

1 yesterday doesn't even start until 2012. That
2 data is very important and I think we would
3 put before the Court that there is a competing
4 1st Amendment concern which is our access to
5 the courts. We can't come to the courts at
6 the risk of losing this valuable confidential
7 information. That would be a huge business
8 loss to the company if it lost the
9 information.

10 And if that's the penalty for
11 exercising our right of access to the courts
12 that becomes a real inhibition on the
13 companies. That's why we negotiated the
14 protective order and frankly spent a lot of
15 time trying to get it right. We hope that's
16 why Your Honor entered the protective order.

17 JUDGE SIPPEL: I did.

18 MR. SCHMIDT: And it does seem to
19 us that there is a balance that can be struck
20 where Your Honor has been very clear as to
21 where you want us to fall and there are close
22 questions on whether something is or is not

1 subject to redaction. We'll both be very
2 mindful of that as we go through and do our
3 redactions in a prompt manner.

4 But we do submit the right way to
5 balance those concerns that we're talking
6 about here is exactly the way that the
7 gentleman from Bloomberg suggested which is
8 they can come out. We think it's actually
9 come out in a pretty open way in the written
10 submissions and we'll follow the same
11 philosophy if that's acceptable to Your Honor
12 in the actual transcripts.

13 JUDGE SIPPEL: Well, I'm not
14 totally -- I could ask some more questions on
15 these arguments. But for purposes of moving
16 this case along, I think we're where we
17 clearly need to be. But I am not going to --
18 I am not going to remove the reporters from
19 this case on Mr. Furman. Now it's different
20 with Mr. Singer. I think he's got numbers
21 that nobody understands and so there might be
22 some very important numbers.

1 (Laughter.)
2 But I'm just obviously
3 exaggerating. But he does have loads of
4 numbers, statistics, projections, rejections,
5 everything. So we're going to continue with
6 him in camera. But Mr. Furman is going to
7 come into court and he's going to start with
8 his direct testimony and his direct testimony
9 at least in the redacted copies or the
10 redacted versions should be available to the
11 press when they come in. And I'm going to
12 permit them to stay until Mr. Carroll or
13 whoever is on your side reaches a point in
14 your cross examination where you say, "Okay.
15 They have to go." And I want to see why it is
16 that they have to go and I'm going to make a
17 ruling on that.

18 Now once they're out, I'm not
19 going to open the door and let them back in
20 again unless you can convince me, unless you
21 can assure me, that I only have these one or
22 two emails and when we finish that I'm back in

1 open court so to speak. But I know you're not
2 going to do that. So I'm not going to --

3 But I do want to test it to see
4 how far you can go on cross examination before
5 we have to exclude somebody. I didn't do that
6 yesterday and I think that was a mistake.
7 It's not going to slow things down.

8 MR. CARROLL: No, I have only two
9 reactions. One for purposes of press access,
10 I'd like there to be an even ruling throughout
11 the whole proceeding and so if that's the
12 rule, I'm unhappy that my cross of Hawkins was
13 not available to the press yesterday because -
14 -

15 JUDGE SIPPEL: I made a mistake.

16 MR. CARROLL: No, no. I'm --

17 JUDGE SIPPEL: It's error on my
18 part. I will admit it.

19 MR. CARROLL: I'm not -- I don't
20 think it was, Your Honor.

21 JUDGE SIPPEL: It was. I'm the
22 one that made the ruling.

1 MR. CARROLL: I think it compounds
2 things to start changing to a different system
3 in the middle of the proceedings when the
4 press itself has proposed something to Your
5 Honor that the lawyers are in agreement with.
6 You basically now have in front of you the
7 press and both parties proposing the solution
8 and I don't know why. You are the judge to be
9 sure and I'm not presuming to suggest that you
10 would be bound to do what everybody has
11 stipulated would be agreeable. But I would
12 have thought that at least at this stage it
13 would be an option to just try that process
14 and you might decide, yes, this works very
15 well and that's why the parties and Bloomberg
16 have all proposed it and have agreed to it.
17 I would have thought as a next
18 step that's a better step than just reversing
19 course entirely and starting to put burdens on
20 the side that's crossing. Right now, we're
21 crossing and then the other side would be
22 crossing with our witnesses shortly of trying

1 to think how do I organize my materials now so
2 I've got a clear – I'm highly confidential of
3 that and where I'm not. I guarantee you if we
4 go down that road highly confidential
5 information will start to appear in newspapers
6 within this. I guarantee you. Reporters will
7 be leaving and they'll have numbers out there
8 and everybody will know financial information
9 because you can't impose the burden on my side
10 or their side to edit themselves in the middle
11 of a live cross examination and you remember
12 yesterday with Hawkins. It was very live,
13 very fast moving and there's a lot of
14 information coming out on a very quick basis.

