

1 A The way that I heard you just read
2 it was that in an alternative methodology, we
3 also weight it by -- I mean, first can I read
4 it, and I'll tell you what they did?

5 Q By all means.

6 MR. CARROLL: Do we have other
7 copies of that?

8 This is the FCC order, Your Honor.

9 JUDGE SIPPEL: Is that the merger
10 order?

11 MR. CARROLL: Yes, and it's Tennis
12 Channel Exhibit 13. May I hand the witness my
13 copy of it?

14 JUDGE SIPPEL: Go ahead, please.

15 MR. CARROLL: Now, Your Honor, let
16 me get you a copy of it as well. It's in
17 evidence. It's obviously a public record
18 document.

19 JUDGE SIPPEL: Okay. Number 13.
20 Thank you.

21 MR. CARROLL: Okay. You guys have
22 it then? You've got it.

1 JUDGE SIPPEL: There's no exhibit
2 number on it.

3 MR. CARROLL: It's actually at the
4 top, I think, Your Honor.

5 MR. PHILLIPS: It is Exhibit 13,
6 Your Honor.

7 MR. CARROLL: I know it's been
8 marked that way.

9 JUDGE SIPPEL: Is it under the
10 clip, or --

11 MR. CARROLL: I may have given you
12 a copy that doesn't have the exhibit number
13 marked on it.

14 JUDGE SIPPEL: Well, that's okay,
15 but I want to be sure that I'm not picking up
16 somebody's work copy, or something.

17 MR. PHILLIPS: Mr. Carroll, is
18 this the same as Exhibit 13? Because I know
19 that you guys may have access to it, and --

20 MR. CARROLL: This is a redacted
21 version of it, in my understanding. Yes, this
22 is the same one.

1 And Your Honor, we're going to
2 turn to page 167, and happily, I'm not going
3 to go through the entire document. We're
4 going to focus on one footnote here.

5 JUDGE SIPPEL: No, do what you
6 have to do. Do what you have to do.

7 Okay, there is -- yes, that's
8 redacted.

9 MR. CARROLL: Right.

10 JUDGE SIPPEL: I see it's marked,
11 redacted.

12 MR. CARROLL: This is the public
13 version that everyone is --

14 BY MR. CARROLL:

15 Q You've had access to this, Dr.
16 Singer, correct?

17 A That's all I've had access to.

18 Q No, but you've had access to --

19 A Yes, yes.

20 Q Great.

21 A We're trying to find column two of
22 a table that doesn't exist, obviously, because

1 it's been redacted.

2 Q There's no question I've asked
3 yet.

4 A Okay.

5 Q My question is very simple. I've
6 handed to you -- this is from the technical
7 appendix that you spoke about in your direct
8 testimony, isn't it, Dr. Singer? The section
9 we're looking at?

10 A Yes.

11 Q Okay. This is where the FCC is
12 explaining the work it did with respect to
13 this discrimination issue, and testing it
14 using the Goolsbee approach that you testified
15 about on direct, correct?

16 A Correct.

17 Q Okay. And here's the footnote,
18 94, and here, the FCC explains that the column
19 2 reports the results of estimating the same
20 model while weighting headends by subscribers.

21 Have I read it correctly?

22 A Yes.

1 Q You'll agree with me that that
2 weighting approach, weighting by subscribers,
3 is not the approach that you used in the model
4 that you've presented here, correct?

5 A What is important to point out --

6 Q Is that correct, sir?

7 A -- is that this was an alternative
8 approach that the FCC is using, and just as I
9 did, I did an alternative based on weights as
10 well.

11 Q Sir --

12 JUDGE SIPPEL: Would you answer
13 his question?

14 THE WITNESS: So, yes --

15 BY MR. CARROLL:

16 Q You need to answer my question.

17 A Yes, I did not use column 2, which
18 is the FCC's second model, its alternative
19 model. I did not report that approach in my
20 direct testimony.

21 I can't see what is column 1, but
22 if they say, in column 2, we did an

1 alternative. Now, we weight the headends by
2 subscribers.

3 Q Sir --

4 A It suggests to me, you know,
5 what's in column 1?

6 Q Sir, it's a simple question. This
7 footnote, the description in this footnote as
8 to how they weigh it, the headends, basing it
9 on subscribers, is not the way you weighted
10 your analysis in the model that you presented
11 to this courtroom. Correct?

