

1 entity.

2 MR. PHILLIPS: They're just an  
3 infinite network. Your Honor, they do have  
4 shareholders, including --

5 JUDGE SIPPEL: I'm sure they do.

6 MR. PHILLIPS: Some of the  
7 shareholders are some of the distributors, but  
8 they do have shareholders.

9 JUDGE SIPPEL: I'm assuming that.  
10 But for purposes of my illustration, I'm  
11 trying to think in terms of how significant is  
12 it that Comcast Cable, is it Comcast Cable is  
13 the network or Comcast --

14 MR. PHILLIPS: Comcast Cable is  
15 the distributor, Your Honor.

16 JUDGE SIPPEL: Is the distributor.  
17 Okay. And who is the network?

18 MR. PHILLIPS: Comcast Programming  
19 side is the network.

20 JUDGE SIPPEL: On the side of  
21 what?

22 MR. PHILLIPS: Of the Comcast

1 Corporation. They are both wholly owned at  
2 some point.

3 JUDGE SIPPEL: Exactly, so they're  
4 going up like this. And if I am looking at  
5 the balance sheet or the P&L at the end of the  
6 year to decide if I want to buy this stuff,  
7 all it's going to show -- it's not going to  
8 break things out that way and say well, you  
9 have to look at it from the standpoint of if  
10 Comcast was paying or there was an excessive  
11 amount of money being paid for programming by  
12 cable, that's really kind of a meaningless  
13 number for purposes of making that decision.

14 MR. PHILLIPS: Well, Your Honor --

15 JUDGE SIPPEL: It's what comes out  
16 at the end.

17 MR. PHILLIPS: It's not because  
18 what the statute is aimed at Your Honor --

19 JUDGE SIPPEL: Okay --

20 MR. PHILLIPS: What the statute is  
21 aimed at, when Congress permitted vertical  
22 integration by distributors to own their own

1 content, they put into the statute, they said  
2 well, it's fine for distributors like Comcast  
3 Cable. It's fine for them to own their own  
4 content and put it on as long as they don't  
5 discriminate. That's the reason for Section  
6 616. They're not allowed to discriminate on  
7 the basis of their affiliation or non-  
8 affiliation.

9 In other words, they've got to  
10 make the same decisions about the networks  
11 that they own versus the networks that they  
12 don't own. And they do this because otherwise  
13 you'd end up in a situation, for example,  
14 Comcast which is the market leader with 25  
15 percent of the homes in America. If you  
16 didn't have a non-discrimination just from an  
17 economic policy stand what the fear would be,  
18 Your Honor, is that they'd show only their own  
19 programming in the end.

20 So Congress enacted the non-  
21 discrimination that says that you can't treat  
22 them differently, Your Honor, you can't.

1 JUDGE SIPPEL: I understand that  
2 you can't treat, but you can't treat them  
3 differently unless you have a darn good reason  
4 for doing it.

5 MR. PHILLIPS: That's right. And  
6 that's what I'm focused on, Your Honor. One  
7 has to have a darn good reason. And as I said  
8 on the cost benefit reason, Your Honor, that  
9 Mr. Bond applied, he says The Tennis Channel  
10 just costs too much. But what he didn't look  
11 at was Golf and Versus cost many times the  
12 amount that The Tennis Channel did.

13 So we come down here to what I  
14 call the discriminatory equation. You input  
15 cost down here as well, because that's what  
16 got applied over here, The Tennis Channel,  
17 just like date, but doesn't get applied over  
18 here to the Comcast networks.

19 Now Your Honor, there are other  
20 requirements to discrimination. I'm sure my  
21 colleague, Mr. Carroll, will point them out.  
22 We disagree about whether or not Tennis

1 Channel in this case meets them. I tell you  
2 I think the evidence in this case is  
3 overwhelming that we do. Is Tennis Channel  
4 similarly situated to The Golf Channel and  
5 Versus? That's one of the questions for  
6 discrimination. Are these candidates with  
7 equal qualification?

