

1 sports in the country. And without - I'm just  
2 going to rattle off without giving the order,  
3 football, baseball, basketball and hockey.

4 So, and then maybe golf is a quick - it's not  
5 a professional team sport, but golf is very  
6 popular too.

7                   So beyond that, can I say on a  
8 line if I were to draw a line and say that  
9 hockey is this far away from football? I  
10 don't think that as an economist I don't have  
11 a lot to add to that point. In fact I'm not  
12 sure that anybody could. This is more fodder  
13 for sports talk radio. They are all in there  
14 somewhere; it makes the two networks similarly  
15 situated. But I can't say that the distance  
16 between football and hockey is this big. At  
17 that point we are just engaged in sports talk  
18 radio channel, not economics.

19                   BY MR. SCHONMAN:

20           Q       So does the widespread popularity  
21 of NFL over that of Versus and Golf have any  
22 impact on the similarity or dissimilarity

1 between those programs, those channels?

2 A Sure. Sure. So what - the way  
3 that I am interpreting the data, and the way  
4 that I think the FCC used it to establish  
5 similarly situated was what I said again, that  
6 it be unaffiliated networks' popularity, as  
7 measured by its ratings, exceeds the  
8 popularity of the affiliated network, then one  
9 can infer that the demand for that programming  
10 is at least as great.

11 And when I say at least as, I'm  
12 saying that it's on par, it's in the  
13 neighborhood. So they are using ratings to  
14 inform the similarly situated prong.

15 Q As an economist do you agree with  
16 that approach?

17 A I think that it establishes that  
18 they are close in product space, and that the  
19 demand for the NFL's programming is greater  
20 than the demand for Versus programming.

21 Q Do you disagree at all with the  
22 Commission's approach?

1           A       I don't disagree. Ratings is one  
2 indicator as I said during a deposition; it's  
3 one indicator. I could find two networks who  
4 have the same ratings but weren't similarly  
5 situated. So it's one thing that you would  
6 look at.

7           Q       But you could have programs that  
8 have disparate ratings and that would affect  
9 whether they are similarly situated?

10                   I'm sorry if I keep asking the  
11 same question, but if it's my problem I am not  
12 understanding your answer.

13           A       No, no, that's fine. For me to  
14 get - I was asked during my direct what  
15 evidence do I look to first to establish  
16 similarly situated. It's the fact that these  
17 guys or networks among the top four national  
18 professional sports leagues in the country.  
19 That is where I start.

20                   Number two they are competing for  
21 the same content. Remember, Versus was going  
22 after the eight-game package in competition

1 with the NFL Network; they both wanted the  
2 same content. They both wanted the PAC 10  
3 games. It turned out that the NFL Network  
4 lost the Pac 10 games to Versus. So now  
5 Versus is actually carrying football  
6 programming. So now we don't even have to get  
7 into a fight over comparing hockey. It's  
8 football versus football.

9           Ratings should go into it, but  
10 it's not where I'd start. The FCC in its  
11 order on reconsideration put a lot of emphasis  
12 on the ratings, so I followed them, but that  
13 is not where I would start my analysis of  
14 similarly situated.

15           Q       Would you turn to paragraphs 12  
16 and 13 of your direct testimony, direct  
17 written testimony?

18           Paragraph 13 refers to an  
19 assertion that you characterize Comcast as  
20 having made in paragraph 12. And in the first  
21 sentence of paragraph 13 you say that the  
22 assertion is undermined by Comcast's admitted

1 failure to reduce its prices to subscribers  
2 and remove NFL Network from its more broadly  
3 distributed tier.

4 As an economist is it your  
5 experience that cable companies will reduce  
6 their fees to subscribers when they shift  
7 around networks to different tiers?

8 I'll tell you from my experience,  
9 my prices have never gone done.

10 A Probably neither have mine. The  
11 point that I'm trying to establish is that  
12 there is not a tight correlation between  
13 carriage of the NFL Network and Comcast's  
14 price that it charges consumers. And that is  
15 an important data point; I just want to point  
16 that out. I think the more relevant question  
17 is, what would Comcast do if it were compelled  
18 to carry NFL Network? That is, what portion  
19 of its [REDACTED] if you go with my number would  
20 get passed on.

21 And the answer, to the best that I  
22 can give, is somewhere between zero and 50

1 percent; it's the best answer I can give. And  
2 zero is anchored in this fact, the 50 percent  
3 is anchored in the fact and the evidence that  
4 their own expert put forward.