12 A I will grant you that the FCC
13 tried --

14 JUDGE SIPPEL: Can you answer that
15 question?

16 THE WITNESS: Yes, I will.

17 BY MR. CARROLL:

18 Q Will you answer it yes or no?

19 JUDGE SIPPEL: And then you can
20 explain?

21 THE WITNESS: Okay, yes, I will
22 grant you that the FCC used a host of

1 specifications and different weights. And I
2 did not implement every single approach that
3 they did and then report them in my testimony.

4 JUDGE SIPPEL: Can I ask a
5 question?

6 MR. CARROLL: Please, Your Honor.

7 JUDGE SIPPEL: In other words, you
8 just did not paraphrase or regurgitate, if I
9 can use that word, the FCC's approach as
10 indicated in paragraph -- I mean, footnote 94.
11 You took the Singer approach?

12 THE WITNESS: Yes. And to be
13 absolutely clear, if you look, Your Honor, at
14 the technical appendix, there's much redacted,
15 including the tables --

16 JUDGE SIPPEL: I see that.

17 THE WITNESS: -- and complete
18 sources, and so --

19 JUDGE SIPPEL: Reading it through,
20 I had an order on that.

21 THE WITNESS: And I didn't have
22 access to what the FCC was using. And so what

1 I tried to do is understand their methodology.

2 What are they getting at? You
3 know, what experiment are they taking
4 advantage of that life has given us?

5 And I also had the luxury of
6 reading Dr. Goolsbee's white paper, which kind
7 of set this entire debate in motion. So I
8 think I have a firm understanding of the
9 overarching methodology.

10 What Mr. Carroll is pointing out
11 is that in footnote 94, is that the FCC used
12 many different weighting schemes.

13 It says, "column 2 reports the
14 same results, it reports the results of
15 estimating the same model, while," that is, in
16 this approach, "while weighting headends by
17 subscribers."

18 Okay, that is an alternative
19 approach, in the footnote 94. And as it turns
20 out, I actually did do various sensitivity
21 tests with different weights, recognizing that
22 headends might not be a perfect proxy for the

1 number of Comcast subscribers.

2 It turns out, it appears to be, a
3 good subscriber, based on my observation of
4 the exhibit Mr. Carroll put in front of me,
5 the way an economist would do it, you would
6 plot all the data points and see if you see a
7 correlation or a line between number of
8 headends and number of Comcast subscribers.

9 JUDGE SIPPEL: Well, this is 1055?
10 Exhibit 1055?

11 THE WITNESS: Correct. Correct.
12 Correct.

13 BY MR. CARROLL:

14 Q And under the approach that you
15 used for your opinion, sir, if we just go back
16 to 1055 -- 1056, go back to 1056 -- yes, 1055,
17 I'm sorry.

18 Just to follow up on His Honor's
19 question, and to make sure it's clear, so,
20 based on the footnote 94, what the FCC has
21 explained in that footnote is that the
22 weighting they used the subscriber population

1 column to the far right on Exhibit 1055.

2 Correct?

3 A I can't be sure that it is the
4 same subscriber column that you used, but it
5 is some sort of weighting by subscribers.

6 Q Okay.

7 A And again, just to be clear, I'm
8 not sure that I even had Comcast subscribers
9 at the headend level. In fact, I didn't. I
10 only was given by Comcast --

11 Q Sir --

12 A -- how they carried Tennis
13 Channel.

14 Q -- I didn't ask you why. I just
15 asked you to confirm for a fact that based on
16 footnote 94, footnote 94 is telling you what
17 the FCC did, was the weighted, and kept
18 calculating the averages. They used for the
19 weighting factor the subscriber information on
20 the far right column, correct?

21 A In an alternative specification,
22 they appear to have weighted by subscribers.

1 I'm not sure it's the same subscribers that
2 you're presenting to me.

3 Q And the weighting that you used
4 was the middle column, which is the raw number
5 of headends. So for Boston, for example,
6 again, you weighted that using ■ in the sense
7 we've looked at before. Correct?

8 A Yes. I treated each headend as an
9 individual unit of observation, which appears
10 to be consistent with what is column 1 in the
11 FCC's appendix.