8 JUDGE SIPPEL: Okay, so now -- I'm  
9 going down this checklist. You've got date  
10 test and you've got cost benefit test. Now is  
11 this the third category?

12 MR. PHILLIPS: No, this isn't a  
13 third test, Your Honor.

14 JUDGE SIPPEL: Okay.

15 MR. PHILLIPS: There are other  
16 tests applied, but every time that you hear,  
17 Your Honor, every time you hear a  
18 justification from Comcast, from its fact  
19 witnesses, or from its experts, this is the  
20 question I want you to ask, the discriminatory  
21 equation, Your Honor. I want you to ask were  
22 the tests that are being applied that tell

1 Tennis Channel that it should not be broadly  
2 distributed, would it apply over here to  
3 Comcast networks and if they were would they  
4 pass or fail?

5 Because I would submit to you,  
6 Your Honor, that's where the discrimination  
7 here is, that Comcast didn't apply the same  
8 test to its own networks and that they  
9 wouldn't pass. That they applied these tests  
10 over here to the female candidate, but not to  
11 the male candidate. They just gave him the  
12 job.

13 Similarly situated, Your Honor.  
14 Is Tennis Channel similarly situated to Golf  
15 Channel, Tennis Channel, Golf Channel? Well,  
16 they're both cable sports networks. They both  
17 compete for audiences with similar  
18 demographics. They both compete for upscale  
19 audiences. They both compete for male skewing  
20 audiences, in other words, audiences that are  
21 more men than women. The numbers aren't exact  
22 on these, but like Princeton and Harvard, Your

1 Honor, I would submit to you that they're not  
2 meaningfully different enough to make a  
3 difference in the basic question of are they  
4 similarly situated. Indeed, Your Honor, when  
5 you look at the ratings in the markets where  
6 they're both available, they're comparable and  
7 competitive.

8 JUDGE SIPPEL: Well, Harvard was  
9 really a bad example. Can we try Williams or  
10 some second tier --

11 (Laughter.)

12 MR. PHILLIPS: Your Honor, I've  
13 got a 17-year-old at home and if he could get  
14 into any of these places, I'd be ecstatic.

15 JUDGE SIPPEL: Okay.

16 MR. PHILLIPS: Let me put it this  
17 way to you, Your Honor, if Golf Channel and  
18 Tennis Channel are not similarly situated,  
19 then I suggest to Your Honor that there are  
20 not competing networks that are similarly  
21 situated and Section 616 does not have any  
22 meaning because I can't imagine between Golf

1 Channel and Tennis Channel, if you say the  
2 words golf, what usually comes next in your  
3 mind?

4 As to Versus, which is a multi-  
5 sport channel, again, they're both sports  
6 networks. They both compete for the same  
7 viewers and they both compete for the same  
8 limited pool of advertising dollars. Most  
9 importantly, they compete for the same tennis  
10 rights.

11 Now I can't go into this in public  
12 session, but suffice it to say, Your Honor,  
13 that the evidence will show and it's not  
14 disputed, Your Honor, it's just not disputed,  
15 that Versus competes, has competed and is  
16 competing for the same tennis rights that  
17 Tennis Channel now has. It's not going to be  
18 a matter of dispute.

19 JUDGE SIPPEL: So Versus has a  
20 tennis element to its programming?

21 MR. PHILLIPS: They show hockey.  
22 They show tennis. They show caged fighting

1 and bull riding. They show a bunch of  
2 different sports, Your Honor.

3 JUDGE SIPPEL: Wow. I don't think  
4 Princeton cares about those.

5 (Laughter.)

6 MR. PHILLIPS: I'm losing it.

7 (Laughter.)

8 JUDGE SIPPEL: Wow is all I can  
9 say. Okay.

10 MR. PHILLIPS: Another element  
11 here, Your Honor, is harm. Section 616  
12 requires a showing of harm and the ability to  
13 compete fairly. We also believe that's fully  
14 met here. First, let's just start with the  
15 fact that Comcast is the largest cable  
16 distributor in America. It's in 25 percent of  
17 homes. And that by limiting Tennis Channel,  
18 we say as a victim of discrimination in  
19 distribution to 3 million, it necessarily  
20 limits its revenues that it would get from  
21 subscriber fees, but it also reduces its  
22 attractiveness to advertisers who care about

1 getting as many eyeballs as they can get.