5 Q Is it safe to say, then, that  
6 Comast's failure to reduce its prices or  
7 decision not to reduce its prices does not  
8 necessarily undermine that assertion in  
9 paragraph 12?

10 A Oh, I'm sorry -

11 Q I'm getting tired myself.  
12 Could you turn to paragraph 18?

13 A Sure.

14 Q And we are talking here - you are  
15 talking here about the harms to NFL by having  
16 them shifted to a premium tier. And about  
17 halfway through that paragraph one of the  
18 harms that you describe is that it forecloses  
19 NFL Network from the most efficient  
20 distribution channel. Do you see that?

21 A Yes.

22 Q What do you mean by that?

1           A        What I mean is that carriage on  
2   the expanded basic tier is more efficient for  
3   an NFL Network in terms of getting the  
4   eyeballs than carriage on a sports tier. In  
5   other words, I can explain - I mean it's lower  
6   cost.

7                    JUDGE SIPPEL:   More efficient for  
8   who?

9                    THE WITNESS:    For the NFL.

10                   JUDGE SIPPEL:   The NFL?

11                   BY MR. SCHONMAN:

12           Q        It's a more widely distributed  
13   tier?

14           A        It's a little more subtle. Let me  
15   if I could. The - think about how NFL is  
16   going to try to reclaim the [REDACTED]  
17   customers that it loses overnight when Comcast  
18   decides to tier it. And ask yourself, what  
19   was the marginal cost of addressing those, of  
20   reaching those customers, before the tiering  
21   decision? Zero, right. That is, once Comcast  
22   flipped the switch, all of its D2 customers

1 had it.

2 So now it flips the switch the  
3 other way, and you are taken from [REDACTED]  
4 [REDACTED] to [REDACTED] How do I get those  
5 [REDACTED] back?

6 It's going to cost me something.  
7 So it's a new incremental cost that I didn't  
8 face before, to get back those [REDACTED]  
9 customers that just vanished overnight I've  
10 got to do something. I've got to convince  
11 them to spend [REDACTED] a month to go to the premium  
12 tier. I've got to convince them we heard  
13 about the switch campaign yesterday. I've got  
14 to convince them to switch to some other NVPD  
15 in their neighborhood who is carrying it.

16 That is cost; that's a new selling  
17 cost that didn't exist before, and this notion  
18 of the most efficient distribution channel is  
19 something that is recognized in the economics  
20 literature. So that is why I cited that.

21 Q When you refer to the most  
22 efficient distribution channel, are you

1 referring to the D2 tier, or to the tier that  
2 Versus and Golf are on?

3 A Well, it's relative, right. So if  
4 the expanded basic tier is more efficient from  
5 NFL's perspective in terms fo reaching  
6 eyeballs than D2, and D2 is more efficient for  
7 reaching eyeballs than is the sports tier.

8 Q So when you refer to most  
9 efficient distribution channel, are you  
10 referring to D2 or to the tier that Versus and  
11 Golf are on?

12 A Expanded basic tier; I think  
13 that's what I had in mind when I wrote this.

14 Q And is that the one - that's the  
15 tier that Versus and Golf are on, correct?

16 A And it is the most efficient tier.

17 Q It is the most - but that is not a  
18 tier that the NFL was ever on, correct?

19 A I agree.

20 Q So by moving NFL up to the premium  
21 tier, when you talk about it, you are talking  
22 about that action foreclosing the NFL from

1 being on a tier it was never on.

2 A When I say foreclose, I just want  
3 to be real clear, I interpret the offer to be  
4 the only way that you would be carried on  
5 expanded basic is if you give us equity in the  
6 program. You give us the eight-game package  
7 exclusively on Versus. That is a  
8 discriminatory strategy that forecloses you  
9 from the most expanded basic - from the most  
10 efficient tier.

11 That offer, there is no access,  
12 the NFL has no access to the most efficient  
13 tier.

14 Q That being the tier that Versus  
15 and Golf are on?

16 A Correct.

17 Q [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 A [REDACTED]

21 [REDACTED]

22 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 Q Can you turn to paragraph 21?

8 A Sure.

9 Q You are talking about fewer harmed  
10 in paragraph 21, and the next to the last line  
11 about paragraph - one of the factors you  
12 referred to is that viewers are forced to  
13 spend more money to watch programming for  
14 which they had previously paid less; correct?