12 Q Now, you keep referring to
13 alternative methods that the FCC used. In
14 fact, as you sit here, you don't have any idea
15 whether there's other weightings different
16 than footnote 94 that the FCC had used, do
17 you? Yes or no?

18 A I'd want to look at the paragraphs
19 --

20 Q Yes or no? Sitting here now, do
21 you know the answer to that --

22 A Sir, I can't memorize all of the

1 specifications that they did. I don't know
2 how that could be expected. I could tell you
3 what other -- if I could divine from the text
4 if there are others.

5 But when they say, "in column 2,
6 we report the same results this time while
7 weighting -- "

8 Q It's a simple question. As the
9 expert who came in here and gave direct
10 testimony about what the FCC had done, as you
11 sit here now, based on the work you've already
12 done, are you aware of any different weighting
13 that the FCC did in its analysis that I point
14 you to in footnote 94? Yes or no?

15 (Pause.)

16 A Well, I --

17 JUDGE SIPPEL: Try yes or no
18 first, and then --

19 THE WITNESS: I'm going to give a
20 yes or no.

21 As I sit here right now, and given
22 the information that I have in front of me, I

1 can't tell you precisely what alternative
2 specifications they used or what alternative
3 weighting schemes.

4 However, I can infer reasonably
5 from footnote 94 that the weighting of the
6 headends by subscribers as opposed to just
7 treating each unit as its own observation
8 giving it equal weight, it is strongly
9 suggestive to me that column 1 was just a run
10 in which each headend was treated as its own.

11 BY MR. CARROLL:

12 Q You don't know, sitting here?

13 A I can't know, sitting here. It's
14 just impossible to know.

15 Q Okay. You can put that to the
16 side.

17 Now, do you think the results you
18 got using your approach, the weighting
19 approach you've explained, makes sense in the
20 real world?

21 A Um --

22 Q Start with a yes or no.

1 A Yes. Yes. Yes.

2 Q Okay. Do you think -- do you
3 agree with me that one of the things
4 economists do when they come up with a theory
5 is, at the end of working up your theory, it's
6 often helpful to go back and look at the real
7 world data and compare it to what your theory
8 would predict to see whether your theory looks
9 like it's predicting things correctly? Is
10 that something that economists typically
11 should do?

12 A Sure.

13 Q Did you do that with your
14 database? That is, after you came up with
15 your theory, did you test your theory by
16 looking at particular DMAs and particular
17 market shares and seeing whether your theory
18 was lining up with the real world data?

19 A Yes.

20 Q Now, the theory that you came up
21 with, and your -- that you put forward here in
22 this courtroom, is that as a result of your

1 work, you think that there is a correlation --
2 using your term, between market share and the
3 level of carriage that Comcast is offering
4 Tennis Channel. Is that correct?

5 A I'd like to be a little more
6 precise. That's pretty close. But
7 conditional on carriage, I believe that
8 there's a relationship between Comcast market
9 share and the extent of the distribution.

10 Q And the relationship you believe
11 exists is that the greater the market share
12 Comcast has in a market, the more likely it is
13 that the programming the Tennis Channel will
14 be on a sports tier, correct?

15 Don't listen to your Counsel, just
16 -- you're looking at your Counsel. I'd just
17 like your answer.

18 A No, no, no. It's just, these
19 things are hard for me --

20 MR. PHILLIPS: Excuse me, Your
21 Honor.

22 MR. CARROLL: I heard a comment

1 across the room, and I just want to make sure.

2 MR. PHILLIPS: Not from me,
3 certainly not, sir.

4 MR. CARROLL: Okay.

5 JUDGE SIPPEL: All right. Let's
6 drop that. I mean --

7 MR. CARROLL: Okay, I'm happy to
8 remove that.

9 JUDGE SIPPEL: Please don't do
10 that again, Mr. Carroll. If you've got an
11 objection, make an objection to me.

12 MR. CARROLL: All right. Okay.

13 BY MR. CARROLL:

14 Q Dr. Singer, it's a simple
15 question. Under the theory that you proposed
16 in the courtroom, the greater the market share
17 that Comcast has, you are saying, the more
18 likely it is that Comcast will put that
19 channel on a sports tier. Is that correct?

