

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CV No. 17-2511
	)	
	)	Washington, D.C.
vs.	)	April 30, 2018
	)	2:05 p.m.
AT&T, INC., ET AL.,	)	
	)	Afternoon Session
Defendants.	)	
<hr/>		Day 21

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

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## 1 P R O C E E D I N G S

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

7 Your Honor, re-calling Civil Action No. 17-2511,  
8 United States of America v. AT&T, Inc., et al.

9 THE COURT: When you're ready, Mr. Petrocelli.

10 MR. PETROCELLI: Thank you, Your Honor.

11 And once again, I wish to thank the Court and its  
12 staff for the tremendous work you have all done to make this  
13 trial possible. Speaking on behalf of everybody on both  
14 sides, we very much appreciate everything you have done to  
15 accommodate our schedule.

16 Now, I stood before you some six weeks ago in  
17 opening statements, Your Honor, and said that you will not  
18 need a crystal ball to decide this case. Instead, I said it  
19 is the obligation of the government, who seeks to block this  
20 historic merger, to give Your Honor convincing proof  
21 grounded in real-world facts that this merger will  
22 substantially lessen competition. That is the burden that  
23 the law imposes on the government to block a vertical  
24 merger, and that is the burden the government did not come  
25 close to meeting.

1           This comes as no surprise, Your Honor. When the  
2 government filed this case back in November, even as  
3 alleged, it rested on thin, tenuous claims of harm. And  
4 that was after the government had conducted a massive  
5 investigation, spanning some 25 million-plus pages of  
6 documents, interviewing scores of witnesses from both the --  
7 from all the defendants and from industry participants all  
8 over the country.

9           And by the time of trial, after we, for the first  
10 time, we defendants had had an opportunity to conduct  
11 discovery and contest and challenge the plaintiff's claims,  
12 the case had shrunk even more.

13           There was no claim that prices of Warner Brothers  
14 content would increase. There was no claim that HBO prices  
15 would increase. There was no claim that the merged company  
16 would unilaterally withhold any content from anyone, not a  
17 single movie, not a single television show, not a single  
18 Turner television network.

19           As you may recall, I then described it as the  
20 incredible shrinking case.

21           And now, Your Honor, here we are, when, after what  
22 little remained of the government's case was subjected to  
23 the scrutiny of the trial process in this courtroom, the  
24 rest of their case vanished before our very eyes.

25           The government presented no credible evidence of

1 harm to competition from this merger. To the contrary, the  
2 overwhelming evidence shows that this merger will provide  
3 important benefits to American consumers, including new and  
4 innovative ways to watch television; and it will generate  
5 substantial efficiencies that even the government was forced  
6 to concede will cause pay-TV bills of AT&T's customers to go  
7 down.

8 I'm talking 25 million people, from the  
9 government's own evidence, will get lower pay-TV bills.

10 But they got that wrong too, Your Honor, because  
11 as it turns out, the pay-TV bills can be expected to go down  
12 for all pay-TV consumers by over a half a billion dollars a  
13 year; and that's using their own model, correcting for the  
14 numerous flaws.

15 And I'll go through those figures with you that  
16 Dennis Carlton, Professor Carlton, put on.

17 Now, the government has managed to string out this  
18 merger, Your Honor, for 18 months, based on a case that I  
19 submit should never have been brought in the first place.  
20 This is a case of theories in search of facts.

21 This case, I submit to you, has been manufactured.  
22 I'm not sure, Your Honor, there has ever been a challenge to  
23 a vertical merger, much less a trial, without a claim that  
24 some essential input would be foreclosed from a substantial  
25 share of the market. But that's what we have here.

1           They are asking Your Honor to block this merger,  
2 knowing there will be zero foreclosure of any content;  
3 knowing there will be no elimination of a single competitor;  
4 knowing there will be no contraction of any relevant  
5 markets; knowing just the opposite, that the markets have  
6 exploded with content and competition, fueled largely by  
7 vertically integrated companies; and knowing that this  
8 merger will produce price decreases to a substantial segment  
9 of the American population.

10           And knowing all of that, what is the reason the  
11 government urges this Court to block this merger and deprive  
12 consumers of substantial benefits? Because, under their own  
13 flawed analysis, there's going to be a price increase that  
14 started out at 27 cents per subscriber per month and, by the  
15 last day of trial, was down to 13 cents per subscriber, per  
16 month.

17           That is a number that is indistinguishably  
18 indistinguishable from zero from a statistical point of  
19 view. And I will talk about that a little bit more.

20           But understand this: 27 cents, down to 13 cents,  
21 statistically indistinguishable from zero.

22           Is it remotely credible, Your Honor, that AT&T  
23 would pay \$100 billion to squeeze out 13 cents or 27 cents  
24 or any of the other numbers that Shapiro spun out of his  
25 model? Do they really believe that's what this merger is

1 about?

2           Your Honor heard from Jeff Bewkes. You heard from  
3 Randall Stephenson. You heard from John Stankey -- the  
4 leaders of these companies. And you heard that this merger  
5 is a response to an unprecedented transformation that is  
6 taking place in the video marketplace.

7           They explained how both companies are trying to  
8 confront this transformation and the serious challenges that  
9 they have been facing.

10           They -- the government's own witnesses,  
11 Your Honor, have corroborated this. The government's own  
12 competitor witnesses have come in; and they've described  
13 that this industry has more competition than ever before,  
14 with Netflix, with Amazon, with Facebook, with Google  
15 breathing down everybody's backs; declining margins; loss of  
16 subscribers; viewers move -- cutting the cord.

17           I mean, I heard Mr. Conrath suggest that the FAANG  
18 companies don't compete in the same market as Time Warner  
19 and AT&T and the other companies in this business. Look at  
20 their companies' 10Ks and 10Qs. They all describe Netflix  
21 as a competitor, for example.

22           Your Honor, the whole idea of cord cutting comes  
23 from Netflix. Where do you think these people are going?  
24 They're leaving the traditional ecosystem, and they're  
25 cutting the cord and they're going to Netflix and all the

1 other companies that have been propagated.

2 And on the advertising side with Google and  
3 Facebook, you heard the evidence. They're taking away ad  
4 dollars from TV. They're putting stress on subscription  
5 revenues. These are very serious challenges by all these  
6 companies in the same business, and why would the government  
7 suggest otherwise?

8 There is absolutely no support for that  
9 proposition, and it's completely inconsistent with the  
10 evidence that you heard.

11 And, you know, Your Honor -- and I'll be blunt  
12 about this. This trial has exposed serious questions about  
13 the credibility of the government's entire presentation.  
14 They tried insisently to dump countless documents in the  
15 record with no witness testimony, no foundation, no  
16 explanation, and no context so they could cherry-pick bits  
17 and pieces of documents out of context.

18 We just saw evidence of that in the closing  
19 argument. Mr. Conrath, for example, spoke about a core  
20 beliefs document, in which he picked out some sentence that  
21 he liked.

22 Did he tell you that this was prepared by a  
23 Mr. Manty, for whom they had more documents than anybody  
24 else, who's, what, four, five, six years out of business  
25 school, a young executive trying to make his way, preparing

1 a spitballing document that never went up to chain to  
2 anybody who had anything to do with the decision to acquire  
3 Time Warner?

4           Why is he -- why are they showing the Court these  
5 documents? And on top to it, they didn't even cite the  
6 whole document.

7           For example, I'm looking at  
8 Plaintiff's Exhibit 363, which talks about, "There will be a  
9 segment of single-person households that don't need a  
10 bundle.

11           But the bundle won't go away for families. We  
12 need to capture value across all segments with different  
13 direct-to-consumer and bundle approaches," and other  
14 comments, making it perfectly clear that with all the  
15 changes going on, the company has to face where the consumer  
16 is going, wherever they're going, whether they want to sit  
17 in the living room and watch a big bundle or whether they  
18 want to watch smaller packages over the Internet. That's  
19 what these documents are about. And they tried to make  
20 these documents sound sinister.

21           He did it again with Mr. Stephenson's document.  
22 He pointed to the Board document -- Mr. Stephenson's notes,  
23 I should say, to himself, where he said, "How can you  
24 advantage your own distribution without harming  
25 Time Warner's position as a wide distributor of content?"

1           And as he explained, those two are somewhat  
2 inconsistent, so he made emphatically clear to the Board:  
3 We're not going to compromise Time Warner's position as a  
4 wide distributor.

5           And he put his money where his mouth is,  
6 because -- Mr. Conrath didn't bring this out, but he sent  
7 out a letter to the world, essentially. That's  
8 Defendants' Exhibit 625, which internally became known as  
9 the Magna Carta. "We will continue to distribute  
10 Time Warner content broadly across the industry. We want to  
11 create new choices, including skinnier bundles."

12           So this cherry-picking, Your Honor, caused grave  
13 concern about the credibility of the evidence that we're  
14 putting on.

15           And these cooperating competitor witnesses. We  
16 heard Mr. Conrath point to their testimony that they're  
17 worried and they're concerned.

18           Your Honor, they produced no hard evidence, no  
19 data, no statistical studies, no analyses to support that  
20 they would ever pay a nickel more for the same content after  
21 this merger.

22           They speculated, because they don't want to face a  
23 stronger competitor, which this merger undoubtedly will  
24 create.

25           If you could block a merger by bringing up a bunch

1 of competitors to say that they don't like the merger and  
2 they're worried, no merger would ever be cleared.

3 One of Mr. Delrahim predecessors appointed back in  
4 the Reagan administration is famous for saying that if a  
5 competitor witness likes the merger, the Court should block  
6 it.

7 If the competitor witness opposes the merger, the  
8 Court should clear it. In other words, the competitor's  
9 always wrong. And I think those words ring true today, as  
10 they did when he spoke them, Your Honor.

11 The other serious issue about the credibility of  
12 their evidence is the evidence that they deliberately  
13 refused to present to the Court. And I'll just point out a  
14 couple of examples, which I think are stark, Your Honor.

15 One of the most important indicia of what will  
16 happen with this vertical merger in this business is to look  
17 at what happened to the prior vertical mergers in this  
18 business, yet the government -- and the government had all  
19 of the pricing data that would show exactly what had  
20 previously happened, because they had investigated all these  
21 mergers and they had all the pricing data in their files.

