

1 THE WITNESS: One forty? I think
2 that it's small. It's small. It's not -- you
3 know, it's small.

4 JUDGE SIPPEL: Considerably small.
5 I think it's -- you know, if you go to the --
6 you might get into the top 20 percent at 100
7 or a little bit over 100, but then, all of a
8 sudden, bingo. It's wide open. And, you
9 know, people are making maybe 60-70.

10 THE WITNESS: Correct, correct.

11 JUDGE SIPPEL: And so I don't know
12 this. You know, what is it? But,
13 nonetheless, the number that are being cited
14 here, a lot of people are watching this
15 program.

16 THE WITNESS: Right.

17 JUDGE SIPPEL: When I say, "this
18 program," I mean across the board.

19 THE WITNESS: The way that at
20 least Tennis Channel is pitching itself to
21 advertisers -- okay? -- is that we bring you
22 a very special demographic. On average, they

1 can't say that every single person who watches
2 us makes X, but they have statistics that say
3 there have been surveys of people who watch
4 us, and their average income is very high.
5 And that is the kind of stuff that gets
6 advertisers excited.

7 JUDGE SIPPEL: Well, I don't know
8 if you've ever done a study on this, but
9 wouldn't it be true or at least it would seem
10 to be true that if somebody was paying the
11 extra money to get Tennis or whatever it might
12 be -- I would refer to that almost as a
13 specialty sport, but I guess it is not -- but
14 something like that on a third tier, in the
15 highest tier.

16 These are people who are really
17 interested in this. And I would think that if
18 you did a survey of everybody that was
19 subscribed to that tier, they're going to be
20 pretty wealthy people percentage-wise.

21 THE WITNESS: Right. But, yet,
22 Comcast only sells . Only

1 of its customers take that tier.

2 Right?

3 JUDGE SIPPEL: Well, I understand
4 that from that standpoint.

5 THE WITNESS: Right, right. And
6 so let me try to explain what I think.

7 JUDGE SIPPEL: But you can sell --
8 if you don't have -- if you have a third tier
9 that's way more cost, way more than the first
10 tier, and a lot more than the second tier, you
11 have to offer something to people to pay that
12 extra whatever it is, 25 cents or \$5 or
13 whatever it is.

14 THE WITNESS: Five to seven
15 dollars a month.

16 JUDGE SIPPEL: Well, but they're
17 ratcheting it up.

18 THE WITNESS: Yes. It can. It
19 can and --

20 JUDGE SIPPEL: Why should I get
21 that if I can get all of this other stuff --

22 THE WITNESS: Exactly. That is

1 the --

2 JUDGE SIPPEL: -- on broadcasting
3 and a combination of all of these things?

4 THE WITNESS: But you put your
5 finger on the impairments here. It's that
6 it's so hard -- once the customer has hundreds
7 of channels with this digital starter, digital
8 preferred tier, it is very hard to go back to
9 them and say, you know, "For these extra seven
10 over here, we want to get another five to
11 seven dollars from you each month."

12 They say to themselves, "I'm
13 already paying you 60-something dollars a
14 month. Now you're asking me for another
15 five?" That is a hard burden. That is a hard
16 obstacle to overcome.

17 JUDGE SIPPEL: Well, I'm not
18 arguing with that point at all. I'm just
19 simply saying, why have a third tier that is
20 not profitable for the distributor and it's
21 not profitable for the network that's on it?
22 Why have it?

1 THE WITNESS: Well, it's certainly
2 profitable for Comcast, right? And we can get
3 into what Comcast is doing with that tier, but
4 it is a way to extract additional what we call
5 consumer surplus from consumers who really,
6 really value the stuff that is on that tier.

7 JUDGE SIPPEL: Well, you're making
8 my point.

9 THE WITNESS: Yeah.

10 JUDGE SIPPEL: I mean, you could
11 have a fourth tier, you know, if you could
12 find people -- you know, the Royals, let's
13 say. We're going to call this the Royals
14 tier.

15 (Laughter.)

16 JUDGE SIPPEL: You know, you build
17 it, and people will come. I'm sorry. I'm
18 just offering this.

19 BY MR. PHILLIPS:

20 Q Dr. Singer, what --

21 THE WITNESS: But we built it, and
22 they haven't come in droves. It's

1 of their customers subscribe. That's my
2 point.