2           It limits its attractiveness to  
3 the people who sell those valuable tennis  
4 rights that we're both competing for because  
5 if you're the French Open, for example, you  
6 want to be seen by as many eyeballs as  
7 possible. And if you're looking at a company  
8 that's foreclosed for the most part in 25  
9 percent of the market, that's a competitive  
10 disadvantage, Your Honor. And it's a  
11 competitive disadvantage against Comcast's own  
12 networks.

13           I'm pausing here a second, Your  
14 Honor, because I want to make sure that I  
15 tried to stay on the public side.

16           JUDGE SIPPEL: Okay, you're doing  
17 fine. Take your time.

18           MR. PHILLIPS: What you'll hear,  
19 in fact, Your Honor, and indeed what you have  
20 heard before, is testimony from Comcast  
21 witnesses, and you'll see this again, that an  
22 ad-supported network is not viable on a sports

1 tier. Your Honor doesn't need to look any  
2 further than that to see the competitive farm.

3 JUDGE SIPPEL: Ad-supporting --  
4 will you repeat that for me, please? An ad-  
5 supporting network?

6 MR. PHILLIPS: An ad-supported  
7 network is not viable on a sports tier. Their  
8 own executives admit that.

9 JUDGE SIPPEL: And the sports tier  
10 is the high tier?

11 MR. PHILLIPS: The sports tier is  
12 the limited, narrow tier that goes to people  
13 who pay an extra \$5 a month.

14 JUDGE SIPPEL: When I say high, I  
15 mean the more expensive tier?

16 MR. PHILLIPS: Yes, Your Honor.  
17 As you may recall, Your Honor, the last time  
18 we were here two years ago almost exactly,  
19 Comcast's Chief Operating Officer, Mr. Burke,  
20 said that Comcast treats its affiliated  
21 networks as siblings. You may recall that  
22 testimony. We've put it into the exhibit

1 binders.

2                   There is, of course, something  
3 very familial, indeed, warm and cozy about  
4 treating your affiliates as siblings. The  
5 issue, however, does not sound quite so  
6 charming when the same behavior has been  
7 described by the Commission, and as Your Honor  
8 is aware, in connection with the findings in  
9 the proposed Comcast-NBCU merger in January,  
10 the Commission ruled and indulge me, Your  
11 Honor, I'm going to read it. "Our analysis  
12 Comcast's data on carriage and channel  
13 placement shows" --

14                   JUDGE SIPPPEL: Is this in the  
15 technical section, so-called technical  
16 section?

17                   MR. PHILLIPS: Yes, Your Honor.  
18 "Shows one, that Comcast currently favors its  
19 affiliated programming in making such  
20 decisions; and two, this behavior stems from  
21 anti-competitive motives rather than due to  
22 reasons that arise from vertical

1 deficiencies."

2 Those are the Commission's words,  
3 Your Honor, in the technical section.

4 Now they made this finding, as Mr.  
5 Carroll, I'm sure he's going to tell you,  
6 he'll say that's a general finding. It  
7 doesn't apply in any specific case. The  
8 Commission is careful to note they were not  
9 making a finding in any specific case. But  
10 what I think Your Honor is going to hear over  
11 the next several days is that the evidence in  
12 this case shows this is the specific case.  
13 This case shows that the Commission's view  
14 that Comcast does discriminate on the basis of  
15 affiliation and it does so for anti-  
16 competitive reasons is true here with respect  
17 to Tennis Channel.

18 JUDGE SIPPEL: Well, I want you to  
19 know that that language is -- that is not  
20 Commission policy language. It doesn't bind  
21 me at all and I'm not interested in it at all  
22 for purposes of this case. I mean I think I'm

1 more independent maybe than the Commission is  
2 in terms of -- I don't think in those terms at  
3 all. I want you to know that.

