

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CV No. 17-2511
vs.	:	
	:	Washington, D.C.
	:	Monday, April 23, 2018
AT&T, INC., ET AL.,	:	2:45 p.m.
	:	
	:	Day 18
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 Government:

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P-R-O-C-E-E-D-I-N-G-S

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

THE COURT: Call your next witness.

MR. CONRATH: Your Honor, may we approach for one quick follow up thing?

THE COURT: Yes.

(Sealed bench conference.)

MR. CONRATH: [REDACTED]

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[REDACTED]

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THE COURT: [REDACTED]

MR. CONRATH: [REDACTED]

THE COURT: [REDACTED]

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MR. CONRATH: [REDACTED]

THE COURT: [REDACTED]

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MR. CONRATH: [REDACTED]

THE COURT: [REDACTED]

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MR. CONRATH: [REDACTED]

THE COURT: [REDACTED]

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MR. PETROCELLI: [REDACTED]

[REDACTED]

[REDACTED]

MR. CONRATH: [REDACTED]

[REDACTED]

[REDACTED]

MR. PETROCELLI: [REDACTED]

THE COURT: [REDACTED]

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MR. CONRATH: [REDACTED]

THE COURT: [REDACTED]

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MR. CONRATH: [REDACTED]

1 THE COURT: [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 MR. CONRATH: [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 MR. PETROCELLI: [REDACTED]

8 MR. CONRATH: [REDACTED]

9 (Open court.)

10 MR. CONRATH: Mr. Schwingler will be handling our  
11 next witness, Your Honor.

12 THE COURT: All right.

13 MR. PETROCELLI: Mr. Raiff will be handling the  
14 defense of the witness, Your Honor, thank you.

15 THE COURT: All right.

16 Call your witness.

17 MR. SCHWINGLER: United States calls Professor Susan  
18 Athey as a rebuttal expert.

19 And Your Honor, we've provided Professor Athey with  
20 copies of her reports in case they may be of assistance.

21 GOVERNMENT WITNESS SUSAN C. ATHEY SWORN

22 MR. SCHWINGLER: May I proceed, Your Honor?

23 THE COURT: All right.

24 DIRECT EXAMINATION

25 BY MR. SCHWINGLER:

1 Q. Good afternoon, Professor Athey.

2 A. Good afternoon.

3 Q. Please state your name for the record?

4 A. Susan Athey.

5 Q. And Professor Athey, are you here today to testify about  
6 the ad growth in content intelligence synergies that defendants  
7 claim will result from their merger?

8 A. Yes.

9 Q. Could you start by describing your educational background  
10 for His Honor?

11 A. Yes. I have Bachelor Degrees in economics, computer  
12 science and mathematics from Duke University, and a Ph.D. in  
13 economics from Stanford.

14 Q. Where are you currently employed?

15 A. I'm the economics of technology Professor at the Stanford  
16 Graduate School of Business.

17 Q. Could you walk us through the various academic positions  
18 you've held throughout the years leading up to your current  
19 job?

20 A. Sure. I have spent about six years each as an economics  
21 Professor at M.I.T., Harvard and Stanford.

22 Q. In your current position at Stanford Business School, do  
23 you teach any classes related to advertising?

24 A. Yes. I teach classes to MBAs, called advertising and  
25 monetization, the economics of digital platform markets and

1 market places.

2 Q. You mentioned the economics of digital platform markets.

3 Could you briefly explain what a platform market is?

4 A. Sure. A platform is a business that brings together two  
5 different types of constituents like buyers and sellers.

6 So an example might include eBay that brings together small  
7 sellers and small buyers, Airbnb or Uber.

8 Q. Do any of the classes you teach involve data?

9 A. Yes. So I teach classes to executives about operating  
10 data driven businesses, using data in business strategy. As  
11 well as using machine learning and artificial intelligence for  
12 businesses.

13 I also teach classes to Ph.D. students about machine  
14 learning and econometrics which is basically about using  
15 statistics to analyze large data sets.

16 Q. What fields do you conduct your research?

17 A. A lot of my research falls into the broad field of  
18 industrial organization. Within that field the few sub fields  
19 including the economics of platforms, the impact of technology  
20 and digitization on markets including media markets and  
21 advertising.

22 Q. Could you just briefly define industrial organization?

23 A. Yes. So industrial organization is the study of market  
24 structure and the sources of market power. Horizontal and  
25 vertical integration, firm behavior and firm organization.



1 Q. So you've listed a few sub topics of specialization.

2 Have you also published on the economics of context?

3 A. Yes, I have.

4 Q. Have you served on any editorial boards?

5 A. Yes. Over the years I've served as associate editor for  
6 most of the top economic journals including for example, the  
7 RAND Journal of Economics.

8 Q. Have you received any awards for your scholarship?

9 A. Yes. In 2007 I received the John Bates Clark Medal which  
10 is awarded by the American Economic Association to the  
11 economist under the age of 40 who's made the greatest  
12 contributions to the field.

13 I'm also an elected member of the National Academy of  
14 Sciences which is one of the highest honors for an American  
15 scientist.

16 I've also received some other awards like recently I  
17 received the Jean-Jacques Laffont prize from the Institute of  
18 Industrial Economics for a world renowned scholar.

19 Q. I'd like to set aside academics for a moment.

20 Could you briefly describe for the Court your business  
21 experience?

22 A. Yes. So I spent about six years as the consulting chief  
23 economist for Microsoft. I also served on boards of directors  
24 for technology firms. I just joined my fourth board a few  
25 weeks ago.

1 I advise to venture capital companies and I also do  
2 consulting for some small startups as well as large businesses  
3 about their data and platform strategy.

4 Q. Could you describe some of the experience you have in the  
5 business world with platform businesses?

6 A. Yes. So three of the four companies where I serve on the  
7 board are platform businesses. And then at Microsoft almost  
8 all of my work concern platforms particularly their advertising  
9 platforms.

10 THE COURT: What are the other boards you serve on?

11 THE WITNESS: Expedia, Lending Club, A Place for  
12 Rover, and Ripple.

13 THE COURT: Microsoft too?

14 THE WITNESS: No, I'm not on the board of Microsoft.  
15 I was the consulting chief economist there for six  
16 years.

17 BY MR. SCHWINGLER:

18 Q. Professor Athey, have you advised businesses on strategies  
19 relating to starting platforms?

20 A. Yes, I have. So the, in my business consulting work for  
21 example I considered strategy around programmatic television  
22 advertising platforms.

23 Q. Have you personally been involved in designing a platform  
24 business?

25 A. Yes. When I started at Microsoft their search engine was

1 very young and one of my main responsibilities was to help  
2 operate the search advertising platform, to evaluate it's means  
3 of improvement including evaluating sources of data, the  
4 benefits of the data and improving the search advertising  
5 platform.

6 And also strategic partnerships and large business deals  
7 that would for example induce other websites to sell their  
8 advertising inventory through Microsoft's advertising platform.

9 Q. I'd like to change topics for a moment.

10 Could you describe for the Court your business experience  
11 with television advertising?

12 A. Yes. The companies where I serve on the board are very  
13 large advertisers and they advertise across a range of media  
14 ranging from digital to television.

15 Of course, I also teach about television in my advertising  
16 and monetization course including the impact of recent changes  
17 in industry as they relate to television.

18 Q. Could you describe the role of data in your work?

19 A. So data is part of almost everything that I do. I  
20 mentioned that data was a critical part of my work at  
21 Microsoft. And it's a key source of competitive advantage for  
22 all of the businesses that I work with.

23 My research is also intimately involved with data. I  
24 develop statistical methods that can be used on large data sets  
25 and apply them to consumer data sets including web browser

1 behavior, individual consumer purchase behavior, mobile  
2 location data and other types of large data sets.

3 Q. So we discussed platforms, television advertising and  
4 data.

5 Do you have any experience analyzing mergers?

6 A. Yes, I do. I've served as a consulting expert on a  
7 variety of vertical and horizontal matters involving  
8 advertising platforms.

9 As part of that I've presented to regulators around the  
10 world and produced analyses for them including the Department  
11 of Justice, the Federal Trade Commission, the European  
12 Commission, and a variety of state and international agencies.

13 Q. Professor Athey, have you ever testified as an expert?

14 A. Yes, I have.

15 Q. In what context?

16 A. I was retained by the FTC for a matter involving digital  
17 advertising. And I recently testified as an economic expert in  
18 a case involving a tax matter.

19 Q. Have you been qualified to testify as an expert in  
20 industrial organization?

21 A. Yes, I have.

22 Q. Have you been qualified to testify as an expert in the  
23 economics of advertising platforms?

24 A. Yes.

25 Q. Has any court ever excluded you from testifying as an

1 expert?

2 A. No.

3 MR. SCHWINGLER: Your Honor, the United States offers  
4 Professor Athey as an expert in industrial organization and the  
5 economics of advertising platforms.

6 THE COURT: What court were you qualified in  
7 industrial organizations as an expert?

8 THE WITNESS: I'm sorry?

9 THE COURT: What court?

10 THE WITNESS: Oh, in the tax court in my recent  
11 testimony.

12 THE COURT: In industrial organizations?

13 THE WITNESS: Yes.

14 THE COURT: That was a U.S. Tax Court Judge?

15 THE WITNESS: Yes.

16 THE COURT: What is the Judge's name?

17 THE WITNESS: It's slipping my mind as I sit here.

18 THE COURT: You testified in the trial?

19 THE WITNESS: Yes.

20 THE COURT: And the economics of what was it?

21 MR. SCHWINGLER: The economics of advertising  
22 platforms.

23 THE COURT: Same court, same judge?

24 THE WITNESS: No. That was in FTC court.

25 THE COURT: That was in a FTC proceeding,

1 administrative proceeding?

2 THE WITNESS: Yes, exactly.

3 THE COURT: So never in an Article III Court. Never  
4 been qualified in an Article III Court?

5 THE WITNESS: No.

6 THE COURT: What year did you get your Ph.D.?

7 THE WITNESS: In 1995.

8 THE COURT: Defense position?

9 MR. RAIFF: Yes, Your Honor.

10 THE COURT: Do you have questions?

11 MR. RAIFF: No, Your Honor.

12 We do have objections to the extent she's being offered  
13 as an expert on efficiencies and to the extent she's being  
14 offered on an expert on content intelligence.

15 THE COURT: Step down.

16 (Witness leaves the stand.)

17 (Sealed bench conference.)