22 What did they do with it? Did they give it to  
23 their expert, Carl Shapiro? No.

24 Did they give it us to? No.

25 In fact, they told us they wouldn't even look at

1 it, and we had to go to court to get relief in order to get  
2 our hands on that data.

3 And, furthermore, Your Honor, when we put an  
4 interrogatory to them asking what their position was on  
5 this, they answered back. And, again, the question was:  
6 What's your position on the pricing effects of these prior  
7 transactions, including the Comcast-NBCU transaction, which  
8 they urged Your Honor to approve -- they answered that they  
9 have no position; they take no position.

10 What does that mean, they take no position?  
11 Your Honor, that's the definitive issue in this case.

12 The definitive issue in this case is what's going  
13 to happen, and they're taking no position regarding what's  
14 happened in the prior transactions.

15 And as you heard Professor Carlton, even though  
16 Professor Shapiro did none of this analysis and none of this  
17 work, Professor Carlton did, once we got our hands on the  
18 data. And the data from those prior transactions  
19 indisputably do not support that there will be any price  
20 increases claimed by the government as a result of this  
21 merger.

22 Another disturbing set of circumstances is the  
23 Altman Vilandrie situation.

24 So as Your Honor heard, Altman Vilandrie -- and  
25 I was amused by the characterization of that as an "ordinary

1 course" document, Your Honor. That was a document paid,  
2 I think, \$700,000 to this consulting firm to create a  
3 document that was then given to the government to oppose the  
4 merger. Hardly "ordinary course" document and a document  
5 that they -- that Mr. Shapiro said was the single most  
6 important document to his work.

7           And one of the reasons he said it was the single  
8 most important document to his work is because he said it  
9 was an ordinary business course document to inform  
10 negotiations at Charter.

11           The problem with that is the guy that runs  
12 negotiations at Charter never heard of it, had nothing to do  
13 with it, didn't commission it. It was being handled by a  
14 lawyer who was meeting with DOJ. And I'm going to get into  
15 that document a little bit more.

16           But my point here is that as Your Honor learned  
17 from the case, Mr. Shapiro relied on the document to come up  
18 with his analysis. But what he did not know is he did not  
19 have the original document, because the government didn't  
20 give it to him, even though the government had it.

21           And if he had the original document, Your Honor,  
22 his numbers would have gone to his 9 percent subscriber loss  
23 rate, to a much lower rate. And when you run his model, it  
24 would have eliminated the price increase in its entirety.

25           So they gave him the document with the higher

1 numbers. They kept to themselves the document with the  
2 lower numbers. And they didn't even tell him about it. And  
3 he first found out about it in his deposition. That's when  
4 he first learned, Your Honor.

5 Now, one final point -- because I could go on, but  
6 in the interest of time, I want to point out one other thing  
7 that caused concern about the credibility of this  
8 presentation by the government.

9 They restricted and compartmentalized, Your Honor,  
10 the scope of their experts' work, particularly  
11 Professor Shapiro. They did not have him talk about  
12 arbitration, for example, and the "no blackout" commitment.  
13 They didn't have him speak to program access rules, federal  
14 laws that will govern this merged company that will prohibit  
15 the very sort of activity the government's complaining  
16 about.

17 Instead, Professor Shapiro testified that he  
18 relied on two other experts to address those issues. But  
19 that was an important part of his opinion, that he was  
20 relying on these other experts.

21 Well, it turns out, Your Honor, the other experts  
22 were never called.

23 They had Professor Kwoka on arbitration. They  
24 didn't call him.

25 They had Professor Wilkie on program access rules,

1 they didn't call him.

2           And when you then consider now all the evidence  
3 they did present, the manner in which they presented it, the  
4 quality of the evidence that they presented and, in  
5 particular, all the evidence that they did not present, it  
6 leaves no doubt whatsoever that the government could not and  
7 did not meet its burden of proof to block this merger.

8           Now, with that said, I'm now going to turn to what  
9 I believe is the only remaining claim in this case; and that  
10 is that the merger will cause the price of the Turner  
11 networks to go up.

12           I say I think it's the only remaining claim,  
13 because with respect to their coordination claim and their  
14 HBO claim, Professor Shapiro effectively conceded away those  
15 claims, because he was asked point-blank whether he was able  
16 to opine whether there was any probability of harm  
17 associated with either the coordination or the HBO promotion  
18 claim, and he said he could not. He could not give the  
19 Court any probability. He couldn't even tell the Court if  
20 it was more than 1 percent.

21           So they have no economic analysis whatsoever  
22 respecting those two claims, Your Honor. And they don't  
23 really have any other evidence to support it as well, and  
24 that's why we heard virtually nothing about it in closing  
25 argument.

1           And, in fact, Your Honor, you may recall you  
2 actually asked Professor Shapiro and he tried to duck the  
3 question, whether the HBO issue, by itself, would harm  
4 competition, and he answered it would not.

5           So let's go to the Turner pricing theory. And  
6 Your Honor, we heard over and over and over again, that the  
7 reason why this merger needs to be blocked boils down to the  
8 single proposition that the merged company will have an  
9 incentive and ability to increase prices, incentive and  
10 ability. I don't know how many times I've heard that.

11           Again, if it were all one had to do was say  
12 "incentive" and "ability" to block a merger, no merger would  
13 be cleared. The question is whether there is any such  
14 incentive and ability and whether you can prove it. And  
15 none of those things has been established in this record,  
16 not one of them, Your Honor.

17           The entire incentive and ability analysis rests  
18 itself on one thing. This is like a house of cards. It  
19 rests on the Turner -- it rests on the Shapiro pricing  
20 model. That's what it rests on.

21           And I was struck by how little Mr. Conrath said  
22 about the Shapiro pricing model in his closing argument. It  
23 is the centerpiece of their case. Without it, there is no  
24 case. I submit with it, there's no case.

25           But I'm going to spend my time now going through

1 that -- the flaws, the deficiencies, the assumptions, and  
2 there are many of them. In fact, Your Honor, there are so  
3 many things wrong with that model and the opinions that I do  
4 not have the time to go over them all. I'd be here for  
5 hours. And I know you're not going to last up there  
6 listening to me for hours.

7 So what I'm going to try to do my best is to pick  
8 up the highlights. But I'll tell you there are a lot of  
9 highlights too. So I'll do my best.

10 The -- I think what I'd like to do is start by  
11 make sure that we all understand this bargaining theory on  
12 which -- whatever is left of the government's case rests  
13 entirely on.

14 And, you know, I've been trying to get my head  
15 around this for months now, and I guess I ended where I  
16 started. It makes absolutely no sense and has nothing to do  
17 with this case. It might have interest in a classroom.  
18 Somebody may have won a Nobel Prize for some aspect of it,  
19 but you can't use it to predict how these knock-down,  
20 drag-out negotiations are going to go, let alone to predict  
21 some price increase.

22 Here's the logic of it. The logic of it -- and  
23 you heard me do this with some of the witnesses, Your Honor.  
24 The logic of it is as follows.

25 The day before the merger, Turner, who fights to

1 get every nickel they can get, just like the distributors  
2 do, is going to threaten a blackout in order to try to get  
3 the best price it can; and at the same time, the distributor  
4 knows what Turner knows: There will never be a blackout.

5 I mean, there have only been two blackouts in the  
6 history of Turner, Your Honor: one for like 21 days or 23  
7 days and one for a month. You heard about both of them, one  
8 with Dish and one with Cable ONE. It's like the most hollow  
9 threat that anybody can make in this business. Everybody  
10 threatens the blackout and yet nobody does, except  
11 Charlie Ergen and Dish. He blacks everybody out.

12 But the idea is that Turner is going to threaten  
13 to black out if they can't get a deal; but at the end of the  
14 day, they're not going to black out so a deal gets made.

15 Now, let's turn to the day after the merger. We  
16 are talking now about the identical content that is being  
17 negotiated. It's not new stuff. It's the same stuff as the  
18 day before the merger. Okay?

19 Nothing has changed except Turner is owned by AT&T  
20 and has a sister company called DirecTV. That's all that's  
21 changed. Nothing else has changed.

22 So Turner is going, the day after the merger, to  
23 say, I'm going to ask for more money today than I did  
24 yesterday.

25 And let's use Charlie Ergen. Ergen says, why are

1 you going to do that?

2 Well, because I'm now owned by AT&T, and my sister  
3 company is DirecTV.

4 Ergen says, well, why do I care about that?

5 Well, because I might black you out.

6 Okay. If you black me out, you're going to suffer  
7 catastrophic losses. We know that.

8 Turner says, that's true. The day before the  
9 merger if I blacked out, which is why I never black out, I  
10 would suffer catastrophic losses. I'd lose all the  
11 subscription revenue. I'd lose all the advertising revenue.  
12 I'd lose hundreds of millions of dollars, unrecoverable,  
13 gone forever.

14 Okay. So you're telling me you're going to do it  
15 now after the merger?

16 Yes.

17 Why? Because I'll lose a tiny bit less. Instead  
18 of losing 200 million, I'll lose 195 million.

19 And when you know what? When Ergen stops  
20 laughing, they continue the discussion and they ultimately  
21 cut a deal.

22 I mean, I'm being a little bit facetious, but  
23 really not. That is the model, Your Honor. That is the  
24 model, the idea being that they're going to suffer a tiny  
25 bit less of a catastrophic loss the day after the merger;

1 so, therefore, they're going to risk a blackout.

2 Nobody thinks that. Not one person in the  
3 business thinks that. It's absurd. It's ridiculous, as you  
4 heard the witnesses testify. It's a made-up theory that  
5 might work in some other situation.

6 In fact, Professor Carlton told us when it worked.  
7 He gave us the example. He said, suppose you want to sell a  
8 car. And let's just use some low numbers for simplicity.

9 Suppose you want to sell a car to somebody, and  
10 you got a backup offer in your pocket for \$6. So you're  
11 going to try to push to get \$8, okay?