3 JUDGE SIPPEL: That point I
4 understand. I understand what the problem is.

5 BY MR. PHILLIPS:

6 Q And, Dr. Singer, what did you find
7 with respect to --

8 A I didn't finish the -- we got
9 interrupted with Warren and the Olympics. The
10 --

11 Q Yes. I am sorry. I interrupted
12 you. And my apologies.

13 Could you please tell me what you
14 found about programming right?

15 A Certainly, yeah. We did World
16 Team Tennis. We did competition for the
17 rights to U.S. Open. And now Comcast has
18 admitted that it is competing for the rights
19 through Versus for Wimbledon.

20 Q Okay. Let me move you along, Dr.
21 Singer. Did you find in your analysis any
22 alternative explanations for the disparate

1 treatment of the Tennis Channel, on the one
2 hand, and, say, the Golf Channel and Versus,
3 on the other hand, in terms of, you know, the
4 wide disparity of distribution?

5 A Well, I tried. And I certainly
6 entertained all of the partial explanations
7 that were offered by Comcast and its expert,
8 but none of them could explain the totality of
9 Comcast carriage decisions. That is, none of
10 them could explain Comcast carrier decisions
11 with respect to Tennis Channel and with
12 respect to Comcast-affiliated national sports
13 networks.

14 What was offered, instead, were
15 what I call partial explanations. But to an
16 economist, we have to just think about this as
17 -- we see a pattern in the data. Okay? It's
18 this table. Okay? And we have a hypothesis
19 that explains the pattern. It's affiliation.
20 Okay? Affiliation is driving the
21 decision-making of Comcast.

22 You can come up, you can posit

1 alternative explanations, but the alternatives
2 to be a viable alternate to an economist has
3 to explain all of the data. It can't explain
4 three observations in the data. It has to
5 explain all of the data.

6 And when you subject
7 Comcast-proffered ex poste justifications
8 here, none of them survive that test. And so
9 at the end of the day, I am left to conclude
10 that the best explanation for what is driving
11 the decision-making here is affiliation.

12 Q Well, let's run through these
13 tests briefly. Let's begin with the cost
14 test. Are you familiar with that?

15 A Well, sure. You had mentioned
16 this in your opening. And if I am reading you
17 correctly on the cost test, you mean that it
18 would cost Comcast more money to carry Tennis
19 Channel more broadly.

20 Q Exactly. Doesn't that justify the
21 refusal by Comcast to move it down to the same
22 levels that it thinks it's affiliated to?

1 A It does not. And, again, here is
2 the problem. Again, to be a viable
3 alternative, it has to explain not only how
4 Comcast treats Tennis Channel but also how
5 Comcast treats Golf and Versus. It turns out
6 that the license fees that Comcast pays its
7 Programming Division for Golf and Versus is
8 much higher than what they would pay if they
9 carried Tennis Channel at the same level.

10 And this is a simple -- kind of
11 falls out of the math. It's just that Versus
12 is asking for less on a price-per-subscriber
13 basis per month than what the Versus -- sorry.
14 Sorry about that. Tennis Channel was asking
15 for less than what Comcast pays Versus and
16 Golf per subscriber per month.

17 So, again, to me it is not a
18 defense to say we would spend, you know, X
19 millions of extra dollars per year to get
20 this. They're spending some multiple of that
21 today to get their affiliated.

22 So, again, to go back to your

1 example on the board up here of men and women,
2 the idea -- and I'm hoping we will see a
3 pattern here -- is the idea is that subjecting
4 the unaffiliated, subjecting the independent
5 to one test, and then not subjecting your own
6 to the same test is discrimination on the
7 basis of affiliation.

8 Q Well, let me take another test.
9 What about the date test, the test that things
10 have changed since the original launching of
11 Golf and Versus?

12 A Right. If I could restate the
13 date test just so that we could all orient
14 ourselves, it is the idea that we made this
15 decision about Golf and Versus a long time
16 ago, you know, eight years before Tennis
17 Channel came on the scene, which is, arguably,
18 not that much of a distance in time.

19 And that gives us a justification
20 for treating the nascent network worse.
21 That's the date test. It's just it's a
22 difference of the timing of when they came and

1 applied for the job. Okay?

2 And, to that, I would say again
3 it's a partial explanation of the totality of
4 Comcast carriers' decisions. We have nascent
5 networks, namely Major League Baseball and NHL
6 Network, nascent -- they were formed in
7 2008-2009 -- which came after the Tennis
8 Channel. And, yet, those get broader
9 distribution because they are owned, in part,
10 by Comcast.

