wanted a change of
16 volume discount. You wanted a change of that item on that
17 piece of paper. You wanted changes of other things that you
18 had been dealing with Turner for the past number of years prior
19 to the announcement of this merger, correct?

20 A. So --

21 Q. Can you answer that yes or no, please?

22 You had been dealing with Turner on these items long before
23 Turner announced it was going to merge, correct?

24 A. On which item? There are a lot of items.

25 Q. Well, take the two that I mentioned?

1 A. Certainly we had, we have had volume discounts, yes.

2 Q. Discussions?

3 A. Discussions.

4 Q. With Turner?

5 A. Well, certainly it's a part of negotiations.

6 Q. So my question is a pretty simple question.

7 Prior to the announcement of this merger which I will
8 represent to you occurred on or about October 22, 2016, you had
9 been dealing with Turner on these issues, correct?

10 A. So it wasn't an active issue. It was certainly something
11 that we had argued about when we first negotiated the deal.

12 But certainly the item that was on the piece of paper that
13 was previously given to me was an ongoing issue.

14 Q. You also asked the DOJ for arbitration, correct?

15 A. Yes, we did.

16 Q. Just like in the Comcast case, could you turn to page
17 31818.

18 You see that?

19 A. I do.

20 Q. And this discussion with DOJ occurred in the summer of
21 2017, correct?

22 A. That sounds right.

23 Q. And that was before you received, before this lawsuit was
24 filed, correct?

25 A. Yes.

1 Q. And before you received the arbitration offer from Turner,
2 correct?

3 A. That is correct.

4 Q. So you asked for an arbitration provision like in Comcast
5 NBCU in July, correct?

6 A. Again, as an item that we would feel would be appropriate
7 if the merger was passed or was agreed upon, it was something
8 that we felt like would be important if conditions were
9 imposed.

10 Q. And you got a Comcast NBCU like offer from Turner about
11 four or five months later?

12 A. We disagree with that.

13 Q. Well, you got an arbitration offer, correct?

14 A. We did, yes.

15 Q. In your deposition you remember being somewhat confused
16 about the provisions of the arbitration offer and what it
17 actually meant?

18 A. I don't remember being confused.

19 Q. Do you remember testifying that you don't even think it
20 allowed you to introduce your Carriage Agreement?

21 A. We certainly talked about the fact that we had concerns
22 that when we first read this Arbitration Agreement that it
23 could potentially limit the contracts that could be involved in
24 the analysis by the arbitrator.

25 Q. I'm sorry, finish in your answer?

1 A. We still believe the language is odd. So that was
2 certainly a concern. It wasn't our largest concern.

3 Q. By the way, did you ever pick up the phone and call the
4 folks at Turner to ask them about any possible questions that
5 you had about how the arbitration offer worked, what the terms
6 were that you may not have understood?

7 A. We did not --

8 Q. Did you ever call them?

9 A. We did not.

10 Q. Did you write them?

11 A. We did not.

12 Q. And you've worked with lawyers, right, regarding this?
13 You consulted with your counsel regarding this Arbitration
14 Agreement, correct?

15 A. Sure, but we honestly didn't think it was something real
16 to respond to.

17 Q. Wasn't real? Who told you it wasn't real?

18 A. That was our opinion based on the way it was thrown out in
19 the market place.

20 Q. But bottom line is I think you called Turner a partner.
21 You didn't pick up the phone and call your partner to find out
22 anything about this pretty extensive document that they sent
23 you along with a letter, true?

24 A. We did not.

25 Q. Okay. Now you did talk to DOJ about it, right?

1 A. Yes, they asked us questions about it.

2 Q. And you had a meeting about it in fact, didn't you?

3 A. We had a meeting where we talk about it, yes.

4 Q. So you had a big meeting with DOJ but not even a single
5 phone call with Turner, true?

6 A. That is true.

7 Q. Now can you take a look, you have the document in front of
8 you, the Arbitration Agreement?

9 THE COURT: Do you have an exhibit number for that,
10 Mr. Petrocelli?

11 MR. PETROCELLI: Yes, it's the Plaintiff's Exhibit
12 491. It's the one that they introduced, Your Honor. I'm just
13 working off the same one.

14 THE COURT: Okay, thank you.

15 BY MR. PETROCELLI:

16 Q. Okay, you say you have that in front of you?

17 A. I do.

18 Q. First of all, your last contract with -- well, is that
19 confidential, the date of your contract?

20 A. It is.

21 Q. With Turner. Okay, let me do it this way then.

22 Take a look at paragraph 4 under extradited arbitration
23 rules. You see where it says 4 A, Carriage Agreements in
24 effect on or after October 22, 2014 between the claimant?

25 A. I'm sorry, I wasn't -- I was in the first page.

1 Are you on the 4995 page?

2 Q. I'm on 4996. Paragraph 4 A, Carriage Agreements in effect
3 on or after October 22, 2014, do you see that?

4 A. I see that.

5 Q. That's pretty clear is it not?

6 A. I think the language was odd.

7 Q. Odd? Was your agreement in effect as of that date?

8 A. Our agreement was in effect as of that date.

9 Q. Okay?

10 A. We didn't feel like this provision was clear.

11 Q. Okay. To be clear, your Carriage Agreement with Turner
12 was in effect as of October 22, 2014, correct?

13 A. It was.

14 Q. Let me ask you about another provision.

15 Go to paragraph 5. Do you see there where it says Turner
16 and the claimant, that would be Cox, are each entitled to
17 submit any additional relevant evidence to the arbitrator.