12 Now, the next day it turns out you've got a new  
13 backup offer for \$7. So you're a little bit more  
14 aggressive, and you're going to push maybe for 8.50 or \$9.  
15 That's the model's logic.

16 Your Honor, there are no -- we're not selling  
17 cars, and there are no backup offers here. The backup offer  
18 is you suffer a catastrophic loss. It's not like you have  
19 another offer in your pocket that you can go to if you can't  
20 squeeze out the last nickel from this other guy.

21 So the very logic of this thing makes no sense  
22 whatsoever. And it was demonstrated, Your Honor, because  
23 Professor Shapiro tried to take this model and apply it to  
24 this industry in a situation where nothing lined up with the  
25 facts of the case, nothing. No executive testified they

1 think that way. All the evidence was exactly to the  
2 contrary. And I'll give you a couple of examples.

3 We had some real examples, Your Honor, when you  
4 heard from the folks at Time Warner. When Time Warner and  
5 Time Warner Cable were all in the same company and Turner  
6 was all in the same company for a number of years, they were  
7 in that situation, to do the bargaining model that  
8 Professor Shapiro said that they would do; otherwise, they  
9 would leave money on the table if they didn't do it.

10 Well, it turns out, despite all the really smart  
11 people at Time Warner, nobody thought of that thing, because  
12 nobody ever did any of the things he was saying.

13 You heard John Martin. You heard Jeff Bewkes.  
14 They both testified that people at Turner, they didn't talk  
15 to the people at Time Warner Cable when they were doing  
16 their deals with distributors and vice versa. Those kind of  
17 discussions never came up.

18 And if somebody at Time Warner Cable told someone  
19 at Turner, hey, look, I want you to threaten a blackout or  
20 you can maybe suck over a couple of subscribers my way, they  
21 would have been tossed out.

22 And then you also heard the same thing from the  
23 folks over at Comcast. You heard that from Mr. Rigdon on  
24 the distribution side and Mr. Bond on the programming side.  
25 No one has done these things that he is saying is going to

1 happen in a vertical merger.

2           In fact, Your Honor may recall, you actually asked  
3 Professor Shapiro what was the basis of this. And it was  
4 even before I had a chance to cross-examine him. And you  
5 pointed out that that's not been consistent with the  
6 evidence we've heard in the trial. And his answer was, it's  
7 just an assumption, an economic assumption.

8           Well, again, if you're teaching a class in  
9 economics, maybe that assumption has some currency. But to  
10 use that to block a merger, it just makes no sense  
11 whatsoever.

12           It's not only -- you know, Mr. Bewkes, I thought,  
13 by the way, gave a really excellent analogy to, I thought,  
14 just definitively destroy the logic of this negotiating  
15 model. And he said, as I recall, that it would be like the  
16 day before the merger, you're negotiating with a 1,000-pound  
17 weight over your head; and the day after the merger, it's  
18 suddenly dropped to 940 pounds on your head. And is that  
19 going to make a difference? Are you now going to take a  
20 risk to black out just because it's a slightly less  
21 catastrophic outcome? Of course not.

22           And Mr. Shapiro himself admitted, admitted that  
23 his opinion testimony was not consistent with what the  
24 business executives testified. And he literally urged  
25 Your Honor or suggested to Your Honor that you should be

1 careful about making a decision based on what business  
2 executives actually do, as opposed to what economic theories  
3 suggest.

4           And that was probably the single statement that he  
5 made that I thought was the most unwarranted and most  
6 unjustified, because what we're doing here, Your Honor, is  
7 we're trying to really get to the bottom of the real world  
8 and what's really going to happen with this merger.

9           And he's essentially admitting that if you take a  
10 look at the real-world facts, then, yes, I have to concede  
11 this may not work. But you shouldn't look at the real-world  
12 facts. You should look at the theory. And that's just  
13 completely wrongheaded, Your Honor.

14           In addition to the fact that there's no real-world  
15 evidence to support this theory, we actually did take a look  
16 at the prior transactions and what actually happened in  
17 those transactions, and there were three precedent  
18 transactions that Professor Carlton studied very carefully.  
19 Despite the government and despite Professor Shapiro's  
20 decision to ignore those transactions entirely, they are  
21 when News Corp. split off DirecTV back in '08, when  
22 Time Warner spun off Time Warner Cable in 2009, and when  
23 Comcast acquired NBCU in 2011.

24           And he looked at all the data in those  
25 transactions, Professor Carlton did, and he concluded that

1 none of the things that Professor Shapiro was saying that  
2 were going to happen, none of these price increases on  
3 account of vertical integration was evidence at all in any  
4 of these transactions, Your Honor. And to me, that is the  
5 absolute best evidence that it's not going to happen here.

6           If Professor Shapiro were right, it would have  
7 happened each and every one of those times. He had no real  
8 response to that, other than to say, well, Comcast is a  
9 regional distributor.

10           Regional? There are like 23 million subscribers  
11 in 40 states and almost every big city in the country.  
12 They're a dominant cable company. In every market that they  
13 operate, they are the dominant cable company. And they  
14 compete with DirecTV and Dish everywhere. So there was no  
15 basis to try to justify not looking at those transactions,  
16 Your Honor.

17           Another thing that Shapiro acknowledged -- and  
18 this is astonishing as well, Your Honor. He ignored the  
19 fact that Turner has fixed-term contracts with all the  
20 distributors, where the prices are already locked in and  
21 they can't change any prices. So what he is positing can  
22 never happen. It can't happen while those contracts are in  
23 place; that's for sure.

24           And one of the contracts with a very major  
25 distributor lasts for four more years. And he acknowledged

1 that he didn't take those into account, because you have to  
2 look at what's going to happen, you know, I guess, forever.

3 But even he conceded that his binoculars don't  
4 work that well and you can't look at forever. We have to  
5 look at what's going to happen this year and next year and  
6 the next couple of years, as reasonably as we can project.

7 And if you take into account any of those  
8 contracts, Your Honor, especially the big one, it wipes out  
9 this price increase that he's projecting. In fact, I can  
10 give you the exact numbers.

11 If you correct for the existing contracts, the net  
12 price increase of 27 cents that Shapiro projects becomes a  
13 price decrease of 20 cents to all pay-TV consumers, all of  
14 them. So that one correction at all, that one correction  
15 alone, I should say, wipes out the pay increase and produces  
16 a decrease.

17 In addition, Your Honor, Professor, as I mentioned  
18 at the outset, Professor Shapiro did not take into account  
19 the "no blackout" commitment that Turner has made.

20 Now, understand something, why this is important.  
21 The government asserts that there's going to be all this  
22 leverage post-merger, because DirecTV will be in the same  
23 company and for all the reasons that I previously described.

24 We have vehemently disagreed that any of that  
25 makes sense and is supported by any of the evidence, as

1 I have been explaining to you. We were saying that to the  
2 government way back when.

3 But when the government filed suit anyway, what  
4 Turner did is it immediately decided to take that issue  
5 right off the table immediately by telling the distributors,  
6 making a unilateral binding commitment: We won't black you  
7 out. How's that? We don't believe what Shapiro is saying.  
8 We don't believe what the government is saying. We'll put  
9 our money where our mouth is. And we're going to agree, in  
10 a binding, legal way, not to black you out.

11 So any leverage that someone could accuse us of  
12 not having, not only are we not going to have it, we're  
13 going to give you all the leverage. How's that? This gives  
14 all of the leverage to the distributor, all of it.

15 And Turner is now post-merger at a decided  
16 disadvantage. And it's not surprising, Your Honor, that  
17 Professor Shapiro did not take that into account. He said  
18 it was not within the scope of his assignment and referred  
19 to some other expert who never showed up to testify. You  
20 never had a chance to hear that expert, and we didn't have a  
21 chance to cross-examine him.

22 You heard from Professor Katz, though, who we  
23 called. And he explained how you have to take into account  
24 the arbitration commitment.

25 And it's not about the details of the process,

1 Your Honor. I mean, people can quibble about the details of  
2 the process. It's about the no-blackout commitment that  
3 destroys the very premise of the entire bargaining model.

4 If you can't black out, you can't threaten to  
5 black out, even Professor Shapiro would have to concede that  
6 his model doesn't work in that situation. That's why he  
7 didn't take it into account. It wasn't an accident. It was  
8 a deliberate decision not to take it into account.

9 And Professor Katz went through that and  
10 explained, by the way, that even if it just applied, for the  
11 sake of argument, even if you just applied the no-blackout  
12 commitment to a couple of distributors and not all of them,  
13 that would wipe out the price increase. It doesn't even  
14 have to be fully effective. It could be partially  
15 effective.

16 I do have to take issue with something that's been  
17 a constant -- it's been a constant theme throughout the  
18 government's case. They keep trying to call this a remedy.  
19 It's not a remedy, Your Honor. It's part of Turner's  
20 contracts. It's not a remedy.

21 A remedy means there's harm, and that's why they  
22 keep wanting to call it harm and a remedy. And that's why I  
23 kept objecting during the course of the trial, because they  
24 want to suggest that the existence of the arbitration means  
25 that there's been an admission or acknowledgment of harm.

1 Absolutely not.

2 This case would come out the same way, in my view,  
3 without the arbitration commitment.

4 But the arbitration commitment erased any question  
5 that they could possibly raise about this leverage issue,  
6 although they've still raised it, but simply by ignoring it.  
7 That's how they dealt with it. They've just ignored it.

8 But it's not a remedy. It's a structural part of  
9 our contract with our distributors. It's completely binding  
10 under New York law.

11 And Your Honor can set that out in findings of  
12 fact. That will be included in findings of fact, that it's  
13 binding, that it applies to the little cable companies like  
14 the NCTC.

15 We heard testimony that it doesn't apply to NCTC,  
16 and we showed the exhibit that shows exactly that it does  
17 apply to NCTC. It's fully enforceable, and it's totally  
18 irrevocable, and it should have been taken into account.

19 Your Honor, the exhibit on the NCTC is Defense  
20 Exhibit 785.

21 The other thing that Professor Shapiro didn't take  
22 into account and that also dooms his model is the federal  
23 program access rules first enacted by Congress and then  
24 promulgated by the FCC.

