IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CV No. 17-2511
	)	
	)	Washington, D.C.
vs.	)	April 18, 2018
	)	10:40 a.m.
AT&T, INC., ET AL.,	)	
	)	Morning Session
Defendants.	)	
	)	Day 16

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES:

For the Government:

Craig W. Conrath
Eric D. Welsh
Donald G. Kempf, Jr.
Claude F. Scott
Richard Cameron Gower
Sarah L. Oldfield
U.S. DEPARTMENT OF JUSTICE
Antitrust Division
450 Fifth Street, NW
Washington, D.C. 20530
(202) 532-4560
craig.conrath@usdoj.gov
eric.welsh@usdoj.gov
donald.kempf@usdoj.gov
claude.scott@usdoj.gov
richard.gower@usdoj.gov
sarah.oldfield@usdoj.gov

APPEARANCES CONTINUED

For Defendant AT&T
and DirecTV Group
Holdings, LLC:

Katrina M. Robson
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
(202) 220-5052
krobson@omm.com

Daniel M. Petrocelli
M. Randall Oppenheimer
O'MELVENY & MYERS LLP
1999 Avenue of the Stars
8th Floor
Los Angeles, CA 90067
(310) 553-6700
dpetrocelli@omm.com
roppenheimer@omm.com

Michael L. Raiff
Robert C. Walters,
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Suite 1100
Dallas, TX 75201
(214) 698-3350
mraiff@gibsondunn.com
rwalters@gibsondunn.com

For Defendant
Time Warner, Inc.:

Kevin J. Orsini
Peter T. Barbur
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1140
korsini@cravath.com
pbarbur@cravath.com

APPEARANCES CONTINUED

Court Reporter: William P. Zaremba
Registered Merit Reporter
Certified Realtime Reporter
Official Court Reporter
U.S. Courthouse
333 Constitution Avenue, NW
Room 6511
Washington, D.C. 20001
(202) 354-3249

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

- - -

WITNESS INDEX

- - -

- - -

INDEX OF EXHIBITS

- - -

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.

Your Honor, this morning we have Civil Action No. 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. SCOTT: Your Honor, Claude Scott on behalf of the United States.

THE COURT: Welcome back.

MR. SCOTT: Thank you, sir.

MR. GOWER: Cameron Gower on behalf of the United states.

THE COURT: What's your name?

MR. GOWER: Cameron Gower, G-o-w-e-r.

THE COURT: Gower?

MR. GOWER: Yes.

THE COURT: All right.

MR. WELSH: Good morning, Your Honor. Eric Welsh for the United States.

THE COURT: Welcome back.

MR. WELSH: Thank you.

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

THE COURT: Welcome back.

MR. CONRATH: Thank you.

MS. OLDFIELD: Good morning. Sarah Oldfield for the United States.

THE COURT: Welcome.

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

THE COURT: Welcome back.

MR. PETROCELLI: Good morning, Your Honor. Daniel Petrocelli for defendants.

THE COURT: Welcome back.

MS. ROBSON: Good morning, Your Honor. Katrina Robson for defendants.

THE COURT: Welcome back.

MR. OPPENHEIMER: Good morning, Your Honor. Randy Oppenheimer for the defendants.

THE COURT: Welcome back.

MR. WALTERS: Good morning, Your Honor. Rob Walters here for AT&T and DirecTV.

THE COURT: Welcome back.

MR. BARBUR: Good morning, Your Honor. Peter Barbur for Time Warner.

THE COURT: Welcome back.

MR. ORSINI: Good morning, Your Honor. Kevin Orsini for Time Warner.

THE COURT: Welcome back.

MR. ORSINI: Thank you.

MR. RAIFF: Good morning, Your Honor. Mike Raiff for AT&T and DirecTV.

THE COURT: Welcome back.

I'll see counsel.

(Sealed bench conference)

THE COURT:

MR. PETROCELLI:

THE COURT:

MR. PETROCELLI:

THE COURT:

MR. PETROCELLI:

THE COURT:

MR. PETROCELLI:

THE COURT:
MR. PETROCELLI:
MR. CONRATH:
THE COURT:

MR. PETROCELLI:

THE COURT:
MR. CONRATH:
THE COURT:

MR. PETROCELLI:
THE COURT:

MR. PETROCELLI:
THE COURT:

MR. PETROCELLI:

THE COURT:
MR. PETROCELLI:
THE COURT:

MR. CONRATH:

MR. PETROCELLI:

THE COURT:

MR. PETROCELLI:
THE COURT:
MR. PETROCELLI:
THE COURT:
MR. PETROCELLI:

THE COURT:

(Open court)

MR. PETROCELLI: Your Honor, may we proceed?

THE COURT: You may.

MR. PETROCELLI: The defendants call Jeff Bewkes.

THE COURT: All right.

DEPUTY CLERK: Sir, please raise your right hand.

(Witness is placed under oath.)

DEPUTY CLERK: Please be seated.

JEFF BEWKES, WITNESS FOR THE DEFENDANTS, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. PETROCELLI:

Q Good morning, Mr. Bewkes.

A Good morning, Mr. Petrocelli.

Q Please state your name for the record.

A Jeffrey Lawrence Bewkes.

Q What's your title, Mr. Bewkes?

A Chairman and chief executive of Time Warner.

Q How long have you been chairman and chief executive?

A A little over ten years.

Q And how long have you been with Time Warner?

A 39 years.

Q So let's turn the clock back a little.

When and where did you start?

A I started at HBO, a division of Time Warner, back in 1979.

Q And before we move forward to your current responsibilities, how many years were you with HBO?

A 23 years.

Q Until approximately when?

A 2002.

Q So let's focus a little bit on those years. And, perhaps, you can tell His Honor what you did during those years.

A Okay.

For the first five years or so, I was in the sales and marketing area. And these were the early days of cable TV being built. And we were mostly at HBO engaged in trying to get cable systems to put in satellite dishes so they could receive HBO and offer it to subscribers in the town.

And the second part of that is, it was very important to us to get them to not just carry the channel but to get as many people in town to watch it or subscribe to it as we could.

So we were mostly doing that. And there were a number of jobs, roughly, related to that.

Q And what did you do after spending some time in sales and marketing?

A About five years later, maybe three or four, I moved into the financial area. And I spent seven years, mostly in finance, as -- doing VP of budgeting, and then Chief Financial Officer from '86 to '91.

Q And then what?

A And then from '91 to 2002, I moved to Chief Operating Officer for all the business lines of HBO, and that started in '91. And '95, I became the Chief Executive of HBO, and that lasted until 2002.

Q And then in 2002, you went to Time Warner corporate?

A Yes.

Q Before we get to Time Warner corporate, you know, we've heard a lot in the trial about HBO. But, perhaps, you can spend a few minutes describing to His Honor what HBO is and how it works.

A Okay, yeah.

Well, it started, we were having mostly uncut movies because back in those days, you couldn't watch a movie in your home unless you -- well, you couldn't, unless you waited a few years and it was on CBS. And then there commercials, and maybe they would cut scenes.

So HBO had uncut movies earlier than anywhere else. And over time, we added original programming, television series, like *Sopranos* and now *Game of Thrones* is a pretty noticeable one. And we have a lot of other kinds of programming on HBO.

But the -- how did it work, the key thing about it was there was no advertising. There's never been. There isn't now, any advertising on HBO. So in order to pay for the programming, we had to get people to subscribe to it, the more, the better. And that's how we paid for what we were doing.

The other important thing, very different from what the networks, CBS and the broadcasters were doing in those days, is we had to go through a cable system on a wholesale basis, to get them to carry the network and then get them to offer it vigorously to the homes in their cable system.

And there was quite lot of difference between how well one cable operator did that versus another. That was very important to us. So that's basically how it worked.

And over those years, HBO was getting more and more distribution on cable systems because they were being built across the country.

Q How do you get these distributors to take your product and convince subscribers to buy it?

A Well, you -- well, they had to put in -- they had to make investments to carry the channel. And then we had to try to motivate them in our affiliate deals that the more subscribers they would get, the better their earnings would be, the better their relationship with us would be. The more they got, usually it helped their pricing. So our wholesale prices would go down if they had more subscriber penetration.

Q What are the key drivers for HBO?

A Well, the first one -- there are two really.