18 MR. RAIFF: [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 THE COURT: [REDACTED]

22 MR. RAIFF: [REDACTED]

23 [REDACTED]

24 THE COURT: [REDACTED]

25 MR. SCHWINGLER: [REDACTED]

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THE COURT: [REDACTED]

MR. RAIFF: [REDACTED]

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MR. SCHWINGLER: [REDACTED]

MR. RAIFF: [REDACTED]

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THE COURT: [REDACTED]

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MR. SCHWINGLER: [REDACTED]

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THE COURT: [REDACTED]

MR. SCHWINGLER: [REDACTED]

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MR. RAIFF: [REDACTED]

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MR. SCHWINGLER: [REDACTED]

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MR. RAIFF: [REDACTED]

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MR. SCHWINGLER: [REDACTED]

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MR. SCHWINGLER:

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MR. SCHWINGLER: [REDACTED]

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THE COURT: [REDACTED]

MR. RAIFF: [REDACTED]

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MR. RAIFF: [REDACTED]

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MR. SCHWINGLER:

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THE COURT:

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[REDACTED]

MR. RAIFF:

[REDACTED]

THE COURT:

[REDACTED]

1 (Witness resumes the stand.)

2 (Open Court.)

3 THE COURT: The Court will find her an expert in  
4 industrial organizations and the economics of advertising  
5 platforms. You may proceed.

6 MR. SCHWINGLER: Your Honor, the United States, the  
7 witness may reference Diversion 41 document which is DX 658 and  
8 then DX 658 A which is that one page excerpt that Mr. Stankey  
9 testified about.

10 May I approach and provide her copies?

11 THE COURT: Sure.

12 THE WITNESS: Thank you.

13 MR. SCHWINGLER: Your Honor, I have extra copies if  
14 the Court would like some as well.

15 THE COURT: I got so much up here, I don't need it.

16 MR. SCHWINGLER: May I proceed, Your Honor?

17 THE COURT: Go right ahead.

18 BY MR. SCHWINGLER:

19 Q. Professor Athey, what was your assignment in this matter?

20 A. So my assignment was to provide an economic analysis of  
21 certain synergies related to advertising revenue and content  
22 intelligence.

23 Q. Which synergy specifically did you assess?

24 A. So with reference to the Exhibit DX O 65 5A, the ad growth  
25 synergy and the content intelligence synergies.

1 Q. As a very high level what are your opinions in this  
2 matter?

3 A. So my opinion is that these synergies are neither merger  
4 specific.

5 MR. RAIFF: Your Honor, can we approach?

6 It isn't consistent with the bench conference. We  
7 object to the extent she's making an ultimate conclusion on  
8 what is merger specific and what's verifiable.

9 THE COURT: All right, overruled.

10 THE WITNESS: So my opinion is that the revenue  
11 synergies that I analyzed are neither merger specific nor  
12 verifiable.

13 BY MR. SCHWINGLER:

14 Q. We'll get into the details in a moment.

15 Could you briefly describe the framework you applied in  
16 analyzing these revenue synergies?

17 A. So I used the standard framework applied by economists to  
18 these problems. So a synergy would be considered merger  
19 specific, if it can be attained with the merger but cannot be  
20 attained without the merger.

21 And so for example, if there are other practical methods to  
22 achieve the synergies, they wouldn't be merger specific.

23 For verifiability, the synergy would be verifiable if it  
24 can be objectively verified by reasonable means both in terms  
25 of likelihood as well as magnitude.

1       So for example, if a synergy is speculative, it wouldn't be  
2 verifiable.

3 Q.   Professor, what materials did you consider when you  
4 analyzed these claimed synergies?

5 A.   So I started with the merger planning document and the  
6 number summarizing the synergies and then I considered all of  
7 the materials that were provided by the defendants to justify  
8 those synergies.

9       Beyond that I looked at business documents from the  
10 regulatory business as well as depositions that pertained to  
11 those synergies and I conducted my own industry research. And  
12 all of those materials are described in my report and my  
13 materials considered.

14       There were also expert reports that were prepared to  
15 justify those synergies. Those experts, two experts did not  
16 end up testifying for the defense.

17       And then subsequent to that I reviewed portions of trial  
18 testimony that are relevant to the efficiencies.

19 Q.   You referenced a core merger planning document, is that DX  
20 658?

21 A.   Yes, it is.

22 Q.   Let's start with the ad growth synergies. What are the  
23 two main types of revenues that fit under this category?

24 A.   So there are two big buckets of ad growth synergies. The  
25 first pertain to increasing the revenue for certain data driven

1 products that Turner sells that they already have. They're  
2 products that already exist.

3 The second category of revenue synergies pertain to  
4 programmatic ad platform that Mr. Stankey described last week.  
5 This is a brand new business that doesn't yet exist.

6 Q. Let's start with the first category of Turner ad revenues.  
7 And we will cover the platform later.

8 Just briefly, what is your understanding of the defendant's  
9 claims with respect to Turner ad revenues?

10 A. So the Turner ad revenues come from expanding the sale of  
11 certain products that Turner sells. So today most of Turner's  
12 ad sales are sold based on the broad demographic categories of  
13 the viewers of certain shows.

14 Turner also sells a product that uses additional data for  
15 targeting and that basically allows advertisers to select their  
16 programs based on finer grand demographics. That product is  
17 sold at a premium and the synergies involve a selling more of  
18 that product than is sold today.

19 Q. Are defendants claiming synergies for both traditional  
20 linear TV and TV distributed over the internet?

21 A. Yes.

22 Q. Without saying the specific number which is confidential,  
23 about how much money are we talking about for this category of  
24 synergy?

25 A. So revenue scaling up to several hundred million dollars

1 per year by 2020 and continuing on an going basis.

2 Q. At a high level what's the basis for your opinion that  
3 these claimed increases in ad revenues are not merger specific?

4 A. So the defendants haven't shown that a merger is necessary  
5 to improve Turner's ad revenues, even if the value of AT&T data  
6 for that purpose had been shown.

7 Furthermore, they haven't evaluated the benefits of AT&T's  
8 data above and beyond the data that's available today.

9 And finally, if this is really as valuable as the  
10 defendants claim, so if it's really several hundred million  
11 dollars available from bringing this AT&T data to Turner  
12 inventory, the parties would be highly incentivized to find a  
13 way to make a deal rather than walking away and leaving all of  
14 that money on the table.

15 Q. Professor, what economic principles are relevant to  
16 assessing whether this category of synergy is merger specific?

17 A. So just at a very high level economic theory says that if  
18 two parties can come together and create a lot of value that  
19 they should find a way to make an agreement. They should find  
20 a way to split the surplus rather than again walking away and  
21 leaving all of that money on the table.

22 Q. How does that principle apply to the claimed increase in  
23 Turner ad revenues?

24 A. So in this particular case, we're talking about hundreds  
25 of millions of dollars of revenue and so they would be highly



1 motivated to really do what it took to work out how to split  
2 the surplus.

3 Q. The Court has heard some testimony about bargaining  
4 frictions or contracting frictions.

5 Could you explain what a contract friction is?

6 A. Just to start with if you are going to make a contract  
7 particularly about data, you will need to do the work to write  
8 down all of the conditions in the contract that specify the  
9 relevant contingencies. Exactly which data is going to be  
10 produced, on what time interval, the quality of the data, what  
11 happens if the contract was terminated and so on. And what  
12 happens if something about the data changes.

13 So that can be a lot of work, but that's the work that you  
14 would do to set up a contract for something complicated.

15 Q. Are contract frictions common in data transactions?

16 A. Yes. So every data transaction would need to overcome  
17 these frictions, but data contracts are ubiquitous. They are  
18 used everywhere in the advertising industry and even in this  
19 case there are dozens of examples of data contracts involving  
20 the parties even.

21 So even though these frictions exist, they are also  
22 overcome on a regular basis and processes and approaches to  
23 overcoming those are commonly used.

24 Q. Is uncertainty about the value of the data a type of  
25 friction that is important to consider?

1 A. Yes. So if you're buying and selling data that's an  
2 example of a good that you might need to try out before you  
3 understand the value of it.

4 And that's going to be again common across all of the  
5 different types of data transaction. Any time someone buys  
6 data for the first time, they're going to face uncertainty  
7 about what the value is.

8 But again, data contracts are ubiquitous in industry and so  
9 people then finding some ways to overcome those frictions.

10 Q. Short of merging with the company across the table from  
11 you, are there any practical ways that the firm could establish  
12 the value of its data?

13 A. Yes. So there's a number of practical alternatives and  
14 these are the alternatives that are regularly used in this  
15 industry.

16 So when it's a small number of firms they can engage in  
17 things like revenue sharing or profit sharing. They can also  
18 write flexible contracts where the contracts can adjust to new  
19 information that comes out.

20 But probably the most common way of salvaging the value of  
21 data is just to do trials or pilots.

22 Q. Could you just briefly explain for His Honor how a typical  
23 trial or pilot might work?

24 A. Sure. So the most common way that data contracting works  
25 is that the buyer really buys a subscription to the data. They

1 pay a monthly or annual fee to continue to access and use the  
2 data and receive new deliveries of data.

3 So in that type of subscription model what a pilot or trial  
4 would look like is a discount on the initial subscription value  
5 or even a free trial.

6 And for a profit maximizing firm offering a subscription  
7 they're going to consider that stream of subscription revenue,  
8 that's the lifetime value of the customer.

9 And a profit maximizing firm trying to attract a customer  
10 and get that life time value finds it profitable to offer an  
11 initial period even for free in order to prove the value of its  
12 product. And of course, this is a very common practice even  
13 outside of data.

14 Most products that require a consumer to experience them  
15 before knowing the value will be introduced with, you know,  
16 free trials, or when you buy software it will have a trial  
17 period or initial subscription for free.

18 Q. Professor Athey, based on your experience and your review  
19 of the record in this case, do you have any reason to believe  
20 the methods that you just described would not work in  
21 establishing the value of AT&T's data?

22 A. No. This is what you would expect as a start up cost if  
23 you were going to go out and try to sell the data product. You  
24 would expect to follow the normal business practices of  
25 offering introductory trials and pilots and really doing what

1 it takes to establish the value of the product.

2 Anticipating that they, when people see the value you'll  
3 get that future, that future value. Again, these types of  
4 arrangements are really ubiquitous in this industry and  
5 factually for these types of data.

6 Q. Now other than what you've discussed already, are there  
7 any other reasons why your view is that the Turner advertising  
8 revenue synergies are not merger specific?

9 A. Yes. So far, we've been talking from the perspective of  
10 AT&T as a seller of data and the things that they could do to  
11 get people to buy their product.

12 For the synergies to be merger specific we also have to  
13 consider the perspective of the buyer. If the buyer could find  
14 alternative sources other than merging to get data to improve  
15 its advertising revenue, then the synergies would not be merger  
16 specific.