15 A Correct.

16 Q Just to be clear, when the NFL was  
17 moved, or was moved to a premium tier,  
18 customers were paying for the NFL Network plus  
19 a host of other channels as well, correct?  
20 They weren't just paying more for that one  
21 channel?

22 A Absolutely. Let's just pick a

1 number, they were paying X dollars for the D2  
2 tier. And enjoying the NFL Network at no  
3 incremental cost. Conditional on having been  
4 on that tier. So if I'm a D2 subscriber, I  
5 didn't pay anything extra to get NFL. I just  
6 had it.

7 Q But when they moved up to a  
8 premium tier, they were then going to get the  
9 NFL plus a number of other channels?

10 A In fact these other channels right  
11 here for an extra [REDACTED] a month. So to me that  
12 is the easiest - there is a lot of other harm  
13 that is going on from that decision, but that  
14 is the easiest one to quantify, so that is the  
15 one I focus on. You have a guy who used to  
16 pay no incremental cost and now has to pay [REDACTED]  
17 a month to watch NFL Network. That is a lost  
18 of [REDACTED]

19 Q But to lose the NFL Network plus  
20 other programs?

21 A It's true. But if he had a real  
22 strong preference for this other stuff that is

1 on the sports tier, he probably would have  
2 already been on the sports tier. What we  
3 observe -

4 Q Is that an economic opinion that  
5 you are making?

6 A Absolutely. What we observed  
7 after the tiering decision was a big increase  
8 in the - in Comcast's subscribers on the  
9 sports tier. As an economist the inference  
10 that I can make from that is that it was the  
11 NFL that changed the decision on the margin.

12 Q How big was that increase?

13 A Very big. I think it went from on  
14 the order of [REDACTED] to [REDACTED] after  
15 the tiering decision.

16 Q I'm sorry, what are the numbers  
17 again?

18 A I think - I'm going by memory, and  
19 it's all in the testimony - I think you saw an  
20 increase from [REDACTED]  
21 That is an [REDACTED] I don't know what  
22 that is, a [REDACTED] increase. You can do

1 the math, but to me that is a big jump.

2 Q The fact that there was a jump in  
3 the numbers of people who followed the NFL  
4 Network down to a premium tier, does that  
5 affect your expert opinion as to whether there  
6 was discriminatory action or not?

7 A Whether there was discriminatory  
8 action? Well, I don't think so. To inform  
9 the discrimination prong I'm looking at this,  
10 and I'm looking at the ratings, and I'm  
11 looking at - so no, what I think this informs  
12 is the - it's really no prong, because I think  
13 the second prong is actually impairment to the  
14 unaffiliated program.

15 I'm trying to go one step further  
16 just for completeness of the proof and  
17 actually look at the harm to consumers. And  
18 these guys are clearly hurt. I mean anyone  
19 who had to spend an extra [REDACTED] a month to follow  
20 what they before were watching at an  
21 incremental cost of zero have been hurt by [REDACTED]  
22 a month.

1           Q       Well, in terms of hurt, you are  
2 going to have to help me out here, you are the  
3 economist, in terms of hurt they couldn't have  
4 been hurt that much if they followed the  
5 channel up to a premium tier. It's the people  
6 who are now denied the ability to see it.  
7 Wouldn't those be the people who are hurt?

8           A       The inference you just made, I  
9 can't agree with.

10          Q       Why is that?

11          A       Because you said the fact that  
12 they followed means they weren't hurt. An  
13 economist defines hurt by the difference  
14 between your willingness to pay for something  
15 and what you are paying for it.

16                   So let's pick someone who was  
17 previously willing to spend \$10 a month to get  
18 NFL Network programming. That is his  
19 willingness to pay, his valuation for it. And  
20 there was zero incremental cost to having it  
21 before the tiering decision. His surplus was  
22 10. Now you tier it and you put it up to the

1 sports tier and he has got to spend an  
2 additional [REDACTED] month. So whereas before his  
3 surplus was 10 minus zero, his surplus now is  
4 10 minus [REDACTED] you follow? So the fact that  
5 he followed doesn't mean that he didn't suffer  
6 harm; his welfare has been reduced.