25 And without reciting the rules, Your Honor, the

1 simple point is that they would bar this kind of  
2 impermissible either discriminatory conduct or  
3 anti-competitive conduct in pricing content to distributors.  
4 And it applies to vertically integrated companies in this  
5 business. It would apply to the merged company post-merger.

6 It's a legal constraint, in some ways, like the  
7 arbitration commitment. But, again, Professor Shapiro did  
8 not take it into account. He said he was relying on a  
9 Professor Wilkie, and Professor Wilkie never showed up to  
10 testify. So we have a complete failure of proof,  
11 Your Honor, on dealing with a number of these items,  
12 complete failure.

13 THE COURT: What about the notion that they'll use  
14 their leverage to not only increase prices but to get  
15 subscribers to leave, who will then be picked up by DirecTV?

16 MR. PETROCELLI: Well, that is the theory,  
17 Your Honor.

18 And their theory is that the merged company will  
19 be slightly -- will -- won't be as worse off post-merger as  
20 pre-merger, because while they'll suffer, in my hypo, the  
21 \$200 million of lost subscription fees and advertising  
22 revenues if Turner were to black out -- again, we're in the  
23 post-merger scenario now --

24 THE COURT: Right.

25 MR. PETROCELLI: -- that will be cushioned a bit,

1 because if they black out a competitor, some of that  
2 competitor's customers will get upset that they don't have  
3 Turner; they'll cancel their subscription, and they'll go to  
4 different other places in search of Turner, one of which  
5 would be DirecTV.

6 And idea would be that some of those people would  
7 come to DirecTV, and those would now be customers of  
8 DirecTV. That's what I'm about to get into, Your Honor,  
9 because in order for that to work, they would have to pick  
10 up massive amounts of customers to more than compensate for  
11 all the money they're going to lose by blacking out.

12 And Professor Shapiro really had to struggle with  
13 that. That's why he kept changing what he called those  
14 departure numbers. He had 9. He had 14. He had numbers  
15 all over the place.

16 But the reality is if -- in order for you to be  
17 better off as a merged company, you have to be able to,  
18 frankly, withhold your content, actually black it out, never  
19 make it available to the other distributor, and then bring  
20 over so many more subscribers that you would make more money  
21 in that scenario than distributing the content and getting  
22 the fees and the advertising revenue.

23 The government is not making that argument,  
24 Your Honor. That's what so confusing about this whole  
25 bargaining model. The government is not making the argument

1 that it would be profitable for the merged company to do  
2 what I just said, because the math doesn't work.

3           It would be impossible to pick up that many  
4 customers by blacking out or by even to threaten to black  
5 out. It can't be done. The numbers don't work. So that's  
6 why they're not making the argument that the content is  
7 going to be foreclosed. And that's why this whole  
8 bargaining theory doesn't make any sense, because it's based  
9 on the idea that you will threaten to foreclose. But it  
10 assumes you're going to reach a deal.

11           Well, if you're going to reach a deal, what good  
12 is the threat? It doesn't make any sense, not to mention  
13 all the other reasons, like the arbitration commitment, the  
14 program access rules, and so forth.

15           So the short answer to that, Your Honor, is that  
16 the facts don't support the ability of the merged company to  
17 be better off by withholding content in the hopes of getting  
18 more customers. That's the foreclosure theory. That would  
19 be the rare breed of horse that Your Honor wrote about some  
20 time ago. That is when a challenge to a vertical merger  
21 would make sense. But no such claim is being asserted here.

22           They are not saying that the Turner networks will  
23 be withheld. And the reason they're not saying, it's not  
24 because of the goodness of their heart. They would say it  
25 if they could say it, but the numbers don't work.

1           Shapiro admitted it would be profitable for the  
2 companies to continue to license the networks post-merger.  
3 It would not be profitable for them to withhold them in the  
4 hopes of getting more subscribers.

5           But what he is saying is they could threaten to do  
6 it and make some more money. And for all the reasons I've  
7 discussed and will continue, that doesn't hold up.

8           Now, one other thing before I get to the model  
9 itself, and that has to do with efficiencies. And  
10 Professor Shapiro testified that, except for one particular  
11 type of efficiency called the elimination of double  
12 marginalization, which he gave us credit for but which he  
13 understated -- and I hope to have time to deal with that.  
14 He understated it, Your Honor.

15           But with the exception of that one efficiency,  
16 Professor Shapiro gave us a total of zero credit, zero for  
17 any of the \$2.5 billion in revenue synergies and cost  
18 savings that the company projected it would begin to earn on  
19 an annual basis starting in 2020.

20           And he said he was relying, once again, on another  
21 expert, because he knew that if he didn't have a zero to pop  
22 into his model, he couldn't project the price increase.

23           So he had to put zero in there. So how do they  
24 get to zero? They call this other guy, Robert Quintero, to  
25 testify.

1           And Robert Quintero testified that we got no  
2 credit -- or we get no credit for any efficiencies. And,  
3 frankly, I thought his testimony was disingenuous,  
4 Your Honor. And I say that because he conceded that there  
5 would be synergies and benefits from this deal.

6           But he said that, you know, it's like an IRS audit  
7 or something. You know, you didn't show me enough documents  
8 to prove it.

9           I mean, he's not the Court. I mean, Your Honor  
10 is -- makes those decisions, not Robert Quintero. And it  
11 turned out that he didn't look at a fraction of the  
12 documents that were made available to DOJ and to him. And  
13 he came up with an impossible standard that nobody could  
14 meet in order to come up with zero.

15           And if we get credit for a fair number of these  
16 efficiencies that Mr. Stankey -- really, even a small amount  
17 of these efficiencies that Mr. Stankey projected of this  
18 2.5 billion, it would flip of the results of  
19 Professor Shapiro's model.

20           Now, I want to turn to the model, and I want to go  
21 through the three inputs. I've spent the time so far  
22 explaining why, even before we get to the actual inputs to  
23 the model, why the logic of the model doesn't make sense,  
24 why it doesn't square with how real people actually  
25 negotiate deals. Nobody is going to pay a nickel more for

1 the same content just because Turner is now owned by AT&T.

2 In fact, because DirecTV is now a sister company  
3 to Turner, if anything, a bare-knuckled distributor is going  
4 to want to pay less, not more.

5 And there's been no proof from any of those  
6 witnesses that they would actually pay more money for the  
7 identical content just because of the merger.

8 Now what I want to do is I want to turn to the  
9 actual inputs that he used to try to come up with these  
10 numbers, because the first thing Shapiro is trying to do is  
11 suggest that this model and the logic of this model work in  
12 this case and they don't work.

13 And then he goes one step farther and is actually  
14 trying to predict the price increase, because the government  
15 needs to come up with some showing of harm to consumers.

16 And, Your Honor, to be very clear about this, the  
17 numbers that Shapiro comes up with, these are not  
18 statistically significant calculations. He even conceded  
19 that. These are just like estimates. That's why he's got  
20 numbers all over the place.

21 I mean, at one point, there was an exchange when  
22 Professor Carlton was talking about Professor Shapiro's  
23 models, about it being a Rube Goldberg contraption.

24 And I think that's a fitting description of it,  
25 because it's kind of garbage in, garbage out. It depends on

1 so many assumptions, none of which square with reality, that  
2 the numbers that are coming out -- and you can see it from  
3 his testimony. He was making up numbers on the spot.

4 It started out at 27 cents. Then it went up to  
5 45 cents. Then it went down to 13 cents. The numbers are  
6 all over the place. And it's because there's no rigor to  
7 this, because the model doesn't apply in this situation.

8 So he's got three different inputs to the model.  
9 And the first one is the most important one. It's the one  
10 Your Honor was asking me about. And that is that assuming  
11 Turner were to make these threats to black out a distributor  
12 post-merger in order to get a higher price, how many  
13 customers would it take to have the distributor -- if there  
14 is a blackout, how many customers would that distributor  
15 leave that would then wind up at DirecTV?

16 Now, this is like an "Alice in Wonderland"  
17 situation, Your Honor, because, remember, Shapiro's  
18 bargaining model assumes there's not going to be a blackout,  
19 assumes there's going to be a deal. And what he's trying to  
20 do is recreate what's in the minds of these negotiators and  
21 how they're going to strategize.

22 And he's actually saying, Your Honor, that they're  
23 going to strategize that a lot of people might leave a  
24 distributor if the distributor is blacked out from Turner.  
25 He'll be afraid to lose those people because some of them

1 will end up in DirecTV; and, therefore, Turner can ask for  
2 more money.

3           Putting aside the illogic of that, you don't even  
4 get to first base on this unless you can prove, with hard  
5 evidence, that a lot of people would leave a distributor if  
6 Turner were blacked out and that a lot of them would end up  
7 at DirecTV.

8           So the first part of this is, how many people  
9 would leave a distributor in a threatened, hypothetical  
10 blackout of Turner?

11           You may recall this from the testimony; but when I  
12 cross-examined Professor Shapiro, he admitted that if the  
13 number were about 5 and a half percent or less -- that is,  
14 the distributor would lose 5 and a half percent or less --  
15 then his model produces no price increase, zero.

16           So Professor Shapiro's job was to come up with a  
17 number greater than 5 to 6 percent, and that's why you start  
18 seeing numbers of the sort that he did.

19           So what are the numbers that he came up with? And  
20 how did he come up with them? Well, Your Honor, he came up  
21 with them by relying on the Altman Vilandrie slide deck.

22           He said that was the single most important  
23 document for him. It was like a buffet for him. It had  
24 everything he needed. It had departure rates in there. It  
25 had prospective customer losses in there. It had cord

1 cutting in there. It had countermeasures and mitigation  
2 efforts. It had everything in there.

3 So it was like a dream come true for him, or at  
4 least he thought, because it turns out he didn't ask a  
5 single person at Altman Vilandrie any questions about that  
6 slide deck, how it was prepared, how the Internet surveys  
7 were done.

8 He had no information whatsoever about it other  
9 than what he read in the slide deck itself. And it turns  
10 out, he didn't even have the original slide deck.