15 So I would just again as your
16 humble servant on this side of the table
17 because this is your courtroom to be sure I
18 would propose that Your Honor reconsider and
19 seriously consider just going with the
20 proposed compromise at the moment and seeing
21 if that addresses this situation adequately.

22 JUDGE SIPPEL: Well, I'm impressed

1 by the argument I must say. It's not often
2 that a trial lawyer cries wolf in the middle
3 of a trial. But you've got a point and it's
4 a good point and I'm not making light of it.

5 Let me ask Mr. Schonman one more
6 time. What's your judgment? They're
7 proposing both sides that we go forward on
8 basically the outline that Bloomberg made, the
9 proposal that Bloomberg made.

10 MR. SCHONMAN: I think trying the
11 least restrictive method is probably the most
12 appropriate.

13 JUDGE SIPPEL: Well, my way would
14 be the least restrictive.

15 MR. SCHONMAN: Well, the gentleman
16 from Bloomberg has suggested a solution which
17 the named parties are in agreement on. It
18 would seem to me that that at least is a good
19 starting point and see how that works out. I
20 think it would also be a good idea if the
21 parties would agree to it to provide the
22 redacted versions of the direct written

1 testimony. That can be made available
2 immediately. It's already redacted. It's
3 already done.

4 JUDGE SIPPEL: Well, they're going
5 to do that.

6 MR. SCHONMAN: So what we're
7 talking about now is how to handle cross
8 examination and the method that the gentleman
9 from Bloomberg has suggested providing
10 transcripts as soon as possible that's
11 redacted seems an appropriate remedy. That
12 way at commencement of the cross examination
13 the present public is removed from the hearing
14 room. So we don't have to gauge at what point
15 during cross examination everyone has to
16 leave. They would leave at the commencement
17 of the cross and knowing that they will get
18 hopefully the next day transcripts, redacted
19 transcripts, of that cross. So they would
20 have the direct virtually immediately when the
21 witness takes the stand and then the redacted
22 cross examination transcripts the next day.

1 JUDGE SIPPEL: All right. I'm
2 convinced. It's not because of votes. This
3 is not a democratic solution. But I'm
4 convinced of the reasoning, the rationale and
5 I think it certainly is a lot – a much bigger
6 advance than where we left it off yesterday.
7 And again I take responsibility for that. I'm
8 not blaming the parties. So that's what we're
9 going to do now.

10 My question now is a practical
11 matter. If we have testimony let's say today
12 of Mr. Furman. Okay. And you get overnight
13 delivery or whatever it, next day delivery.
14 When's the earliest that you could have the
15 redact up to the press office? That same day
16 or you would require the following morning?

17 MR. CARROLL: I'm anticipating
18 this. I've already devoted somebody in my
19 shop to be on standby to process that as soon
20 as it comes in and I would think within a
21 couple of hours. My team is groaning
22 somewhere back in the war room right now.

1 Within a couple of hours we could get through
2 that because I'll establish what the rules
3 are. It's dollars and cents figures if it's
4 truly a sensitive company name information and
5 otherwise not. The two sides could probably
6 then exchange that and I would think you're
7 looking at hours. You're not looking at –
8 you're looking at hours in a day.