7 Q Does it matter that he is getting  
8 the value of the additional channels as well  
9 as the NFL Network?

10 A I think on the margin you may want  
11 to consider his value to the other channels.  
12 But I mean there is nothing there that  
13 compares to NFL football is the first point  
14 I'd make, and the second point -

15 Q You mean they are not similarly  
16 situated in anyway?

17 A No, in terms of the value  
18 proposition I think that NFL stands out. I  
19 think that -

20 Q You used the phrase, value  
21 proposition. I don't know the phrase.

22 A Oh, sorry. I'm going back to this

1 valuation. You know the 10? That is what he  
2 assigned to watching, in my example, what he  
3 assigned to watching an NFL program. You are  
4 right that if now he spends an extra [REDACTED] a  
5 month he is getting some other stuff. But we  
6 can infer that he is worse off, because if he  
7 really liked that other stuff he would be  
8 there already.

9 His willingness to pay for that  
10 other stuff must be less than [REDACTED] otherwise  
11 he'd be there already.

12 Q Paragraph 24, you talk about  
13 option value. Can you just tell me what that  
14 is, please?

15 A Sure. A lot of new networks get  
16 traction if you will by virtue of the fact  
17 that someone accidentally stumbled onto their  
18 programming and it was available on the most  
19 penetrated tier.

20 I mean there are shows, to pick an  
21 example, Madmen, that draw people to I believe  
22 it was A&E, and otherwise I wouldn't be

1 watching A&E. But somebody tells you about,  
2 watch an episode of Madmen, you won't stop -  
3 you will never stop watching again. And I  
4 flip over to A&E, and that is an experience  
5 that I was able to undertake that I wouldn't  
6 have been able to enjoy had my cable operator  
7 tiered A&E and put it on some higher tier.

8           So by virtue of the tiering  
9 Comcast is depriving its users of experiencing  
10 something similar to what I just described for  
11 Madmen.

12           Q       I understand. Do premium tiers  
13 not have option values in your opinion?

14           A       Well, not in the sense that I just  
15 used it. I am using the word, option value,  
16 that says that I have no idea when in the next  
17 six months if I am ever going to tune to FX.  
18 I have no idea, but it's there. And it's a  
19 nice option that I have. If a friend calls me  
20 and says, Nip Tuck, you have to watch Nip  
21 Tuck, it's one of the best shows ever, it's  
22 something that I can experiment with, and if

1 I like it I'll start watching FX.

2 So that is the option value that  
3 I'm talking about, so I don't see how that  
4 concept, at least how I'm using it here, can  
5 be applied to premium tier.

6 Q Maybe I didn't ask it properly.

7 If I moved up to a premium tier, I can still  
8 stand around and discover new channels on this  
9 new tier just as easily at a cost of [REDACTED]  
10 as I could scan the 100 or so other channels?

11 A Right, after you drop the [REDACTED] you  
12 are free to play around in that space, and you  
13 might experiment with something and decide you  
14 like it.

15 Q So by moving - does - Comcast's  
16 decision to move the NFL Network to a premium  
17 channel, does that necessarily destroy this  
18 option value or does it diminish it?

19 A It largely destroys it, I mean for  
20 the context I'm trying to use it in. Because  
21 I can no longer turn over to the NFL because  
22 someone tells me that Cowboys, San Francisco

1 playoff game from 1993 is being replayed.

2 Q Okay. Further on in that  
3 paragraph you have a clause, because of lack  
4 of information. Do you see that? Paragraph  
5 24, you say, only if they pay a substantial  
6 fee they may, hyphen, because of lack of  
7 information, hyphen, forego that programming.

8 What do you mean by that?

9 A Let me just read that.

10 Q Sure.

11 A Sure. So this is a personal  
12 experience, but every time that playoff game  
13 shows up on NFL Network I can't help myself  
14 but watching that to the exclusion of  
15 everything else. It puts me back in a stat of  
16 mind where I was in 1993 when I watched that  
17 playoff game.

18 Q You are talking about old playoff  
19 games.

20 A Yes.

21 Q I thought I had earlier they don't  
22 carry - the NFL Network doesn't carry playoff

1 games?

2 A They don't carry life playoff  
3 games. That's how I interpret it. They carry  
4 classic playoff games.

5 Q Thank you. I'm sorry to interrupt.

6 A So I was flipping through the  
7 channels, and because my MVPD carries it, on  
8 a fairly penetrative tier, I got to experience  
9 something by accident. And I wouldn't have  
10 known what the programming was on the NFL  
11 Network had I not kind of flipped through the  
12 channels. And that opportunity or experience  
13 is being deprived.