17 Q. Have defendants established that AT&T's data would in fact  
18 provide incremental value to Turner over alternative sources  
19 available?

20 A. No, they have not.

21 Q. What's your basis for that?

22 A. So there's a variety of opportunities for Turner to buy  
23 additional data for the purposes of targeting. They are  
24 already offering an ad product that uses a variety of data  
25 sources for incremental targeting and there are other data

1 sources for sale even using similar set-top box data from  
2 millions of consumers that can be used to provide additional  
3 targeting for advertising for programmers.

4 Q. And does the merger planning document that AT&T produced  
5 analyze the value of AT&T's data relative to these alternative  
6 sources?

7 A. No. The merger planning document just starts from where  
8 Turner's current position and doesn't evaluate any additional  
9 data source that they might acquire beyond what they had at the  
10 time of putting forward the document.

11 Q. Professor, did you review Mr. Stankey's testimony last  
12 week that the merger is necessary to achieve all of the  
13 synergies including the categories you analyzed?

14 A. Yes.

15 Q. And what's your response to that testimony?

16 A. So I understand that Mr. Stankey's statement, but he  
17 didn't explain why. He didn't explain why these other  
18 practical methods that are widely used wouldn't work in this  
19 circumstance.

20 And so he didn't really address the questions about  
21 practical alternatives.

22 Q. Did Mr. Stankey's testimony cause you to change your  
23 opinion on merger specificity in any way?

24 A. No.

25 Q. Let's turn to verifiability and we'll still on the Turner

1 advertising.

2       What's the basis for your opinion that these Turner ad  
3 revenues are not verifiable?

4 A.    So I started by studying the documents that the defendants  
5 put forward including what they provided to support their  
6 numbers as well as the ad records that were also put forward in  
7 support of numbers.

8       When I dug in I saw that the numbers here were merely  
9 assumptions and there was no meaningful analysis underlying the  
10 magnitude that were put forward.

11 Q.    Could you give an example for His Honor of an assumption  
12 that was not justified in your view?

13 A.    So the lion share of the synergies come from improved  
14 revenue from additional targeting for linear TV.  So again,  
15 linear TV is sold using these broad targeting buckets and the  
16 special product they're selling now includes additional data  
17 and allows advertisers to target more finely.

18       That product is sold at a large premium over the base line  
19 product.  So all of the synergies around this product come from  
20 the assumption that they're going to sell dramatically more of  
21 this product without lowering the price.

22       So going from perhaps low single digits of adoption to more  
23 than 40 percent of customers adopting this product without  
24 changing the price as a result of the merger as a claim.

25 Q.    How did defendants arrive at those numbers?

1 A. So they appeared as simply to be assumptions. There's not  
2 an analysis underlying the claims about the additional uptake  
3 of this product.

4 In particular, what we haven't seen is that any analysis of  
5 which customers would actually see that big of value. And to  
6 see why we would need such an analysis, the value of this  
7 additional targeting could vary a lot from customer to  
8 customer.

9 So a lot of the biggest TV advertisers are using TV because  
10 they want to reach a very broad audience. So it's an open  
11 question whether it would be twenty percent more valuable for  
12 them to more finely target and particularly the way that  
13 they're targeting is just by picking shows so that they would  
14 see a twenty percent greater efficiency by better picking which  
15 shows reach their target audience.

16 And there wasn't an analysis of how many firms would,  
17 would, could use that or the potential efficiencies from  
18 different segments of firms for example.

19 Q. Let's turn to this programmatic ad platform for a few  
20 minutes.

21 Before we start, could you explain for His Honor just what  
22 a programmatic ad platform is, how it works?

23 A. Sure. So programmatic just basically means automated.  
24 That word can be used in a variety of ways. But here for these  
25 purposes it's automated.

1       An ad platform is something, a platform for buying and  
2 selling ads where the sellers of ads or like programmers or  
3 distributors would come together with advertisers to buy the  
4 ads. So the programmatic ad platform is an automated way to do  
5 that.

6 Q.    Is that how most television ads are bought and sold today?

7 A.    No. So today the majority of linear television  
8 advertising is bought and sold at what's called the upfront.

9       So the upfront, the programmers and the advertisers all  
10 come to New York, they're stars, they get to hear about the new  
11 show, and then they buy and sell the ads based on the  
12 demographic of who is watching the shows.

13       After those are over throughout the year there's additional  
14 direct sales called scatter between the programmers and the  
15 advertisers throughout the year.

16 Q.    So how does this ad platform that AT&T wants to make fit  
17 into this process?

18 A.    So as I mentioned today, the buyers and sellers are  
19 connecting directly. They are directly contracting over the  
20 ads and they're directly delivering the video.

21       So the programmatic ad platform would insert itself as a  
22 middleman between those relationships. There would be a  
23 middleman between the programmers and distributors and the  
24 advertisers for automated buying and selling.

25 Q.    Is there anything like this in the market for television



1 advertising today?

2 A. No. So the, what this platform is hoping to do,  
3 accomplish, is to attract the inventory from distributors as  
4 well as programmers and earn a commission on that inventory.

5 We have not seen any programmatic platforms like this gain  
6 wide adopting in the industry for programmers and distributors  
7 to sell their inventory.

8 Q. And I'd like to turn to the actual synergy claims and just  
9 very briefly so we know what we're talking about.

10 What types of revenues are defendants claiming will result  
11 from this platform?

12 A. So there's two types of revenue included in the synergy  
13 claim. The first are the commissions that are charged when the  
14 platform intermediates the sales between advertisers and  
15 programmers and distributors.

16 The second is there's a type of advertising called  
17 addressable advertising and the claim is that when other  
18 distributors bring their addressable inventory to the platform  
19 so there's an increase in addressable inventory available on  
20 the platform, that will help AT&T sell its own addressable  
21 inventory and AT&T will sell more of it.

22 Q. I'm not sure we have had a definition for addressable yet.  
23 So briefly could you explain what it means to have an  
24 addressable ad?

25 A. Sure. So for addressable ads two people might be watching

1 the same show at the same time. But one of them comes from a  
2 high income household and another from a low income household  
3 and those two people might see different ads on the same  
4 program at the same time.

5 Q. For both types of revenues from this platform, what's your  
6 opinion about these claimed synergies?

7 A. So my opinion is that they're neither merger specific nor  
8 verifiable.

9 Q. Let's start about merger specificity. Why are these not  
10 merger specific?

11 A. So to build a platform like this and make it successful,  
12 it does require overcoming a variety of obstacles.

13 But there's no evidence that the, the merger is necessary  
14 for the firm to overcome those obstacles or that it  
15 substantially increases the likelihood of success of the  
16 platform.

17 Q. Did you review Mr. Stankey's testimony last week where he  
18 talked about using Turner's ad inventory to get the platform  
19 started and prove that it works?

20 A. Yes. So he's referring to a concept of seed inventory and  
21 seed inventory would be the initial inventory on the platform  
22 that would help attract the first advertisers to the platform.

23 Q. And based on your experience with the platform businesses,  
24 is a merger the only way to acquire seed inventory?

25 A. No, it's not. A variety of ad platforms have started

1 without, without a merger instead by forming contracts to  
2 attract the first inventory onto a platform.

3       These are commonly used practices across industries but  
4 particularly in advertising. And even the, in some of the  
5 ordinary course, I'm sorry, in the merger planning documents  
6 that I reviewed, these types of practice, the number of  
7 contractual practices were proposed that could be used to  
8 attract additional inventory to the Turner, to the AT&T  
9 platform.

10 Q.    Could you give His Honor a few examples of common  
11 contractual arrangements that can be used to acquire seed  
12 inventory?

13 A.    Sure. If you're going to come and sell something on a  
14 platform instead of your existing alternatives, you are going  
15 to be worried about whether you will get a good price for it  
16 and whether you'll make as much money as you would in your  
17 alternatives. That's the big problem.

18       If you are a platform you are hoping that if you succeed  
19 you'll see a big stream of revenue. And the platform is going  
20 to enjoy that.

21       So as a profit maximizing platform you're going to be  
22 willing to bear some of that risk for the initial customers to  
23 get them to come.

24       So there's some very simple ways to do that. One of the  
25 first is a revenue guarantee. So you basically tell the seller

1 they'll, you'll guarantee them a minimum amount of revenue when  
2 they sell through your platform, but then they can keep the  
3 upside or share in the upside.

4 Another way to do it just to simplify things further is the  
5 platform can actually buy inventory and that removes all of the  
6 risk from the partner. And then sell it on the platform.

7 So this aligns the incentives of the platform to do a good  
8 job monetizing the revenue and it shifts the risk onto the  
9 platform who will ultimately bear the benefits if the platform  
10 succeeds.

11 Q. Based on your experience with platforms and your review of  
12 the record in this case, do you have any reason to believe that  
13 those alternative arrangements wouldn't work here?

14 A. No. So just to start with AT&T actually already has a  
15 large amount of inventory and so just putting AT&T's inventory  
16 on the platform already means that if advertisers came, they  
17 would have something to buy.

18 And then these techniques again are commonly used in  
19 advertising and they were proposed in the merger planning  
20 document as the type of techniques that would attract  
21 additional inventory onto the platform after the merger.

22 Q. Let's turn to verifiability for this ad platform.

23 At a very high level, why are the revenues from the ad  
24 platform in your view not verifiable?

25 A. So for this category all of the synergies come from a

1 brand new product. So introducing any new product is risky.

2 Introducing a platform that has to bring together both  
3 buyers and sellers is especially risky.

4 Then finally, in the TV industry putting forward this type  
5 of platform is particularly risky.

6 Q. And what has to happen for defendants to pull this off?

7 A. So a whole bunch of things have to happen. First, they  
8 just have to build it, so they have to build the technology.  
9 They have some piece of it today.

10 They would have to build others and they might also need to  
11 do some acquisitions to get other components of the technology  
12 to just stand up to the platform.

13 Once the platform is built then comes sort of the greater  
14 challenges. They need to convince both buyers and sellers to  
15 participate in the platform.

16 So generally when you speak about the economics of  
17 platforms, they're going to create the most value. When, it's  
18 hard for buyers and sellers to interact without the platform  
19 when there's lots of buyers and sellers like on eBay.

20 They might have trust problems or coordination problems in  
21 figuring out how to interact with one another. They might need  
22 help with payment.

23 So those types of services need the platform to add a lot  
24 of value and firms don't, the participants don't need the  
25 platform because they are getting a lot of value.