11 So using that slide deck -- and, Your Honor,  
12 I have in your binder there -- and I'd like to put that  
13 board up right there. This is Defense Exhibit 125 in your  
14 binders. If you want, I think that should be in the pocket  
15 of the binder.

16 But, first of all, Your Honor, you can see that  
17 Shapiro, this parallels his testimony in court that it's the  
18 single best document is the Altman Vilandrie, which is very  
19 important here, using the lower end, because Shapiro wanted  
20 to demonstrate that he was being fair and reasonable in  
21 using the lower end of a whole bunch of numbers rather than  
22 the upper end.

23 And I'll just cut to the chase. Now that it shows  
24 that his reliance on these lower-end numbers is completely  
25 unjustified, what he actually said on the stand and what I

1 actually heard Mr. Conrath said is, well, instead of the  
2 lower end, let's use the upper end.

3 Well, Your Honor, the upper end is doubly less  
4 reliable and doubly more indefensible than the lower end.

5 So he staked his case out on using the lower ends  
6 of these ranges, and that all fell apart for him. And I'll  
7 explain how.

8 So Professor Shapiro was given this document,  
9 Your Honor, that showed a 9 percent and a 10 percent. These  
10 are the people that would leave the distributor if there was  
11 an actual blackout of Turner, and these are the people under  
12 prospects who wouldn't join the distributor because of an  
13 actual blackout of Turner, 9 and 10 percent.

14 And Shapiro used the 9 percent. And he came up  
15 with a 9 percent departure rate, as he called it, or  
16 subscriber loss rate.

17 The problem was, Your Honor, that he never got the  
18 original report, which was -- and I should correct myself,  
19 because it's not a report. It's a slide presentation. The  
20 original slide presentation showed 5 percent and 6 percent.  
21 And had Professor Shapiro received those, he would have come  
22 up with a subscriber loss rate that would have predicted a  
23 price increase of zero or less.

24 But he didn't know about these other numbers  
25 because the government not only didn't give him the

1 documents, but the government didn't tell him about it. And  
2 the government had it.

3 And the government met with and spoke -- there  
4 were two long telephone calls that the government had with  
5 Mr. Bewley, who prepared this slide deck.

6 And the fact that the government doesn't tell  
7 Professor Shapiro, knowing he's going to rely on this as the  
8 single most important document, Your Honor, that's just  
9 inexcusable.

10 And then when -- Professor Shapiro first learns  
11 about the 5 and the 6 percent at his deposition, when we  
12 took his deposition.

13 So then, Your Honor, the plot thickens because  
14 when Professor Shapiro shows up to testify at trial, now he  
15 knows about all of this, because he was confronted with it  
16 at his deposition.

17 He said, I've got you, Mr. Petrocelli. You were  
18 right. There was a 5 percent, and I didn't know about it.  
19 I only knew about the 9 percent. But even if I used the  
20 5 percent with the 10 percent, I still get a number around  
21 9 percent departure rate -- actually, 8.5 is what he said.

22 But, Your Honor, he got that wrong, too, which he  
23 finally admitted when he came back yet again on rebuttal.

24 He said when he gave me that testimony, that only  
25 the 5 percent number had changed, nothing else.

1           But the 10 percent number was also a different  
2 number in the original report. It was 6 percent.

3           So how could he be so reckless, Your Honor, as to  
4 not read the document. Read the document. Once it was made  
5 available to him, read that, 5 and 6 and 9 and 10. And you  
6 can't use the 9 from 1 and the 10 -- or the 5 from 1 and the  
7 10 from the other, because as we learned, these numbers are  
8 derived from one another.

9           See, it says, "Implied, 6 percent"? That comes  
10 from the actual 5 percent. The 10 percent comes from the  
11 actual 9 percent. You can't mix and match them. You can't  
12 take 5 percent and 10 percent.

13           Five goes with 6, and 9 goes with 10.

14           And if you use 5 and 6, which is the lower end of  
15 the range, then it eliminates entirely the price increase.

16           So that's one piece of evidence that just  
17 completely blew up in his face, Your Honor. And that's why,  
18 in closing argument, we heard very little about it.

19           But remember what he originally said, and he said  
20 it on the stand. This was the most important document.  
21 Well, this document shows there would be zero price  
22 increase.

23           The next one, Your Honor, is the Suddenlink  
24 situation. For Professor Shapiro said that when Suddenlink  
25 dropped Viacom, it was a good thing to study, because the

1 drop lasted a couple of years. And then he estimated that  
2 Suddenlink lost 9.4 percent of its subscribers. Again, he's  
3 trying to get everything to line up to about 9 percent so he  
4 can come up with a price increase.

5 The problem with the 9 percent, Your Honor, is  
6 it's flatly inconsistent with what Suddenlink itself said --  
7 if you could put up the other chart -- Suddenlink itself  
8 said.

9 And this is Defense Exhibit Demonstrative 114.

10 Suddenlink itself said it was 2 to 2 and a half  
11 percent. Comcast said it was 3.8 percent. Citibank said it  
12 was 2.5 percent. And Charter said it was 4 to 5 percent.

13 And then when Professor Carlton took a look at  
14 this issue and did the right way, he came up with  
15 4.8 percent.

16 So Professor Shapiro's 9.4 percent is clearly  
17 wrong, and it's clearly an outlier. So how did he come up  
18 with 9.4 percent?

19 Can you put up the next chart, please.

20 First of all, here's how.

21 THE COURT: What's the number on that one there?

22 MR. PETROCELLI: Yeah. This one is -- what do we  
23 got here? What's the red line number?

24 MR. ROBSON: PXD11-06.

25 MR. PETROCELLI: Plaintiff's Demonstrative 11-06.

1 THE COURT: Okay.

2 MR. PETROCELLI: So this will explain this.

3 There's a lot of testimony about it.

4 This is Suddenlink before the drop of Viacom.

5 This is what actually happened. And this is what happened  
6 afterwards.

7 And this is what the rest of the industry was  
8 doing.

9 So Professor Shapiro says, wow, Suddenlink did way  
10 worse than everybody else. He computed that number and came  
11 with 9.4 percent.

12 Now he made two critical errors, Your Honor. And  
13 I pointed them both out in my cross.

14 First of all, he left off December. He left off  
15 December 2016. And while the government tries to dismiss  
16 this now, let's be clear what happened. They did not tell  
17 the Court, they did not present it in their argument that  
18 Professor Shapiro had left off December.

19 And when I cross-examined him on it last Tuesday,  
20 he said I had no recollection about December, he couldn't  
21 explain it. Then he shows up on Thursday, and he has a  
22 lucid interval. And he can all of a sudden remember, oh, it  
23 was Dish. And I left it off on purpose because the numbers  
24 didn't make sense to me.

25 Well, you can't leave anything off just because it

1 doesn't go your way.

2           There was a big drop there on Dish. Maybe some of  
3 the numbers were wrong, but maybe some of these numbers are  
4 wrong, too. You've just got to take it all and see what  
5 happens. And it turns out if he had included the month of  
6 December with the big drop, this line would have come down.

7           So here's the other thing he did wrong, in  
8 addition to deleting December off the chart.

9           You can put up the next one, please.

10           He didn't control for industry trends. And let me  
11 explain what I mean by that. Here's what was happening to  
12 Suddenlink before they dropped Viacom, and here's what  
13 happened afterwards, okay?

14           And what Professor Shapiro said is the difference  
15 between these two lines is the 9.4 percent.

16           How did he get this line? He just took this  
17 pattern and just extrapolated it as though it was going to  
18 continue at the same rate.

19           But he didn't take into account that the industry  
20 changed around this time, and this is not the right number;  
21 in other words, this is not what Turner would have done had  
22 there not been a blackout. The number is different. The  
23 line is different.

24           The line would look something like this,  
25 Your Honor.

1           And remember, Professor Carlton explained that the  
2 dot goes down. The dot goes down.

3           This is the proper area to measure, not this,  
4 because this is what actually happened, and this line is  
5 what would have happened, given the industry, had there not  
6 been a Viacom blackout. And so Professor Shapiro got that  
7 wrong.

8           In addition, Your Honor, you heard Mr. Barbur's  
9 cross-examination of Professor Hauser. Shapiro relied on  
10 Hauser. Hauser's survey was fundamentally biased in so many  
11 ways.

12           And in the interest of time, I'm not going to  
13 really go over them too much with you, other than to point  
14 out, Your Honor, a few things that he said in that regard.

15           He talked about how Professor Hauser did. Let me  
16 just get my notes on that.

17           He talked about -- we called Dr. Rossi, as you may  
18 remember, who gave very compelling testimony about the  
19 Hauser survey, as well as the Altman Vilandrie survey. And  
20 one thing I skipped on Altman Vilandrie is Dr. Rossi  
21 testified that everything about the Altman Vilandrie  
22 Internet survey and the work they did was, in his words,  
23 invalid. They just cobbled all kinds of things together.  
24 And it was a mess, and he said it was totally invalid from a  
25 methodological standpoint.

1           He also -- Professor Rossi also spoke about the  
2 Hauser survey. And Hauser comes up with a 12 percent-or-so  
3 departure rate for Professor Shapiro. But Rossi explained  
4 that the Hauser Internet survey was designed in such a  
5 biased way that its results were "unreliable."

6           It was systematically biased, Your Honor, towards  
7 finding a higher switching rate. It created undue  
8 associations between the respondents' favorite programs and  
9 Turner. It presented Turner content as more popular and  
10 prominent. It eliminated switching costs. It had a large  
11 margin of error and so on.

12           And Professor Rossi's testimony about that was  
13 absolutely definitive that that survey, as well as the  
14 survey and the work done by Altman Vilandrie were completely  
15 unreliable.

16           Now, there's a second part now to Dr. Shapiro's  
17 analysis. He comes up with this 9 percent departure rate,  
18 which as I just explained, is indefensible. And anything  
19 under 5 or 6 would produce a zero.

20           And you may recall that John Martin and  
21 Jeff Bewkes were asked what they thought was reasonable,  
22 given their vast experience in running these companies. And  
23 you're talking probably about 60, 70 years of collective  
24 experience between them.