14 Q So that is what you mean by the  
15 lack of information?

16 A That's right. That's right.

17 MR. SCHONMAN: Your Honor, that  
18 concludes my five minutes.

19 JUDGE SIPPEL: That's fine. Very  
20 interesting.

21 Now is there any more redirect on  
22 that? Mr. Schmidt?

1 MR. SCHMIDT: None here, Your  
2 Honor.

3 JUDGE SIPPEL: Anything from your  
4 side, Mr. Burke?

5 MR. BURKE: I just have two  
6 questions, Your Honor. Sorry for that, but I  
7 just want to make sure the record is clear.

8 May I?

9 JUDGE SIPPEL: If there are two  
10 questions. I've had different  
11 interpretations.

12 BY MR. BURKE:

13 Q You talked about the MASN case.  
14 There are two different MASN cases, one  
15 involving Time Warner, and one involving  
16 Comcast, that you referenced. The Comcast  
17 case, there was no decision, isn't that  
18 correct?

19 A It was resolved, I don't know if  
20 there was no decision -

21 Q There was no order of the FCC that  
22 decided the merits of the case.

1           A        There was an order by the FCC that  
2 effectively decided the merits of the case.

3 The RSN provision -

4           Q        Effectively.

5           A        No, the RSN provision that was put  
6 into the Adelphia order was motivated by the  
7 conflict that we were discussing. The FCC in  
8 its order cited my testimony in its section to  
9 grant relief to unaffiliated RSNs. So there  
10 was an order, yes, there was an order.

11                    That issue went away. If you  
12 notice the carriage dispute evaporated a few  
13 weeks after the FCC's order in Adelphia.

14           Q        Was there ever a final decision by  
15 the FCC or an arbitrator or the media bureau  
16 on MASN's complaint?

17           A        No, and there didn't need to be  
18 after the FCC's -Adelphia order.

19           Q        The answer is no?

20           A        Correct.

21           Q        And with respect to the Time  
22 Warner matter, that was a media bureau

1 decision that is on appeal to the FCC right  
2 now?

3 A I am not sure where it is now. I  
4 do not know.

5 JUDGE SIPPEL: What was the  
6 second one, MASN?

7 MR. BURKE: They're both MASN,  
8 Your Honor.

9 JUDGE SIPPEL: MASN two?

10 MR. BURKE: The Comcast MASN  
11 case, and the Time Warner MASN case.

12 JUDGE SIPPEL: Thank you.

13 MR. BURKE: And that's what I  
14 wanted to make sure we had clarified.

15 Thank you.

16 JUDGE SIPPEL: That concludes it.

17 Well, we thank you very much. You  
18 are excused. You can stay in the courtroom or  
19 not as you see fit.

20 (Witness excused)

21 JUDGE SIPPEL: It's quarter after  
22 1:00. We are supposed to come back at 2:30.

1 Is that doable? Or do you want 15 more  
2 minutes? You want quarter of? We can come  
3 back at 2:30 or quarter of 3:00? What is your  
4 preference?

5 MR. CARROLL: The hour and a half  
6 to make sure we have time to get there. It's  
7 your call, Your Honor.

8 JUDGE SIPPEL: Two thirty.  
9 (Whereupon at 1:16 p.m. the  
10 proceeding in the above-entitled  
11 matter went off the record to  
12 return on the record at 2:30 p.m.)

13 JUDGE SIPPEL: Let's go on the  
14 record then.

15 MR. SCHMIDT: I'd like to call Mr.  
16 Furman as our next witness.

17 JUDGE SIPPEL: Mr. Furman, would  
18 you come forward, please. I'm going to ask  
19 you to raise your right hand, so I can swear  
20 you in.

21 WHEREUPON,

22 RONALD FURMAN

1 was called as a witness and, after having been  
2 first duly sworn, was examined and testified  
3 as follows:

4 JUDGE SIPPEL: Please be seated,  
5 sir. Are those your water bottles?

6 THE WITNESS: Yes.

7 JUDGE SIPPEL: Good. Okay. You  
8 put them there ahead of time. That's  
9 excellent. That's wonderful. You may  
10 proceed, Mr. Schmidt.

11 DIRECT EXAMINATION

12 BY MR. SCHMIDT:

13 Q Mr. Furman, could you introduce  
14 yourself to the Court?

15 A Ronald H. Furman, currently  
16 employed at the National Football League.

17 Q Okay. How long have you been with  
18 the National Football League?

19 A With the National Football League,  
20 approximately three years.

21 Q What are your responsibilities  
22 with respect to the NFL Network?