1       In this industry we have kind of the opposite scenario  
2 where we have a lot of concentration on one side of the market.  
3 You know, just a handful of programmers and distributors who  
4 control most of the inventory, so it's extreme concentration on  
5 one side of the platform.

6       On the other side of the platform there's maybe two hundred  
7 advertisers that account for about two-thirds of the  
8 advertising revenue. So that's also highly concentrated  
9 relative to most commercial platforms.

10       So just concentration on one side of the market would be  
11 sufficient to create risk of people going around the platform.  
12 But with extreme concentration on one side and concentration on  
13 the other, it can be very difficult to induce people to come to  
14 your platform and pay a commission especially if they already  
15 have established relationships and they've already sort of  
16 solved the set up problems and coordination problems of  
17 contracting directly.

18       Then a final thing they need to pull off is they actually  
19 need to convince their competitors to do this. So if AT&T was  
20 standing up alone, they would already be trying to induce their  
21 competitors on the distribution side to contribute inventory  
22 like the addressable inventory.

23       If the firms merged then all of the sources of inventory  
24 are competitors to the merged entity. The programmers are  
25 competitors of Time Warner, the distributors are competitors of

1 AT&T.

2       So in an environment where they have pretty good  
3 alternatives, it may be especially difficult to get them onto  
4 the platform.

5 Q.   Professor, has anyone tried to create a similar platform  
6 in the past?

7 A.   Yes.   So there have been a few attempts.   For example,  
8 Google which has had a lot of success in creating advertising  
9 platforms for example in search or banner ads created something  
10 called Google TV in 2007 which was intended to be a  
11 programmatic platform similar to this one.

12       They shut that down in 2012 and that was partly due to the  
13 types of concerns that I've raised before that the participants  
14 didn't see the value of going through a platform.

15 Q.   To circle back on one point and then we'll move on to the  
16 next topic.

17       You mentioned you need to acquire inventory from the  
18 defendant's competitors.   Have you seen any evidence in the  
19 record suggesting that AT&T or Time Warner competitors are  
20 likely to contribute inventory to this platform?

21 A.   I have not seen analysis or evidence to that affect.

22 Q.   Of the revenue synergies attributed to this ad platform,  
23 what portion depend upon the contribution of inventory from  
24 AT&T and Time Warner's competitors?

25 A.   So all of the synergies from the platform depend directly

1 on the contributions of the competitors.

2 Q. Professor Athey, let's move onto content intelligence.

3 And before we get into the synergy claims, could you  
4 briefly describe for the Court what content intelligence means  
5 as defendants use that term?

6 A. Sure. Content intelligence is basically using data to  
7 make content better. And so here we are talking about applying  
8 AT&T's data to improve the content of Time Warner.

9 Q. I direct your attention to page 114 of DX 658. This is  
10 the version 41 document.

11 A. Okay.

12 Q. And can you confirm for the Court that the three  
13 categories of synergies are revenues on this page are the  
14 categories of content intelligence that you analyzed?

15 A. Yes. So the three categories are content acquisition and  
16 syndication which basically means making more money on the  
17 syndication of shows like reruns.

18 Second is scheduling optimization. So that's using data to  
19 figure out which programs should come after which other program  
20 to keep people from turning off the TV.

21 The third is creative development. That's basically using  
22 data to pick STARZ or make a movie that people would like more.

23 Q. Are these three categories are these the ones that the  
24 defendants went ahead and actually quantified?

25 A. Yes, that's correct.



1 Q. Are all three of these categories based on the application  
2 of AT&T data to Time Warner content?

3 A. That's correct.

4 Q. Again, without getting into the specific numbers which are  
5 confidential, about how much money do defendants claim they'll  
6 make through these content intelligence synergies?

7 A. So revenues rising to a couple of hundred million dollars  
8 per year by 2020 and continuing on an ongoing basis.

9 Q. Why aren't in your view these revenues merger specific?

10 A. So similar to the advertising revenue synergies, the  
11 defendants haven't established that a merger is needed to  
12 create this value as opposed to practical alternatives like  
13 contracting for the data.

14 And then further, they haven't shown that AT&T's data is at  
15 all better than other types of data that would be available and  
16 that are sold in the market for these same purposes and could  
17 be used by Time Warner if they chose for these purposes.

18 Q. Why in your opinion are these synergies not verifiable?

19 A. So again, when I look at the numbers put forward in the  
20 documents, they were not justified by meaningful analysis.

21 They were simply assumptions about the magnitudes that they  
22 would receive.

23 Q. Could you give His Honor an example of an assumption  
24 underlying these calculations that you found programmatic?

25 A. Yes. So for the scheduling optimization which is about

1 which programs should come after which other program. All of  
2 the numbers were based on a single example and they assumed  
3 that that example could be replicated once a day.

4 Q. Could you turn to page 116 of the version 41 document, DX  
5 658?

6 A. Yes.

7 Q. And on the right side under the synergy details and  
8 assumptions it refers to a viewership uplift.

9 Do you see that?

10 A. Yes.

11 Q. Is that what you're referring to?

12 A. Yes.

13 Q. Where did defendants get that number?

14 A. So again, the number came from a single example actually  
15 on a different network. So the example was based on AMC which  
16 has one of the most popular show on cable called The Walking  
17 Dead, that's about zombies.

18 And so this Walking Dead show was appearing in a certain  
19 time slot. Then they took the prequel to The Walking Dead  
20 called Fear The Walking Dead and they put that prequel in the  
21 time slot directly following The Walking Dead.

22 From that they got a thirty-five percent increase in the  
23 viewership for that time slot. And that thirty-five percent  
24 number is the number that's entered here and it's described The  
25 Walking Dead example for the justification for the number.

1 Q. Why is that one example insufficient to verify all of  
2 these claimed synergies?

3 A. So a couple of reasons. First of all, The Walking Dead is  
4 one of most popular shows on television and it's in a  
5 relationship with Fear The Walking Dead is about as close as it  
6 could get.

7 So that uplift is probably not representative of what you  
8 could get from rescheduling other programs.

9 Second, there's no reason to believe that data was needed  
10 to make that decision. Let alone advanced data or data better  
11 than what comScore provides about which people watch which  
12 programs in common. For this type of extreme synergy it may  
13 also be extremely obvious which programs should go together.

14 And so this example is that's not representative of the  
15 kinds of uplifts that you would get from the incremental  
16 addition of data beyond what's already available for scheduling  
17 decisions.

18 Q. And just so the record is clear, this example, does this  
19 relate to all three categories of content intelligence or just  
20 the scheduling category?

21 A. Just the scheduling category.

22 Q. Do defendants -- let me try again.

23 Are there similar issues with the other categories of  
24 content intelligence calculations?

25 A. Yes. Just for example, around creative development

1 actually there was a fear of it as skepticism and controversy  
2 about whether data was even useful for making a great movie.  
3 Whether the creative developers really wanted data for that  
4 purpose. And there's no analytic justification for these  
5 magnitudes.

6 Q. Apart from the issues with the calculations are there any  
7 other reasons why in your view the content intelligence  
8 synergies aren't verifiable?

9 A. Yes. So as I mentioned, there's in order for what we  
10 would need to be verified here would be the incremental value  
11 of the data beyond other data sources that are already  
12 available.

13 And so there's, there was no attempt to show that  
14 additional data was needed to carry out any of these goals.

15 Q. Did you review Mr. Stankey's testimony last week that AT&T  
16 isn't able to confirm that these content intelligence synergies  
17 even work?

18 A. Yes, I did and that's consistent with my review of other  
19 documents that expressed similar concerns.

20 MR. SCHWINGLER: No further questions, Your Honor.

21 THE COURT: All right. Cross exam.

22 MR. SCHWINGLER: May I proceed, Your Honor?

23 THE COURT: You may.

24 CROSS EXAMINATION

25 BY MR. RAIFF:

1 Q. Professor Athey, a few questions on your experience.  
2 Prior to this case, you've never testified as an expert  
3 relating to merger efficiencies, true?

4 A. Not in a court, no.

5 Q. In fact, in your deposition you told me you had never been  
6 retained as an expert relating to merger efficiencies; is that  
7 right?

8 A. Not for a proceeding like this, no.

9 Q. On the advertising front, have you ever worked in an  
10 advertising agency?

11 A. No.

12 Q. Okay, have you ever sold television advertising?

13 A. No, I've not directly sold it myself.

14 Q. Have you ever personally placed an order for television  
15 advertising?

16 A. I've certainly reviewed orders for television advertising  
17 in terms of their magnitude, their content, and their  
18 effectiveness, but I haven't attended an upfront and placed an  
19 order myself.

20 Q. So back to my question, you have never personally placed  
21 an order for television advertising true?

22 A. No, I have not.

23 Q. Okay. Let's talk briefly about vertical mergers and  
24 innovations.

25 First of all, you agree that when analyzing a merger an

1 economist like yourself should take into account pro  
2 competitive effects of the merger, right?

3 A. An economist would balance the cost and benefits.

4 Q. And you recall us discussing at your deposition the  
5 potential benefits that might arise from vertical mergers.

6 Do you recall that discussion?

7 A. Broadly, yes.

8 Q. Okay. And you agreed in your deposition that some of the  
9 potential benefits of vertical mergers might include cost  
10 reduction and improved product design that can lead to lower  
11 prices, higher quality products and increased investment and  
12 innovations.

13 You still agree with that today?

14 A. I agree that those are possible outcomes, yes.

15 Q. Okay. Well, let's focus on the potential for innovations  
16 first.

17 You know AT&T and Time Warner are hoping the merger is  
18 going to allow them to build and develop this programmatic ad  
19 platform, right?

20 A. That's their hope.

21 Q. Right. And you know from, and I think you talked about  
22 this in your expert report, you know that this is a platform  
23 that's going to specialize in the sale of premium video ad  
24 inventory, right?

25 A. That's their plan.

1 Q. Okay. And they also plan and they envision selling  
2 targeted data driven advertisements through this new platform,  
3 right?

4 A. That's correct.

5 Q. Okay. And this new platform is going to be able to serve  
6 multiple, sell ads to multiple devices, cell phones, tablets,  
7 TVs, even computers, right?

8 A. The broad aspiration would be to serve advertising to  
9 different devices.

10 Q. All kinds of devices, right?

11 A. That would be their hope.

12 Q. Okay, and then once completed the hope is the platform  
13 would be open to other programmers and other distributors,  
14 right?

15 A. More so than not all of the merger synergies that I  
16 evaluated required the participation of other platforms and  
17 distributors.

18 Q. So then back to my question. Once completed this platform  
19 would be open to other programmers and other distributors,  
20 right?