18 Do you see that?

19 A. I do.

20 Q. Did I hear you testify that you thought that the
21 arbitrator in such a proceeding was somehow limited in the
22 information the arbitrator could receive to decide the matter?

23 A. So our interpretation is that the primary factors, the
24 major factors that were articulated were around subscribers and
25 rate and readings and that was part of the definition of fair

1 market value.

2 And I think later in the agreement it talks about the
3 arbitrator picking which offer based on fair market value.

4 Q. Then you see in paragraph 6 it says there shall be a
5 presumption that for each Carriage Agreement used as evidence
6 of fair market value, the number of subscribers, the total
7 payments and revenues, et cetera, et cetera, shall be relevant
8 evidence.

9 Do you see that?

10 A. I do.

11 Q. And then 5 says the arbitrator can consider any other
12 relevant evidence.

13 Do you see that?

14 A. I see it.

15 Q. Did you have a belief that there was some type of evidence
16 the arbitrator was not permitted to receive?

17 A. No.

18 Q. Okay. I think you said that you would only be allowed to
19 submit an offer for an agreement of three years; is that
20 correct?

21 A. I believe there was somewhere in this agreement that the
22 terms proposed would be three years, yes.

23 Q. Can you go to paragraph six on page 4995. And you'll see
24 at the bottom it says the final offers, and I'm skipping some
25 words, shall be for a term of three years unless the parties

1 agree to a different term.

2 Do you see that?

3 A. I see that, but there would be no incentive for them to go
4 longer than three years.

5 Q. So you and the DOJ have talked quite a bit about this
6 incentive issue, haven't you, in the various conversations that
7 you've had?

8 A. We've talked about it, yes.

9 Q. Yes. Did you ever hear of something called the Nash
10 Bargaining model?

11 A. No.

12 Q. Let me talk to you a little bit about this idea of
13 incentive that you keep talking about.

14 Let's begin with must have, okay. You kept saying Turner
15 is must have, must have, must have.

16 Now to be clear all the programmers say their works are
17 must have, is that a fair statement?

18 A. Certainly if they're in marketing mode and they come in
19 they generally find some statistics to say they're number one.

20 Q. It's a sales pitch term, isn't it?

21 A. It could be from a network perspective, yes.

22 Q. Now and you rattled off NBC, Fox, Disney, ESPN and there
23 are others as well?

24 A. Sure.

25 Q. Who claim their works are must have, must see, must watch.

1 The term is widely used to refer to popular programming,
2 correct?

3 A. Yes, in some cases, yes.

4 Q. Now with respect to Turner, I think I heard you say most,
5 but apparently not all of the Turner Networks are must have in
6 your opinion, right?

7 A. Well, certainly from a ratings perspective some are more
8 popular than others.

9 Q. Which are the ones that are not popular?

10 A. Well, I can certainly sitting here today that are less
11 popular, Turner Classic Movies is not going to be as popular.
12 Boomerang may not be as popular.

13 Q. Which are of the ones that are popular in your opinion?

14 A. Well, certainly from what the Nielsen data says as well as
15 my opinion, CNN is certainly popular, TBS, TruTV, TNT are
16 among, Cartoon Network.

17 Q. You're not suggesting that Cox couldn't do business
18 without the Turner Networks, you're not telling that to the
19 Court, are you?

20 A. I think that if we didn't have the Turner Networks, it
21 could significantly impact the viability of our video model.

22 Q. Let's follow up on that a bit. Have you done any analysis
23 before coming here to testify about, have you personally done
24 any analysis to testify about what your subscriber losses would
25 be if you didn't have Turner?

1 A. No.

2 Q. You have not?

3 A. I have personally not done that, no.

4 Q. Does your company Cox have any historical record of
5 subscriber losses from a Turner blackout?

6 A. We have not gone dark with Turner in the past.

7 Q. And Turner has not gone dark with you in the past,
8 correct?

9 A. Correct.

10 Q. Even though you had these very tough negotiations, there's
11 been no blackouts with Turner, correct?

12 A. There have not been.

13 Q. And in fact, Cox has never done a drop analysis to study
14 the potential effects of going dark on Turner, correct?

15 A. We felt like that was not something we even needed to do
16 because we certainly knew how important the networks are.

17 Q. Well, that wasn't any question.

18 My question was isn't it true that you, your company has
19 never once done a drop analysis with respect to Turner?

20 A. Not to my knowledge.

21 Q. Okay. And a drop analysis for the Court's benefit is when
22 you assess how many subscribers you might lose if you're not
23 able to reach a deal with the programmer, correct?

24 A. That's correct.

25 Q. And you have done drop analysis for other companies,

1 correct?