25           And they said that if there was a Turner blackout,

1 anything, like 1 or 2 percent at most, very low single  
2 digits, that happens to correspond pretty much exactly with  
3 what happened when Cable ONE blacked out Turner. I think  
4 there was like a 21-, 23-day blackout of all the Turner  
5 networks. And what did Cable ONE lose? They lost, I think,  
6 less than 1 or 2 percent subscribers.

7           The same thing when Charlie Ergen of Dish blacked  
8 out the Turner networks for a month in 2014, Your Honor, all  
9 the networks except TNT and TBS. And I think there was a  
10 less than 1 percent.

11           And so the estimations given by John Martin and  
12 Jeff Bewkes are kind of right on the money. And here you  
13 have, you know, Professor Shapiro using ridiculous numbers  
14 like 9 percent, which are only -- they are to create a price  
15 increase in his model.

16           The second part of his input, Your Honor, is how  
17 many of those 9 and a half percent, using his numbers, are  
18 going to go over to DirectTV? Because there's other places  
19 they can go.

20           They can go to another cable company. They can go  
21 to Dish. And, most importantly, they can cut the cord and  
22 say, you know, I've had it. People are cutting the cord all  
23 the time anyway. It's an increasing trend.

24           And so what did Professor Shapiro do? He came up  
25 with a very small percentage of people who would cut the

1 cord in order to inflate the number of people who would go  
2 to DirecTV. He used 10 percent.

3 Now, where did he get the 10 percent? Where do  
4 you think? Altman Vilandrie. That's where he got the  
5 10 percent. That number is not defensible, Your Honor.

6 Professor Carlton testified conservatively, you  
7 have to use at least 20 percent, and it could be as high as  
8 30 percent.

9 Now -- and all the witnesses, even the  
10 government's witnesses, all explained how systematic this  
11 cord cutting is.

12 You know, Millennials and even people who are not  
13 Millennials are in search of cheaper television packages.  
14 So they're gutting cutting the cord. They're going to  
15 YouTube TV. They're going to Sling. They're going to  
16 DirecTV Now. They're going to Netflix. They're going all  
17 over the place.

18 And to just give a 10 percent figure is not  
19 supported by any of the evidence. Again, the only thing he  
20 relied on was Altman Vilandrie on that, Your Honor.

21 Now, there's an important consequence to that. If  
22 you -- if he used a 20 percent figure, which Carlton said  
23 was conservative, that completely eliminates the price  
24 decrease. That's how sensitive, Your Honor, his model  
25 estimates are. You just turn the dial in one direction and

1 you've got no price increase. You turn it in another  
2 direction, you've got -- like you're down to a penny.

3 I mean, it's just a contraption is what it is.  
4 That's why we have all these numbers floating around.

5 The other thing he did wrong on this cord  
6 cutting -- and it gets a little complicated, Your Honor, but  
7 he underestimated how much benefits the merged company would  
8 get through the elimination of double marginalization.

9 And what that means is that if -- the more people  
10 that are out there who don't have pay-TV service or who have  
11 pay-TV service but don't have Turner, because Turner is in  
12 most of the pay-TV bundles -- but not all of them. There's  
13 probably 10 percent of households who have pay-TV bundles  
14 that don't get Turner. And then there's a bigger number of  
15 people who don't have any pay-TV service.

16 Elimination of double marginalization, very  
17 simplistically means that -- because DirecTV doesn't have to  
18 pay for the Turner content anymore, effectively, because  
19 it's buying the company, it can lower its prices. It can  
20 now charge cheaper prices.

21 And even Professor Shapiro acknowledges that.  
22 That's why he shows price decreases to the 25 million-or-so  
23 DirecTV customers.

24 But by underestimating the elimination of double  
25 margin -- by underestimating the cord cutting, he has

1 underestimated the amount of elimination of double  
2 marginalization.

3           If you use a bigger cord-cutting number, you get a  
4 bigger number for elimination of double marginalization  
5 because there are more people out there that might be  
6 attracted to DirecTV's lower prices because it's now a more  
7 efficient seller of pay-TV services. And that would mean  
8 that there would be a bigger price increase spread across  
9 the pay-TV services. And so he under --

10           THE COURT: Wouldn't that also mean there's more  
11 competition in the marketplace?

12           MR. PETROCELLI: Excuse me?

13           THE COURT: Wouldn't that also mean there's more  
14 competition.

15           MR. PETROCELLI: For that reason, because now  
16 other people have to now respond to those price cuts,  
17 Your Honor, that DirecTV. And that just helps to stimulate  
18 even more price cuts from the other competitors. And that's  
19 part of what Dr. Shapiro referred to as his merger  
20 simulation model, okay?

21           Because when DirecTV cuts its price because of the  
22 elimination of double marginalization, it makes other  
23 competitors have to work harder to compete, because now  
24 they're up against a stronger rival. And that makes them  
25 have to cut their prices in order to be able to keep their

1 customers and grow their business. That's the whole idea of  
2 it. So it very much fosters competition, rather than  
3 stifles it.

4 Now, the last piece of Professor Shapiro's  
5 analysis is the profit margin. So, again, in this  
6 hypothetical blackout, you're thinking to yourself, if I  
7 black Turner out, if you're at Turner and you're trying to  
8 see if you can gin up a higher price and you say, if I  
9 threaten a blackout, a certain number of people are going to  
10 leave, let's say, Dish; a certain number of people are going  
11 to come to DirecTV; and how much money is DirecTV then going  
12 to make on those customers? Because if DirecTV isn't going  
13 to make very much money on those customers, then why go  
14 through this exercise at all?

15 So what Professor Shapiro did is he used a profit  
16 margin that went back to June 2016, which was a very high  
17 profit margin, which, again, inflated his numbers and  
18 created a much bigger price increase.

19 Now, as you know, this became an issue of  
20 contention. When we turned over more recent profit margin  
21 data, Professor Shapiro refused to acknowledge it. It was  
22 in his -- it was in David Christopher's deposition, which  
23 Professor Shapiro cited in his report. The deposition had  
24 been taken two weeks earlier. And the new number was in the  
25 deposition. It was significantly lower because of the cord

1 cutting and subscriber losses that the company had been  
2 encountering. And yet Professor Shapiro didn't use the  
3 lower number.

4 When I asked him why, he said, well, I didn't read  
5 the deposition.

6 In fact, he didn't even know who David Christopher  
7 was, even though he's a high-level president in the video  
8 business of the company. Didn't even know who he was.

9 And so -- and he didn't know that we had given him  
10 data with Professor Carlton's backup report, his rebuttal  
11 report. We gave him all the backup data. He still didn't  
12 update his numbers.

13 And, Your Honor, there was an exhibit. It's  
14 Exhibit 942, as I recall. And it is an exhibit that we --  
15 that David Christopher presented, in which there were a  
16 number of different profit margins that showed the  
17 following.

18 It showed that, number one, the last final one for  
19 the company was the one that Professor Carlton used. And  
20 that's the number for June 2017. And you'll see the Carlton  
21 name on there. This is Defendants' Exhibit 942.

22 All the other numbers, Your Honor, after June 2017  
23 are still in draft form, although July, according to  
24 David Christopher, is almost final. But you'll see there  
25 that they're going up and down.

1           The government contends that it was cherry-picked.  
2 It wasn't cherry-picked at all. It was the most final  
3 number that the company had that was used, and that's the  
4 appropriate number to be used.

5           And even if you look at the subsequent months,  
6 Your Honor, you'll see the number goes up twice and then  
7 comes down again. And, again, these are draft numbers.

8           Nowhere near the 1300-plus number that  
9 Professor Shapiro used.

10           Your Honor, may I pass up a copy? I'm not sure  
11 Your Honor has one in your binder.

12           THE COURT: I don't think it's in this little  
13 notebook I have.

14           MR. PETROCELLI: It's not. So I'm just going to  
15 pass this up.

16           THE COURT: Okay.

17           MR. PETROCELLI: I apologize for that.

18           THE COURT: That's all right.

19           MR. PETROCELLI: What I want you to do is take a  
20 look at the June 2017 number. That's the most current  
21 number that Mr. Christopher testified the company has. And  
22 the ones after that are draft numbers that go up and down.  
23 And the last one goes down.

24           Now, I asked Mr. Shapiro on the witness stand when  
25 he last testified, I said, what happens when you, let's say,

1 take the average of January, April, and June 2017? Because  
2 those three numbers are final, although June is the most  
3 current final number.

4 And it turns out, Your Honor, when you average  
5 those numbers -- and Shapiro testified to this -- and you  
6 drop them into his model, you come out with a price increase  
7 of 13 cents. And that's why he said 13 cents is his new  
8 low, because he had to acknowledge that using 2017 final  
9 figures cut his price increase in half.

10 But I submit to you, Your Honor, the proper number  
11 to use is the last final number, which is 812, which  
12 eliminates his price increase altogether.

13 So where does that now leave us, Your Honor?  
14 Professor Carlton summed all this up in a chart, which I'd  
15 like to turn to. That's Defense Exhibit 115.

16 So if we walk through this Defense Exhibit 115, if  
17 you just change in Professor Shapiro's model, the departure  
18 rate from 9 percent to 5 percent -- 9 percent is not  
19 supported by any evidence, any credible evidence, and 5  
20 percent is higher than the actual evidence would suggest --  
21 it eliminates the price increase entirely and produces a  
22 price decrease. And to be clear, these price decreases are  
23 for all pay-TV customers, not just DirectTV's. All of them,  
24 okay?

25 So there could be no possible harm at all using

1 his own flawed model, if you just change one input, from 9  
2 to 5.

3 If you change another input and even holding the  
4 9 percent constant, if you change the cord cutting from 10  
5 to 20 percent, the 27-cent price increase becomes a 6-cent  
6 price decrease, decrease.

7 If you use the current margin, holding the others  
8 constant, a 27-cent price increase goes down to a nickel.

9 If you hold those constant and just take into  
10 account the fact that there can't be a price increase  
11 because there are actual contracts that prevent price  
12 increases for a certain period of time, the price increase  
13 goes down to a price decrease immediately of 20 cents.