You have to have -- we need to be on every platform there is. So it started with our own cable operators that could do this. Over that decade, the '80s, the satellite companies got into the business. So we tried to get HBO on the satellite companies.

Q That would be whom?

A That would be Verizon, AT&T, other TelCo, if they could carry video.

I'm sorry. What was I doing, the satellites?

Q Who were the satellite companies? Yeah.

A I was talking about satellite.

Telephone came later. I'm sorry. I got it out of order.

The satellite companies were DirecTV and Dish company.

And I already -- then the next thing that happened was these TelCo.

Q Okay. And I interrupted you, but you were talking about the key drivers.

A Yes. The key drivers were, we needed to get our channel, HBO, into the -- carried in the cable ecosystem and then, look, if they sold -- if they didn't sell anybody an HBO subscription in their cable system, we didn't get -- we had no revenue.

So we had both goals: get it in, get it on every distribution platform, and try to get as many people subscribing to it as we could.

Q And why is broad distribution and, for that matter, maximum marketing, important?

A Well, the first reason is to pay for the programming. And the more people that are signed up, the more we can spread the cost and keep the prices down, because there's always a tension that if you have a higher price, you're going to have fewer subscribers or buyers.

There's a fairly important related reason, which is, in those early days, we were buying movies and reselling them; and we knew, as time went on, that we needed to add original programming. But the question was: How do we get good-quality original programming when we had a pretty small budget in those days? And how do we attract talent?

So the more we were distributed, the more we could have press articles written about us, the more able we were to attract talent to our programming service.

Q Is that what is known as a virtuous cycle?
A Absolutely, yes. Yes, it is, because the more subscribers we have, therefore, the more revenue. And the more people in the country are talking about it, the more the press will write about it. That attracts the talent that wants to have their show on HBO, and that gives us better shows and, therefore, more subscribers. So it works like that.
Q And is HBO in every pay-TV household bundle?
A When you say, "every" -- most households that subscribe to a subscription TV bundle, they have to do it on top, in the old days, of a basic cable network model. They -- most of them, the great majority have HBO.
Q Is it considered an add-on?
A It is an add-on.
Q So you don't get it as part of the basic; you have to pay extra?
A Yes. That's why the marketing is so important.
Q And can you say what percentage of pay-TV households actually subscribe to HBO?
A Yes.
I think the national average is in the 30, low 30 percent range.
There are some affiliates that have 40 percent of their subscribers paying for an add-on premium like HBO.

There are some distributors that we have HBO offered through that are down at 15 percent. That's a very significant difference between a good -- a well-performing distributor and a poorly performing distributor.

Q So HBO is heavily dependent on distributors?

A Heavily dependent, yes.

Q Now, let's move past HBO to your years in corporate. Can you take us through the chronology there.

A Yes.

So I went up to Time Warner in 2002. And for three to four years, I was a -- with another man, Don Logan, we were both sharing really the Chief Operating Officer job. So we were running the many businesses of Time Warner. At that time, there were about ten of them.

Q What were the ten businesses of Time Warner at that time?

A Okay. They were -- let's start with the ones we still have.

So they were Warner Brothers studio; HBO; the Turner network room; the Time Warner Cable distributor company, the Time Warner Music companies, which was a group; the Time Warner -- sorry.

The Time, Inc., publishing company. That's time magazine, et cetera. AOL. Time Life books. Three sports teams: The Atlanta Braves, the Atlanta Hawks, and the

Atlanta Thrashers.

I'm trying to remember. I apologize if I --

Q New Line?

A New Line Cinema, which was another cinema company.

Q Okay. And over the years, those got spun off or sold?

A Well, many of them did, but we did -- we spun off -- well, let me do it in chronological order.

So we sold the music companies, the sports teams, and the book, Time Life books company between 2002 and '5 or '6, I think.

We spun off, separated from the company, the Time Warner Cable, AOL, and the Time, Inc., publishing company, where we got our name, in later -- in two thousand -- after 2008.

Q And that leaves the three that you have now: HBO, Turner, and Warner Brothers?

A That's right.

Q And can you explain to the Court what the difference is between a sale and a spin-off.

A Yes.

A sale, you sell the company to some other company, usually. They pay you money, cash. And then you pay tax on it if there's a gain at the corporate level. That's what we did with the books, the sports teams, and the music companies.

When you spin a company -- and remember, your shareholders own it as part of Time Warner. They still own it after you spin it. You just separate it and say, if you used to own AOL as part of Time Warner's share of stock, we're now going to give you a share of the AOL company. So now you own the same percentage of that. It's just a separate security.

So in case investors want to own more of Time Warner and less of AOL, then they can sell their share, whichever half, which is the main reason for doing spins, because you have different shareholder bases that are natural for these industries because of the fortunes or futures of these industries differ as time goes on.

Q And was Time Warner Cable at one point spun out?

A Yes, it was. It was spun out in -- well, we decided it in late 2007, announced it -- we decided it inside the company with the Board in early 2008. And we spun if off -- I believe it went effective in 2009. So that when that that was over, our shareholders still could own it. It was just a question of whether they wanted to have more or less of whichever side.

Q Prior to the time that Time Warner Cable was spun out, how many years, approximately, was Time Warner Cable vertically integrated with the Turner networks?

A   15 years.
Q   And what years were those, approximately?
A   1990 -- this is -- can you ask again.
Q   Turner.
A   Turner and Time Warner Cable?
Q   Yes.
A   1995 to 2009. So 15 -- 14, 15 years.
Q   And I'm going to go come back later on to the period of time when Turner and Time Warner Cable were vertically integrated, so just hold that thought for a bit, okay?
So then when you moved up to corporate now in 2002, you oversaw some of the businesses that you indicated, including the Turner networks; is that right?
A   Yes.
Q   And can you describe to the Court, at a high level, the nature of Turner's business.
A   Okay. The Turner network company had a group of networks that are -- the kind of programming they had was news, children's and family programming, general entertainment, and sports, mostly in the general entertainment networks.
So that's what the programming was, but unlike HBO and, but very much like every other basic cable kind of network, because there are two different kinds of cable.

The Turner network's revenue comes over time, roughly half of it, although that moves around -- so the Turner -- I'm not. I'm sorry. I'll speed it up.

The Turner networks revenue comes from subscriptions and from advertising. And so different than HBO, which only subscriptions. But the related thing about that that's, again, different from HBO or premium, it's not an add-on in most places.

So you don't have to decide, as a consumer household, whether to subscribe to the Turner networks. They come, hopefully, as part of the general offering, when it started, 20 channels, 30 channels. Now it's 100 channels in the big ones.

And so it goes into every home, as do most of its competitor networks, like the ones owned by our other media company, competition.

Q What are the key drivers of the Turner business?

A Well, the Turner business, first, we need to get it on every distribution platform so that we can have subscriber fees and advertising revenues.

And, really, the second thing is we have to have good ratings and effective advertising sales, because you can have ratings; but if nobody wants to buy an ad in front of who's watching the show, you have a problem. So we need both.

Q So like HBO, is broad distribution paramount to Turner's business?

A Yes.

Q Now, finish out your bio a bit. You're in corporate starting in 2002. You've got responsibility for Turner and some of the other units. At some point, did you become COO, Chief Operating Officer?

A Yes. That, I became COO in 2006. That went for two years, and then I became chief executive in 2008.

Q And it was during that time that you made these decisions to either sell off or spin out the other businesses, leaving you with the three that you now have?

A Yes.

Q So since the time, let's say, of the spin-off of Time Warner Cable in 2008 and '9 and moving more into the current years, how has the world changed in your business?

A Well, there have been many, many changes.

The two big tectonic changes have been that there's been a huge technological change, the Internet, really, that allowed giant new competitors to come into the business with us and go direct to the consumer with television programming. So the first one is, there's television program being offered directly to consumers.

The second is that sometimes those same companies, sometimes some other new entrants, you can now have digital advertising. And that's different than the old television advertising, and it competes with us.

Q So you described these two changes, I think, as tectonic?

A Yes.

Q And I'd like to talk about each of them for a bit, okay?

So could you first explain a little bit more by how streaming of television over the Internet directly to consumers has changed things so much?

A Well, this is a big change, because when you're streaming television over the Internet to someone's house, you can do a lot of things a bit differently or better than if you're putting it through a set-top box.