2 A. We have.

3 Q. But not Turner, correct?

4 A. No.

5 Q. And before coming in here to give your testimony, you
6 didn't do any math or any calculations or computations about
7 how many subscribers Turner, your company Cox would lose if it
8 didn't have these so-called must have Turner Networks, correct?

9 A. No, that's not something that I normally do.

10 Q. But other people in your company are capable of doing it?

11 A. Sure.

12 Q. Did they do it?

13 A. Not to my knowledge.

14 Q. So you're just basing this on your background, your
15 experience, your opinion then that the company would suffer
16 losses?

17 A. Well, not just my opinion. Certainly we know even looking
18 at third party data how important Nielsen networks are. We
19 also know that if the merger goes through Turner has a benefit
20 that they didn't have before --

21 Q. I'll get to that. You're going ahead of me now. We're
22 pre merger right now, okay?

23 But besides Nielsen and this thing, your company was
24 perfectly capable before you took the stand today to do a drop
25 analysis to determine what the effect would be if you didn't

1 have Turner.

2 And the answer as I understand your testimony is that no
3 such drop analysis has been performed, correct?

4 A. Not to my understanding.

5 THE COURT: This be a good time to take the afternoon
6 recess?

7 MR. PETROCELLI: Yes, Your Honor.

8 THE COURT: All right, we're going to take a ten
9 minute recess.

10 You remain a witness under oath. As you know, you're not
11 allowed to discuss your testimony so far with anybody.

12 THE WITNESS: Understood.

13 THE COURT: So step down, be back in ten minutes.

14 THE WITNESS: Okay.

15 THE COURT: All right, we're going to take a ten
16 minute recess. We're going until 5:30 today.

17 (Witness excused.)

18 (Recess at 4:50 p.m.)

19 (Proceedings resumed at 5:05 p.m.)

20 (Suzanne Fenwick resumed the witness stand.)

21 THE DEPUTY CLERK: Your Honor, recalling civil action
22 number 17-2511, the United States of America v. AT&T, Inc., et
23 al.

24 THE COURT: Proceed when you're ready,

25 Mr. Petrocelli.

1 MR. PETROCELLI: Thank you.

2 CROSS-EXAMINATION (Cont'd)

3 Q. Before I return to the discussion we were having, just a
4 couple of quick facts about your company. Cox Communication is
5 the largest private telecommunications company in the United
6 States, correct?

7 A. I believe that's correct.

8 Q. And you're the third largest cable company in the United
9 States, correct?

10 A. That doesn't sound correct, no.

11 Q. Well, Comcast is bigger, Spectrum is bigger, and you're
12 next, right?

13 A. I think you're not taking into account the other DirecTV
14 and Dish.

15 Q. Well, I said cable.

16 A. Well, we consider them all part of the same ecosystem.

17 Q. But my question was cable. You're the third largest
18 cable, not satellite, cable?

19 A. I actually am not sure if that's correct.

20 Q. Well, who's bigger than you besides Spectrum and Charter?

21 A. So Verizon may be.

22 Q. Well, that's a telco, right?

23 A. But they provide the same type of business service. So
24 again, we look at it in the same ecosystem.

25 Q. What's the publically reported number of subscribers,

1 video subscribers that Cox has?

2 A. We don't publically report subscribers.

3 Q. But Kagan reports it publically, right?

4 A. I frankly don't know.

5 Q. If I told you that they reported four million subscribers
6 for Cox around that ballpark, would that be in the
7 neighborhood?

8 A. It's probably in the neighborhood.

9 Q. Four million, okay, I'm going to return to that number in
10 a minute.

11 The parent company is Cox Enterprises, correct?

12 A. That's correct.

13 Q. And Cox Enterprises owns fourteen broadcast television
14 stations, including one in Atlanta and one in Boston, true?

15 A. That may be correct, I don't know how many.

16 Q. It owns six daily newspapers, true?

17 A. I don't know how many.

18 Q. Sixty radio stations, true?

19 A. Potentially.

20 Q. Over a hundred commercial websites, right?

21 A. I don't know.

22 Q. It even owns the Kelly Blue Book, right?

23 A. That's correct.

24 Q. And a website called dealer.com and auto trader, correct?

25 A. That's correct.

1 Q. And it has over fifty-five thousand employees and twenty
2 billion dollars in revenue, correct?

3 A. I'm not sure what the total numbers are.

4 Q. Okay.

5 So let's go back to the must have again. Let me follow up
6 on that. And then we're going to go to probably my final
7 topic.

8 On must have, can you tell me how many of the top 500 rated
9 television shows in 2017 of the top 500, okay. You with me?

10 A. I'm with you.

11 Q. Okay. How many did Turner have?

12 A. I frankly couldn't tell you that sitting here today.

13 Q. Well, using your best judgment given your testimony about
14 how must have they are, you must have some idea of how many
15 within the 500 they have.

16 A. I couldn't tell you.

17 Q. Not at all?

18 A. No.

19 Q. What if I told you the number was zero, would you believe
20 that?

21 A. No that doesn't necessarily make a lot of sense, and I
22 think that's probably not including sports.

23 Q. I'm going to get to sports. I said television shows,
24 okay?

25 A. Yeah, I frankly don't know sitting here looking at show by

1 show.