11 So, again, you can't offer up a
12 date test that explains a part of the data but
13 can't explain the way that they treat Major
14 League Baseball and the National Hockey
15 League?

16 Q Did you also consider the renewals
17 of Golf and Versus in connection with the date
18 test?

19 A Well, certainly. I mean, the
20 renewals kind of just drive the point down
21 harder, which is that they didn't make this
22 decision in '94 and '95 and leave it at that.

1 They have to make a renewal decision.

2 My understanding is that the
3 renewals came up for Versus and Golf very
4 recently around . And so I just can't
5 accept the notion that, well, once we put you
6 in on '94 and '95, we're no longer -- despite
7 the obligations that we have in the Cable Act,
8 we're no longer going to subject our
9 affiliates to the same test that we are
10 imposing on the independents.

11 Q Let me move you to another test.
12 We talked about anchor programming yesterday.
13 By the way, is "anchor programming" a term
14 that you have heard outside of Tennis or is it
15 only used in Tennis?

16 A No. It has been used outside of
17 Tennis. I know Mr. Solomon said that, you
18 know, he uses it. It's not his term. The
19 term "anchor programming" came up in the NFL
20 case, just to jog your memory there.

21 JUDGE SIPPEL: Maybe that is why
22 it sounded familiar.

1 THE WITNESS: Yes, yes. So the
2 anchor to the NFL Network and the thing that
3 caused the two parties to get in a bloody
4 fight was the Thursday night football games.
5 That is the anchor programming of NFL Network.
6 All the rest is what the industry insiders
7 called shoulder programming.

8 JUDGE SIPPEL: Say it again.

9 THE WITNESS: Shoulder. Okay?
10 These are not my terms. It's just industry
11 terms of art.

12 JUDGE SIPPEL: Mr. Carroll, how
13 are we doing on the glossary?

14 MR. CARROLL: It is getting
15 longer. I'm not agreeing with these
16 definitions we're hearing, but it is getting
17 longer.

18 JUDGE SIPPEL: It is shoulder?
19 Say that word one more time.

20 THE WITNESS: Shoulder. Shoulder.
21 I have heard the term "shoulder" and "anchor."
22 You know, they probably have five different

1 names for every flavor in between, but the
2 anchor in the NFL Network was the Thursday
3 night games. Comcast wanted those games on
4 Versus. That was the right.

5 Everything else, you know, you
6 have got to fill up 24 hours in a day.
7 Unfortunately, you can't. There aren't that
8 many football games to do that. And so you do
9 things like the combine, the draft. You show
10 old football games.

11 So Golf has anchor programming.
12 Tennis has anchor programming. And we can get
13 -- we can quibble over what we mean by anchor
14 programming, but, you know, suffice it to say
15 we can all agree I think that the live
16 programming, the live tournament play, is what
17 gets people most excited. It is what gets
18 advertisers most excited. Okay?

19 And I will answer your next
20 question. I think I am done.

21 MR. PHILLIPS: Okay. I would like
22 to actually approach, if I may, Your Honor,

1 and hand out another exhibit, which corrects
2 a chart in Dr. Singer's testimony, also adds
3 some information.

4 JUDGE SIPPEL: Thank you.

5 MR. PHILLIPS: Dr. Singer, this is
6 the one I e-mailed last night.

7 (Whereupon, the aforementioned
8 document was marked for
9 identification as Tennis Channel
10 Exhibit Number 16A.)

11 BY MR. PHILLIPS:

12 Q Dr. Singer, this has been marked
13 as Tennis Channel exhibit 16A. And can you
14 tell me what this is?

15 A Sure. It is just a decomposition
16 of the hours of programming on Versus, Golf
17 Channel, and Tennis Channel. There is a
18 contention here -- we heard Mr. Carroll make
19 it in his wonderful opening on Monday -- that
20 Tennis is just filling its style with a bunch
21 of reruns, bunch of yucky, unvaluable stuff
22 that nobody wants to watch and that's why they

1 don't want it.

2 Q I would also point you, Dr.
3 Singer, to the very first line here under
4 "Versus Live" or "First Run Delayed." Do you
5 see 582? Can you explain?

6 And if you look at page 38 of your
7 testimony for the same column and line, it's
8 different. Can you explain to me what that
9 difference is?

10 A The difference is just a
11 mathematical mistake that someone at Tennis
12 Channel had caught in the last day or two.
13 Tennis Channel did the tabulations. I did
14 not. I have no special expertise in
15 classifying an event on Tennis Channel or on
16 Golf or on Versus. And so I left it to Tennis
17 Channel to make that determination.