And basically what it allows is those companies that are streaming the TV directly to you, they don't go through a wholesaler. They have a direct pipe to you. They have a direct connection with the consumer.

So they know who the consumer is. They know what the consumer is watching. They know -- they know the contact information. They know billing -- they have billing relation -- they have all kinds of relationships with the consumers, beyond just providing, in many cases, the television.

So they can offer more effective choices. Or whatever choices they do have on their TV channels, they can tell you about the programming and recommend it to you based on when you may have watched, because they know all that.

So they can sell you a better package. It's not just signing up the subscriber; it's also -- there's a fair amount of churn at the end of the month; people disconnect and you need to replace them.

They know how to re-market you if you've interrupted or signed off on your subscription. So they've got a lot of advantages because of what that technology affords, and they have these big data platforms that let them do it.

Q Now, you have been using the word "they." Who are "they"?

A Well, in the case of direct-to-consumer video, television delivery, that would be Amazon, Netflix, Google YouTube.

Q Are those companies vertically integrated?

A Yes, they are.

Q They have a direct relationship with the consumer?

A Yes. They have the content, the programming, and they have the technological capability of delivering it straight to you. And they can communicate with you about that relationship and what to watch and how to value the program.

Q So is that good for the consumer?

A Yes, it is good for the consumer.

Q Why?

A Well, it gives them more choices of what they may want. It gives them a much better viewing experience, because they know, oh, I didn't know that was on this channel, because they'll tell you that.

And, you know, it also offers, which they do, many different price points. So depending what you want to pay or what kind of channels you like, you can pick different bundles or you can decide what you can afford.

So it's quite a bit more flexible than what our wholesale business -- we try to keep up with that, but it's a bit advanced.

Q So to that point, has this been good for Time Warner?

A Well, yes, because it allows -- we've -- well, it allows us -- if we can get on these packages, it allows us to get our channels to new places where consumers are.

It wouldn't be good if we could not.

Q But since you're historically always a wholesaler, have you had the capability or the assets or the information to go direct to the consumer?

A No.

Q Why don't you do it?

A Well, we tried, but -- we tried -- let's take HBO. It's the best example.

A few years ago, we -- because HBO had been on cable, satellite, TelCo, et cetera. And we have these new Internet distributors. We try to sell HBO directly to consumers over the Internet.

When we did that, because we turned it on in 2015, we didn't have the technological capability to actually deliver the HBO signal right through to your house, so we had to contract with a third party to do that.

The other thing we needed to do that was we couldn't market to the consumers very effectively. So we made really wholesale deals with Apple and -- first, with Apple and then later with Amazon. And we're trying to make them with anybody who will make them with us to get them to market our HBO subscriptions themselves, because they've all got hundreds of millions of consumer relationships.

Q Does Time Warner have billing systems?

A No. There's the part -- we don't have billing systems. We don't have retail stores. We don't have retail outlets. We don't have customer service people, where you can call them on the phone and complain about your bill or say, I didn't watch that channel.

We don't have that. And that's a very big infrastructure question, and it's a very expensive proposition.

Q Do you have server farms?

A We don't have server farms.

Q What kind of information and data do you have about consumers?

A Well, basically, in relation to subscriptions -- not advertising. Subscriptions.

Q Subscriptions.

A There's a difference there.

Q Right.

A What information we have about people when we're trying to sell them subscription is we don't know who they are; we don't know what their name is.

And in a given cable system, let's say the average is 30 percent of the people in the cable system have subscribed to HBO. We don't know which 30 percent it is. We can't talk to them.

And so we don't know any of that; whereas, our new competitors do know that.

Q Do you have their emails or their contact information?

A We do not have their e-mails, their contact information, their billing information, financial information. We don't have any of it.

We have a little bit of survey data like what

Nielsen does with samples that tells us whether x-million people are watching *Game of Thrones*. We don't know which people are watching.

Q And do I understand you to be explaining that all these things you don't have to go direct to the consumer, the vertically integrated companies like Netflix and Amazon do have?

A Yes, they do. They not only have all that information about what they're doing with our programming; they know what they're doing -- what that consumer is watching. If it isn't ours, they know what they're buying; they know probably how much money they have. They know all sorts of things. We don't.

And they know, most importantly, who it is. So if they want to renew their subscription, they can send you a communication and tell you, this is great; you should renew the subscription.

Q Okay. Now, you mentioned a second tectonic shift, moving past direct-to-consumer and subscriptions. And can you explain what has happened in recent years to the Court in that regard.

A Okay. The second one is advertising.

So there's been a massive change in advertising.

It's related to the first one, because it comes out of the capabilities of Internet, two-way capability.

And what the change is, it's complicated. I'll try to -- so --

THE COURT: We get a lot of that around here. Don't let that bother you.

THE WITNESS: It's hard. It's hard to keep it --

MR. PETROCELLI: Yesterday, we learned what a durable good was, Your Honor.

THE COURT: There you go.

THE WITNESS: So television advertising is pretty much the same as it was 25 years ago. And what I mean by that is that when you're watching some television channel, let's say the Turner channels, and an advertisement comes on, everybody watching the channel is going to see that advertisement.

Q Like a Chevy ad, for example?

A Yeah. Let's say we sell an ad to Chevy, I hope, to sell a car. So everybody sees that.

Now, there's a little tweak to it because there may -- well, by and large, that's the problem.

So we have that.

And, therefore --

Q What's the problem with everybody seeing a Chevy ad?

A Well, there's a lot of problems with it, and I think everybody sitting here knows it.

You're watching a bunch of ads. There are too many of them. And you don't -- you're not interested in any of the things that the ad is for.

Now, the advertiser doesn't like that either, because why would they pay to send -- put an ad in front of a thousand people, where they themselves know that only 2 percent of them are interested in buying a car? They don't want to pay for all those people.

But the TV ad business has been, you get as many people as you can to watch the channel so they watch the ad; and then you sell the ad to the advertisers, hoping they want to pay for all these people that are watching the ad.

Now, the problem is increasingly, they do not want to put the ad there, because they know they're showing it to people that aren't interested in it.

And if they go over to the digital advertising platforms of Google and Facebook, to name the two leaders, they can sell a Chevy ad just to people that are trying now to buy a car.

Q They know that?

A They know that, from all the data that they have.

And they can give them also a different ad than anybody else sees. They just don't -- they don't just know whether they want to buy a car. They know lot about these people, how much money they may have. They know all kinds of things that help them sell ads against the television business.

So the problem there is that advertisers are moving there ad budgets, which are finite, to the digital platforms at Google and Facebook. They're moving it away from television advertising in general.

Q And how is that affecting your business?

A Well, if -- we don't have ads on HBO, so that's about the Turner networks.

It was, for many years, that roughly half the revenue came from the advertising and half from subscription. That's how we paid for the programming.

What that does is it takes the ad revenue away from the Turner networks, so it no longer can support half the revenue. It's now less.

And that puts -- it either means our earnings start going down or that it puts pressure on consumer subscription prices, because that's the only two places where we can figure out how to -- if we're short on advertising revenue, we've got to try to get other revenue to cover it.

And this is all happening at the same time that these same companies are bleeding away our viewers, because they're offering competitive video that has these advantages, because they know what to put in front of you individually, and we don't.

Q So it's kind of a double whammy?

A It is a double whammy that is a significant one. And it's not just bad for our company. It's really bad for all television companies supported by advertising.

But what that means is it's actually bad for consumers, because it means that the financial support for all this programming on all these different channels gets pushed over toward subscription prices. And that's a problem, because we think consumers are up to here with subscription prices.

Q Well, Google and Facebook, those are the two dominant ones on the advertising digital side?

A Yes.

Q And they're vertically integrated?

A Yes.

Q And why don't you do what they're doing? Do you have the same kind of information? Does Turner have that kind of information?

A That's a problem, because all this money that's moving in advertising and, increasingly in subscriptions, over to these companies, there are just two of them. So that's -- I think we need competition for that.

The advertisers need it. It's good for consumers if we have it.

But the reason we can't do it is we don't have the tech platforms; we don't have engineers; we don't have any of the information to know who is this person. What ad would they like to see? We can't do any of that. It's very difficult. We've been trying to do it, but it's hard to do it at the speed and scale that our new competitors are doing it.