2 Q. What about, you mentioned NBC, let's say the top five
3 hundred rated shows last year. How many did NBC have?

4 A. I don't know.

5 Q. If I told you one hundred or over one hundred, would you
6 dispute that?

7 A. I frankly don't know.

8 Q. Now, let's talk a bit about sports.

9 Do you know what -- do you know what the percentage of
10 national sports viewing in 2017 was represented by Turner
11 sporting events?

12 A. I do not.

13 Q. No idea?

14 A. No.

15 Q. Let's go to the top five hundred highest rated sports
16 telecasts of 2017?

17 A. I can't tell you that sitting here.

18 Q. Where do you think Turner fell?

19 A. I don't know.

20 Q. If I told you it was a hundred and sixty-one, you wouldn't
21 dispute that, right?

22 A. I just don't know.

23 Q. You know there are over four thousand major league
24 baseball games in a season, not counting playoffs, how many do
25 you think Turner telecasts?

1 A. I really don't have an idea how many.

2 Q. If I told you thirteen out of four thousand plus, would
3 you dispute that?

4 A. I frankly don't know.

5 Q. How many NBA regular season games, a couple thousand or
6 more?

7 A. Potentially.

8 Q. And how many do you think Turner has?

9 A. I couldn't tell you how many.

10 Q. If I told you 64, would you dispute that?

11 A. No, I don't know.

12 Q. How many NFL games does Turner telecast a year?

13 A. They don't carry the NFL.

14 Q. Okay. How about hockey?

15 A. I don't know.

16 Q. They don't carry hockey, do they?

17 A. I don't believe so.

18 Q. What about golf?

19 A. I don't know sitting here.

20 Q. Okay. Well, you're in the television business, so you
21 know about golf telecasts, right?

22 A. I do.

23 Q. Do they telecast any golf tournaments?

24 A. I couldn't tell you sitting here.

25 Q. What if I told you that every golf tournament of the year

1 that's telecast on TV, Turner telecast two rounds, not even a
2 whole tournament, would you dispute that?

3 A. I don't know.

4 Q. Thursday and Friday of the PGA championship tournament
5 telecast by Turner, that's what they have, would you dispute
6 that?

7 A. I'm not sure how to keep saying I don't know.

8 Q. I guess I realize you don't know. I'll move on.

9 On this incentive thing that you talked to DOJ about and
10 told the Court about, I think you went so far as to say that if
11 this merger occurs when you have to do your next deal with
12 Turner, it's going to be horribly ugly, those are the words I
13 think you used, right?

14 A. Yes.

15 Q. Horribly ugly. Let's talk about horribly ugly. Right now
16 there's no merger, right?

17 A. Correct.

18 Q. Okay. Now, if you're in a negotiation the day before the
19 merger and then we're going to do the day after the merger,
20 okay? So let's -- let's focus now on the day before.

21 You're not able to make a deal with Turner because they
22 want more money than you want to pay and whatever the disputes
23 are, but you can't make a deal, and you're going to lose the
24 networks, they're going to go dark, you're going to go dark,
25 whatever, that's the scenario, okay?

1 A. Okay.

2 Q. Now, to be clear, you've never, your company has never
3 actually analyzed this scenario, right?

4 A. We have not, to my knowledge.

5 Q. Your counsel or the DOJ, I should say, asked you about a
6 going dark analysis that your company did on the direct exam,
7 but that wasn't about Turner, right?

8 A. That's correct.

9 Q. And in that going dark analysis, was that analysis of one
10 week, four weeks, or forever, do you know?

11 A. I think we looked at it in two different ways. One was a
12 short-term and one was a long-term scenario.

13 Q. Now, and there has never been in the case of the Turner
14 Networks ever a long-term blackout, correct?

15 A. Not with Cox.

16 Q. Okay. Now, so the day before the merger, let's use four
17 million subscribers for Cox, and I'm going to make up a number
18 for the price of the Turner Networks, a hypothetical number.
19 I'm going to say six dollars for all the Turner Networks per
20 sub, per month, okay?

21 A. Okay.

22 Q. Now, there's four million, if Turner goes dark or you go
23 dark on Turner, that's six dollars a sub times four million,
24 that's twenty-four million dollars a month that Turner does not
25 receive from Cox, correct?

1 A. That is correct.

2 Q. Okay. I'm putting that down, twenty-four million. And
3 that loss goes on month after month after month, correct?

4 A. Correct.

5 Q. Okay. Now, they would also lose, because four million
6 people are not watching Turner on your system any longer, they
7 would also have a reduction in advertising revenues because they
8 have to make good to the advertisers for the rates that were
9 charged with the expectation that four million additional
10 viewers would be watching, you tracking me?

11 A. I'm tracking you.

12 Q. Okay. So if I told you that -- do you know how much that
13 would be to Turner?

14 A. I don't know.

15 Q. So if I told you that Turner roughly has 50/50
16 subscription fee, 50/50 advertising fees, so we'll put another
17 twenty-four million. That's forty-eight million dollars a
18 month, okay?

