

1 here.

2 MR. SCHMIDT: That's it.

3 JUDGE SIPPEL: I do have it right  
4 here. And this is marked as 189?

5 MR. SCHMIDT: Yes, sir.

6 JUDGE SIPPEL: All right. This is  
7 Enterprises ENT exhibit 189 for  
8 identification.

9 (Whereupon, the aforementioned  
10 document was marked for  
11 identification as Enterprises  
12 Exhibit Number ENT-189.)

13 JUDGE SIPPEL: So now it has to be  
14 moved into evidence. You can do it now or  
15 after you have -- probably you should ask the  
16 doctor to acknowledge that it's his and that  
17 it's his signature, sir.

18 MR. SCHMIDT: I would love to do  
19 that now, Your Honor.

20 JUDGE SIPPEL: Go right ahead.

21 DIRECT EXAMINATION

22 BY MR. SCHMIDT:

1 Q Dr. Singer, do you have in front

2 of you what we have introduced as ENT-189?

3 A I do.

4 Q Is this something that you

5 authored?

6 A Yes, it is.

7 Q Did you sign it?

8 A Yes, I did.

9 Q Is this your testimony in this  
10 case?

11 A Yes, it is.

12 Q And do you stand behind that  
13 testimony?

14 A Yes, I do.

15 MR. SCHMIDT: And we move it into  
16 evidence, Your Honor.

17 JUDGE SIPPEL: Any objection?

18 MR. BURKE: No, Your Honor.

19 JUDGE SIPPEL: It is received in  
20 evidence at this time as Enterprises exhibit  
21 number 189.

22 (Whereupon, the aforementioned

1 document, having previously been  
2 marked for identification as  
3 Enterprises Exhibit Number  
4 ENT-189, was received in  
5 evidence.)

6 JUDGE SIPPEL: Now, are there any  
7 declarations or anything else to go along with  
8 this or this is it?

9 MR. SCHMIDT: This is it, Your  
10 Honor. We don't plan to submit the earlier  
11 declarations for Dr. Singer.

12 JUDGE SIPPEL: Thank you. Okay.  
13 Counsel?

14 MR. BURKE: I do, Your Honor. Art  
15 Burke for Comcast.

16 JUDGE SIPPEL: Mr. Burke, please  
17 proceed.

18 BY MR. SCHMIDT:

19 Q Dr. Singer, I would like to ask  
20 you some short questions in the beginning.

21 MR. BURKE: I don't mean to  
22 interrupt, but did we swear the witness?

1 JUDGE SIPPEL: Raise your right  
2 hand, sir.

3 (Whereupon, the witness was  
4 sworn.)

5 JUDGE SIPPEL: Please be seated.

6 Thank you, Mr. Burke.

7 BY MR. SCHMIDT:

8 Q Dr. Singer, do you mind  
9 identifying your educational background for  
10 the Court?

11 A Sure. Well, my highest degree is  
12 a Ph.D. in economics.

13 Q Have you published in  
14 peer-reviewed economics journals?

15 A Yes, I have, several times,  
16 including on the subject we are discussing  
17 today: vertical foreclosure strategies of  
18 vertically integrated cable operations.

19 Q Have you previously had the  
20 opportunity to testify before the FCC and  
21 other governmental bodies?

22 A Yes, I have, including, in

1 particular, two carriage disputes. One was  
2 TCR, which goes by the name MASN, M-A-S-N,  
3 versus Comcast. And another was TCR versus  
4 Time Warner.

5 Q Is it a regular part of your  
6 practice as an economist to study the cable  
7 industry and the network industry and the MVPD  
8 industries?

9 A Yes, it is.

10 Q And, applying that study, have you  
11 had occasion to study the dispute that brings  
12 us before this Court between the NFL Network  
13 and Comcast?

14 A Yes, I have.

15 Q Have you reached opinions on that  
16 dispute that are expressed in the exhibit that  
17 we have marked as ENT-189?

18 A Yes, I have.

19 Q What I would like to do is walk  
20 through those opinions in very brief form with  
21 you. Am I correct that one of your opinions,  
22 the first of your opinions, relates to the

1 question of whether the NFL Network is  
2 similarly situated to Versus and the Golf  
3 Channel?

4 A Yes, that is one of my opinions.

5 Q What is your opinion on that,  
6 Doctor?

7 A I believe that they are similarly  
8 situated for many reasons, but just to name a  
9 few, they compete for the same type of  
10 programming. In particular, in this instance,  
11 they competed for the eight-game package  
12 offered by the NFL. They also competed for  
13 Pac-10 programming.