4 MR. PHILLIPS: Your Honor, it's  
5 certainly a fair point and I'm not suggesting  
6 to you that that language would bind you at  
7 all in this case.

8 JUDGE SIPPEL: Would you call it  
9 dicta, Mr. Carroll?

10 MR. CARROLL: At best.

11 MR. PHILLIPS: I think that my  
12 point is, Your Honor, is that the evidence  
13 that's going to be presented before Your Honor  
14 will show you that there is discrimination  
15 here. And what I would, in closing, when I  
16 ask you to keep the following questions in  
17 mind, whenever you hear Comcast give a  
18 justification for why The Tennis Channel is  
19 being -- was rejected in June 2009 from a  
20 carriage proposal that was priced far below  
21 their own affiliated network, when you hear  
22 about why that happened, ask yourself does --

1 where does it fall in the discriminatory  
2 equation I set up here, in the same test --  
3 whether they apply to Comcast networks and do  
4 they apply to Comcast networks and would they  
5 pass it? That's the question I'm asking Your  
6 Honor. That's discrimination.

7 I think that you'll leave when  
8 you're done, Your Honor, with the conclusion  
9 that I have which is that if Tennis Channel  
10 were owned by Comcast, we wouldn't have the  
11 distribution issues that we have.

12 Thank you, Your Honor.

13 JUDGE SIPPEL: You're very  
14 welcome. I want to be sure -- let me ask just  
15 one clarification. The Tennis Channel is  
16 strictly tennis, is that right?

17 MR. PHILLIPS: Strictly tennis,  
18 just like The Golf Channel is strictly golf,  
19 Your Honor.

20 JUDGE SIPPEL: Okay.

21 MR. PHILLIPS: Just like The  
22 Baseball Channel is strictly basement and The

1 Hockey Channel is strictly hockey. They're  
2 all single sport networks.

3 JUDGE SIPPEL: There is no bull  
4 riding?

5 MR. PHILLIPS: There's not a bull  
6 riding network. They put that one in with  
7 caged fighting and hockey and some others.

8 JUDGE SIPPEL: What I'm thinking  
9 of is that tennis is played pretty much all  
10 year round, but there's going to be down times  
11 when there's not going to be a tennis match,  
12 I gather. What do they do? What do they show  
13 then?

14 MR. PHILLIPS: Well, Your Honor,  
15 the actually have rights to the 100 top tennis  
16 tournaments in the world. And they show about  
17 80 tennis tournaments a year, including all  
18 the four slams. The slams go, as Your Honor  
19 knows, they start in January with the  
20 Australia Open and they end on Labor Day with  
21 U.S. Open. So just the slams themselves are  
22 two-week tournaments, take up a great deal of

1 time. But there are other various significant  
2 tennis tournaments, some of which are almost  
3 as popular that take place throughout the  
4 year. There's the U.S. Open series which took  
5 place, is a lead up to the U.S. Open. And  
6 there are other tennis tournaments that take  
7 place and they show those, Your Honor.

8 One of the reasons that Your Honor  
9 may not know that, of course, and like a lot  
10 of viewers is that one of the ways that you  
11 gain exposure to these channels is just by  
12 flipping up and down the dial. The Tennis  
13 Channel is at 735. I never flip up that far  
14 myself.

15 JUDGE SIPPEL: So is al Jazeera, I  
16 think.

17 (Laughter.)

18 MR. PHILLIPS: Comcast is now at 7  
19 and 11. So you can get exposed to The Golf  
20 Channel pretty easy.

21 JUDGE SIPPEL: That's interesting  
22 because I mean not necessarily that it has

1 bearing to the case, but for example, baseball  
2 and football, we know that there's downtime,  
3 off season, and what do they show? They show  
4 a lot of -- what do they show? They show old  
5 games?

6 MR. PHILLIPS: Well, there are  
7 things that happen all year round in sports.  
8 Some of the stuff is just commentary.  
9 Football, for example, shows the draft that's  
10 coming up right now. Sometimes they show old  
11 games.