MR. PETROCELLI: Your Honor, may I approach?

THE COURT: You may.

MR. PETROCELLI: Your Honor, I've handed the Clerk and Mr. Bewkes what I've marked as Defense Exhibit 746A.

Defense Exhibit 746 is a company document, a Time Warner document dated June 16, 2016, entitled "TV Industry Trends and Strategy."

There's no objection to this document, but it's a lengthy document, and I only want to address the witness to one page. And so that's the page that I've put in front of the witness and would ask Your Honor to receive in evidence.

Again, there's no objection to it.

THE COURT: This larger document has already been admitted?

MR. PETROCELLI: No, but I have not, but I can, if you'd like. I don't think it's necessary.

THE COURT: Oh, okay.

MR. PETROCELLI: Okay.

THE COURT: So you just want to do this one page?

MR. PETROCELLI: This one page, right.

THE COURT: All right. Any objection?

MR. SCOTT: No objection, Your Honor.

THE COURT: All right. It will be admitted.

MR. PETROCELLI: Thank you.

THE COURT: It's not under seal, though, right?

MR. PETROCELLI: No, Your Honor.

THE COURT: No. Okay.

(Defendants' Exhibit DX746A received into evidence.)

BY MR. PETROCELLI:

Q So can you -- you have it in front of you, Mr. Bewkes?

A Yes, I do.

Q I think it's best if you just describe this to His Honor.

A Okay.

Q Just describe the document, the chart, what it depicts.

A Okay, Your Honor.

If you'll look on the left side of this, say from 2000 to 2007 or '8, what you see is how this all started, where we were the, we're the top line, television. And our advertising going into all the different television networks -- this is the cable networks, the part that comes from advertising. It's the broadcast networks -- that shows that 27 percent of the national advertising was there in the television business. And we were part of that, and it's a pretty steady business.

If you look down at the online, at the bottom, you see them at a pretty low share, starting in the single digits, and really staying fairly modest, although you start to see them moving upward in their share in 2006, '7, '8. But still, they were a third, less than half, really a third, of what the TV ads were.

And when you then move to -- and that's when I was becoming familiar with this, because I had gone up to taking over a responsibility for the Turner networks in 2002, which is on the left side.

Once you get to the 2010, '11, '12 -- and it really doesn't pick up steam -- well, when you get to the 2015 -- well, let's see. Where does it cross -- 2016, what happens is, digital advertising at Google, Facebook mostly, has taken off like a rocket.

And television advertising, which had gone up a bit, starts to decline.

And so now you get to the place here where you're looking at 2018 and '99, where digital advertising is quite a bit bigger and on an increasing glide path, in the television advertising, which in total is starting to go down. That is bad for television networks, because it presses their ability to get programming.

Of course, the digital advertising companies are taking the ad money and starting to bid away the programming, to continue this trend.

And as I've said, I think it's bad for consumers, because it means that more pressure on our programming cost would have to be borne by subscribers, or we just simply start not being able to fund our operations.

The fact that there are a couple of these -- and the more scale they get, the better information they get to be even more effective at selling subscriptions or selling advertising. That compounds the problem.

Q Do you have a pen on you?
A Yes -- no, I don't. I'm sorry.
MR. PETROCELLI: May I approach, Your Honor?
THE COURT: Yes.
BY MR. PETROCELLI:
Q If you could draw a line for the Court when Time Warner Cable, you made the decision or the announcement to spin it out.
A Okay.
Q When was that?
A Late 2007.
Q And show the Court that line there. Hold it up.

THE COURT: Okay.

BY MR. PETROCELLI:

Q And so was it after, essentially, Time Warner Cable spun out that these significant changes began to manifest themselves?

A Yes.

Q And, you know --

A Well, back in those days --

Q Excuse me?

A Well, I should say -- I have to wait till you ask me a question. I'm sorry.

BY MR. PETROCELLI:

Q That's usually how it works.

A Yeah, so --

Q Why don't you let the Court know why you decided to spin off Time Warner Cable back in '08, '09.

A Well, basically, financial reasons.

As I testified earlier, we had had a very big company with a lot of unrelated things in it, from AOL to books to music and publishing and so on.

And the way the world was going -- you can see it here -- is in every industry, it was moving towards more focus on whatever your main talent was.

And the problem of having a cable distribution company as a part of basically a media TV production, movie production company, is those are quite different activities.

So for financial -- so we spun off the cable company because we thought it had a different natural investor base because the growth rates, the profit margins, all that, future fortunes for cable investing, if you're investing in cable systems, were different than if you're investing in networks or movie production.

We thought it could have a different financial structure. You can put your debt, properly should, on a very predictable stream of revenue, which is what a cable system has. It's not what a movie studio has.

So those were the main reasons on the financial side.

There was another kind of half-financial, half-strategic reason.

Time Warner Cable was about 12 to 13 percent of the geographical cable subscribers.

And all these other cable distributors, like Comcast, DirecTV, and so forth, getting bigger, and we thought that it might need to consolidate with other distribution companies in order to be more efficient, because there's a lot of fixed costs in the plant of a distribution company. And you need to spread it over more people, and that's exactly what happened.

Q Okay. Again, I'm going to come back to the time when Time Warner Cable was vertically integrated with Turner. But before I move on, just one quick question about the spin-off.

If you -- might you think about it differently if Turner happening today?

A Yes, maybe, but I'm not sure -- we didn't have all of the -- all this business of direct video wasn't there at that time. In those days, Netflix, for example, was still sending you movies, CD, DVDs in the mail.

There was no -- most -- video streaming directly to your house hadn't really happened.

We didn't know about -- I don't think anyone did, and no cable company was doing it -- nobody in the cable business or the distribution business at that point was mining data to sell advertising or to sell descriptions. So those things weren't really on anybody's top of mind at that time.

Q Following up on the advertising, can you, can we go back to that.

I want to show you a demonstrative.

This has been marked as DX122.

MR. PETROCELLI: May I approach, Your Honor?

BY MR. PETROCELLI:

Q Could you please walk the Court through this demonstrative.

A   Okay.

This shows, all right, what's happened in advertising from 2012 to 2017.

And what you see at the top, in the red bar, is Google alphabets, many tens of billions of advertising, growing and, in fact, more than doubling, almost tripling, in five years.

You see Facebook starting it out at that five years ago, very small advertising. It's down at the bottom. It's like $4 billion, and growing at tenfold in the five years, to 40 billion-or-so.

And you see them taking now the lion's share of advertising.

If you look at the various television companies and you see us down in the light blue, we're basically flat throughout this period. So the advertisers we had back then are moving most their increased spending over to our new competition.

And in certain quarters, our advertising declines, and I believe it's either flat or down as you go forward.

Q   So now that you've explained these two very significant changes to your industry, I'd like to have you talk to His Honor briefly about what you tried to do to address these challenges.

I think, on the subscription side or the direct-to-consumer side, you indicated you launched HBO Now?

A Yes.

Q But even then, had to go through third-party retailers, right?

A Yes. We had to use -- well, we're happy they're doing it for -- we had to use Apple and Amazon and whoever else would help us sell subscriptions.

Q Meaning you couldn't do it directly yourself?

A Right.

Q Okay.

A And it's good if we get the descriptions through those means at the HBO Internet-delivered service.

But we're still not getting from that the data about our own subscribers at HBO that an Amazon or Apple has about those subscribers. We don't know what else they're watching. We don't know who they are by name. They do. We don't know other things they do, which would help us to market to them for more subscription penetration.

So that's on the HBO side -- on direct-to-consumer, which was HBO.

We do have a few other things we tried to do.

We've launched a couple of niche services at Turner, Boom, and FilmStruck. FilmStruck is classic films.

And we did -- I think we do most of the technology end to end for that, but they're niche. And we've only got a few hundred thousand subscribers.

So if we were trying to serve tens of millions of subscribers, our systems couldn't handle it. In fact, that's what happened when we turned on HBO Now. It crashed, and we had to beef it up.

Q And what kind of subscriber bases do some of these vertically integrated giants have that you've been talking about?

A Well, Amazon has 50 to 100 million out of their however many hundreds of millions. And they connect that to their shipping service.

Netflix has 125 million global subscribers.