21 A. Yes.

22 Q. And today I think you explained on the television side  
23 there's no such thing, right, there's no programmatic  
24 advertising platform for buying linear television ads today,  
25 right?

1 A. That's correct. So some, some companies offer  
2 programmatic buying on their own inventory and there may be  
3 other nation things but nothing that's gotten widespread  
4 adoption.

5 Q. Back to my question. On the television side, there's no  
6 programmatic advertising platform for buying linear television  
7 ads, true?

8 A. Not one that has, is serving a variety of third party  
9 inventory sources.

10 Q. Got you.

11 So if AT&T and Time Warner are successful in building their  
12 programmatic ad platform on TV side, it will be a first of its  
13 kind, right?

14 A. It would be the first successful platform of serving these  
15 third parties.

16 Q. And AT&T actually has a very long history of inventing and  
17 innovating as you probably read from Mr. Stephenson's  
18 testimony, right?

19 A. So for example, Bell Labs was very successful in basic  
20 R&D.

21 Q. On TV side there's no programmatic ad platform but there  
22 are programmatic ad platforms on the digital side or the  
23 internet side, right?

24 A. That's correct.

25 Q. For example, Google's programmatic ad platform, right?



1 A. So Google gets more than eight percent of it's revenue  
2 from it's search advertising platform where it buys and sells  
3 search advertisements and then it also operates a banner ad  
4 platform for selling display ads.

5 Q. So back to my question. Google has its own programmatic  
6 ad platforms, right?

7 A. Yes.

8 Q. And you read Mr. Bewkes's trial testimony about how he  
9 expressed some concern about how advertising dollars are  
10 leaving the TV side and moving over to the digital side.

11 Did you read that part?

12 A. Yes, so there's --

13 Q. I just want to know if you read it first.

14 Did you read that testimony from Mr. Bewkes?

15 A. Yes. I'm not sure you fully characterized the entire  
16 exchange about that.

17 Q. Got it?

18 A. But I'm familiar with the testimony.

19 Q. You agree and you explained in your deposition that over  
20 the past few years advertisers have been spending more and more  
21 money on the digital advertising side, right?

22 A. As users spend more and more time on the digital side,  
23 advertising dollars have tended to follow the users, not always  
24 as fast as the users move, but they have been following the  
25 users.

1 Q. Okay. So back to my question.

2 Over the past few years advertisers have been spending more  
3 and more money on the digital advertising side, true?

4 A. Yes. It makes it sound like they're, it's the way you ask  
5 the question that it's coming away from TV revenue per hour for  
6 example and that's been more stable, but as the advertising,  
7 entire advertising pool has grown as people are spending more  
8 and more of their time connected.

9 Q. Let me ask you that next question again.

10 You agree, Professor Athey, that in general more and more  
11 ad dollars have been shifting from the television ad side to  
12 the digital ad side?

13 You agree with that?

14 A. In terms of percentages, yes, so that the shares have been  
15 shifting.

16 Q. And Google and Facebook are the biggest players in digital  
17 advertising, right?

18 A. Yes. They are players in slightly different things.

19 Q. That's right. In fact, in your deposition you confirmed  
20 that Google and Facebook together account for roughly sixty  
21 percent of the digital advertising in the U.S., right?

22 A. That's correct.

23 Q. And these two companies are capturing most of the online  
24 advertising industry revenue throughout the last few years,  
25 right?

1 MR. SCHWINGLER: Objection, Your Honor.

2 May we approach?

3 THE COURT: Yes.

4 (Witness leaves the stand.)

5 (Sealed bench conference.)

6 MR. SCHWINGLER: [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 MR. RAIFF: [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 THE COURT: [REDACTED]

18 (Witness resumes the stand.)

19 (Open court.)

20 THE COURT: You may proceed.

21 MR. RAIFF: Thank you, Your Honor.

22 BY MR. RAIFF:

23 Q. Back to my question. There's these two companies,  
24 Facebook and Google. They have been capturing most of the  
25 online advertising throughout the past few years, right?

1 A. That's correct.

2 Q. And there are a few out there that are trying to compete  
3 with for example, Google's programmatic advertising platforms,  
4 right?

5 A. Yes.

6 Q. For example Bing, Microsoft Bing, their search engine and  
7 programmatic platform is trying to compete with Google, right?

8 A. That's right on the search side.

9 Q. That's right.

10 And as you explained in your deposition, you agree, don't  
11 you, that healthy competition to the Google programmatic  
12 platforms will help consumers, advertisers and publishers,  
13 true?

14 A. That's correct.

15 I also talked about how to be effective the competition  
16 needs to concern advertising and these are experiences that are  
17 similar to the platforms that they're competing with.

18 Q. But you agree, you agree that healthy competition to the  
19 Google programmatic platforms will help consumers, advertisers  
20 and publishers, true?

21 A. Effective competition, yes.

22 Q. Okay. Let's continue talking a little bit about that and  
23 benefits to consumers.

24 And let's talk a little bit about the benefits to consumers  
25 of targeted advertising. First of all, as you explained in

1 your deposition, one way consumers benefit from targeted ads is  
2 by seeing more relevant ads, right?

3 A. That's correct, depending on the product and the format.

4 Q. You agree, right?

5 A. That if consumers see more relevant ads, yes, they can  
6 benefit from that.

7 Q. And you also read some of the trial testimony about how  
8 advertisers are generally willing to pay more for data driven  
9 targeted advertising, right? You read some of that testimony?

10 A. Yes. Again, some advertisers more than others depending  
11 on the context and type of ad, they may be, see more value to  
12 reaching a wide set of consumers at other points in the  
13 conversation that a marketer is having with a consumer having  
14 them be more targeted is more helpful.

15 Q. Got you.

16 So they're willing to pay more for that, right?

17 A. They are willing to pay to the extent that it provides  
18 additional value to them.

19 Q. And you heard and probably read some of Mr. Bewkes's  
20 testimony where he was talking about the importance of  
21 advertising revenue in order to keep subscription prices down  
22 for consumers?

23 You recall reading that?

24 A. I'm broadly familiar with that testimony.

25 Q. You recall that in your deposition, we talked about that

1 same point? You recall about how advertising revenues can be  
2 used to help subsidize or offset the cost of consumers, that  
3 cost of consumers have to pay for services?

4 You recall us talking about that subject?

5 A. I recall that we discussed different business models for  
6 --

7 Q. Yeah and for example, on the internet side you agree that  
8 advertising profits have subsidized a wide variety of useful,  
9 powerful and entertaining services that might otherwise have  
10 never come into existence or would have cost consumers  
11 significantly more?

12 You still agree with that, right?

13 A. Yes. So I would frame it that the business model for  
14 certain internet product is to monetize them through  
15 advertising. There's a range of monetization models used out  
16 there through subscriptions and combination based.

17 Q. Like Google, like Google consumers get a lot of benefit  
18 from Google's advertising and monetizing advertising because  
19 they get a lot of free services like free search, right?

20 A. Yes.

21 Q. And that's a benefit to consumers, right?

22 A. The search engine as a whole provides benefits, yes.

23 Q. This is consistent with the concept that Mr. Bewkes and  
24 Mr. Stephenson were testifying about, right, that it's  
25 important to be able to increase ad revenues in order to take

1 pressure off subscription price, right?

2 A. I haven't studied the interplay between subscriptions and  
3 ad revenue in response to this case. Those aren't part of the  
4 synergies that I was, part of my assignment.

5 Q. You agree or at least don't dispute Mr. Stephenson's and  
6 Mr. Bewkes's testimony about increasing ad revenue can help  
7 take pressure off subscription prices?

8 You don't dispute that, right?

9 A. You know, I haven't analyzed exactly how their incentives  
10 change. So I don't, I'm not ready to express an opinion about  
11 how I think their profit maximization would work.

12 Q. Got you.

13 I just want to make sure you're not disputing that concept?

14 A. I'm familiar with his testimony.

15 Q. All right, let's switch gears and spend a few minutes  
16 talking about how companies can build successful programmatic  
17 platforms.

18 And you referred earlier to Mr. Stankey's trial testimony  
19 where he discussed how AT&T wants to use Turner's advertising  
20 spots to prove to themselves and to prove to others that this  
21 new platform can work, right?

22 You recall that testimony?

23 A. I'm familiar with the testimony.

24 Q. And first of all, you agree that in order to have a large  
25 successful programmatic platform, you would need to have a

1 large amount of ad inventory, you agree with that?

2 A. Yes.

3 Q. Okay. And in fact, I think the way you described it is to  
4 be big, you need to be big, right?

5 A. I don't think I used those words.

6 Q. Okay, but you agree with that to be big, you need to be  
7 big?

8 A. I guess it's hard to disagree.

9 Q. Okay. In your report you discussed this chicken and egg  
10 problem, you recall that?

11 A. Yes.

12 Q. And what you were trying to say is to be successful an ad  
13 platform needs to have a critical mass of sellers and a  
14 critical mass of buyers, right?

15 A. That's correct.

16 Q. And as you noted in your report, it's very difficult to  
17 attract one side of the platform without having the other side,  
18 right?

19 A. That's correct.

20 Q. And so for example, advertisers will not use the platform,  
21 their advertisers are not going to come to the platform unless  
22 there's plenty of advertising inventory for them to buy, right?

23 A. Well, I'm not sure how to define plenty, but they need to  
24 have sufficient advertising inventory to buy, to justify their  
25 time and expense to come and more broadly, they need to see



1 value from transacting through the platform including  
2 commissions versus other alternatives.

3 Q. Right, they need to see. As you explained, having scale  
4 of advertising inventory is required for an advertising  
5 platform to succeed?

6 You still agree with that?

7 A. Having sufficient scale to attract advertisers, of course  
8 all platforms go through a growth phase.

9 For example, the Google double click ad platform for banner  
10 ads it started as a start up and it made, it had contracts for  
11 sellers, then it got more buyers, then it got more sellers and  
12 then it got more buyers and it started from zero and grew.

13 Q. You talked about ways, there are ways to break through  
14 this chicken and egg problem you describe, right?

15 A. Exactly.

16 Q. One way you mentioned in your report is by offering  
17 something unique or something of unique value, right?

18 A. Yes.

19 Q. And you recall us discussing exactly how Google and  
20 Facebook were able to break through this chicken and egg  
21 problem and build their programmatic ad platform?

22 You recall us discussing that?

23 A. Broadly.

24 Q. Okay. For its search advertising programmatic platform  
25 Google solved the chicken and egg problem by growing user

1 eyeballs and ad inventory first, correct?

2 A. That's an oversimplification, so.

3 Q. Well, let's take a look at your deposition on exact words  
4 because I want to be precise in exactly your, the question and  
5 answer.