12 The Tennis Channel has live events  
13 throughout the year, however.

14 JUDGE SIPPEL: That's what I'm  
15 hearing. I mean there are so many of them.

16 MR. PHILLIPS: Right.

17 JUDGE SIPPEL: And they're all  
18 over the world and --

19 MR. PHILLIPS: And one of the  
20 great advantages, Your Honor, is that the  
21 stars in tennis are always playing. Roger  
22 Federer, Raphael Nadal. These guys -- the

1 Williams sisters, Venus and Serena, they're  
2 always out there playing. They're always  
3 being televised in these tournaments. So it's  
4 not like it's just this one or that one or the  
5 other.

6 You can turn on and get them  
7 throughout the year.

8 JUDGE SIPPEL: Did they ever think  
9 of -- those tennis matches can be really  
10 pretty long. Do they ever think of doing --  
11 this is way out of my bailiwick now, but do  
12 they ever doing anything like a red zone for  
13 tennis, you know, you can just flip to it and  
14 it can show you what the hottest moments are -  
15 - I mean at the end, in other words, towards  
16 the end of the tournament, is it typically  
17 Federer and somebody else?

18 MR. PHILLIPS: Your Honor, I think  
19 that there are all sorts of things that they  
20 thought about like that and have been  
21 discussed like that.

22 Mr. Solomon who is the CEO is

1 going to be my first witness and I invite Your  
2 Honor to ask him that.

3 JUDGE SIPPEL: Maybe I'll ask him,  
4 I don't know. Typically, that's bad business.

5 (Laughter.)

6 Okay, that's it. Thank you very  
7 much. thank you very much, Mr. Phillips.

8 Now Mr. Carroll, I believe it will  
9 be you.

10 MR. CARROLL: It will be me, Your  
11 Honor. May I?

12 JUDGE SIPPEL: You may proceed,  
13 please.

14 OPENING ARGUMENT OF

15 MICHAEL C. CARROLL, ESQ.

16 ON BEHALF OF COMCAST CABLE COMMUNICATIONS

17 MR. CARROLL: Good morning, again.

18 And let me say on behalf of my team and I'm  
19 sure my worthy adversary's team, it is a  
20 pleasure to be back in the courtroom almost  
21 two years to the date. It's become an Easter  
22 tradition.

1 I also want to thank you, Ms.  
2 Gosse, and the staff for all the  
3 accommodations in terms of our boxes and our  
4 exhibits. It's one of the nice things about  
5 being down here. You make it very easy for us  
6 and we're very grateful for that.

7 JUDGE SIPPEL: Appreciate that.

8 MR. CARROLL: I have some comments  
9 prepared that I'm going to get to here, but  
10 let me first start out with a few responses to  
11 some points my friend on the other side, Mr.  
12 Phillips made,

13 First, he spoke of hypotheticals  
14 during his opening, a fair amount, and the  
15 hypothetical discrimination with the hiring of  
16 the man and the woman. I'm going to focus a  
17 great deal of my time on the real facts here  
18 which I think are very compelling when I put  
19 them before you. But I do want to address the  
20 hypothetical right at the outset.

21 I have four daughters and two of  
22 them are in college now. And if I were

1 applying now to go to the colleges they're  
2 going to or to go to the same college I went  
3 to some 30 years ago, I would never get in.  
4 And thankfully, I was able to apply 30 years  
5 ago to go to my school and my school back then  
6 would take me because my generation was just  
7 not as competitive and academically strong as  
8 the current generation is.