18 That explains the reason for the
19 errata, if you will. This column right here,
20 Your Honor --

21 JUDGE SIPPEL: The right column.

22 THE WITNESS: -- is intended to

1 replace the right column, the "2010 First Run
2 Delay" column, because of a mistake the Tennis
3 Channel identified either last night or the
4 night before.

5 And it's a trivial difference.
6 It's 582 is the new number.

7 JUDGE SIPPEL: I see it.

8 THE WITNESS: And if you're
9 looking at my table, it was five something
10 else.

11 JUDGE SIPPEL: I see the numbers.

12 BY MR. PHILLIPS:

13 Q And you have also added a couple
14 of lines under Versus, under Golf Channel, and
15 four lines under Tennis Channel. Can you
16 explain to me what those are?

17 A Sure. What I asked Tennis Channel
18 to do in this tabulation was to simply break
19 apart the first line. This first line has
20 become such a bone of contention that Comcast,
21 one of Comcast's experts, Egan I think is his
22 name, devoted eight paragraphs to saying that

1 Tennis is propping up its numbers by combining
2 live with first run delay.

3 I said, "My God. I can't take
4 this any more. Just break it apart. And
5 let's compare live versus live. We do not
6 need to fight to our death over whether or not
7 anchor should be defined as live by itself or
8 live or first run delayed."

9 Now, I just want to say as an
10 aside we heard testimony from Mr. Solomon that
11 explained that, just like NBC does with the
12 Olympics, because Tennis Channel is carrying
13 events that are occurring overseas, if they
14 were to show them in real time, they could
15 guarantee that no one would watch them here
16 because we would be sleeping. Okay?

17 And so what they do, instead, is
18 they shift it to the prime time hours. Okay?
19 And that gives you the --

20 JUDGE SIPPEL: The wedding on
21 Friday doesn't have a chance, then?

22 THE WITNESS: Is that going live?

1 JUDGE SIPPEL: I don't know where,
2 but I'm sure it's going to go live. Anybody
3 know? Who's got it? Versus have it?

4 (Laughter.)

5 MR. CARROLL: Too violent even for
6 us.

7 THE WITNESS: So I am -- I
8 understand why Tennis Channel believes that
9 anchor should include these first run delayed
10 matches. It makes sense to me, but it is a --
11 it has become a serious bone of contention.

12 The assertion that Comcast is
13 making, as I am understanding it, is that
14 Tennis Channel needs that, needs the inclusion
15 of the first run delayed so that it could prop
16 up its anchor programming so that it looks
17 good in comparison to us. That is what I am
18 hearing. Okay?

19 And I am tired. I am getting old.
20 I am tired of this fight. Let's just look at
21 live versus live. And if you don't think that
22 the first run delayed has value because we're

1 delaying it enough so that people can see
2 this, fine. Fine. Let's just look at the
3 live. Okay?

4 And so what we have done now is I
5 am going to take you to the row that's marked
6 "Live." And that row says 508 for Versus.

7 JUDGE SIPPEL: Are we okay with
8 the --

9 MR. PHILLIPS: We don't have an
10 issue, Your Honor.

11 JUDGE SIPPEL: Okay. Let's go.

12 THE WITNESS: It says now looking
13 at the Golf Channel live, Your Honor --

14 JUDGE SIPPEL: I hear you.

15 THE WITNESS: -- it says 827. And
16 I'm looking at Tennis Channel live, 754.

17 Comcast cannot with a straight face say that
18 the reason why they don't carry Tennis Channel
19 the same way that they carry Versus and Golf
20 is because Tennis Channel fills its dial with
21 a bunch of reruns. They just can't say that.

22 Okay?

1 And I hope this puts an end to it.
2 I'm sure it won't. But I am trying to end
3 this little sideshow and move on to plausible
4 efficiency justifications.

5 BY MR. PHILLIPS:

6 Q Well, speaking of efficiency
7 justifications, let me move you on, Dr.
8 Singer, to another one. Are you familiar with
9 Ms. Gaiski's field tests, where she went out
10 and surveyed the four regional managers to see
11 if there was demand for Tennis Channel in
12 response to the May of 2009 proposal?

13 A Correct. So, again, just to
14 orient, my understanding, again, this is yet
15 another justification. It says that we
16 subjected Tennis Channel to a test and they
17 failed miserably.