19 A. Okay.

20 Q. That Turner loses in a going dark situation every month,
21 month after month, unrecoverable, do you agree?

22 A. I agree.

23 Q. Okay. Now, let's go to Cox. That was the Turner part.
24 Now we're going to go to Cox, okay?

25 Now, Cox, you're now saving twenty-four million dollars a

1 month, right?

2 A. Yes, we are, but we're [sic] also have lost a lot of
3 customers.

4 Q. Well, we'll get to the customer part. But immediately
5 you're saving twenty-four dollars a month [sic], right, because
6 you're not paying for the Turner Networks?

7 A. Correct.

8 Q. I assume, I think you testified in your deposition that
9 you like to be very sensitive to your consumers' cable bills,
10 you don't even pass on all of your content costs, do you
11 remember testifying to that?

12 A. Yes.

13 Q. Okay. And you would agree that cable bills are sort of --
14 people are at the gag point right now, aren't they?

15 A. They're very high, yes.

16 Q. Right. And so with your saving twenty-four dollars a
17 month if Turner went dark, you could pass that savings on to
18 your subscribers by lowering their cable bills, right?

19 A. Yes, that's --

20 Q. And if you lower you cable bills and the price is lower,
21 you could actually get more subscribers, couldn't you?

22 A. No, because we don't have enough content to compete.

23 Q. Wait. You only are losing the Turner Networks, you've
24 still got everybody else, right?

25 A. Customers will leave if we don't have them.

1 Q. So let's talk about that. How many customers are going to
2 leave even with the reduction in your price to your cable
3 subscribers, how many?

4 A. We don't know.

5 Q. Have you tried to compute it?

6 A. I have not.

7 Q. You have no idea?

8 A. We believe that it's a large number.

9 Q. I know you believe that, but do you have any evidence, any
10 information, any hard facts?

11 A. I don't have a churn analysis for you, no.

12 Q. By the way, the word "churn" means when you lose
13 subscribers, right?

14 A. That is correct.

15 Q. Now, you understand that you came into court today to give
16 testimony to oppose this merger. You knew that, right?

17 A. I came in to tell you what I know about the business.

18 Q. Well, Cox is opposing the merger, correct?

19 A. We feel like it, yes.

20 Q. Do you think you had an obligation in giving testimony to
21 oppose a merger of this importance that you would do some
22 homework and run some numbers?

23 A. No, we felt like our job was to point out how the leverage
24 changes.

25 Q. So you think you could just come in here and give your

1 opinion that the leverage is going to change and you're going
2 to lose all of these customers even though you have no idea how
3 many customers you're going to lose and you've never done a
4 single bit of quantitative analysis; is that true?

5 A. Sure.

6 Q. Now, let's go to the day -- let's assume that you lose,
7 since you don't have any idea, I'm just going to pick a number.
8 Well first of all, do you know what number the government has
9 picked through its expert?

10 A. I have no idea.

11 Q. Did government tell you that their expert is taking the
12 position that if Turner is not on a system like Cox they will
13 lose twelve and a half percent of their subscribers?

14 A. Okay.

15 Q. In your case that's -- what's twelve and a half percent
16 times four million, is that like a half a million?

17 A. Close to it.

18 Q. Do you think you would lose a half million subscribers if
19 Turner wasn't on the air?

20 A. I think it's possible.

21 Q. By the way, does your -- were you authorized by your CEO
22 to come in here and testify that it's possible that you could
23 lose a half a million of your subscribers without doing a
24 single bit of quantitative analysis, does your boss know that
25 you're giving this testimony?

1 A. He does. In fact, I heard from my boss, and I heard from
2 our CEO the night before, and he knows why I'm here to testify.

3 Q. And did you discuss that you would give testimony that
4 your company could lose as much as a half a million
5 subscribers?

6 A. That's your number, not my number.

7 Q. My question is, did you discuss that with them?

8 A. I did not discuss five hundred thousand.

9 Q. And yet you're telling the Court that it's possible that
10 you could lose that much without doing a single bit of
11 homework?

12 A. I told you I don't have a number, but you asked me if I
13 could conceive of it, and I do.

14 Q. You want to conceive of it, correct?

15 A. I really don't want to conceive of it.

16 Q. Now, let's go to the day after the merger, okay? Let's
17 assume you lose, I'm just going to pick a number. I'm going to
18 say you lose ten thousand subscribers because you don't have
19 Turner. It's my number, you don't have to agree with it, okay?

20 A. Fine.

21 Q. Now, the day after the merger, you're in this negotiation
22 with Turner. You're negotiating over the identical content,
23 correct?

24 A. That's correct.

25 Q. Now, if you don't reach a deal, you're going to save the

1 identical amount of money, twenty-four million, correct?

2 A. That's correct.

3 Q. Turner is going to lose the 48 million in my hypo,
4 correct?

5 A. Correct.

6 Q. You're still going to lose the identical number of
7 subscribers that you would the day before the merger, correct?

8 A. I'm not sure I understand the question.

9 Q. Well, if ten thousand people are going to leave your
10 system because you don't have Turner the day before the merger,
11 the same ten thousand are going to leave your system --

12 A. Oh.

13 Q. -- if you don't have Turner the day after the merger.

14 A. Yes.

15 Q. That number doesn't change, correct?

16 A. Correct.

17 Q. Now, there is one difference, though. Some of those
18 subscribers might go over, some of the subscribers might join
19 another Pay-TV provider, right?