14 There's another flaw that he made, and he assumed  
15 in his bargaining model, Your Honor, that the parties would  
16 split the difference evenly. But as you will recall, I  
17 crossed him on the fact that there's a leading article in  
18 this area that says the bargaining profits get split  
19 differently. And if you apply the 70/30 split rather than  
20 the 50/50 split in that article, that produces -- that  
21 eliminates the price increase and brings it all the way down  
22 to a price decrease.

23 Now, if you just take these five corrections --  
24 and there are others. But if you just take these 5  
25 corrections, his 27-cent price increase becomes a 54-cent

1 price decrease. That's per consumer, per month.

2 And when you do the math, Your Honor, 12 months a  
3 year, 80, 90 million-plus consumers with pay-TV services,  
4 you get over a half a billion dollars a year in price  
5 decreases to American consumers as a result of this merger,  
6 one-half billion dollars a year if you correct Shapiro's  
7 model.

8 So, Your Honor, this whole case is a house of  
9 cards. It's based on this model, which somebody may have  
10 won a Nobel Peace Prize for; but this is a Court of Law, and  
11 we have to prove these allegations, these incredibly serious  
12 allegations by real facts, not by Nobel Prizes, Your Honor.

13 The model makes no sense. The model is not  
14 consistent with the real world. The model is not what  
15 people in this business who live this business and work it  
16 every day think about or do. The results of the model are  
17 utterly inconsistent with the prior transactions, which  
18 Professor Shapiro failed to take into account, refused to  
19 take into account.

20 The model is not consistent with the fact that  
21 there's a binding irrevocable commitment not to black out.  
22 The model assumes you can blackout, which you can't.

23 The model is not consistent with federal program  
24 access rules. The model understates efficiencies and facts  
25 other than EDM, which he also understates. The model gives

1 us a total of zero based on the testimony of  
2 Robert Quintero, who apparently was completely unaware that  
3 a federal -- that another court found his testimony to be  
4 utterly unreliable.

5 The model uses inflated departure rates that are  
6 not grounded in reality. It uses an indefensible  
7 cord-cutting number, which was a double whammy, because it  
8 assumed more people would divert to DirecTV. And it  
9 underestimated the elimination of double marginalization.

10 The model uses the wrong bargaining split. And  
11 it's completely inapplicable at the end of the day to this  
12 case and, certainly, as a basis to block a merger,  
13 Your Honor.

14 The -- you heard the testimony from Jeff Bewkes,  
15 Randall Stephenson, John Stankey. Nothing that you heard  
16 from them, nothing in the documents remotely suggests that  
17 the purpose of this merger is to thwart competition, that  
18 the purpose of this merger is to squeeze out another nickel  
19 or 27 cents or any other of these figures he's manufactured.

20 It's not to turn the clock back and try to keep  
21 big bundles alive as long as they can. It's just the  
22 opposite. It's to keep up with what's happening in the  
23 world and -- which is undeniable, even by the government's  
24 own witnesses.

25 The marketplace has become so intense in the past

1 few years that Time Warner and AT&T felt they had to do  
2 something to keep up, to preserve the long and rich  
3 histories that these companies have enjoyed and wish to  
4 continue to enjoy.

5           They run parallel paths, Your Honor, for, as it  
6 turns out, exactly the same reasons, parallel paths that  
7 converged over a lunch that Randall Bewkes had -- that  
8 Randall Stephenson had with Jeff Bewkes in August of 2016,  
9 where they talked about these challenges in businesses. And  
10 that ultimately led to the realization that they could be  
11 stronger, more efficient together than separate, Your Honor.

12           I mean, when you think about it, Time Warner can  
13 no longer remain trapped in this obsolete wholesale  
14 structure, with all of this vertical integration going on  
15 around it.

16           They have the content. They have great content.  
17 But they need the technology and the direct access to  
18 connect to the people who are watching their content.

19           They have advertising inventory. The Turner  
20 networks have all kinds of advertising inventory. But they  
21 need customer information and data in order to sell that  
22 inventory for higher prices to relieve the fees that are  
23 being charged to consumers.

24           As I said in my opening statement, the idea is  
25 General Motors pays more and the consumer pays less.

1           AT&T has the technology and the consumer  
2 relationships that Time Warner needs. But AT&T doesn't have  
3 the content. Time Warner has the content.

4           AT&T has the data, but it doesn't have the  
5 advertising inventory. Time Warner has the advertising  
6 inventory.

7           You put the two together, and you have a perfectly  
8 efficient match.

9           The evidence could not have been more clear and  
10 compelling, Your Honor. The government did not and cannot  
11 prove that this merger could conceivably violate Section 7.  
12 The only lessening of competition that will occur is if this  
13 merger is blocked.

14           Mr. Conrath suggested some alternative remedies in  
15 his closing comments, divestiture of one or more of the  
16 companies. That is no alternative remedy, Your Honor. Make  
17 no mistake, that is an effort to kill the deal, because you  
18 take away these pieces from one another, there is no deal.  
19 The economics makes no sense.

20           You can't take Turner out of the mix. You can't  
21 take DirecTV out of the mix. That's where the synergies  
22 come from. That's where the efficiencies come from. That's  
23 where the logic of the deal comes from. And that's how it  
24 was financially constructed.

25           And so there's only one outcome here, Your Honor.

1 There's only one just outcome here, only one, and it's clear  
2 as a bell, and it became clear through the process of this  
3 trial. And it took a long time to get here, and we  
4 shouldn't have had to come here.

5 But the trial process has worked. It has given us  
6 our day in court, and this government case has been exposed  
7 for what it is.

8 There is no case, Your Honor. They have not met  
9 their burden of proof. And the only, the only outcome of  
10 this case, Your Honor, should be a judgment in favor of  
11 defendants, denying the injunction sought by the government.

12 Thank you.

13 THE COURT: Thank you, Mr. Petrocelli.

14 All right. We're going to take a 15-minute  
15 recess. We'll return shortly and hear the government's  
16 rebuttal summation argument.

17 Thank you. We'll stand in recess.

18 DEPUTY CLERK: All rise.

19 This Honorable Court will now take a brief recess.

20 (Recess from 3:31 p.m. to 3:59 p.m.)

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

1           Your Honor, re-calling Civil Action No. 17-2511,  
2 United States of America v. AT&T, Inc., et al.

3           THE COURT: Mr. Conrath?

4           MR. CONRATH: Thank you, Your Honor.

5           Thank you for the opportunity. I will take my  
6 15 minutes.

7           THE COURT: The floor is yours.

8           MR. CONRATH: All right.

9           Your Honor, I obviously can't cover everything.  
10 I'm going to try to hit a few of the critical points.

11          THE COURT: Hit the highlights.

12          MR. CONRATH: Exactly.

13          We heard an awful lot about Carl Shapiro in that  
14 argument. And I think there was an overall suggestion that  
15 the bargaining model, the basic idea of a bargaining model,  
16 I think we heard "no real-world evidence of the bargaining  
17 model" and statements like that.

18          I think we just have to pull back and ask  
19 ourselves about this. Why do you think we called the  
20 industry witnesses who are the actual negotiators, who came  
21 in and said, yes, we look -- we think about what happens if  
22 we don't do -- if we don't reach a deal. We think about  
23 what happens if we have to go dark. We take that into  
24 account in making our decisions and how much we can pay.  
25 That's the real-world evidence that explains why the

1 bargaining model is the appropriate way if you want to go  
2 the next step and try to quantify.

3 Now, Your Honor may recall that there are some of  
4 those negotiators who have a more gut, experiential-based  
5 reaction.

6 Ms. Fenwick said, "Yeah, I just know we need  
7 Turner."

8 Others took the step of trying to do some  
9 quantification along the lines of what Professor Shapiro  
10 used in his bargaining model. Those included Charter, which  
11 was under seal, and include -- oh, I'm sorry. Comcast was  
12 under seal. Charter, which commissioned the  
13 Altman Vilandrie study, and the others who we talked about.

14 But maybe in one way the most important tidbit of  
15 evidence of why the bargaining model reflects the real world  
16 comes right out of Turner. Turner, you heard Mr. Petrocelli  
17 say it, and it was almost a misstatement. He said they  
18 fight over every nickel. Well, no. They fight over every  
19 penny.

20 You can see on this slide here -- and if I can  
21 approach, I'll offer my last -- the last demonstrative of  
22 this trial, Your Honor, I promise.

23 THE COURT: That's all right.

24 MR. CONRATH: Mr. Breland, they got close to going  
25 dark with Time Warner Cable over a single penny, over a

1 single penny.

2 Well, that's -- the fact that they're willing to  
3 go dark, to threaten to go dark over a single penny is how  
4 they get the high prices that they get.

5 You remember the testimony that they're able to --

6 THE COURT: But isn't it a bit of a kabuki dance  
7 where everyone threatens to go dark? Everyone threatens to,  
8 okay, we're going to go dark; or we'll let you go dark, and  
9 then it never ends up happening.

10 MR. CONRATH: Well, so -- right, but that doesn't  
11 mean that it doesn't influence the outcome.

12 Two things:

13 One, sometimes it does happen, and everybody  
14 watches to see what happens when it does happen.

15 And, two, it's what do we think influences the  
16 outcome.

17 Why don't all of those people that Mr. Breland was  
18 negotiating with just say, take a hike; we're not paying  
19 your rate increase? Why don't they do that? Because they  
20 know that they're bargaining in the face of knowing what the  
21 alternative would have to be. And that's the evidence --  
22 that's the evidence that --

23 THE COURT: Kind of like that joke in Woody  
24 Allen's *Annie Hall*, we need the chickens, at the end of the  
25 movie.

1 MR. CONRATH: I don't remember that one.

2 THE COURT: The guy who's brother was claiming to  
3 be nuts and thought he was a chicken. Why don't you take  
4 him to a psychiatrist?

5 He said, we need the eggs.

6 MR. CONRATH: Yeah.

7 THE WITNESS: You should watch *Annie Hall*. It is  
8 a good movie.

9 MR. CONRATH: It is a good movie. I haven't  
10 watched it for years, Your Honor, but Turner Classic Movies,  
11 I'm sure, has it available for me.