14 They compete for the same set of  
15 viewers. The demographics are very similar.  
16 We heard earlier today about an 18 to  
17 49-year-old male demographic. And that  
18 implies that they are, in turn, competing for  
19 the same set of advertisers.

20 Q Did you consider the respective  
21 ratings for the different networks?

22 A I did, in fact. The reason why I

1 did is that in the TCR versus Time Warner  
2 case, the Media Bureau in its order on  
3 reconsideration said that ratings can provide  
4 an important indicator of the degree to which  
5 two networks are similarly situated.

6 Q Got you. I would like to ask my  
7 colleague Matt Friedman to put up a poster  
8 that was prepared under your direction.

9 MR. SCHMIDT: And what I will do  
10 is, if I may, Your Honor, I will approach and  
11 hand out copies of the poster, which I will  
12 mark for identification as ENT-190.

13 JUDGE SIPPEL: ENT-190?

14 MR. SCHMIDT: Yes, sir.

15 JUDGE SIPPEL: All right.

16 MR. SCHMIDT: Thank you.

17 JUDGE SIPPEL: And that is the  
18 chart?

19 MR. SCHMIDT: Yes, sir. It's the  
20 same chart that appeared --

21 JUDGE SIPPEL: Let's mark that,  
22 then, as Enterprises exhibit number 190 for

1 identification.

2 (Whereupon, the aforementioned  
3 document was marked for  
4 identification as Enterprises  
5 Exhibit Number ENT-190.)

6 JUDGE SIPPEL: Do you want to move  
7 it into evidence right now, too?

8 MR. SCHMIDT: Sure, if I may.

9 JUDGE SIPPEL: Any objection?

10 MR. BURKE: I guess, subject to  
11 what the testimony is, really, Your Honor.

12 JUDGE SIPPEL: Well, I'll reserve  
13 a ruling on the motion, then, too, until we're  
14 ready to go.

15 BY MR. SCHMIDT:

16 Q Is this a chart that you prepared?

17 A Yes. In fact, it's a chart that  
18 appears verbatim in my written testimony.

19 Q Okay. And can you tell us, there  
20 is a heading at the top that says, "Nielsen  
21 Prime Time Ratings." What are prime time  
22 ratings?

1           A        So prime time ratings are a gauge  
2 of popularity during the prime time hour,  
3 which is defined by Nielsen to fall between  
4 7:00 p.m. and midnight.

5                   And this is important because this  
6 is the time where you have the greatest  
7 concentration of eyeballs. And so it is the  
8 time that programmers can command the highest  
9 prices for advertisements.

10           Q        What does this chart indicate  
11 about the relative prime time ratings for NFL  
12 Network, Golf Channel, and Versus?

13           A        The chart indicates that NFL  
14 network across all four quarters in a year is  
15 significantly more popular than the affiliated  
16 national sports networks of Comcast, all  
17 channel and Versus?

18           Q        Now, am I right in understanding  
19 that this chart gives ratings by each quarter  
20 of the year.

21           A        Do you know why the NFL Network's  
22 ratings are higher in the fourth quarter of

1 each year?

2 A Sure. Because that's when the  
3 marquee programming occurs, the eight-game  
4 package, the eight end-of-season regular NFL  
5 games are occurring in that fourth quarter.  
6 So you see a big spike naturally in the rating  
7 stream that quarter.

8 Q Did you, in fact, average out the  
9 ratings across the years?

10 A Yes. In the yellow column at the  
11 bottom, I am showing the average of the  
12 ratings across all four quarters in a year.

13 Q What does that indicate to you?

14 A It indicates that the coverage  
15 ratings for the NFL Network, as I said  
16 earlier, are much higher than the ratings of  
17 Comcast-affiliated national sports networks,  
18 indicating that the stuff that is on NFL  
19 Network is more popular.

20 And, just to tie back to the logic  
21 that the FCC used in its order of  
22 reconstruction, that suggests that the demand

1 for NFL programming in their words is at least  
2 as strong as the demand for the programming of  
3 the Comcast-affiliated networks.

4 MR. SCHMIDT: Okay. At this  
5 point, Your Honor, we would move this into  
6 evidence.

7 JUDGE SIPPEL: Any objections,  
8 sir?

9 MR. BURKE: No, sir.

10 JUDGE SIPPEL: It is in as  
11 Enterprises exhibit 190.

12 (Whereupon, the aforementioned  
13 document, having previously been  
14 marked for identification as  
15 Enterprises Exhibit Number  
16 ENT-190, was received in  
17 evidence.)