20 A. They could.

21 Q. The people that leave Cox because they don't have Turner
22 are going to go elsewhere, right?

23 A. That is correct.

24 Q. Some of them will go over the top, as they say, to one of
25 the online distributors, cut the cord and say I've had it with

1 cable, correct?

2 A. Sure, DirecTV now would be an option.

3 Q. You always say DirecTV now. Of course, there's a number
4 of other ones, like there's Hulu, correct?

5 A. Hulu is not the same type of OTT competitor.

6 Q. They do have a live feed, don't they?

7 A. They do, but it's limited.

8 Q. What about YouTube, they have a live feed, right?

9 A. Again it's limited, it's not --

10 Q. And Sony Play Vue, right?

11 A. Yes, it's limited.

12 Q. And Sling, right?

13 A. Again, limited.

14 Q. Okay. Limited, meaning in a good way, right, because
15 they're offering lower prices to consumers for smaller bundles
16 of channels?

17 A. For consumers that are targeted by that type of product,
18 but certainly Hulu and Amazon and Netflix have very unique
19 content.

20 Q. And DirecTV, now, what do you think their price is to
21 consumers?

22 A. I don't know what their price is.

23 Q. How about if I told you it was only thirty-five dollars?

24 A. Okay.

25 Q. Do you know how many channels a consumer can get for just

1 thirty-five dollars if they sign up with DirecTV now?

2 A. I don't know.

3 Q. If I told you it was sixty channels, would you dispute
4 that?

5 A. I really haven't looked at it, so I don't know.

6 Q. You said it's very different from Hulu and YouTube.

7 A. It's more of a replicate product from my understanding of
8 what DirecTV is.

9 Q. Well, how does the sixty channels differ from what the
10 other ones do? Do you know how many channels the others give
11 out?

12 A. I know that it is less.

13 Q. You know for a fact it's less?

14 A. I know that Sling is less, and that some of the OTT
15 providers don't provide the same type of content.

16 Q. Now, the truth is you don't really have any idea what
17 these other providers, the number of channels, the pricing
18 offerings, how they compare exactly to DirecTV now. You don't
19 have -- you haven't done that homework either, right?

20 A. I have a sense of it.

21 Q. Okay. Now, I want to get back to the day after the
22 merger. I got a little sidetracked there.

23 The day after the merger I told you that some of these
24 subscribers, I believe Cox, are going to go over the top. We
25 talked about that. Some are going to sign up for other

1 systems, right? Verizon Fios would be one, correct?

2 A. Just in certain geographic areas.

3 Q. Correct. And DirecTV, Dish might be one, correct?

4 A. It could.

5 Q. And Dish is national, right?

6 A. That's correct.

7 Q. And DirecTV might be one, right?

8 A. That's correct.

9 Q. So what percentage, what percentage of the subscribers
10 that leave Cox because Turner is not there would actually go to
11 DirecTV as opposed to all these other places?

12 A. I can't tell you an exact number. But we know that Direct
13 is one of our largest competitors.

14 Q. But have you done any analysis or any quantification to
15 determine how many would actually go to DirecTV?

16 A. I have not, no.

17 Q. But your whole argument about ugly, horrible and incentive
18 post-merger has to do with the idea that the merged company is
19 now going to profit because it's going to pick up those
20 additional subscribers, correct?

21 A. Yes.

22 Q. But you have no idea how many are actually going to be
23 picked up, correct?

24 A. No, I know that the incentives change and that the
25 leverage changes. And that they have the -- certainly the

1 incentive to pick up customers, that's good for their business
2 because it could potentially drive out a competitor.

3 Q. But you're not -- you're not answering my question. My
4 question was, you have no idea how many are going to go to
5 DirecTV, correct?

6 A. I have no idea how many.

7 Q. And you have no idea how much additional money DirecTV
8 would earn by getting however many subscribers depart from Cox
9 and divert to DirecTV?

10 A. I don't know.

11 Q. You don't know.

12 Now, let's assume of the ten thousand, I'm just going to
13 pick 25 percent because of the other places they could go.
14 Let's pick 25 percent. That's twenty-five hundred subscribers
15 would go to DirecTV. Do you know how much profit DirecTV would
16 earn from getting twenty-five hundred new subscribers?

17 A. I do not.

18 Q. But you do know that, and we just went over this, that
19 Turner is still losing in this example the forty-eight million
20 dollars every single month, correct?

21 A. Yes.

22 Q. But maybe it's not forty-eight million anymore, maybe it's
23 like forty-seven million that they're losing or forty-six
24 million because they're going to pick up a little bit of profit
25 from the DirecTV subscribers that join DirecTV from Cox,

1 correct?

2 A. I think you're oversimplifying.

3 Q. Well, you say I'm oversimplifying, but you have not done
4 this math, have you?

5 A. I have not done this math.

6 Q. Okay. Did you sit down to do it with DOJ?

7 A. No.

8 Q. Did you run the numbers with DOJ?

9 A. No.

10 Q. Did they show you any of these numbers?

11 A. They did not.

12 Q. So the bottom line is here's what your incentive argument
13 boils down to, the day before the merger Turner has an
14 incentive to do a deal because if it doesn't, it's going to
15 lose in my hypo forty-eight million dollars a month, month
16 after month after month. The day after the merger it's going
17 to lose forty-seven million, forty-six million, forty-five
18 million, forty million, some number less than forty-eight, but
19 a big number nonetheless, correct?