12 THE COURT: No question about it.

13 MR. CONRATH: All right.

14 But the point is, the idea that you negotiate  
15 based on what else -- what your alternative here is no deal,  
16 that's well-established from the defendants, as well as the  
17 third-party witnesses. That's the basic of the model.

18 Now, we heard a lot of specific attacks on  
19 Professor Shapiro's model. I tried to anticipate some of  
20 those. I invite the Court to look very carefully at  
21 Professor Shapiro's testimony, because I think there was a  
22 little overstatement or pushing the envelope on what he  
23 actually said.

24 I may try and touch on one or two things. But I  
25 want to start with the basic point that you don't have to

1 quantify the harm of the merger down to a penny in order to  
2 make a decision about the merger. That just reminds us that  
3 this is a law from 1914, Your Honor. Nobody was making  
4 predictions of that kind at that time.

5           The question is, is competition likely to be  
6 substantially lessened? And that's the question that you  
7 can, you can -- frankly, you can decide that based on the  
8 testimony of the industry witnesses and turn then to  
9 Professor Shapiro for an estimation of approximately how  
10 much that might be.

11           I'd like to just call out a couple of points that  
12 go to Professor Shapiro. I think we heard Mr. Petrocelli  
13 say that Professor Shapiro ignored the program access rules,  
14 didn't account for the FCC's program access rules.

15           The actual testimony, page 2328 of the transcript:

16           "Question: You also didn't take into account the  
17 FCC's program access rules and modeling those figures,  
18 right?

19           "Answer: No. I did."

20           And then he goes on to explain it, and I'm not  
21 going to read it because I don't have time, but just to be  
22 careful.

23           Mr. Monte -- then let's talk about the  
24 Altman Vilandrie thing just briefly.

25           One of the assertions was that the guy who's the

1 head negotiator, Mr. Montemagno, who just joined Charter  
2 about the time that this study had been commissioned, there  
3 was an allegation that he didn't even know what it was.  
4 That's not true. Let's remember what he said.

5 "Question" -- Mr. Montemagno this is -- "And  
6 did you look at this analysis" -- one of the analyses that  
7 came from the Altman Vilandrie study -- "when you reviewed  
8 this deck with your co-workers and the CEO of the company?

9 "Answer: We did.

10 "Question: And was this information helpful to  
11 you when you were thinking about your negotiations with the  
12 programmer at issue here?

13 "Answer: Yes, it was helpful."

14 So it's not that he just ignored it. He, in fact,  
15 used it.

16 Look, let's just briefly run down the  
17 Altman Vilandrie thing. There's been a lot about this.  
18 It's an ordinary course document where you have the  
19 documents dating back to November 1916 -- November 2016 when  
20 they started, when they started -- they let this contract.  
21 It was used in preparation for them to -- preparation for  
22 negotiations. That's the testimony I just mentioned in  
23 PX373, was based on quantitative analysis.

24 The adjustment that was made, and there was an  
25 adjustment that was made, was recommended by Altman.

1 Mr. Bewley plainly said, yeah, I recommended it in order to  
2 make it more accurate.

3 The same adjustment was later implemented for all  
4 150 other networks in the fall of 1917 [sic], adding an  
5 additional expense to Charter. So they must have thought it  
6 was worth something.

7 And remember the basic recommendation, the basic  
8 change in recommendation in the Altman Vilandrie was from 14  
9 down to 9.

10 And, finally, let me just say briefly that all the  
11 innuendo and the suggestion of the Justice Department doing  
12 this and that with Altman Vilandrie, really, it doesn't add  
13 up. It doesn't make sense. The facts are the facts that  
14 I've just laid out. I reject the suggestions.

15 Let's talk briefly about a couple of the  
16 responses, efficiencies. I think I want to tell you that  
17 their basic defense is: Trust us. We can do this.

18 The *H&R Block* case does a pretty good job setting  
19 forth the standard on this question. It says they have --  
20 that efficiencies to be taken into account have to be  
21 "reasonably verifiable by an independent party."

22 They didn't meet that standard here. They gave us  
23 the document that, by its name, version 41, calls into  
24 question what's going on here.

25 And they had two witnesses that they could have

1 called on this, Mr. Gokhale, Mr. Kearns. They didn't call  
2 them. Our witness looked at what they provided, its  
3 assumptions. There's no justification. Whether they  
4 achieve the efficiencies or not is an interesting question.  
5 They certainly didn't meet the burden for approving the  
6 anti-competitive merger in Federal Court.

7 Let's talk briefly about the arbitration remedy.  
8 I think we heard a couple of times from Mr. Petrocelli on  
9 this that Turner's arbitration offer is a binding  
10 commitment. It's fully enforceable, completely binding  
11 under New York law.

12 I think there's some important difficulties here.  
13 One is, it's not necessarily under New York law. If you  
14 look at, for example, PX -- the offer was sent from Turner,  
15 which has its headquarters in Georgia. Georgia law requires  
16 some consideration for an irrevocable offer. There's  
17 obviously no consideration here.

18 If you look at PX422, the Cox contract clearly  
19 says the applicable law there is Georgia. So it's not clear  
20 that this contract has the same irrevocable character that  
21 has been represented.

22 And more to the point, they'd like to argue that  
23 Professor Shapiro should have taken the arbitration offer  
24 into account and the arbitration offer -- in addition to  
25 arguing that the arbitration offer could solve every

1 problem.

2 But the arbitration offer only makes sense if the  
3 people who are potentially subject to the anti-competitive  
4 effect are going to enter into it.

5 And you heard a lot of testimony from the people  
6 who would be affected by this about a lot of good reasons  
7 why they might not want to go into that arbitration offer.  
8 I listed eight of them earlier, and I won't repeat them.  
9 But the fact is that there's an arbitration offer doesn't  
10 solve the problem, and that's why it doesn't make sense to  
11 take it into account as a part of a fix.

12 THE COURT: In that regard, do you agree with  
13 Mr. Petrocelli that the Court does not have at its disposal  
14 remedial recommendations or steps that could be taken unless  
15 and until it first has proven that there is some kind of  
16 antitrust violation?

17 MR. CONRATH: Yeah. I think upon a finding of  
18 liability, the Court has broad discretion; but I think  
19 that's the entry point --

20 THE COURT: That's the prerequisite.

21 MR. CONRATH: -- the entry point, as it were.

22 Yeah. Right.

23 And, finally, just one more point to talk about.  
24 We've heard -- we heard from the other side that, look, the  
25 reason for this deal is they want -- they're looking to the

1 future. They want to be looking at other parts of the  
2 market.

3 And, look, it's great that CEOs are thinking about  
4 the future and thinking ahead. But they're thinking about  
5 things like we heard the testimony of driverless cars giving  
6 people more time to watch movies on their cell phones. And  
7 that's great. But that's not the market we're in, and  
8 that's not really the immediate future either.

9 We're talking about what happens to 90 million  
10 households in the United States who pay for pay TV. They  
11 pay -- they have been paying ever-increasing prices. This  
12 merger is going to give them the less choice, more  
13 increasing prices, and put them in a worse position.

14 And you don't -- if you're merging companies, you  
15 don't get to say, I want to do some competing over in this  
16 market, so it doesn't matter that my merger causes harm to  
17 consumers over here. That's not what the law is. The law  
18 says you look at every market one by one and assess it.

19 What we've shown in this case -- and I'll rest on  
20 the evidence that we've presented, because my time is about  
21 to run, Your Honor.

22 THE COURT: You've got a couple minutes.

23 MR. CONRATH: Okay. Well, I'm going to wrap up.

24 We've established that there's a reason to believe  
25 that owning content and distribution together gives you the

1 incentive and the ability to use the content to advantage  
2 your own distribution and disadvantage that of your  
3 competitors, to soften the competition that you face.

4 What that's going to lead to is higher prices.  
5 It's going to lead to less-competitive alternatives for  
6 consumers. Consumers would be worse off. And that's why  
7 this transaction ought to be blocked, Your Honor.

8 Thank you very much.

9 THE COURT: All right.

10 Well --

11 MR. CONRATH: And let me just add the words -- we  
12 said it the other day, but we appreciate the time and  
13 attention of the Court and all of its personnel.

14 Thank you.

15 THE COURT: Thank you.

16 Well, while you might not be conversant with  
17 Woody Allen's *Annie Hall*, I am confident that you have heard  
18 of the great American composer Lenny Bernstein. He's famous  
19 for having said, "To achieve great things, two things are  
20 necessary. A plan and not quite enough time."

21 I have to compliment the parties for a  
22 hard-fought, well-done job litigating and trying their case  
23 in such a high speed in definitely what was not quite enough  
24 time.

25 It was truly an amazing achievement to pull this

1 off since last November. And now it's my turn to endeavor  
2 to do the same.

3 I'm, of course, painfully aware of the June 21st  
4 drop-dead date of this transaction and the price tag that  
5 accompanies it. I'm even more painfully aware of the case  
6 management order that I signed off on, effectively giving  
7 the losing party six days to pursue a stay in the Court of  
8 Appeals.

9 By my rough calculation, that means that this  
10 Court's ruling needs to be completed by June 12th, six days  
11 from tomorrow [sic], to accommodate that appellate effort  
12 and deadline. For a matter of this complexity and  
13 consequence, that surely is not quite enough time.

14 Nevertheless, I will do and I pledge to do my  
15 level best to have, at a minimum, a ruling by June 12th and,  
16 if need be, with an opinion to follow.

17 Accordingly, I will set today a hearing for 4:00  
18 on June 12th to announce my ruling in this case. If it  
19 should come to pass that my opinion is also done that day,  
20 so much so the better. I'll distribute it to the parties.

21 And if by some miracle it's done earlier I'll move  
22 the hearing back to that earlier date.

23 Either way, I thank you for all your hard work and  
24 excellent pleadings. I look forward to seeing you on the  
25 12th of June.

1                   We'll stand adjourned.

2                   DEPUTY CLERK: All rise.

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

5                   (Proceedings concluded at 4:17 p.m.)

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## C E R T I F I C A T E

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

Date: April 30, 2018      /S/ William P. Zaremba

William P. Zaremba, RMR, CRR