6 MR. RAIFF: Your Honor, may we approach with the  
7 deposition?

8 THE COURT: Sure.

9 MR. RAIFF: May I approach the witness as well, Your  
10 Honor?

11 THE COURT: You may.

12 BY MR. RAIFF:

13 Q. I want to make sure we get these next few questions  
14 exactly right. If you could turn to the transcript on page 53.

15 MR. RAIFF: And Your Honor, this is a deposition  
16 taken on March 8th, 2018 of Professor Athey.

17 BY MR. RAIFF:

18 Q. And we're turning to page 53, lines 10 through 13. And do  
19 you recall at your deposition, Professor Athey, that I asked  
20 you almost the precise question I'm reading from line 10.

21 Question, for the search programmatic platform, did Google  
22 solve the chicken and egg problem by growing user eyeballs and  
23 ad inventory first?

24 And your answer was yes.

25 A. Yes. And there's about a page one and a half long answer

1 prior to that where I outlined the whole history.

2 Q. Your counsel can ask you plenty of questions about the  
3 long history?

4 A. Yes.

5 Q. I'm on a, I'm on the clock here, so I'm going to get  
6 straight to the point.

7 Now I want to turn to the Facebook question. Same kind of  
8 questions on Facebook.

9 Same thing with Facebook. For its social media  
10 programmatic platform, Facebook attracted users and ad  
11 inventory through its own and operated social network, right?

12 A. That's correct.

13 Q. And as you mentioned in your deposition, that's exactly  
14 how Facebook was able to solve and break through this chicken  
15 and egg problem by growing its ad inventory and eyeballs first,  
16 true?

17 A. That's right. And just to be clear, almost all of  
18 Facebook's revenue today comes from Facebook selling its own  
19 inventory. So Facebook is attracting users to the Facebook  
20 social network and then selling access to advertisers for users  
21 on that network.

22 Q. Precisely right. So it actually grew and started its  
23 programmatic platform based on its own owned and operated ad  
24 inventory, true?

25 A. That's right. It's a little bit of a different type of

1 platform because it's main ambition is not to attract third  
2 party inventory but rather to monetize its own users.

3 Q. So let's now turn to the platform AT&T and Time Warner are  
4 hoping to build.

5 So you know, you know AT&T they're planning to use the  
6 Turner ad inventory to start up or as you said, to seed or to  
7 fuel its new programmatic platform, right?

8 A. That together with inventory from AT&T as well.

9 Q. Good point.

10 So you know Turner has about six hundred and seventy  
11 billion ad spots available per year.

12 Does that sound about right to you?

13 A. Roughly.

14 Q. And Turner's ads, they go out to virtually the entire  
15 country, right?

16 A. Yes.

17 Q. Right. Their shows are not just, their ads are not just  
18 distributed to the DirecTV homes. They're distributed through  
19 a bunch of distributors throughout the U.S., right?

20 A. That's correct.

21 Q. And without Turner, AT&T has about a hundred and  
22 seventy-nine billion ad spots, right?

23 A. Again, I'm not sure of the exact number.

24 Q. Roughly, sound about right?

25 A. Sound about right.

1 Q. Okay. And those ads though, they just go to the DirecTV  
2 homes, right? DirecTV ads just go to the DirecTV homes, right?

3 A. DirecTV ads to DirecTV, U-verse also is another  
4 distributor.

5 Q. As opposed to the Turner's fourteen minutes which go out  
6 to the entire U.S., right?

7 A. That's correct.

8 Q. Okay. And if this merger is allowed to go through the  
9 combined company will have about eight hundred fifty billion  
10 combined advertising spots available, right?

11 A. Are you saying that all of the inventory would be on the  
12 platform? Is that what you're asking?

13 Q. Let me read the question again.

14 If this merger is allowed to go through, the combined  
15 company will have about eight hundred and fifty billion  
16 combined advertising spots available?

17 A. That sound like the overall inventory, but I don't -- I  
18 don't believe that's all going to be on the platform.

19 Q. Well, you know from reading Mr. Stankey's trial testimony  
20 that the plan is to use the Turner advertising inventory to  
21 prove up the concept and to demonstrate that in fact these  
22 improvements can be made in the market and effectively work,  
23 right?

24 A. That's their plan in the presence of a merger.

25 Q. If they are able to do this, if they are successful in

1 proving up the concept, then they want to invite others to come  
2 in, right?

3 A. That's right. If they also need to prove it to themselves  
4 for that matter.

5 Q. That's right. That's yet another reason to have Turner  
6 inventory is to prove it to themselves that this programmatic ad  
7 platform can work, correct?

8 A. That's right.

9 Q. Okay. And then Mr. Stankey explained that it's his belief  
10 that yield winds, meaning that programmers and distributors  
11 will join up if they see AT&T has built a better mouse trap and  
12 attracts higher ad dollars, right? That's his belief, right?

13 A. That's a characterization of the testimony.

14 It doesn't address questions about strategy like whether  
15 the highers want to configure their inventory to a competing ad  
16 platform.

17 So they might factor that in addition to yield or concerns  
18 about being reliant on their competitor for their main revenue  
19 stream might also --

20 Q. His belief if yield winds, right? His business judgment  
21 is yield winds, right?

22 A. I can't speak to his overall belief. That's a  
23 characterization.

24 Q. You know from looking at the assumptions in the  
25 advertising synergies, you know from looking at the assumptions

1 that you were talking about a little while ago, it's actually a  
2 pretty modest art and small percentage of contribution that the  
3 assumptions are assuming for the programmers and distributors,  
4 around ten percent for the programmers and five percent for the  
5 MVPDs, true?

6 A. Those, that's roughly the numbers.

7 THE COURT: Will this be a good time to take the  
8 afternoon recess?

9 MR. RAIFF: Yes, Your Honor. Thank you.

10 THE COURT: We'll take a fifteen minute recess.

11 You're a witness under oath in the case. Let me explain  
12 what that means to you. You can't discuss your testimony with  
13 anybody, including your own lawyers. Stay independent of all  
14 others, don't discuss it, what it's been or what it will be  
15 when your return. Stay independent of anyone else.

16 THE WITNESS: Thank you.

17 THE COURT: Step down, see you in fifteen minutes.

18 (Witness excused.)

19 (Recess at 4:00 p.m.)

20 (Proceedings resumed at 4:20 p.m.)

21 THE COURT: Witness remains under oath.

22 MR. RAIFF: May I proceed, Your Honor?

23 THE COURT: You may.

24 MR. RAIFF: Thank you.

25

1 CROSS-EXAMINATION (Continued)

2 BY MR. RAIFF:

3 Q. Let's put aside the platform and let's talk about what  
4 could happen shortly after the merger if it's allowed to go  
5 through.

6 You know part of the synergies relate to improving the  
7 advertising by combining Turner's capabilities with AT&T's  
8 capabilities and data, right?

9 A. That's correct.

10 Q. And you know that today AT&T has certain advertising  
11 capabilities that Turner does not have, right?

12 A. Or that Turner doesn't currently have.

13 Q. Right. So let's talk about a couple of those. Let's  
14 start with addressable TV.

15 You talked about that a little bit. That's basically where  
16 if you and I are neighbors and we're watching the exact same  
17 show, a distributor could send you one ad while sending me a  
18 different ad, right, that's addressable TV advertising, right?

19 A. That's correct.

20 Q. All right. It's very different from the spray and pray  
21 advertising approach that we've heard a little bit about at  
22 trial, right?

23 A. If you're referring to buying based on broad demographic  
24 categories, yes.

25 Q. Okay. And it's also even more targeted than the data



1 driven linear advertising, right?

2 A. It potentially can be if the advertisers choose.

3 Q. And you know that Turner does not sell that type of  
4 addressable TV advertising where it can send one ad to one  
5 house old and the other ad to the other household, right?

6 A. Yes, so in general there are some partnerships in the  
7 industry where programmers can make a partnership or a  
8 contractual arrangement with distributors. So to my  
9 understanding Turner doesn't have such a contract in place  
10 today.

11 Q. Okay. Well, Professor Athey, I don't want to cut you off,  
12 and I know you want to throw in some of the government's views  
13 every once in a while, but it's been a long trial. We're all  
14 trying to finish things up. I'm on a clock, and so if we could  
15 just stick to my questions, please.

16 A. Yes.

17 Q. Okay. So back to my question.

18 You know that Turner does not sell that type of addressable  
19 TV advertising where it can send one ad to one home while at  
20 the same time sending another ad to another home, right?

21 A. No, it does not offer that product today.

22 Q. And, in fact, you read Mr. Bewkes's testimony about  
23 Turner's inability to do this, an inability to serve ads to  
24 different people, right?

25 A. I'm familiar with the testimony.

1 Q. Okay. And you know, though, that today AT&T is able to  
2 sell addressable TV advertising, right?

3 A. Yes, AT&T does offer that product.

4 Q. In fact, AT&T is one of the leaders in addressable TV  
5 advertising, right?

6 A. You know, they sell a substantial portion of their  
7 inventory through that mechanism.

8 Q. Right. And, in fact, DirecTV was the first company, the  
9 first company to sell addressable TV back in 2012, right?

10 A. That sounds right.

11 Q. And you know that AT&T gets more than five times the price  
12 for its addressable TV advertising than it gets on its regular  
13 advertising, right?

14 A. That's an accurate description of the revenue they were  
15 receiving on the volumes that they're selling today.

16 Q. Okay. And so Turner does not have this capability or is  
17 not selling addressable advertising today, and AT&T is the  
18 leader in selling addressable TV, fair?

19 A. Yes.

20 Q. And you read Mr. Bewkes's trial testimony explaining that  
21 this was real important to him, that this was an important  
22 aspect of the merger to him, do you recall reading that?

23 A. That's broadly consistent with my reading.

24 Q. And after the merger Turner will be able to use AT&T's  
25 addressable capabilities, right?

1 A. With or without the merger, Turner can arrange to sell  
2 addressable on AT&T's customers, either through a partnership  
3 or through the merger, so the plan is to do that after the  
4 merger.

5 Q. And let me ask you a couple of questions.

6 I know that that's the theory of contracting or I think you  
7 call it the economics of contracting. I really want to stick  
8 to the real world for a second. In the real world that hasn't  
9 happened, has it?

10 A. Not for this programmer and this distributor, but for  
11 other programmers and other distributors so it just makes it  
12 sound like, when you're asking the question, like it's somehow  
13 impossible.

14 Q. And do you know whether or not any of this was reflected  
15 in Professor Shapiro's efforts to model the merger effects?