18 BY MR. SCHMIDT:

19 Q Before I leave this, did you also  
20 look at ratings across the board if you look  
21 at 24-hour ratings, as opposed to respond time  
22 ratings?

1           A       Yes. Your Honor, there's a myriad  
2 of tables in the report of ratings cut many  
3 different ways. And this is just one of them.

4           Q       Did the NFL Network outperform the  
5 other two networks when you looked at 24-hour  
6 rhythms?

7           A       Not only 24 hours, but in my  
8 opinion, no matter how you cut the data, the  
9 NFL Network outperformed.

10          Q       So that is your first opinion. I  
11 would like to turn now, if I may, to your  
12 second opinion, which is do you have an  
13 opinion about whether Comcast discriminated  
14 against the NFL Network in favor of Versus and  
15 the Golf Channel on the basis of affiliation?

16          A       Yes, I do.

17          Q       What is that opinion?

18          A       They did. I believe that the  
19 tiering decision relegating the NFL Network to  
20 the inferior sports tier was based purely on  
21 affiliation.

22          Q       Okay. I would like to ask Mr.

1 Friedman now to put up a second chart that  
2 comes from what we have marked as ENT-189 and  
3 ask you a few questions about that.

4 MR. SCHMIDT: While he does that,  
5 I will mark it for identification purposes as  
6 191.

7 JUDGE SIPPEL: All right. You  
8 made reference, sir, to a -- there is a second  
9 decision or a reconsideration decision by the  
10 Commission.

11 THE WITNESS: This was the case  
12 that -- just to go back, I was the expert for  
13 MASN, M-A-S-N. As you may know, they own the  
14 programming rights to the Baltimore Orioles  
15 and the Washington --

16 JUDGE SIPPEL: Right. I knew --

17 THE WITNESS: They were in a  
18 carriage dispute with Time Warner. Time  
19 Warner was refusing to carriage MASN  
20 programming in North Carolina in a section of  
21 the state where Time Warner was carrying its  
22 own affiliated regional sports network.

1                   And Judge Margolis ruled in favor  
2 of TCR based, in part, on my testimony in that  
3 case. And then the Media Bureau affirmed his  
4 decision in what is called, I believe, an  
5 order on reconsideration.

6                   MR. SCHMIDT: Your Honor, if I may  
7 approach?

8                   JUDGE SIPPEL: Go right ahead.

9                   MR. SCHMIDT: I would ask Your  
10 Honor to mark this next chart as --

11                   JUDGE SIPPEL: I have it. And  
12 this is going to be number 190 for  
13 identification.

14                   MR. SCHMIDT: I believe it's 191.

15                   JUDGE SIPPEL: One ninety-one for  
16 identification. You are right, Enterprises  
17 exhibit number 191 for identification.

18                   (Whereupon, the aforementioned  
19 document was marked for  
20 identification as Enterprises  
21 Exhibit Number ENT-191.)

22                   BY MR. SCHMIDT:

1           Q       Have you seen what I have  
2 identified as Enterprises exhibit 191 before?

3           A       Yes. This appears verbatim in my  
4 written testimony.

5           Q       What data is reflected in exhibit  
6 191?

7           A       This is the channel lineup for  
8 Comcast in the Washington, D.C. area.

9           Q       What does the far right column  
10 show?

11          A       The far right column, which is  
12 entitled "Tiering," tells you literally what  
13 tier Comcast places that channel or network on  
14 in its lineup.

15          Q       Do you see any Comcast-affiliated  
16 sports networks on the Comcast sports tier?

17          A       No, I do not. Comcast does not  
18 relegate its affiliated national sports  
19 network to the inferior sports tier.

20          Q       Do you see unaffiliated sports  
21 networks that are not on the sports tier in  
22 that channel lineup?

1 A There are two exceptions, yes.

2 Q What are those exceptions?

3 A So the exceptions are ESPN and  
4 MASN.

5 Q What do you make of ESPN being  
6 there, if anything?

7 A I do. I think that the reason why  
8 ESPN defies the pattern that we generally  
9 observe in this picture is that ESPN has  
10 significant countervailing market power.

11 In other words, it can demand that  
12 it be placed on Comcast's expanded basic tier.  
13 If Comcast did not carry ESPN on its expanded  
14 basic tier, there would be -- there likely  
15 would be significant problems in terms of  
16 customer retention.