18 And that is we called up our
19 agents in the field. And we said, "Hey, are
20 you guys getting any phone calls for Tennis
21 Channel? Is anybody knocking down the door or
22 threatening to leave Comcast because we're

1 putting Tennis Channel out into the doghouse?"

2 And they couldn't find any
3 evidence. They couldn't find any evidence.
4 They came back, and they said, "Guess what.
5 We subjected Tennis Channel to a test. Tennis
6 Channel failed the test. Therefore, we are
7 entitled not to carry Tennis Channel the way
8 that we do Golf and Versus."

9 And I would submit, just as we
10 went to our -- subjecting our female
11 candidates to a unique test that they fail and
12 then citing the test, if the test is only
13 applied to the unaffiliated, you can't claim
14 that it's proof that it's not discrimination.
15 It has everything to do with discrimination if
16 it's only applied to the unaffiliated
17 candidates. Okay?

18 And so, for that reason, Ms.
19 Gaiski's test -- I don't know if you want to
20 -- Comcast probably has a nicer name for it.
21 But Ms. Gaiski's test fails. It fails because
22 it was never applied to Golf, to Versus.

1 And Comcast hasn't offered any
2 evidence that it was ever applied to Major
3 League Baseball or National Hockey League when
4 they moved those networks off. Did they run
5 any field tests? Did anyone call and say,
6 "Hey, I'm going to leave Comcast unless you
7 move Major League Baseball down?" and Comcast
8 took a tally of it and that's what drove the
9 decision? There's no evidence of that.

10 What we have here is we have a
11 test that is uniquely applied to independents
12 and then used as a basis to deny the
13 independents.

14 Q Did you look, Dr. Singer, at the
15 way that other distributors carried Tennis
16 Channel, similarly or not, than Comcast?

17 A Sure.

18 MR. PHILLIPS: If I may, before
19 you answer, I would like to hand out yet
20 another exhibit, which is just, once again, an
21 extract from your testimony.

22 This is Tennis Channel exhibit

1 192, Your Honor.

2 (Whereupon, the aforementioned
3 document was marked for
4 identification as Tennis Channel
5 Exhibit Number 192.)

6 JUDGE SIPPEL: Thank you.

7 MR. PHILLIPS: And, again, this is
8 table 6 from Dr. Singer's testimony.

9 JUDGE SIPPEL: And what page of
10 the testimony is that?

11 MR. PHILLIPS: I knew you were
12 going to ask me a question I couldn't answer,
13 Your Honor. Forty we're told.

14 JUDGE SIPPEL: Thank you.

15 BY MR. PHILLIPS:

16 Q Now, Dr. Singer, to go back to my
17 question, which is -- well, the new question,
18 what is this chart?

19 A This chart tabulates Tennis
20 Channel's penetration on all MVPDs over a
21 certain level. That is, what I was trying to
22 do was to create a peer group with Comcast.

1 Remember, Comcast is the largest
2 MVPD in the country. There almost isn't a
3 comparison. The closest you can get is
4 DirecTV. Comcast serves, remember, about one
5 out of every four MVPD customers in the
6 country.

7 But what I said is let's draw some
8 line. And the line is so far from Comcast
9 you're --

10 JUDGE SIPPEL: Excuse me a second.
11 Do you remember that case about U.S. Steel?
12 It was decided -- I think it was -- it was a
13 long time ago. I think it was Learned Hand
14 that they farmed out to and that it was a very
15 difficult case to read, even when I was
16 younger.

17 But I think the conclusion was
18 that U.S. Steel was a natural monopoly. What
19 they did is they just started building and
20 building and building and building.

21 Now, conceivably could Comcast be
22 that?

1 THE WITNESS: I think that there
2 is a way that Comcast could, either through
3 acquisitions, like they did with Adelphia, or
4 --

5 JUDGE SIPPEL: I'm saying leading
6 up to it. If we go back to the whole history,
7 I know there's been -- I know there are a lot
8 of differences, but, you know, you start with
9 the beginning. Isn't that how they started
10 out by hanging wires and cable?

11 THE WITNESS: The paradigm I have
12 in mind -- and I don't know if you have read
13 this best-seller, but there is a book called
14 "The Master Switch" right now that looks at
15 vertical integration and explains some of the
16 dangers of it and how firms with a big
17 foothold that vertically integrate can use
18 discriminatory strategies to eventually
19 monopolize the entire industries.

20 So it is certainly there is a path
21 for Comcast to get bigger. And I think
22 they're pursuing it exactly as I would advise