20 A Relative to a less distributed --
21 a more-widely distributed tier, that's
22 correct.

1 Q Okay. And the smaller the market
2 share that Comcast has, in your view, then the
3 more likely it is that Comcast will be putting
4 the Tennis Channel on D1 or D2, on giving it
5 broader distribution? Correct?

6 A Yes, as you toggle between those
7 two groups, between -- this is conditional on
8 carriage at all, as you toggle between sports
9 tier and more widely distributed tier, and we
10 looked at the averages yesterday. We saw
11 there was a [REDACTED] percentage point difference in
12 market share, and that difference is
13 statistically significant.

14 Q So, you believe, and the theory
15 that you've offered here, is that when you
16 look at Comcast behavior in the marketplace,
17 when you find markets where it has a higher
18 market share, that's where your model predicts
19 the carriage will more likely be on a sports
20 tier. And where they have a smaller market
21 share, that's where it's more likely you'll
22 see the carriage on D1 or D2, correct? All

1 other things being equal.

2 A I think you said it -- I think
3 that's pretty fair. I mean, this is very
4 hard, to do this in real-time, but I think the
5 way you've described it is pretty fair.

6 Q Okay. And the reason for that
7 opinion you're offering is you believe that
8 when Comcast has greater market share, it's
9 facing less competition, and therefore, it can
10 get away with putting Tennis Channel on a
11 sports tier. And the reverse is true, that
12 where Comcast has a smaller market share, it's
13 facing greater competition, and therefore,
14 it's unable to keep Tennis Channel on a sports
15 tier. Correct?

16 A That's fairly close. The way that
17 I would state it is that, this is the Goolsbee
18 test that was implemented by the FCC, is the
19 notion that discrimination is costly.

20 It's more costly in some markets
21 than others. In particular, markets where
22 you're facing a lot of competition, it can be

1 costly to discriminate, so you'd be less
2 inclined to pull it off.

3 Discrimination involves a transfer
4 of profits from the upstream to the downstream
5 division, and those transfers will sometimes
6 cut in your favor, and sometimes they won't.
7 It depends upon how much competition you face.

8 Q So, we've picked some sample
9 cities out of your data to test this, and
10 would like to explore this with you for a
11 moment. Is that all right?

12 A Sure. That's fine.

13 MR. CARROLL: Your Honor, may I
14 approach?

15 JUDGE SIPPEL: Please.

16 MR. CARROLL: Thank you.

17 (Pause.)

18 Your Honor, this is Exhibit 1005.
19 Hopefully it's marked.

20 JUDGE SIPPEL: It is. Thank you.

21 MR. CARROLL: Thank you, Your
22 Honor. And it's headed, Sample DMAs with

1 Different Market Shares. And here we've
2 listed DMAs from Louisville, Fort Wayne,
3 Dayton, and Rockford.

4 BY MR. CARROLL:

5 Q You recognize those as DMAs that
6 were in your sample, sir?

7 A I'll assume they are.

8 Q Okay. And here we've taken --
9 using the same data base you used, we've
10 reflected the Comcast market share information
11 in the first column, the total headends.

12 The next column is the number of
13 headends that are carrying Tennis Channel in
14 that market, and then the carriage decisions,
15 for those that are carrying, D1, D2, and the
16 third from the end column, second from the end
17 is the sports tier headends they're carrying.

18 Do you see that, sir?

19 A So, you've pulled four -- are
20 these four DMAs?

21 Q Four DMAs.

22 A Four DMAs. And how many headends

1 are accounted for here?

2 Q Do you see, sir? It shows --
3 we've taken --

4 A What's the sum of the headends
5 across these? And are these every headend
6 within the DMA? I'm sorry, I'm just trying to
7 -- I've never seen this before. I'm just
8 trying to orient myself.

9 Q This is information we pulled from
10 your analysis that shows, first for each DMA,
11 the market share for each of the DMAs. We can
12 go back if you'd like to check it.

13 I can show you the DMA chart we
14 looked at earlier, if you wish to confirm any
15 of this. And then the total headends in each
16 of those DMAs, so Louisville has [REDACTED]
17 headends, Fort Wayne has [REDACTED], Dayton has [REDACTED],
18 Rockford has [REDACTED]. Do you see that?