Just to illustrate what that does, they've got a programming budget, because of that, that's more than twice the size of HBO's.

And HBO's been working on this for 30 years, 40, and they have been doing it for five.

So they're a vigorous competitor. This is on the subscription side. I'm not doing advertising.

Q Well, let me turn to that on the data side. What have you tried to do to get some of this first-party data that you say Facebook and Google have to rocket these digital advertising platforms?

A Well, we tried -- what we continued to try to do is we've tried to get it in our affiliate carriage renewal agreements, have not succeeded, generally.

We've tried to get what we could from third parties. It's not of the quality and certainly not the scale of what Google or Facebook have competing in ads.

And we had an idea for buying a few companies that had a way to figure out what was on the television screen so we'd know what was being watched, but you still wouldn't know who was watching.

Q Well, let me unpack that just little bit.

There's been some testimony in this trial about potential negotiations, negotiations with Comcast over data.

Do you know anything about that?

A Yes.

Q Can you describe to the Court what you know about that. Well, they're just one of many examples.

But we've tried, as we have in all of our affiliate renewals, to get better data, meaning more information beyond just viewing, but maybe who is it. They don't want to do that. What they watch, all those sorts of data that we need both for subscription selling and for ad sales.

And we've never succeeded. In our last carriage renewal negotiation with Comcast, at the very end, they offered us some data. We were apart on some other things. It was pretty expensive. We didn't know what it was. So we sent a team to talk to them about, well, if we're going to pay tens of millions for this -- it was somewhere close to 50 million they wanted -- what is the data? Had could we use it?

And our teams came back and said, we can't use this. It wouldn't be useful for advertising. It's certainly not worth anything close to what they're asking. So we couldn't get that done.

That's basically what's gone on in all of the negotiations, because we need to get our channels on. You know, we'd like to get the data on top to compete with the new competitors, but we have to get our channels carried.

Can't you get the data from some of the virtual MVPDs, like Hulu and YouTube that carry the Turner networks?

A Well, we do get some that were -- we are carried on the Hulu virtual MVPD.

And YouTube now also has a virtual bundle. Turner's carried on that.

But we don't get -- we just get viewing data on those people watching our channels. We don't get who they are, all their preferences, whatever -- what these same subscribers are watching on competing channels.

All of that, those platforms have; we don't. And they're the ones selling the ads against us or trying to sell a subscription package to move it away from our other distributors.

Q You mentioned these companies with the chips and the set -- are they known as ACR companies, automated content recognition companies?

A Yes.

Q What are they and what can you -- please explain to the Court what you endeavored to do in that regard.

A Okay.

There were three companies that had this automated content recognition that, as I understand it, means they had contracts with television set makers, like LG and Sony and that sort of thing, where, if the TV was a smart TV, connected to the Internet, these ACR companies could collect -- could figure out what was on the screen, through the visual pixels that were on the screen.

And so we were thinking, if we could acquire those, put that information together, maybe we'd have some information about whether our channels were being watched.

Possibly, we'd know the households; but, again, we wouldn't know who anybody was to be able to offer them a subscription renewal or sell them an ad.

So we were thinking about doing that.

The other problem with it, there were a lot of issues. I don't know whether they would have worked out their patent issues.

But the key one I remember was, they only had this information by contracts that periodically came do with the television set makers.

And if they couldn't renew the contracts, then we couldn't get the information. So that was a big risk, if we had gone ahead and bought them --

Q Okay.

A -- which we did not?

THE COURT: Would this be a good time to take the morning recess?

MR. PETROCELLI: Perfect time. I'm just about to go into a different area.

THE COURT: All right. We're going to take a 15-minute recess.

You're now a witness under oath in the case, which means you're not at liberty to discuss your testimony so far or what it might be when you return, with anyone, including your counsel. You have to stay independent of all others. Don't discuss what your testimony has been or what it will be.

THE WITNESS: All right.

THE COURT: All right. See you in 15 minutes.

We'll stand in recess.

DEPUTY CLERK: All rise.

This Honorable Court will again take a brief recess.

(Recess from 11:40 a.m. to 12:05 p.m.)

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

Your Honor, recalling Civil Action No. 17-2511, the United States of America v. AT&T, Inc., et al.

MR. PETROCELLI: May I proceed?

THE COURT: You may. The witness remains under oath.

MR. PETROCELLI: Yes.

BY MR. PETROCELLI:

Q I wanted to finish up on essentially chapter one of this two-chapter examination with a couple of follow-up questions.

We were talking about data. And you indicated the effort to get data from Comcast, and you weren't able to do that.

Do you recall that?

A Yes.

Q Would you call that bargaining friction, an example of bargaining friction?

A Yes, I would.

Q Can you -- when Time Warner Cable was vertically integrated in the Time Warner family, were there examples of the absence of bargaining friction that enabled certain innovations to occur?

A Yes.

Q Can you give the Court just one or two examples of how you were able to innovate during the time when you were vertically integrated?

A Yes.

I think the best examples were HBO -- there are many, but that's the best one. HBO developing multiplex and then video on demand back to --

Q Explain multiplex to the Court.

A -- back in the 1990s.

And innovation is a trial-and-error thing. So -- because there will be many pieces of it if I try to explain it.

So back then, if you had subscribed to HBO and you tuned in on Sunday night, you'd see whatever the movie was or whatever was showing on Sunday night.

Now, if you had already seen it, you couldn't use the channel unless you wanted to watch it again.

Now, in that case, you're paying for the channel. So one of the big issues our customers had was, are you repeating things too much.

And so we thought, well, we have a lot of other programming that maybe you'd want to watch it on Sunday night, or whichever night this is. And so maybe it would be great if we could give it to you on not just one channel but six or seven.

So we worked with our cable company, Time Warner Cable, back and forth over a period of several years, trying to understand, well, what would it take to clear six or seven channels on not just your cable system but everybody's in the country, so that they could offer HBO's programming service, not just on one channel but on many channels?

And we had to do lot of things. They had to, on the cable distributor side, they had to make investments to be able to carry six channels, because they could put other things there. They had to train their marketing and phone operators to deal with people's questions. They had to deal with receiving those feeds and putting them out, a lot there.

On the HBO side, we had to make sure we had the rights to put this on multiple channels. We had to deliver it technically over the satellites. So it was a fair amount of moving pieces there.

When we started, we didn't know what those moving pieces were. So by the team we were ready to launch it, which we did with Time Warner Cable, we had a pretty good idea. We did it.

We launched it for no charge. We didn't charge anything for this improvement to the wholesalers or the customers, because we wanted everyone to adopt it.

And they did and it worked very well.

So what then happened to other cable distributors that we did know is they looked at that and thought, well, that's a good thing; it will help us sell HBO. They make a margin on that.

So they adopted it, which, again, entailed some expense and effort on their part to do. So that was multiplex.

And it helped us with viewing, because more people liked HBO. They could use it more.

So then we went -- and is this is now in the '90s, the mid-'90s -- for quite a big change, which actually -- well, which was video on demand.

And that is really a -- it's kind of an improvement over the multiplex innovation, because on the multiplex innovation, you could see five or six different start times on your HBO service, but they were all on a schedule. You'd have to tune it in at 8:00 and start with the plot and follow it.

On video on demand, you could tune in anytime you wanted, 8:15, whenever.

You could also pick whichever program was on the HBO feed that month that you wanted to see.

And the way I always think is best to explain that is if you think of a show like the *Sopranos* or now it would be *Game of Thrones* and you missed last week's episode, well, then the new one's coming on tonight, but you're not caught up. So how do you -- you can't watch the new one, or maybe you don't want to watch the new one.

But if you have video on demand, you can go back and watch the one you missed, and then you can keep in that. That actually led to us being to make TV shows that had series of episodes over time where you could watch three, four, five at a time. That changed the nature of the programming, gave us an advantage there.

So to do that, that was a much bigger technical undertaking, because the cable -- any cable system that would have to do that would have to put servers in their head ends. They'd have to have a lot more executive expertise in keeping track of which shows were still in the month of April available and which not. Pretty complicated technical process of putting that out there and getting it to people's homes, not having it break down. There were things they had to do on the household end with their equipment also, depending on whether they had addressable boxes in the house or not. Pretty extensive.

On the HBO side, not really any less complicated, because we had to go license the programming rights to be able to offer all these different things on an expanded basis from what we had licensed before.