17 Q Is ESPN unique in that regard?

18 A Yes, they are.

19 Q What about MASN? How do you  
20 account for MASN being on the expanded basic  
21 tier?

22 A Well, MASN is there, but because

1 of literally a regulatory gun that was put to  
2 Comcast's head as a condition. And this is  
3 the other carriage dispute that I was  
4 personally involved in. As a condition of  
5 approving the Comcast/Time Warner joint  
6 acquisition of Adelphia, the Commission  
7 imposed certain arbitration rules on Comcast  
8 that would dictate how an arbitration would  
9 proceed for a carriage dispute involving  
10 regional sports networks.

11 Q Do you understand this channel  
12 lineup to be representative of Comcast channel  
13 lineup throughout the United States? This is  
14 specific to Washington, D.C., correct?

15 A It is specific to Washington, D.C.  
16 I think it is easier to show it, to show the  
17 pattern if you just focus on one. But we have  
18 also gone through about 25 different Comcast  
19 local markets throughout the country and  
20 confirmed that this is, in fact, the pattern.

21 And I would just also note that in  
22 his deposition testimony, Comcast CEO Brian

1 Roberts confirmed that this is, in fact, the  
2 pattern throughout the country.

3 MR. SCHMIDT: Your Honor, at this  
4 point I would move ENT-191 into evidence.

5 MR. BURKE: No objection.

6 JUDGE SIPPEL: Then ENT number 191  
7 for identification is received into evidence  
8 at this time as ENT number 191.

9 (Whereupon, the aforementioned  
10 document, having previously been  
11 marked for identification as  
12 Enterprises Exhibit Number  
13 ENT-191, was received in  
14 evidence.)

15 BY MR. SCHMIDT:

16 Q Now, are you aware that Comcast  
17 has made the claim that they treated the NFL  
18 Network differently because of its price and  
19 that that justified their treatment of the NFL  
20 Network?

21 A I am aware of that claim, yes.

22 Q What is your response to that

1 claim?

2           A       Well, the claim is uneconomic, but  
3 probably more importantly here, it cannot  
4 serve as an efficiency basis during what I  
5 would call a phase one inquiry.

6                   Phase one is the determination of  
7 whether or not discrimination occurred and  
8 whether or not the unaffiliated network is  
9 impaired in its ability to compete.

10                   I don't think that price is an  
11 appropriate mechanism to focus on when making  
12 that determination. I think that price should  
13 be reserved for what I call the phase two  
14 inquiry, which is conditional on a finding of  
15 discrimination and conditional on a finding  
16 that the unaffiliated network was impaired,  
17 what is the appropriate price of carriage.

18                   And the reason why I don't like  
19 price to contaminate what I call the phase one  
20 inquiry is that a vertically integrated  
21 operator who is discriminating and doing so  
22 for anti-competitive reasons will always be

1 able to cite the price as the reason for why  
2 it is not carriage. So long as that price  
3 that is being asked exceeds zero, you would  
4 always be able to make that argument.

5           So that, in a nutshell, the  
6 problem that I have with it is that Comcast's  
7 suggestion of how we can distinguish between  
8 an anti-competitive refusal to deal from a  
9 pro-competitive refusal to deal is  
10 meaningless. It would never allow us to make  
11 that distinction.

12           Q       Did you conduct a survey of what  
13 other MVPDs are paying for the NFL Network  
14 that gave you comfort that what the NFL  
15 Network is seeking from Comcast in this  
16 litigation is within that range or, in fact,  
17 lower than that range?

18           A       Yes. In fact, just to recap,  
19 there are roughly 240 agreements between NFL  
20 Network and MVPDs across the country. But,  
21 most importantly, we focused or I focused on  
22 the top, the largest MVPDs.

1           So I looked at nine agreements in  
2 detail. Those 9 agreements cover 95 percent  
3 of all NFL subscribers that are carried  
4 throughout the United States.

5           So I felt that having looked at  
6 the prices that are reflective of 95 percent  
7 of all NFL subs, I felt that that was a  
8 representative sample of the price in the  
9 marketplace.

10           And the conclusion that I made was  
11 that the price that was being paid was the  
12 fair market value by definition. And it's the  
13 same price that NFL Network is seeking here.

14           Q       Let me circle back to that. First  
15 let me ask you about one other opinion that  
16 you have given, your third opinion. Have you  
17 reached an opinion about whether the NFL  
18 Network suffered competitive harm from  
19 Comcast's decision to tier it?