19 A Right. So I just want to confirm
20 that you've shown all headends within that DMA
21 that are within the database that carry --
22 that Comcast carries Tennis Channel? So if I

1 look --

2 Q And you agree that would be the
3 correct thing to do, yes?

4 A I mean, this analysis is
5 completely the wrong way to proceed. It
6 appears you've picked [REDACTED] observations in a
7 database of [REDACTED] to try to prove that the
8 correlation that I found doesn't exist.

9 Q Well, with all due respect, sir, I
10 haven't asked a question yet.

11 A Well, but I --

12 Q You're anticipating where I'm
13 going.

14 A I know, based on the pair-wise
15 comparisons we just did. I'm sorry, go ahead.

16 JUDGE SIPPEL: Don't anticipate
17 Counsel.

18 BY MR. CARROLL:

19 Q I have to do something here. It
20 is my job. At least let me ask the question.

21 A Okay.

22 Q Okay, first of all, the [REDACTED]

1 headends, I mean, we've got four cities here
2 listed, and let's check our math here. It's
3 not [REDACTED] headends we've listed here for you, is
4 it?

5 A Well, you'd sum them up.

6 Q It's [REDACTED] headends, isn't it?

7 A [REDACTED] out of over [REDACTED] headends in
8 my database.

9 Q Sir, just one question at a time.
10 It's not [REDACTED] it's [REDACTED] for these four. Correct?

11 A [REDACTED] out of [REDACTED], over [REDACTED],
12 correct.

13 Q And then, next to it, we've
14 listed, how many of those headends are
15 carrying, so in Louisville, we have [REDACTED]
16 headends that are carrying. In Fort Wayne, of
17 the [REDACTED] headends, we only have [REDACTED] that are
18 carrying. Do you see that?

19 A Yes.

20 Q Okay. And again, you ignored that
21 information in the analysis you did. That is,
22 you excluded from your analysis the fact that

1 there were, in Fort Wayne, for example, [REDACTED]
2 headends that didn't carry. That's been
3 excluded, correct?

4 A Correct.

5 Q And that's the reason you made the
6 observation earlier ago that your opinion is
7 conditional on carriage. You're only looking
8 at places where there is carriage at some
9 level, correct?

10 A Right. And to be clear, those
11 markets, the headends where they don't even
12 carry Tennis Channel, it's not because they're
13 discriminating against Tennis Channel.
14 They're not carrying anything, but we can get
15 into that later.

16 Q Okay. Well, I'm glad you added
17 that, so we can establish that you're agreeing
18 that all the headends where Comcast is not
19 carrying, there's no discrimination there that
20 you're alleging, correct?

21 A I don't think that's how I would
22 test for it.

1 Q But I think you just agreed with
2 me, and I just want to confirm it. You're not
3 saying there's any discrimination in any of
4 the headends where Comcast is not carrying
5 Tennis Channel. That's what you just said,
6 correct?

7 A The motivation for their not
8 carrying it, I don't think, in those markets,
9 when I look at those markets, what they have
10 in common, they generally have not yet been
11 upgraded. They carry much fewer channels than
12 the headends on which Comcast carries Tennis
13 Channel at some tier.

14 So my inference from that is that
15 in those headends, it's not that they're
16 necessarily being mean or nasty to Tennis
17 Channel, it's that they just haven't upgraded
18 those systems.

19 And these are places where not a
20 lot of people live, and I don't think that
21 that's the way that you would test, if you're
22 trying to follow the spirit of the Goolsbee

1 test and the FCC's test, looking there doesn't
2 tell you a lot about Comcast's intentions.

3 Q At any rate --

4 JUDGE SIPPEL: I want to follow up
5 on what has been asked by counsel because what
6 he's saying is -- I know what he's trying to
7 do but what I'm hearing is that he's
8 segmenting a type of inherent situation where
9 you're not considering it for calculation
10 purposes. We kind of eliminate the category
11 so that we can move on some place else.

12 THE WITNESS: There are three
13 categories.

14 JUDGE SIPPEL: Am I right about
15 that? Isn't that what counsel is trying to
16 do?

17 THE WITNESS: He's asking me why I
18 was excluding the third --

19 JUDGE SIPPEL: I didn't hear it
20 that way. He was asking isn't it true that
21 there wasn't a calculation done, whatever it
22 might be, with respect to we're not carrying