9 JUDGE SIPPEL: Hopefully. Okay. I
10 will go with that. You're going to do it as
11 expeditiously as you can.

12 MR. CARROLL: Yes.

13 JUDGE SIPPEL: And I will thus
14 leave it on that basis and I have full faith
15 and confidence that that's what will happen.
16 So now I'm just going to make one last comment
17 and then we're going to let Mr. Singer
18 continue and that is I would almost – Well,
19 I'm not going to say I would bet. But I would
20 not be surprised at all if, say, a year from
21 the Commission's decision, not this decision
22 here, but a year from the Commission's

1 decision that some professor or professors
2 somewhere are not going to file a Freedom of
3 Information Act request to get all this record
4 in unredacted form because they want to do a
5 paper on it and you know where do you come out
6 on that? Obviously, that's a hypothetical
7 suggestion on my part, but there has to come
8 a point when commercial data because old
9 commercial data. Anyway, I'll just leave that
10 with you.

11 Anything further? Does anybody
12 have anything more on this point?

13 MR. CARROLL: No. Thank you, Your
14 Honor.

15 MR. SCHMIDT: Thank you, Your
16 Honor.

17 JUDGE SIPPEL: Okay. Are we ready
18 to go, Mr. Burke?

19 MR. BURKE: You bet.

20 JUDGE SIPPEL: Are you ready, sir?
21 Dr. Singer?

22 THE WITNESS: Yes.

1 MR. BURKE: This is under the high
2 confidential.

3 JUDGE SIPPEL: Oh, yes. I'm
4 sorry. Anybody here from the public is going
5 to have to leave now. Now do we have a copy
6 of Mr. Singer's redact?

7 MR. SCHMIDT: We're getting one,
8 Your Honor.

9 JUDGE SIPPEL: Okay. While don't
10 you do it when you get it or when your folks
11 bring it in, why don't you bring it up to the
12 press office?

13 MR. SCHMIDT: Okay.

14 JUDGE SIPPEL: And tell Mr. Fiske
15 or his associate what it is that you're
16 bringing and that's available for the press.

17 MR. SCHMIDT: Okay.

18 JUDGE SIPPEL: And I would bring
19 in a dozen copies.

20 MR. SCHMIDT: Okay.

21 JUDGE SIPPEL: Okay.

22 (Off the record discussion.)

1 JUDGE SIPPEL: Are we all set?

2 WHEREUPON,

3 HAL SINGER

4 was recalled as a witness and, having been

5 previously duly sworn, resumed the witness

6 stand, was further examined and testified as

7 follows:

8 CROSS EXAMINATION (Cont'd.)

9 BY MR. BURKE:

10 Q Good morning, Dr. Singer. Dr.

11 Singer, I wanted to actually go into any

12 questions that are actually directly pertinent

13 to what we've been talking about pricing and

14 financial information. I think your Exhibit

15 192 you make a projection as to what Comcast

16 should pay for the NFL Network over the next

17 five years. Do you have that in front of you?

18 A I believe so. My exhibits are not

19 marked, but if you wouldn't mind reading the

20 top.

21 Q "Projected Comcast NERs 2008 to

22 2012."

1 A I have it.

2 Q And are we in agreement that's

3 Exhibit 192 of Enterprise's?

4 A Yes.

5 Q I just wanted to confirm that.

6 Okay. What does NERs stand for, Dr. Singer?

7 A NER stands for the net effective

8 rate.

9 Q And this is basically a rate

10 that's calculated based upon the per

11 subscriber rate. So when you say it says [REDACTED]

12 [REDACTED] here that means [REDACTED] per subscriber.

13 Is that right?

14 A Per subscriber per month, correct.

15 Q Right, and the relief that your

16 client, the NFL Network, is seeking is to have

17 the NFL Network distributed on the analog

18 tier. Is that right?

19 A Well, I think I refer to it as the

20 extended basic tier. It's the same tier in

21 which Comcast carries its affiliated national

22 sport center.

1 Q It's the most widely distributed
2 tier that Comcast has, right?

3 A Correct.

4 Q And they're about [REDACTED]
5 subscribers in that tier. Is that right?

6 A Correct.

7 Q Okay. So I'm just trying to get a
8 sense of I mean [REDACTED] by itself may not
9 sound like that much, but we're saying [REDACTED]
10 [REDACTED] times [REDACTED] subscribers times
11 12 months to know what the total amount is a
12 given year. Is that right?

13 A I would say that's right with one
14 important assumption which is that Comcast
15 decides to leave Golf and Versus on its
16 expanded basic tier. If Comcast were to put
17 Golf and Versus on its, say, D2 tier which I
18 understand is [REDACTED] and if this judge
19 were to order equal treatment for NFL, then it
20 would be [REDACTED] times [REDACTED]. So
21 that's just a -- it's an important assumption.