16 A. I haven't reviewed that.

17 Q. Okay. Let's take another example.

18 Customer list matching, and some advertisers I think call  
19 it customer provided list matching. Maybe just can you briefly  
20 explain to the Court your understanding of how that works, how  
21 customer list matching works for TV advertising?

22 A. Sure. So if you're the kind of advertiser that has a  
23 direct relationship with the customer, you might have a list of  
24 who those customers are. And so with customer list matching  
25 you could try to send it in and then figure out what kind of

1 shows your customers are watching, and you might use that to  
2 decide, you know, which shows to buy, which shows to buy ads  
3 on.

4 Q. And so, for example, AT&T, they can actually build a  
5 campaign around or using the advertiser's list of customers,  
6 right?

7 A. That's a capability, yes.

8 Q. And you heard, I think you probably read Mr. Stankey's  
9 testimony. I think he used the example of a men's clothing  
10 store, do you recall that?

11 A. Yes.

12 Q. And I think you confirmed in your deposition that this  
13 customer list matching is very valuable to advertisers, right,  
14 or actually pretty valuable to advertisers, right?

15 A. It depends on the advertiser, if you don't have a customer  
16 list, then it's harder to use that. Like if you're selling,  
17 you know, wholesale through a retailer and you don't like a  
18 package goods company or something like that that doesn't  
19 directly interact, then you can't use it. But for some  
20 advertisers, that could be useful, especially if you had a  
21 niche audience or an audience that behaved differently than the  
22 general demographics of your audience.

23 So for men, you might know already that you're selling to  
24 men, but if you had a particular audience of unusual men whose  
25 viewing habits were very different than other men, that could

1 be an incremental value from customer list matching.

2 Q. Okay. So you agree it can be pretty valuable to  
3 advertisers who have customer lists, true?

4 A. And it depends on the advertiser, but for some advertisers  
5 it could be valuable.

6 Q. And you know AT&T is able to do customer list matching  
7 today based on the fact they have first party data, right?

8 A. Based on the data that they have about their customers.

9 Q. And, in fact, that's one of their strongest selling types  
10 of advertising products today, right?

11 A. I'm not sure that I would agree with that  
12 characterization.

13 Q. Okay. Well, let's flip to the Turner side.

14 You know that Turner does not do customer list matching  
15 advertising today, true?

16 A. That's correct.

17 Q. And that's because, I think you explained in your  
18 deposition, that's because Turner does not know the specific  
19 identities of the viewers in order to match them to a customer  
20 list, correct?

21 A. That's correct.

22 Q. But if the merger is allowed, you know Turner will be able  
23 to do customer list matching using the AT&T's data, correct?

24 A. So again, the question makes it sound like the merger is a  
25 crucial part of making that happen, but that type of matching

1 could be arranged through a business relationship where  
2 advertisers could have access to that data through a  
3 partnership between Turner and AT&T.

4 Q. Sorry to interrupt.

5 But back to the real world, that certainly hasn't happened  
6 with Turner, right, today they're unable to do any customer  
7 list matching today, true?

8 A. Turner has not entered into those types of contracts and  
9 offered that product.

10 Q. And you don't know whether or not Professor Shapiro would  
11 have taken this into account in his effort to model a merger  
12 effects, right?

13 A. No, I was focused on the revenue efficiencies that I  
14 described.

15 Q. Okay. Let's spend a little more time discussing what  
16 might change if Turner has access to AT&T's data, okay?

17 You agree that -- that programmers just in general, like  
18 Turner, they need data to be able to sell this data driven  
19 targeted advertising, right?

20 A. That's correct.

21 Q. And as a general rule, better data potentially allows for  
22 better targeting, do you agree with that?

23 A. That's right, the data needs to be better than what you  
24 already have.

25 Q. For example, first party set-top box data is generally

1 thought to be better for targeting than traditional Nielsen  
2 ratings, right?

3 A. So you said first party set-top box data, so I think  
4 generally for what you're trying to do with this targeting  
5 product is use data to more finely describe who's watching the  
6 shows. So did the companies like ComScore and Nielsen has now  
7 acquired data set-top boxes, up to thirty million of them, and  
8 matched them with Experian data, which allows you to figure  
9 out -- plenty of data to figure out, you know, who's watching  
10 which show, which then could be used to target ads.

11 So I think the distinction is that I'm -- that relates to  
12 your question is you said that was first party data, set-top  
13 box data, and I'm not sure that that's different.

14 Q. Couple of things on that.

15 First of all, you didn't finish the ComScore/Nielsen  
16 example.

17 Isn't it true that the data ComScore and Nielsen receive  
18 and sell to programmers cannot, cannot be used for targeting  
19 advertising today, true?

20 A. So I'm not quite sure that's right. So some of the  
21 announcements that have been made about partnerships between  
22 programmers like Fox and Turner with the ComScore for these  
23 audience products are -- relate to using the data for our  
24 targeted advertising.

25 Q. Okay. You know today Turner's unable to use any data from

1 ComScore or Nielsen to do targeted advertising, true?

2 A. I think that was the case at the time of the documents  
3 that I reviewed. I actually, as I sit here, I don't know that  
4 that's true today.

5 Q. Okay. So back to the original question. As a general  
6 rule let's -- I'll take out the word "first party," but set-top  
7 box data is generally thought to be better for targeting than  
8 traditional Nielsen rating data, right?

9 A. So all of these datasets are similar. They're panel  
10 datasets where you're watching consumers and recording in some  
11 way or another what the consumers are watching. So the big  
12 difference with the set-top box data is just that it's passive,  
13 it's recorded, and it's sort of recorded, therefore, more  
14 cheaply at larger scale. So the data is roughly just the same  
15 kind of data, it's not like it's, you know, qualitatively  
16 different, it's showing who's watching which show, what they  
17 watch next, and so on, just the set-top box data in principle  
18 is bigger.

19 Q. Okay. And you know today Turner's data driven targeted  
20 advertising relies on third party data, you know that today,  
21 right?

22 A. Yes, it relies on a variety of data sources that they've  
23 acquired.

24 Q. And you know Turner is having difficulty today selling its  
25 data driven targeted advertising, you know that from reading



1 the deposition and from reading the trial testimony, right?

2 A. So I think the analogous products are low single digit  
3 share for both AT&T and for Turner.

4 Q. Well, you didn't know that AT&T sells about twenty-two to  
5 twenty-five percent of its advertisers through target and  
6 advertising?

7 A. So if you're counseling addressable, that's a separate  
8 category. So the data -- the product that's comparable to  
9 Turner's product, the sort of data driven linear product.

10 Q. Because Turner is not able to do addressable?

11 A. It doesn't currently offer that product.

12 Q. Okay. And you read probably John Martin's testimony where  
13 he explained that Turner's advanced targeting advertising  
14 represents less than five percent of Turner's advertising  
15 revenue, do you recall reading that?

16 A. That sounds broadly correct.

17 Q. And you know from reading the deposition, I think you  
18 explained this in your deposition, that Turner believes it's  
19 having difficulty selling its data driven targeting advertising  
20 because it's based on third party data instead of first party  
21 data, right?

22 A. That characterization was in the testimony, also some of  
23 the other documents talked about other reasons as well such as  
24 difficulty with the market adoption or the advertiser's demand  
25 for the product.

1 Q. Okay. So now let's switch over to the AT&T side and  
2 discuss the type of data that Turner will be able to access if  
3 the merger is allowed.

4 We know AT&T has a substantial amount of first party data,  
5 right?

6 A. Yes.

7 Q. Okay. They -- and that's because AT&T has around  
8 twenty-five million television subscribers, right?

9 A. Yes.

10 Q. And AT&T has about sixteen million broadband subscribers,  
11 correct?

12 A. Yes.

13 Q. And AT&T has over a hundred million mobile subscribers,  
14 right?

15 A. Yes, although just to be clear, my report looked at these  
16 advertising synergies in the merger planning document, and so  
17 the set-top box data was the primary source of data for those  
18 advertising synergies.

19 Q. And you know that AT&T's data driven advertising product  
20 sells at prices sixty percent higher than the ads that AT&T  
21 sells just based on traditional Nielsen ratings, right?

22 A. So the way that question is framed it makes it sound like  
23 if you took an advertiser who was buying the regular product  
24 that they would pay sixty percent --

25 THE COURT: Don't worry about what it sounds like.

1 Answer the question.

2 THE WITNESS: Okay. So --

3 THE COURT: You're not teaching a course here.

4 Answer the question.

5 THE WITNESS: So the people who are buying the  
6 targeted product are different than the people buying the  
7 non-targeted product, and the prices are sixty percent higher  
8 for the ones that are in the targeted product than the  
9 non-targeted product.

10 BY MR. RAIFF:

11 Q. Okay, so let's go back to my question.

12 You know that AT&T's data driven advertising product sells  
13 at prices about sixty percent higher than ads that AT&T sells  
14 just based on traditional Nielsen ratings, correct?

15 A. That's an accurate description of the difference in the  
16 CPMs of what they're selling.

17 Q. And part of the reason you explained in your deposition,  
18 part of the reason AT&T can charge advertisers a higher price  
19 is because AT&T has more granular information about its  
20 audiences compared to the traditional Nielsen rating, that's  
21 true, right?

22 A. The higher prices due to the finer demographics that are  
23 offered for targeting.

24 Q. Okay. And it's because AT&T has more granular information  
25 about its audience as compared to traditional Nielsen ratings,

1 do you agree with that?

2 A. The data they're using is providing that more granular  
3 targeting.

4 Q. And you know Turner's data driven advertising product  
5 today that it's offering only sells for about sixteen to  
6 seventeen percent more than ads they sell based on traditional  
7 Nielsen ratings, right?

8 A. Again their -- there's a baseline on Turner that's based  
9 on the types of advertisers they are selling there, and the --  
10 there's a subset, a small subset that are buying this  
11 additional product, and the prices on the additional product  
12 are roughly sixteen percent higher in terms of who's buying  
13 that and what they're buying today.

14 Q. And if the merger goes through, Turner will have access to  
15 the same first party data that AT&T is using today for its data  
16 driven advertising product, correct?

17 A. They could use that data or other data sources to create  
18 the demographic categories that they'd like to sell.

19 Q. Well, let's just stick to my questions, please.

20 If the merger goes through Turner will have access to the  
21 same first party data that AT&T is using today for AT&T's data  
22 driven advertising, true?

23 A. I believe so.

24 Q. Let's jump to a another topic, but related.

25 You talk about AT&T's selling its data to programmers,

1 right, you talked a little bit about that during your direct  
2 examination, right?