Remember, please, we got movies from third parties. Not all of our programming is original.

So that cost money for us to pay for it. That took a lot of time in affiliate negotiations to get the rights sorted out of exactly what right do we have to show your movie in April 23 times, different times to different people. All that was new.

So there was a lot more behind all that than this, but we probably shouldn't go into it all.

Q But was being vertically integrated a crucial factor in your being able to make those kinds of innovations?

A Well, absolutely, because we needed to know what was possible. We needed to know what it cost. And we never -- none of -- neither we nor the network side or the cable side knew the answers to those questions when we started. So we had to iterate.

And if we had had to negotiate to do it, I don't think we could have done it, because then the cable company would have said, well, we're not paying for this.

How do we know it's worth anything? We have to make an outlet. Why would we put in that expense? What are we going to have on this service? Is it going to be any good? So all of that.

So we did it. We didn't worry about which part of our company was going to pay for it, and then we launched it. And it was quite successful. It made people value HBO subscriptions more. It made them watch it more because they could find something they wanted.

We still didn't know who was watching when. That's another story that's still a problem today. But we at least got that far.

And then what happened when we went out -- and it made HBO more watchable, really, is that other cable operators undertook the same efforts, put in the investments, trained their systems to do it. You know, it took a while. But it did make HBO more valuable to consumers.

And then the competitors to HBO, Showtime, Starz, at the time, they decided it was good for them too. And they did it. So that's really how that came about.

Q If you build it, they will come?

A Yes.

Q Let's now turn to chapter 2, and you were describing before our break the significant headwinds in your industry, both on the advertising side, the direct-to-consumer side, and the challenges posed by a number of the large vertical companies and the efforts that your company undertook to address those challenges.

So now, let's turn to what any of that had to do with your decision to merge.

Can we begin by your telling the Court when you first met with Mr. Stephenson and just briefly how that culminated in a recommendation that you made to the Board.

A Yes.

Well, Mr. Stephenson, Randall, who runs AT&T, I had known him because we had been over the years -- he's in the business, and they're one of our distributors at Turner and HBO. So I had known him somewhat. And I talked to him occasionally, every year, about -- because we had business together, and he was a big customer. How are things going? Sometimes we were on panels together.

And in the summer of 2016, he called me in August and said, I'll be in New York. We ought to -- a lot going on in the industry. Why don't we get together -- and I said, come for lunch -- and we'll talk ever what you're doing and what we're doing and can we improve our business together.

And during that lunch, which was not -- ended up being a pretty long lunch, as we talked through what was happening on all the distributor sides, TelCo, cable, what was happening in the network side, all these new developments in digital Internet competition, it became clear to both of us that while our companies didn't overlap, that we actually had complementary assets to take advantage of these opportunities or, the other side of the coin, to meet the challenge coming from these new competitors.

And so in that lunch, we started talking about whether it would actually make sense to put our companies together.

Q And is that the decision that you ultimately reached?

A Well, yes, we did.

We didn't reach it that day. We then probably went back, I did, I think he did, and talked to our respective boards that, hey, this is a possibility; should we pursue it?

On my side, I know, yes, our Board thought we should, because they knew about these challenges and opportunities.

And so over the ensuing months, we reached an agreement to merge the companies and put these complementary capabilities together.

Q And your Board approved it?

A Our Board did approve it unanimously, I believe.

Q And what about your shareholders?
A Our shareholders approved it 98, 99 percent.
Q Now, Mr. Bewkes, in addition to the price offered by AT&T for Time Warner, can you tell the Court what your strategic reasons were for doing this deal.
A Well, there were two main reasons, and we have been talking about them.
This combination gives us, in the combined company, we hope, a good chance to compete effectively in digital advertising and to get the benefits for our networks of direct-to-consumer distribution.
Q So how does AT&T -- let me start all over again.
Dealing with the direct-to-consumer first, okay, how does this transaction allow you to address that issue?
A Well, it allows us -- because AT&T has 150, roughly, consumer relationships through all of its telephone, mobile, household, broadband, DirecTV television, but they've got lot of different --
Q You said 150. You meant 150 --
A 150 million.
Q Okay.
A Yeah. I'm sorry.
They reach a lot of American households with those electronic products. Some wireless, in addition, which is another new, very important area.

So they have all of those 150 million consumer relationships.

They have the ability to deliver video signals through all of these different platforms to those people. And so they can give a better consumer experience knowing what to offer people, which package, which bundle, what kinds of programming within those would be interesting to people.

They know who those people are. They have a lot of customer information. They have stores where they can sell packages of subscriptions. They have retail telephone call centers in the hundreds of thousands.

So they have a very large distribution infrastructure that can allow us to have our networks in front of all these people with more navigation of what we ought to offer them, how we can renew their subscriptions if they're not happy, basically, how to communicate back and forth.

There's another area, which is, the more you know about the viewers -- and that would be a pretty big sample of what AT&T had -- the more it informs your programming because you know what to -- you get a better idea of what -- you should put more of this on your network, less of that.

So it helps you to market. It helps you to program. It helps you to understand, really, how to optimize your business.

And this is true whether it's Turner network viewing or HBO viewing.

Q And what about on the second issue, the advertising? How did this transaction -- how does this transaction help you address the advertising challenges you were facing?

A Well, if you go to AT&T, in their customer relationships, they do have a two-way relationship with real people, the viewers.

And so they know what the people are watching or want to watch. They know their preferences for things. They also have other information about them. I know less about it than they do.

But it's heading in the direction of the very rich information that a Google or Facebook have, which are the two biggest competitors in digital advertising.

But also, AT&T has the ability, increasingly, to deliver a different ad to a different person on whichever of these platforms. So -- and they know which ad to deliver to which person; we don't.

So it moves us in that direction of being able to compete with the Googles and the Facebooks in this new, very fast-growing ad business and, hopefully, keep more of our advertising revenue to support our programming costs and not have it all go on the subscription side.

Q Based on your nearly 40 years of experience and your judgment, do you believe that this was the best way, this being a vertical merger with AT&T, to protect and preserve the business of Time Warner indefinitely into the future?

A Yes.

And may I add to that?

Q You may.

A It's not that we weren't trying to do some of these -- we were trying to do some of these things that we've talked about before the break on direct-to-consumer and on advertising.

But it was my judgment and that of our board's -- and we had a pretty strong agreement on this judgment, that maybe we could get there, but it's very important -- we need to get there in time, at the right scale, without inefficient cost.

And this, for us, is the best way to get where we need to go to compete in this next round and not be too late, too expensive, too risky. That's really why this is clearly better for our business.

Q Mr. Bewkes, was another strategic rationale for this deal that Turner could get more leverage to raise prices to its distributors?

A No.

Q Was that ever discussed or articulated as a reason to do this deal?

A No.

Q Had you ever had an opportunity to do a potential horizontal merger in the past?

A Yes, if we were -- yes, we had.

Q What was that?

A Well, that was two years before, in 2014. The Fox -- the News Corp. it was called at the time, Fox company, had come to us to propose putting our networks together. And I think either the main or one of the main reasons they thought that we should do this was to get more leverage when making distribution arrangements with the distributors.

I think that's what they thought. We did not agree with that. We didn't think that was the right thing to do, because it's not solving the problem we've been talking about.

And so we rejected that.

And then they actually they'll tried to impose it on us with a hostile offer, which our Board rejected. And we did not go ahead and do that.

One of the reasons, I should say -- I'm now remembering it -- that they were thinking about this and proposing this sort of thing -- and a lot of people that are observers in the industry seemed to support this idea. We at Time Warner never supported this idea -- was that the distributors at that time, mostly cable companies, were consolidating. And there was this theory that since the distributors were consolidating, the network groups ought to consolidate so they could have leverage games against each other.

We didn't think that was anything -- that's not a good idea. It's not addressing the fundamental problems consumers have. And it's not addressing what we need to do, because the future is getting our stuff everywhere over digital platforms, having it be supported by advertising, and competing with these new digital players, who even then were starting to take away subscribers and advertising.

Q So I'd like to now follow up with a few questions about -- related to that about the government's bargaining model that they have presented in this case.