20 A. Again, I think you're oversimplifying.

21 Q. Well, are you suggesting to the Court that there would be
22 so many people who would join DirectTV from Cox that would more
23 than make up for the forty-eight million dollars of losses?

24 A. I think it's more complicated than that.

25 Q. Can you answer that question? This is a math question.

1 I'm trying -- the incentive is only there if it's going to make
2 a meaningful difference economically, do you agree?

3 A. That is your view of it.

4 Q. Do you agree?

5 A. I think that that is the license fees are one part of it.
6 I think that the subscribers are one part of it. But if the
7 other terms of the agreement are egregious, we're going to
8 continue to bleed customers, and I think then Direct's in a
9 position to push Cox and others out of the business.

10 Q. But DirecTV, but the merged company, forgive me, would
11 have no incentive to put onerous terms on you if you could go
12 dark or not do a deal when they would just end up losing the
13 same amount of money as before, but maybe a tiny bit less?

14 A. They would if it pushed us out of business.

15 Q. Okay. I think I've run that to ground.

16 Now, did I hear you say that you don't consider -- your
17 company doesn't consider Netflix a competitor?

18 A. They're a partner.

19 Q. Yeah, but my question is, does your company consider
20 Netflix a competitor, yes or no?

21 A. Not today, we don't.

22 Q. Okay. Starting when, when did they cease to be a
23 competitor?

24 A. I frankly can't answer that question. I know today that
25 we're partnering with them, and we think that that is a good

1 experience, a good relationship for our customers.

2 Q. But when you say you're partnering with them, what you
3 mean by that is that a Cox customer can turn on their TV and
4 download it as the Netflix app, right?

5 A. Well, they can, it's not just that, they can sign up for
6 it. They can also search all of their content through our
7 guide to make it a better user experience for them. Netflix
8 has distinct unique content that is a benefit to our overall
9 portfolio.

10 Q. Would you say that Netflix was a competitor of Cox in
11 2016?

12 A. Frankly, I don't know. I'm not in the marketing team.
13 But I can tell you where we are today.

14 Q. Well, if I told you that your company reported to
15 financial investors that our video services are subject to
16 competition from a range of over-the-top providers of
17 programming, including Netflix, Apple TV, Hulu and Amazon, and
18 that that was written in 2016 to the investment community, you
19 wouldn't dispute that, would you?

20 A. I frankly don't know what you're reading from and what it
21 is.

22 Q. Do you dispute it?

23 A. I don't know what the broader company's opinion was at
24 that point in time. I can tell you where we are today.

25 Q. What if I told you that I was reading from an offering

1 memorandum by Cox Communications, Inc.?

2 A. I've never seen it.

3 MR. PETROCELLI: I'll mark this for impeachment,
4 Plaintiff's Exhibit, what is it, 91?

5 THE COURT: Defendant's.

6 MR. PETROCELLI: I'm sorry. Defendant's 917. I'm
7 wrapping up, Judge, getting very late.

8 THE COURT: Yeah, this is exhibit what now for
9 identification?

10 MR. PETROCELLI: It's Defendant's Exhibit 917.

11 THE COURT: 917.

12 (Defendant's Exhibit No. 917 marked for identification.)

13 MR. PETROCELLI: May I approach?

14 THE COURT: You may.

15 BY MR. PETROCELLI:

16 Q. Can you turn to page 5, under "risk factors." The
17 heading, "We face a wide range of competition in an area served
18 by our cable systems which could adversely affect our future
19 results of operations." Do you see that heading?

20 A. I do.

21 Q. And do you see about halfway down the sentence that I read
22 previously?

23 A. I do.

24 Q. And do you agree with that sentence?

25 A. I don't sitting here today, no.

1 Q. Okay.

2 MR. PETROCELLI: Your Honor, I have nothing further.

3 THE COURT: All right.

4 How much redirect have you got?

5 MS. SCANLON: About four to five minutes, Your Honor.

6 THE COURT: Go for it. Finish this witness.

7 MS. SCANLON: Thank you, Your Honor.

8 REDIRECT EXAMINATION

9 BY MS. SCANLON:

10 Q. Ms. Fenwick, earlier Mr. Petrocelli was asking you some,
11 what he called math questions, do you recall that?

12 A. I do.

13 Q. Okay. And those were just assumptions about the numbers
14 that were going into those math questions; is that right?

15 A. Absolutely.

16 Q. He also asked you about what Turner might lose and what
17 Cox might lose if there was a go dark situation, do you recall
18 that?

19 A. I do.

20 Q. Is it right that Cox also loses ad revenues in that
21 circumstance?

22 A. Sure, we lose customers, we lose ad revenue, and quite
23 frankly, if we lose enough customers, that is going to have a
24 huge impact on whether we can sustain our video business.