22 Q Sure. But again, so the

1 mathematics here just to figure out what the
2 total economic impact is or to take per
3 subscriber rate which is the rates in this
4 Exhibit 192, multiply that by the number of
5 the subscribers that received the programming
6 and then that gets you a per month rate and
7 then to know what someone pays for a year, you
8 multiply that by 12. Is that right?

9 A Exactly.

10 JUDGE SIPPEL: Now the [REDACTED]
11 is the basic tier and the D2 is what? [REDACTED]

[REDACTED]

13 MR. BURKE: I think it's actually
14 higher than that now, Your Honor.

15 JUDGE SIPPEL: Well, [REDACTED].

16 MR. BURKE: Something like that.

17 JUDGE SIPPEL: Roughly. I'm just
18 ball park.

19 THE WITNESS: It was [REDACTED]
20 at the time the NFL was carried.

21 JUDGE SIPPEL: So we'll say [REDACTED]

[REDACTED]

1 MR. BURKE: And we will have some
2 -- If that's relevant we can certainly get
3 Your Honor the specific figure.

4 JUDGE SIPPEL: Well, yes, it might
5 -- Never mind. But I'm going to ask him one
6 more question. What is the [REDACTED] You had a
7 term for this, net something or other, the [REDACTED]

8 [REDACTED]
9 THE WITNESS: The net effective
10 rate it is the rate net of marketing
11 subsidies. It's inclusive of the surcharge.
12 It's inclusive of the base rate. It is on
13 that what Comcast would pay NFL on a per
14 subscriber per month basis.

15 JUDGE SIPPEL: Okay. The covering
16 charges or whatever you want. The carrying
17 charges are reduced from that. So it's
18 actually [REDACTED] per subscriber, the net
19 effective rate. So NFL or whoever the user is
20 is going to have to absorb those marketing
21 charges. Right? And the marketing expenses?

22 THE WITNESS: Let me just try to

1 say it back. This is the rate that Comcast
2 would pay NFL on a per subscriber per month
3 basis.

4 JUDGE SIPPEL: Yes, [REDACTED]

5 THE WITNESS: And that rate is net
6 of, that is it includes three components if I
7 could. It's the base rate. It's the sum of
8 the base rate.

9 JUDGE SIPPEL: Yes.

10 THE WITNESS: The surcharge and
11 any marketing subsidies. Sometimes the
12 marketing subsidies are positive. Sometimes
13 they're negative. So it's the sum of those
14 three based on my best estimate of fair market
15 value of [REDACTED] in 2008.

16 BY MR. BURKE:

17 Q And so this is something that you
18 generated using your regression model. Is
19 that right, Dr. Singer?

20 A Correct.

21 Q Now you actually didn't use your
22 regression model to create the price increase.

1 That's right.

2 A Correct.

3 Q You used a different model to
4 create those, the price increases that are
5 listed in Exhibit 191.

6 A That's correct.

7 Q Why didn't you use your regression
8 model to create those price increases?

9 A I think for basically two reasons.

10 One is that I had a complete dataset from 2005
11 to 2008 and that was the most robust dataset
12 over which the regression could be estimated.
13 So if I were to try to expand and predict for
14 '09 through '12 in the context of the
15 regression I'd be missing too many
16 observations.

17 The second reason is that when you
18 look at any given contract there's a pretty
19 even rate of growth, rate of inflation if you
20 will, for a given MVPD. Now what I've tried
21 to do here is take the average of the rates of
22 inflation if you will that you find in the

1 contracts.

2 Just to restate. Now everyone's

3 contract [REDACTED], although

4 that's the average. Some people's grow --

5 Some MVPD's contract grows faster. Some grows

6 slower. I think the best estimate is to take

7 the average.

8 Q And this was just the -- You gave

9 equal weighting to all the different MVPDs or

10 was it weighted based upon the size of the

11 MVPD?

12 A It was weighted based upon the

13 size of the MVPD. I'm happy to explain why

14 too if you're interested.