20           A       Yes, I have.

21           Q       What is that opinion?

22           A       Well, I describe the harm in great

1 detail in the report. I'll just try to touch  
2 on a few issues here. But they certainly lost  
3 advertisers who were upset about the gaping  
4 hole in their footprint as a result of Comcast  
5 tiering decision.

6           They lost the Pac-10 licensing  
7 rights that they were going after because of  
8 this hole in their footprint that Comcast  
9 caused.

10           They incurred higher selling costs  
11 as a result of Comcast's tiering decision.

12 Before, when they had the [REDACTED]  
13 Comcast subscribers, the incremental cost of  
14 getting any additional subscriber was zero.

15           But after the tiering decision, in  
16 which Comcast took them down from [REDACTED] to  
17 roughly [REDACTED] the only way that they  
18 could reclaim those lost subscribers was by  
19 spending money.

20           They either had to convince the  
21 subscriber that it made sense to spend seven  
22 dollars a month to switch to the sports tier

1 or they had to convince the subscriber to  
2 switch to DirectTV or EchoStar or Verizon or  
3 AT&T, some in-region rival to Comcast.

4 I guess the last piece of harm --  
5 and I don't mean to be comprehensive because  
6 I spent a lot of time on this in the report --  
7 is what it did on their advertiser revenues.

8 Of course, advertising revenues  
9 are pegged directly to eyeballs. So as soon  
10 as you wipe off eyeballs through a tiering  
11 decision, you immediately cause advertising  
12 revenues to drop off.

13 In what I call a two-sided market,  
14 these advertising revenues can be used to  
15 subsidize the licensing fee. So if you start  
16 taking away advertising revenues from an  
17 unaffiliated network, you put upward pressure  
18 on the price.

19 I think I will end there.

20 Q And let me take it a little bit  
21 outside of the context of this specific  
22 dispute. Is it at all a remarkable

1 proposition in terms of how networks operate,  
2 networks like the NFL Network, like Versus,  
3 like Golf, that if their subscribership is  
4 frozen or reduced, that they suffer  
5 competitive harm from that?

6 A No, it is not remarkable. Indeed,  
7 Comcast's own witnesses and I think if I am  
8 remembering correctly Mr. Burke said it  
9 exactly that.

10 Q Let me turn to your fourth  
11 opinion, if I may. Actually, before I do, in  
12 your view, did the tiering of the NFL Network  
13 harm consumers and advertisers?

14 A Sure. Sure, it did. And, again,  
15 I explain in great detail how, but I will just  
16 give a few examples here. So I give as an  
17 example the customer who previously was paying  
18 zero incremental cost to watch the NFL Network  
19 and the eight-game package now has to pay  
20 seven dollars a month to watch those same  
21 programs if he's going to stick with Comcast.  
22 So it's very simple. He's now out seven

1 dollars that he previously would have had in  
2 his pocket to watch the same content.

3 That is the easiest group of  
4 affected, of adversely affected, customers,  
5 but there are others that are more subtle but  
6 maybe not so to an economist.

7 For example, if a user values that  
8 programming at five dollars a month but  
9 Comcast charges seven dollars a month, then he  
10 is just out the five dollars of surplus or  
11 utility that he previously enjoyed and he  
12 didn't have to pay for it, it was showing up  
13 on the digital tier.

14 There are a lot of other examples  
15 of harm. I didn't know how much you want me  
16 to go into it --

17 Q Let me --

18 JUDGE SIPPEL: Have you gone into  
19 all of this in detail in your --

20 MR. SCHMIDT: I think he has, Your  
21 Honor.

22 THE WITNESS: Yes.

1 BY MR. SCHMIDT:

2 Q Let me turn to your fourth opinion  
3 because I do want to get through the summary  
4 of your opinions so we can turn it over. Your  
5 fourth opinion relates to the fair market  
6 price that you believe Comcast should pay for  
7 the NFL Network on expanded basic. Is that  
8 right?

9 A Yes, it does.

10 Q Can you find in your report what  
11 that price is, in your testimony, in your  
12 written testimony, what that price is?

13 A What I believe the Comcast should  
14 pay conditional on a decision that --  
15 conditional on a finding of discrimination and  
16 a finding that NFL Network was impaired?

17 A Yes, sir. It was roughly [REDACTED]  
18 per subscriber per month.

19 Q Okay. What I would like to do is  
20 ask Mr. Friedman to put up my last chart.

21 MR. SCHMIDT: And I will mark it  
22 for identification as ENT-192.