25 Q. Ms. Fenwick, is it right that Cox has agreed to price

1 increases from Turner year after year?

2 A. Absolutely.

3 Q. And that's a business decision Cox has made; is that
4 right?

5 A. We have.

6 Q. And why has Cox made that decision?

7 A. Because the content is incredibly important to our
8 portfolio.

9 Q. Mr. Petrocelli had some questions about baseball and NBA
10 games. Do you know whether the Turner Networks carry baseball
11 playoffs?

12 A. They do. They also carry March Madness, which is
13 incredibly important to our customers.

14 Q. Do you know if they carry NBA playoffs?

15 A. My understanding is they do.

16 Q. Last thing, Mr. Petrocelli had some questions about a drop
17 analysis or the concept of a drop analysis. And we talked
18 earlier about the fact that Cox had done a drop analysis for a
19 network that we didn't name. Do you recall that?

20 A. I do.

21 Q. So why did Cox do the analysis for that network, but not
22 do one for Turner?

23 A. Because we had concerns whether that network's content was
24 valuable. We don't have any concerns or questions about how
25 valuable the Turner content is. We know it's extraordinarily

1 valuable.

2 MS. SCANLON: No further questions, Your Honor. I
3 would like to offer PX 520 into evidence under seal, please.

4 MR. PETROCELLI: What exhibit is that?

5 No objection.

6 THE COURT: All right, that will be admitted under
7 seal.

8 (Plaintiff's Exhibit No. PX 520 was received in evidence.)

9 MR. PETROCELLI: Nothing further.

10 THE COURT: Okay.

11 You're excused. You can step down.

12 THE WITNESS: Okay, thank you.

13 (Witness excused.)

14 THE COURT: So, Mr. Conrath.

15 MR. CONRATH: Yes, Your Honor.

16 THE COURT: Let's take a look at Monday's game plan.

17 MR. CONRATH: All right.

18 THE COURT: Who's first?

19 MR. CONRATH: Warren Schlichting from DISH Sling.

20 THE COURT: Your estimate previously was two hours on
21 direct, how does that sound today?

22 MR. CONRATH: I think it will be shorter.

23 THE COURT: You want to give me a guesstimate?

24 MR. CONRATH: Can I say an hour and a half?

25 THE COURT: All right, sounds better than two.

1 MR. CONRATH: Yes.

2 THE COURT: And who would be after that person?

3 MR. CONRATH: Mr. Martin from defendants.

4 THE COURT: Your earlier estimate on that one was an
5 hour and a quarter. Do you want to make any adjustments on
6 that one?

7 MR. CONRATH: I think that's -- may I get a more
8 informed opinion?

9 THE COURT: Yeah, go ahead. I'm not going to hold
10 you to an exact number.

11 MR. CONRATH: We understand.

12 THE COURT: Trying to get a rough idea how many
13 witnesses we can get done on Monday.

14 MR. CONRATH: Probably about two hours for
15 Mr. Martin, Your Honor.

16 THE COURT: All right. So assuming direct and cross
17 are about the same, that's -- we're not getting to a third
18 witness on Monday.

19 MR. CONRATH: That sounds correct to me, Your Honor.

20 THE COURT: Especially since we break at five because
21 I have to leave for teaching.

22 So have those two witnesses.

23 Now, with regard to those two witnesses, are you
24 anticipating any issues of dealing with confidential
25 information that may necessitate any kind of closing of the

1 courtroom or anything like that?

2 MR. CONRATH: I can't speak for Mr. Martin, but for
3 Mr. Schlichting, yes, we are, Your Honor. And if we can, I'd
4 like to, not now, but Monday morning if I have the chance to
5 address that. We obviously are working, we developed some
6 technique that worked out well today, and we were going to work
7 on that in preparation, but I suspect it will be a core of
8 testimony that is very important for us to be able to get in
9 front of the Court for which we will be asking something like
10 that.

11 THE COURT: All right, so first thing on Monday
12 morning we'll deal with that.

13 MR. CONRATH: Okay.

14 THE COURT: At the bench.

15 MR. CONRATH: Sure.

16 THE COURT: How about any other issues that you might
17 anticipate for Monday's proceeding?

18 MR. CONRATH: We don't have any other issues, Your
19 Honor.

20 THE COURT: All right, Mr. Petrocelli, do you have
21 any issues you're anticipating for Monday's session?

22 MR. PETROCELLI: We do not, Your Honor.

23 THE COURT: All right. So next week we'll have four
24 days, Monday through Thursday, 10:30 to 5:00 on Monday, 10:30
25 to 5:30 Tuesday, Wednesday, and Thursday.

1 MR. PETROCELLI: Yes.

2 THE COURT: All right. We won't have court next
3 Friday. The courthouse will be closed.

4 MR. PETROCELLI: Good Friday. Thank you, Your Honor.

5 THE COURT: Any other issues, counsel?

6 MR. PETROCELLI: No.

7 THE COURT: We stand in recess.

8 (Proceedings adjourned at 5:35 p.m.)

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CERTIFICATE

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the stenographic notes provided to me by the United States District Court, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

Crystal M. Pilgrim, RPR, FCRR

Date: March 23, 2018