15 Q No.

16 A Okay.

17 Q So just to try to get a sense of

18 what we're talking about here, if you take --

19 We had to ask our accountants to do this to

20 look at what the total dollar figures we're

21 talking about here, a ball park, and they came

22 up with something in the order of the total

1 month assuming that you guys keep Golf and

2 Versus on the expanded basic tier.

3 JUDGE SIPPEL: Wait a minute.

4 It's [REDACTED] 12.

5 MR. BURKE: And that gives you

6 each year. That's for one year.

7 BY MR. BURKE:

8 Q [REDACTED]

9 [REDACTED]. Isn't that right, Dr. Singer?

10 A [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 Q So, for example, [REDACTED] [REDACTED]

15 [REDACTED] [REDACTED] [REDACTED] [REDACTED]

16 [REDACTED], right?

17 A Correct.

18 Q [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 A Yes.

22 Q In your model.

1 A In my model and in every network
2 that I've ever studied [REDACTED]

3

4 Q If you could try to answer my
5 questions, Dr. Singer, it will help us get
6 through this more promptly.

7 A Okay.

8 Q In your model it [REDACTED]
9 [REDACTED]. Is that correct?

10 A Yes, that is correct.

11 Q Okay. Now it was your testimony
12 that you thought that none of this [REDACTED]
13 [REDACTED] would be passed on to Comcast
14 customers. Is that right?

15 A I don't think that that is the
16 only scenario. I think that it's the most
17 likely scenario. I think that based on what
18 happened, what the experience was when you
19 guys took it off D2 as I've said in my
20 deposition, you didn't give a rebate to
21 customers when you took it off D2. So that
22 suggests that your rate wasn't strictly tied

1 to it.

2 But I am cognizant of what the
3 economic literature says on average happens
4 with passed on rates. So I can't rule out the
5 possibility that you would pass on a portion
6 of the [REDACTED] to your customers.

7 Q I'm not an economist, Dr. Singer,
8 but it seems kind of hard to image that
9 Comcast would have a hit of [REDACTED] and
10 none of that would get passed onto its
11 consumers. Is that credible?

12 A Well, when you think about it in a
13 slightly different context which is the [REDACTED]
14 [REDACTED] relative to the price that they're
15 getting per month on average from a customer,
16 so if they're getting [REDACTED] [REDACTED] on average,
17 the [REDACTED] is small in that context. And
18 when you say the number [REDACTED] that
19 sounds like it's large.

20 Now just to be very clear, I can't
21 rule the possibility as a matter of economic
22 logic and based on the average pass on rate in

1 the cable industry that some portion of the [REDACTED]
[REDACTED] would not be passed onto Comcast
3 customers.

4 Q Isn't it in fact the more likely
5 outcome that a significant portion of that
6 would be passed onto Comcast customers?

7 A What we have to weigh is the
8 actual experience of what Comcast did when it
9 took off D2 which it didn't give a rebate back
10 to its customers, okay, against the industry
11 average pass on weight. So you're asking me
12 to assign weight to those two and I think my
13 most comfortable place is that it could be
14 anywhere in between the two. It could be a
15 [REDACTED] per month pass on rate or if they
16 embrace the industry average pass on rate
17 which I think your expert testified to is [REDACTED]
[REDACTED], then we would be looking a [REDACTED]
19 [REDACTED] per subscriber per month. So I'm
20 going to take the position that it's hard to
21 predict with certainty what Comcast would do,
22 but I'm very comfortable saying that it would

1 be somewhere between [REDACTED] and [REDACTED] per
2 month.

3 JUDGE SIPPEL: I must say that if
4 you decide that you're not going to pass any
5 of the [REDACTED] cost onto customers you
6 might want to put this testimony right out in
7 the public record. I mean that's a pretty
8 good advertisement I would think. Go ahead.

9 MR. BURKE: We'll take that under
10 advertisement.

11 JUDGE SIPPEL: Yes. I don't
12 charge much for that advice.

13 (Laughter.)

14 BY MR. BURKE:

15 Q Okay. Now, Dr. Singer, in
16 preparation for your putting your testimony
17 together you looked at obviously documents and
18 other materials from the NFL Network as well
19 as documents that were produced by Comcast in
20 this matter, right?

21 A Yes, I did.

22 Q And in your review of those