The government has asserted that, in a post-merger world, Turner would be able to raise prices to distributors solely on account of the merger, because a blackout of Turner post-merger would not cost as much as a blackout of Turner pre-merger.

Now, I know you don't agree with that, but are you just aware of that assertion?

MR. SCOTT: Objection, Your Honor. It costs more to whom? The question is vague.

THE COURT: You can rephrase the question.

BY MR. PETROCELLI:

Q Are you aware of the assertion by the government that a post-merger blackout is less costly to the merged company than a pre-merger blackout would have been to Turner?

A I'm aware of that assertion.

Q And are you aware of their assertion that because of that, in a post-merger situation, Turner would risk a blackout more than it would pre-merger in order to gain more leverage against the distributor in order to get higher prices? Are you aware of that assertion?

A Yes, I'm aware of it.

Q Do you agree with that?

A No, I really don't.

No. I think --

Q Can you explain to Your Honor why you don't agree.

A I think it's ridiculous.

It's not anything how -- it's not how this works.

So if our channels, any of them, are not in some distribution offering, that's catastrophic for us. We lose a lot of money.

Q How so?

A Due to the size of most of our distributors, hundreds of milligrams of dollars.

So we try everything to stay on all of our channels, Turner, HBO, everything, to keep them on there. And that's very important to us.

If they're not on there, we're not only losing the subscriber fees; we're losing the advertising revenues. There are other problems that come from it, which is our programming supply starts to dry up, because the sports leagues don't like it if their games aren't carried wherever. The talent doesn't like it if their show isn't everywhere. So there's all kinds of problems beyond financial problems if this were to happen.

But just on the financial problem alone, we're a public company. So if we go out of distribution someplace and start losing a lot of money -- and we never know how would that'll go. Maybe permanent. Some of them threaten to do that -- then it's a catastrophe.

And so we never get the money back. It can be a chain effect if the distributors after that use it, because we're in a weakened state, to go after us too. So it really creates a whole series of risks we don't want to have.

And I've tried to explain it, since I heard this theory a year ago, to friends of mine. And the way I -- I think it's best the way to understand it, is if we have a risk that a thousand-pound weight might fall on us -- we hope it doesn't, but if that's always there, then if you said to me, well, don't worry; it might be a 950-pound weight instead of a thousand pounds, are you going to think about it differently, feel differently? Are you going to take more risk that any of that might happen to you? Absolutely not.

And there are lot of other problems that would ensue if that scenario develops. So, no, we don't -- this makes no sense to us.

Q Well, in your experience, do negotiators, either on the programmer's side or distributor's side, think of these things? Would they think that they have more leverage post-merger because if they threaten a blackout, they believe the distributor will fear it because the distributor might lose some subs to the sister company?

A No, nobody thinks like that, no network executive and no distributor.

Q Well, you were at Time Warner Cable when it was vertically integrated for about 15 years, correct?

A Yeah. Yes.

Q At any point in time, did you ever become aware of any negotiator, either on the cable side or at the Turner side, articulating this theory of added incentive or added ability to leverage a price increase?

A No. And the reason is there isn't any added ability or incentive to do that, and all of our executives know that.

Q Did you believe that you had some kind of undue price increase that you were imposing on other distributors because you were vertically integrated with Time Warner Cable?

A No.

Q And Time Warner Cable, at the time it was vertically integrated, competed with what other distributors?

A All the satellites. So DirecTV and Dish.

All of the TelCos. So Verizon and AT&T.

And in other places, certain other distributors.

We competed with numerous distributors in all of these places and time periods.

Q Is this lawsuit or the events leading up to this lawsuit the first time you've ever heard of this theory?

A Yes.

Q When you were deciding to spin off Time Warner cable, was there ever any consideration given to the fact that you might lose this competitive ability to keep prices propped up because of the vertical integration structure?

A No, because it wasn't there to begin with.

Q And once you spun off Time Warner Cable, did you observe a decrease of Turner pricing because of the disintegration?

A No.

Q In all the conversations that you've had with Mr. Stephenson and others in connection with this merger, has anyone ever suggested this theory of the government?

A No.

Q I will represent to you that the government's expert economist, who is sponsoring this theory, has testified that in the event of a Turner blackout, 12 -- permanent blackout, 12 percent of the distributors' subs would leave solely on account of the Turner blackout, and actually has given a number as high as 16 percent.

Does that sound reasonable to you?

A No, not in -- half of that wouldn't sound reasonable to me.

Q Half of 12 percent wouldn't be reasonable; is that what you're saying?

A I think 5 percent is unreasonable.

Q Based on your vast experience, almost 40 years, in the event Turner wasn't available to a distributor, do you think they would lose any subs?

A Depends what else they did. They could change their pricing, replace it with other things.

I don't think they would lose many -- they'd also be saving money.

Q Well, you have an opinion as to what a potential subscriber loss rate might be?

A Given the -- there are very rare instances of this. This doesn't happen very often, because it's very bad for any network. It's not that great for distributors, but I think they have more protection than we do in those cases.

I've never -- I don't know of any that are beyond 1 percent, less than 1 percent, maybe 2. That's about it.

Q Now, after this lawsuit was filed, you authorized the submission of a letter on behalf of Turner to all distributors, making a unilateral binding offer of arbitration together with a standstill commitment in the event of an impasse in negotiations, right?

A Yes, I did.

Q Okay. Why did you do that?

A Well, it was because of this case.

Once I understood, which took a while, what this theory was, and we were in the settlement discussions for quite a while, because we didn't think there would be any competitive issues in this merger. We thought it was pro-consumer and pro-competition. I still do. But we understood the government was saying that they had this concern.

We do not agree with it. We think it makes no sense.

But since it was their concern and since they had it as a provision in their settlement approach and they had this theory about blackouts, we thought, well, let's get rid of it, because this is a crazy theory; we're not doing it. So let's just take it out.

We also knew -- take it off the table -- that it was in the Comcast-NBC Consent Decree. We think that merger presented more questions on a vertical than ours.

So we thought if that was sufficient, which it has been, to handle that, then it's more than sufficient to handle this one, since we don't have some things that would make it even less applicable to us.

But we thought, let's just get that out of the way so that we can go ahead with the merger and bring these benefits to our network.

Q And just briefly following up on one comment you made, why did you think Comcast was potentially a more challenging than this one?

A Well, they have big broadcast network, a bunch of owned-and-operated stations.

I still think that one is fine, and I think -- I haven't seen any problems with what's happened, according to the theories of this bargaining model, that came out of that merger.

But we thought, well, if that's worked, which it has for that merger, why wouldn't it eliminate any concerns about this one?

Q And to be clear, does Turner have broadcast networks?

A No.

Q A couple final topics.

There's been another assertion by the government in this case that, if this merger goes through, the merged company will coordinate with Comcast-NBCU to harm virtual MVPDs. Are you aware of that argument that the government is making?

A Recently I've been made aware of that.

Q And do you have any views about that?

A Well, that makes no sense.

We want to be on all the virtual MVPDs.

Q Why?

A Because we need our networks carried in front of anyplace where a citizen is watching the screen. So we want to be in there. We need it for subscription revenue. We need it for advertising. That's why.

And we're better placed for that. Those bundles, they ten to have more concentrated channel offerings. They go at different, sometimes lower price points.

We have our networks at Turner much more concentrated than NBC company does. We have all of our -- most of our business, 85, 90 percent in four Turner networks.

Q Which ones?

A CNN, Cartoon Network, TNT, TBS.

Whereas, Comcast-NBC has, I think, 13 or 15.

Q How many does Viacom have?

A Viacom has 25, '6 or '7, somewhere in there.

So they have lot of networks that are marginal. We don't, by our own design, because we wanted to be in every bundle, everywhere, and in every distribution platform.

But we have another key difference, which is we have an HBO. We have an optional add-on, as we've had for 30, 40 years on top.

We have to sell HBO when we're doing it through a wholesale distributor, on top of whatever package of channels the distributor's putting into your house.

So it's better for us to sell HBO on top of a $20 package than an $80 package, where you can also buy HBO with no package at all. Just go buy it directly from a number of sources we've talked about.

But we have a different situation -- I think a better one -- than NBC, in all those respects, getting into these new skinny bundles and getting onto virtual distribution packages.

Q Are you saying that skinny bundles are good for Time Warner's business?

A Yes. Yes, they are.