3 A. Yes.

4 Q. Okay. You know AT&T previously tried to sell its data to  
5 programmers for advertising, right?

6 A. It's a broad characterization of tried to sell, so they  
7 didn't have an actual product that was ready to be negotiated  
8 over, they had discussions with programmers about their  
9 interest in buying such a product.

10 Q. AT&T started this initiative to try to sell its data to  
11 programmers back in 2015, correct?

12 A. So when you're referring to 2015, I think you're referring  
13 to the stages of product, the process where they were combining  
14 the data with their carriage negotiations.

15 Q. Please stick to my question.

16 MR. RAIFF: Your Honor, I might need an instruction  
17 or a little bit help. But if you could, please, just try to  
18 stick to my questions.

19 BY MR. RAIFF:

20 Q. AT&T began this initiative to sell data back in 2015, do  
21 you agree with that?

22 A. They began an initiative.

23 Q. And as of October 2016, AT&T had not successfully and had  
24 not entered into any contracts to sell data to programmers,  
25 true?

1 A. That's correct.

2 Q. And you pointed out in your deposition that the parties  
3 seem to be really far apart on price, the bid ask breadth was  
4 very large, do you recall discussing that in your deposition?

5 A. Well, that's not exactly how I characterized it.

6 Q. Do you recall discussing how when AT&T approached Disney,  
7 for example, that AT&T estimated that Disney was spending about  
8 seven million dollars annually on its data for advertising, do  
9 you recall that?

10 A. Yes.

11 Q. And do you recall that AT&T estimated that its data was  
12 worth about a hundred and sixteen million dollars to Disney, do  
13 you recall that?

14 A. Yes.

15 Q. And you recall commenting on that big gap and how it would  
16 be an awfully big change for a corporation like Disney to go  
17 from spending seven million dollars to a hundred and sixteen  
18 million dollars for data, do you recall that?

19 A. Yes.

20 Q. And that sounded very impractical to you, right, do you  
21 recall that?

22 A. It sounds like it might be difficult to walk into one  
23 meeting and walk out with a signed contract because if you  
24 hadn't even specified what you were selling.

25 Q. And the inability to agree on a value or to agree on a

1 price is a form of bargaining friction, you agree with that,  
2 right?

3 A. The -- I guess the friction comes from different beliefs  
4 about the value.

5 Q. Fair enough.

6 And you read Mr. Welch's deposition where he testified  
7 about how their efforts to sell data to programmers was a  
8 failure, right?

9 A. Yes.

10 Q. And you agree at your deposition that it appeared that the  
11 data for programmers' initiative was unsuccessful, true?

12 A. No, that's not how I would characterize what I described  
13 in my deposition. In my deposition I talked about how this was  
14 an ongoing negotiation. I described how there were initial  
15 meetings where they said here's some data. This is the kind of  
16 data we can possibly sell you, we think that it has very high  
17 value. Are you interested?

18 I reviewed an internal document that gave the list of the  
19 programmers that they were selling it to, with probabilities of  
20 sale ranking from high and medium and so on, an email  
21 describing that they were, in October that they were hopeful,  
22 especially about Disney and Fox. They did say that Turner had  
23 a robust data solution already, so it was slightly lower on the  
24 priority list.

25 And then my understanding is that when the merger was

1 announced that they decided to pursue a different strategy.

2 Q. Let's turn to page 165 of your deposition and see exactly  
3 what you said.

4 Remember we were talking about Mr. Welch's testimony, and  
5 this was on page 165, starting on line 13. And we were talking  
6 about Mr. Welch testimony that the data for programmers was  
7 unsuccessful. And I asked you on line 13, page 165:

8 "You testified under oath that the data for  
9 programmers' initiative was unsuccessful. Are you  
10 disputing that, is he lying," I asked?

11 And your answer: Well, so no. What I said was  
12 that they did not sell data for programmers to a  
13 customer prior to the merger, the merger."

14 And then you go on to say, "Which is consistent  
15 with it being unsuccessful."

16 Do you see that?

17 A. Yes.

18 Q. And that's what you testified to at the time, right?

19 A. I said that it's consistent with being unsuccessful, and I  
20 also said that these were ongoing efforts, and the efforts had  
21 not been stopped prior to the merger announcement, and which is  
22 what I just summarized as a characterization of my testimony.

23 Q. All right. Let's wrap up this topic and go to one final  
24 topic. Just to be clear, AT&T did not reach any agreement with  
25 any programmers to sell its data prior to the merger



1 announcement in late 2016, true?

2 A. That's true.

3 Q. And you're aware that after this data for programmers'  
4 initiative or this effort, AT&T decided that a new programmatic  
5 advertising platform with Time Warner merger could help AT&T  
6 fully monetize its data, right?

7 A. That was their general plan.

8 Q. And you're aware that AT&T plans to keep all of the data  
9 under one roof within its four walls as part of the  
10 programmatic advertising platform, right?

11 A. Yes.

12 Q. And that's another potential benefit of the programmatic  
13 platform being able to monetize AT&T's data with its own  
14 platform within its own four walls rather than selling data to  
15 programmers, right?

16 A. Well, it's a form of selling because they would be  
17 enabling programmers to -- and third party inventory providers  
18 to access the data through the platform.

19 Q. Well, you know from reading the materials that actually  
20 the programmers are not going to be able to actually access the  
21 actual data, you know that, right?

22 A. Not the raw data.

23 Q. Let's turn to a final topic, the content intelligence you  
24 talked about.

25 You recall we discussed at your deposition how Netflix uses

1 data to make content decisions?

2 A. We discussed that topic, yes.

3 Q. Do you recall telling me that customer data is a valuable  
4 asset for Netflix because it helps Netflix choose programs?

5 A. I'm familiar with that general claim.

6 Q. And, for example, consumer data provides Netflix with  
7 information about which movie stars are popular to which  
8 groups, and that helps Netflix in deciding what shows to buy  
9 and what stars to put in shows, that's true?

10 A. Broadly speaking, we don't have a quantification of the  
11 extent or other sources of data that they use.

12 Q. And you agree that data can be useful when a company is  
13 making content decisions, true?

14 A. It can be.

15 Q. And set-top box data, for example, can help demonstrate  
16 that people who like one type of show also typically like a  
17 different type of show, you recall telling me that?

18 A. Yes, so evidence that -- that some people find not useful  
19 or the commercial products available with that kinds of type of  
20 information in it.

21 Q. And, in fact, as you explained yourself in the deposition,  
22 this is the sort of information that can help inform scheduling  
23 decisions, right?

24 A. It could.

25 Q. And after the merger, if it's allowed to go through, Time

1 Warner will have access to AT&T's data, right?

2 A. Yes.

3 MR. RAIFF: No further questions, Your Honor.

4 THE COURT: Okay. Redirect.

5 MR. SCHWINGLER: Just a few questions, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. SCHWINGLER:

8 Q. Professor Athey, you were asked about whether after the  
9 merger Turner could offer addressable advertising, do you  
10 recall that?

11 A. Yes.

12 Q. And is Turner addressable advertising a quantified synergy  
13 in this case?

14 A. No.

15 Q. Before the break you were asked about whether competition  
16 for Facebook and Google could benefit consumers, advertisers  
17 and publishers, do you recall that question?

18 A. Yes.

19 Q. And your answer was "effective competition." Do you  
20 recall that?

21 A. Yes.

22 Q. Could you explain briefly for His Honor what you meant by  
23 "effective competition" for the Google and Facebook advertising  
24 platforms?

25 A. Sure. So at a high level more than eighty percent of

1 Google's revenue comes from search advertising, this is like  
2 direct marketing, so you type "auto insurance" into Google and  
3 an ad comes up for that.

4 That is very different than TV advertising, which is kind  
5 of described as the top of the funnel, it's trying to get  
6 people interested. And so those two types of advertising are  
7 not necessarily substitutes or competitors.

8 Just think about if you were going to send out a catalog  
9 and you thought about how effective and cost effective will it  
10 be to mail those catalogs. If I've just run a great TV  
11 campaign, then actually my ROM (sic) my catalogs would go up  
12 wouldn't throw it in the garbage, but instead they might buy  
13 from your catalog.

14 So TV is not really an effective competitor for a search  
15 because, in fact, they sometimes go together in a positive way.

16 And then, you know, Facebook kind of sits in a different  
17 part of the funnel where you're providing, you know, short  
18 messages, maybe offers, trying to continue the conversation  
19 with the consumer who may be broadly aware of the product are  
20 also some direct marketing.

21 And so these are really different types of advertising and  
22 advertisers thinks about this whole portfolio and how they go  
23 together in making an effective campaign.

24 And so in terms of the TV market, search and Facebook are  
25 pretty different.

1 Q. And is AT&T's desire to compete with Google and Facebook  
2 relevant to your opinions on merger specificity?

3 A. No. If we just think about the platform, a question would  
4 be, you know, does the merger help this platform impede. And  
5 so if you thought, for example, that having a merger might make  
6 it harder to get a broad set of competitors onto the platform,  
7 that could make it harder to compete, but generally since the  
8 merger is not necessary to make the platform successful, it  
9 really doesn't -- the fact that Google and Facebook are out  
10 there doesn't really change the analysis of merger specificity,  
11 which is more about overcoming contracting friction in  
12 different ways to make the platform.

13 Q. And does this desire to compete with Google and Facebook  
14 in any way validate or verify the calculations that AT&T put in  
15 its version 41 merger planning document?

16 A. Sure, so just I'll give an example of the platform, the  
17 existence of competitors might increase the risk of success and  
18 that could make things possibly more speculative. But it  
19 certainly doesn't help verify the magnitude that these  
20 synergies will actually be attained.

21 MR. SCHWINGLER: No further questions, Your Honor.

22 THE COURT: Recross on the redirect?

23 MR. RAIFF: No.

24 THE COURT: You're excused.

25 (Witness excused.)

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THE COURT: See counsel.

(Sealed bench conference.)

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5 MR. PETROCELLI: [REDACTED]

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8 MR. CONRATH: [REDACTED]

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15 THE COURT: [REDACTED]

16 MR. CONRATH: [REDACTED]

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19 MR. PETROCELLI: [REDACTED]

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MR. PETROCELLI: [REDACTED]

MR. CONRATH: [REDACTED]

THE COURT: [REDACTED]

MR. PETROCELLI: [REDACTED]

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(Open court.)

**THE COURT:** All right, we'll stand in recess until 10:30 tomorrow morning. We'll be going until one o'clock tomorrow.

1 (Trial adjourned at 5:09 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.

\_\_\_\_\_  
/s/Crystal M. Pilgrim, RPR,FCRR

\_\_\_\_\_  
Date: April 24, 2018