9           That's why Mr. Phillips'  
10 hypothetically has no bearing whatsoever on  
11 the case. He refers to that as the so-called  
12 date test. Your Honor made the point that the  
13 Versus and Golf networks precede The Tennis  
14 Channel by eight years. Eight years is about  
15 in that industry as fast moving as it is, 8  
16 years is probably the equivalent to the 30  
17 years in the academic world, but at least it's  
18 analogous to this respect. Golf and Versus  
19 were launched when Tennis Channel didn't  
20 exist. And if I might quote a great jurist  
21 who -- in a case recently who wrote the  
22 following words, but it's particularly

1 noteworthy -- this is in the WealthTV case,  
2 that "WealthTV was not yet launched when the  
3 defendants decided to carry two other  
4 networks, INHD, INHD2. Therefore, Wealth was  
5 not and could not have been a factor in any of  
6 defendants' decisions to provide carriage to  
7 their affiliated networks, INHD, INHD2." That  
8 finding from Your Honor in Your Honor's  
9 recommended decision in the WealthTV decision  
10 applies all fours to this case because we were  
11 -- launched these channels, Golf and Versus  
12 eight years before Tennis Channel was dreamed  
13 up and launched. And there can be no argument  
14 that there was any discrimination on the part  
15 of my client in having carried Versus and Golf  
16 and carried them broadly as you'll see. They  
17 reached broad carriage, Your Honor, well  
18 before Tennis Channel was ever around.

19 Now to finish Mr. Phillips'  
20 hypothetical, in the employment world, you  
21 don't go and fire people. You hired eight  
22 years before because new people come along

1 that would perform better on a test. If you  
2 did, Mr. Phillips and I would be out of jobs  
3 today. That is, I'm sure all the people  
4 applying to his firm and my firm can pass  
5 tests and are very desirous to be hired,  
6 probably more so than when I was hired by my  
7 firm years ago. But we don't lose our jobs  
8 over that.

9 He basically wants Versus and Golf  
10 to lose their jobs over the fact that he now  
11 has come along with Tennis Channel and loves  
12 it so much he thinks it's better. Maybe had  
13 Tennis Channel been dreamed up, invented eight  
14 years before, maybe had it been proposed in  
15 the market place at the same time, he could  
16 have made that argument. You don't get to  
17 make that argument now. I wanted to address  
18 the hypothetical and that, I think, takes it  
19 on squarely.

20 The date test is not our test. He  
21 denigrated a little bit by suggesting that  
22 that was a test we came up with. It's your

1 test from WealthTV. And it's a test that  
2 makes perfect sense because you can't have  
3 apples and apples if one of them is eight  
4 years older than the other. You can't make  
5 that comparison. You can't go back in time  
6 and undo how the marketplace developed and  
7 evolved before a channel was created.

8 I would say and I think that  
9 you'll hear this today, Your Honor, there's a  
10 reason Tennis Channel wasn't developed first.  
11 It's the least valuable of all the sports  
12 products that could be out there. The  
13 developers in the marketplace picked the most  
14 valuable things first which makes perfect  
15 sense in a market. Golf is far more valuable  
16 as a marketing product out there than Tennis  
17 Channel is. Don't take my word for it. Don't  
18 take the expert's word for it, take Tennis  
19 Channel's words for it. In a second I'm going  
20 to show you some documents. I won't publish  
21 them to the room, but you can see them. The  
22 lawyers have them already in which Tennis

1 Channel itself is noting the fact that golf is  
2 far more valuable, far more popular than  
3 tennis is. It's a fact of life.

4 We could debate whether it should  
5 be so. I mean you look at a golf club. You  
6 look at a tennis racket, I don't know, maybe  
7 one, maybe tennis should be a better sport.  
8 But the fact is that for whatever reason, golf  
9 has a bigger following. It's been at it for  
10 a long time and it pays more in sports rights  
11 and it's just a fact of life. It's a fact,  
12 frankly, The Tennis Channel just has to get  
13 over and learn to deal with, but it's not  
14 discrimination. We didn't create that work.

15 The cost benefit test. I'm glad  
16 Mr. Phillips referred to that. I'm glad  
17 because it's again not our test. It's the  
18 FCC's test in the MASN decision. Now MASN  
19 last time we were here two years ago, was at  
20 a lower level in the decision-making process.  
21 It hadn't been reviewed by the FCC yet and we  
22 heard a lot about MASN from Mr. Singer, the