Q Let me ask you one final topic. And that's the last assertion that the government's -- the third and final assertion that the government's making in this case, which is that if this merger goes through, the merged company will restrict the availability of HBO as a promotional tool with other distributors.

Do you agree with that argument?

A No.

Q Does it make sense?

A No, it does not make sense.

Q Why not?

A Because HBO's entire business, for all the 40 years I've been in it, we need to be in every outlet, and we need as many -- we'd like, we want as many people to subscribe to it as we can get.

And our efforts, when we're dealing with affiliates, are not, you know, that, yes, we've got to get them to carry the service on their system, but mostly what it's about is getting them providing incentives, getting them to agree to market it so that a lot of people in their system have HBO.

And because the penetration varies between this distributor and that distributor, we work hard at getting the laggards to raise their marketing and raise their penetration.

If we stop marketing HBO, there's monthly disconnects. Our subscriber base starts to go down. Now we're losing money. So why would we ever do that? That's self-harm.

Q And, finally, there's been some testimony about coordinating the negotiations between HBO and Turner with other distributors. Have you ever directed that the negotiations be coordinated in some way?

A Never -- we've never, for example, had an affiliate -- we have separate affiliate contracts.

Q What do you mean, "We have separate"? Explain that.

A Well, Turner's affiliate contract is quite different, dealing with many different issues than the HBO affiliate contract. So we've never had -- we have separate affiliate contracts. We have to.

So we don't have the same -- we don't have a common contract, let's say, for add-on HBO carriage versus basic cable -- we don't have that.

We don't have the same teams doing it, because they're not good at the same things and they're not aiming for the same solutions.

And there are quite different issues that come up if you're making a carriage agreement for a premium add-on like HBO versus if you're doing it for a basic cable network that needs to go into a bundle or a set of bundles that hopefully go to as many homes as you can.

Those are very different things, so we don't do that.

We have, at times, tried to make -- what we do always is we try to keep our channels on the systems, both of them. Mostly, they don't come up at the same time. So we don't coordinate the timing.

But certain cases, if we can, we would, because for those that threaten to take our channels off, we don't want them to take half of them off because they've got the other ones in their pocket. So they just divide and conquer and try to punish whichever one they choose to take distribution away from and then, therefore, pressure our revenue.

Q So has this ever happened in the past as a result of which you asked to somehow coordinate the separate HBO and Turner negotiations with the distributor.

A Yes, they're -- yes.

Q Can you give an example.

A Yeah.

The most recent -- the most recent case of that, I think -- well, the two recent cases. One of them is the Dish satellite distributor; another one is Google, YouTube putting up a new bundle.

And the Dish case -- should I just explain the Dish case?

Q Well, His Honor has heard quite a bit about the Dish case, but you can be brief about it.

A All right.

So the Turner networks were coming up in the fall of '15, I think it was.

Q 2014.

A '14. Okay.

And in that fall, having fought off the Fox offer, we were telling our investors why we should -- they should stay with us. And we said, because of the opportunities and the challenges coming out of Amazon and Netflix who are going direct to consumer, we're going to launch HBO direct to consumers. So that's the fall of 2014.

We did it with Apple helping us when we finally did it.

The Turner networks were facing a renewal with the Dish company that fall. And Charlie Ergen, who runs the Dish company, didn't like what we were doing with HBO and doing competing distribution. And so he sent the message that he was going to punish the Turner networks by taking them out of distribution.

Now, as I recall, he couldn't do all of them, because only two or three of them were up for renewal, because he had split them, again, to have more leverage against the Turner networks.

So he took some of them dark. That costs us $150 million, because while he was at it, he manufactured some billing disputes.

We ended up getting it back on, getting Turner back on a month or so, six weeks later.

We lost the money. We never got the money back.

But when we got them back on, I said, well, because you're going out publicly and saying that you may go permanently out of business with any or all of our networks, if we're going to let you do this billing dispute, you're going to pocket all this money, and we're going to test this, because HBO's coming up in the spring, let's do the whole thing together, Charlie. Let's make -- if we're going to be in business together, let's be in business across all our networks. Let's not have you always threatening to take one and punish the other. So that's basically what we did.

Q And was there a similar circumstance involving YouTube?

A Well, yes, but much more constructive.

In the YouTube case, they were launching a virtual bundle, which they had determined before they did it that they wanted to go for Millennials. They wanted a tight price point. I think it was $20 or thereabouts.

And so they were negotiating with us to get the Turner networks. HBO wasn't going to be in that bundle. It was going to be an optional add-on.

And during the course of their preparation to launch, they came back to us and said, we're not going to have room for you, because we decided, given our price point and our millennial audience target, we want the big networks, ABC, NBC, CBS, Fox, because we want the sports.

And when those companies give us their main networks, they insist, said Google to me and to our negotiators, they want all their cable channels carried. They've got a lot of them.

And so we used up all the budget for you. You're not at that level of need for us, in our judgment, and so your -- Turner networks are going to be left out.

We said, on our side, well, that's a problem for us, because you still want to offer HBO on top, but you're carrying all of the networks that compete directly with Turner, everything from NBC and Fox, like FX, USA, they all compete. Their news channels compete with ours. We're the only one in all these categories that doesn't have our networks in your new Google bundle, and you're a big company. You may make this very big. It will be the future of TV. We won't be in it.

So we're not going to let you do that and use our own premium service to market this thing and get our Turner networks out of circulation.

Q Were you able to ultimately get your Turner networks onto the YouTube virtual offering?

A Well, we weren't --thy launched without us. And then, over time -- I think it took a year. They looked at what their results were and decided that they should go for a bigger audience than Millennials, people of more -- different age groups and interests; that they should change the price point to a bigger package. The one they had didn't have sufficient, I guess, attractiveness.

And, therefore, they had room for the Turner networks and a number of other networks that they then added.

So Turner ended up, very recently, getting onto that distribution platform.

HBO is still negotiating with them. We do expect to reach a distribution deal with HBO, but we haven't yet.

Q And one last question.

There's been some recent testimony by competitors regarding if a distributor were to elect arbitration under the Turner offer, that the merged company might retaliate by withdrawing HBO or doing some mischief with HBO.

Does that make any sense to you?

A No, it does not make any sense.

Q And why is that?

A There are several reasons.

There's nothing wrong with using the arbitration provision -- if the arbitration provision gets us to a deal where our networks are carried, we're -- that our first objective, so good.

If the result of the arbitration is a carriage arrangement that we wish it was better, so be it. It is what it is. There would be no point then in punishing ourselves by taking our HBO subscribers down and hurting the HBO business. That just makes no sense.

Q Now, you are aware that HBO is not part of the arbitration offer?

A Yes.

Q And can you explain to the Court why it isn't.

A Well, there's no reason for it.

There's -- in real life, and I believe evidence in here undisputed, HBO's aim is to get higher penetration and get its wholesale net effective rate down, not up, because that's how HBO can attract consumers, given it's competing with Netflix, Amazon, and all these others. So there's no -- that makes no sense.

Secondly, as I understand it, the government has not said there's any issue with HBO trying to go dark or doing these things. So I don't think there's a basis for it.

And, finally, if the distributor wants to do something with it, they can always get HBO -- if HBO -- if a distributor decided not to carry HBO, which we will work hard that they didn't do that, it wouldn't affect at all what they're selling in basic cable packages, because you don't need to have a basic cable package to get HBO.

You can buy HBO from Apple, Amazon, HBO, and an increasing number of sources. So there's no reason that HBO distribution should affect the distributor in terms of Turner distribution.

MR. PETROCELLI: Thank you. Nothing further, Your Honor.

THE COURT: All right. Well, it's the luncheon recess time, so I don't see any sense in starting cross now.

Why don't we take the luncheon recess, reconvene at 2:30.

You're a witness under oath. So you're not at liberty to discuss your testimony so far or what it might be when you return, and stay independent of all others. And we'll see you back here at 2:30.

THE WITNESS: Thank you.

THE COURT: Okay.

DEPUTY CLERK: All rise.

This Honorable Court will stand in recess until the return of court.

(Proceedings concluded at 12:55 p.m.)

C E R T I F I C A T E

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

Date: April 18, 2018________ /S/__William P. Zaremba______

William P. Zaremba, RMR, CRR