

1 A I have.

2 Q Okay. The last time you were in
3 front of Judge Sippel two years ago, you
4 testified about that case, the MASN case, and
5 you drew comparisons between that case and the
6 NFL case. Do you remember?

7 A It's possible I did. I don't have
8 a good memory of that testimony.

9 Q And in your written testimony in
10 this case do you not comment on the FCC ruling
11 in MASN?

12 A I do.

13 Q You do. So it's part of your
14 direct testimony that your own counsel
15 offered.

16 A My --

17 Q Your direct testimony that your
18 counsel, Mr. Phillips, has offered in this
19 case includes references to the same decision
20 I'm asking you about. Right?

21 A Correct.

22 Q Okay. Good. Would you like to

1 see a copy of it?

2 A Of the --

3 Q The MASN decision.

4 A Yes, please.

5 JUDGE SIPPEL: Are you at the
6 shifting-gears stage or the winding-down
7 stage?

8 MR. CARROLL: I don't know how
9 many gears I have in this car. If we took a
10 short break and I conferred with colleagues,
11 I might be able to get a shorter list. In a
12 wrap-up stage I'm trying to move through a
13 number of issues here quickly. As you know,
14 Your Honor, sometimes you can move through
15 them quickly and sometimes you can't.

16 JUDGE SIPPEL: Would you have any
17 objection to taking 10 minutes?

18 MR. PHILLIPS: Your Honor, I would
19 very much favor 10 minutes.

20 JUDGE SIPPEL: All right. Let's
21 take a liberal 10 minutes and this will give
22 the witness also a chance to stretch his legs.

1 I'll probably be back about quarter of, I'll
2 tell you very honestly. We're in recess.

3 (Whereupon, at 11:24 a.m. off the
4 record until 11:49 a.m.)

5 JUDGE SIPPEL: All right. You're
6 still under oath, Doctor.

7 Mr. Carroll?

8 MR. CARROLL: Your Honor, thank
9 you.

10 JUDGE SIPPEL: Please carry on.

11 MR. CARROLL: I think we were at
12 the point of marking the FCC Decision in the
13 MASN case. If I may approach with a copy of
14 that, Your Honor.

15 JUDGE SIPPEL: Please.

16 MR. CARROLL: Thank you.

17 This is Exhibit 1009.

18 (Whereupon, the document was
19 identified as Exhibit 1009.)

20 BY MR. CARROLL:

21 Q You recognize this as the decision
22 by the Commissioners in the Time Warner MASN

1 case?

2 A Yes.

3 Q And to pick up where we left off,
4 I want to direct your attention to --

5 JUDGE SIPPEL: I wanted to ask him
6 as a matter of range on this, have you read
7 this opinion?

8 THE WITNESS: Yes.

9 JUDGE SIPPEL: Pretty carefully?

10 THE WITNESS: Yes.

11 JUDGE SIPPEL: Okay. And it was
12 dated December 2010, so pretty current stuff.

13 MR. CARROLL: Yes, very current
14 stuff.

15 BY MR. CARROLL:

16 Q And again to review, you testified
17 as an expert on pricing for the claimant in
18 this case, the MASN case?

19 A Right. And through the context
20 Judge Margolis will favor MASN, but that
21 decision was overturned by the Commission in
22 December.

1 Q Right. And if you turn to
2 footnote 101, that relates to the issue I was
3 asking you about. Do you agree with me that
4 in footnote 101, which is page 14 of the
5 Opinion itself, the Commissioners deal with
6 this question of whether the in region MVPDs
7 or the out of region MVPDs should be looked to
8 in doing an analysis in comparison to time, do
9 you see that?

10 A Yes.

11 Q Okay. And your agreement with me
12 that your understanding after this ruling came
13 out is that the rule going forward for people
14 like yourself looking at this issue is that
15 you should include both sets of MVPDs, both
16 the sats and the telecos as well as the cable
17 companies in your analysis in offering any
18 opinions?

19 A Is that the rule going forward?

20 Q Do you understand that that is
21 what you should be doing as an expert in
22 addressing such an issue after this decision?

1 A I -- I wouldn't need this rule to
2 tell me that. I -- I did that, in fact, in
3 this case and I think that's -- that's the way
4 it should be done.

5 Q Okay.

6 A You look -- you look at
7 everything.

8 Q And you would argue for a
9 different position in front of Judge Margolis
10 in that same decision, MASN, you had
11 aggregated for a different result on that
12 issue, correct?

13 A I'm not -- I'm not sure if I -- if
14 it was completely different. I think I was
15 making arguments in favor of giving more
16 weight. But I don't know if I said -- you
17 could show me the testimony. If I said you
18 should give no weight to settling, then I --
19 then I think that I was -- well, I'd just like
20 to see it. But I thought that I was making
21 arguments for giving more weight to the in
22 region rivals.

1 Q We've reviewed your testimony, I'm
2 not going to go back and do it again.

3 You agree with me now that you
4 should be weighting all of them?

5 A I think that that's the approach I
6 used here.

7 Q Okay.

8 A And, yes, I think that's the best
9 approach.

10 Q And one other aspect of the MASN
11 ruling by the Commissioners that you have in
12 front of you, which is Exhibit 1009, again, I
13 want to ask you about is footnote 68. Tell me
14 when you're there, sir.

15 A I'm -- I'm there.

16 Q Footnote 68 the Commission starts
17 out and says "The Bureau predisposed some
18 significance on the fact that Time Warner has
19 carried all of its affiliated RSNs nationwide
20 on basic or expanded basic tiers," do you see
21 that?

22 A Yes.

1 Q Now that's very similar to an
2 argument that you advanced in this case that
3 you believe significance should be attached to
4 the fact that Comcast is carrying its
5 affiliated networks nationwide on basic or
6 expanded basic tiers, am I correct?

7 A If affiliation appears to be
8 driving that decision, yes. But not as a --
9 that fact by itself wouldn't -- wouldn't tell
10 you anything, right

11 Q Ah. But you agree with me that
12 simply looking at a chart as you presented on
13 your direct testimony that presented the fact
14 that Comcast affiliated networks nationwide
15 were all on broader carriage, from that chart
16 alone you couldn't conclude anything, could
17 you?

18 A We have to peel the onion, as I
19 did. You have to get behind and see what's
20 driving it. You have to -- you have to
21 explore alternative theories.

22 Q Do you see that the Commission

1 writes on this same issue in this footnote 68
2 after the sentence I've just read, the
3 Commission writes "We find, however, that Time
4 Warner provided credible justifications for
5 its decision to carry these RSNs on basic or
6 expanded basic tiers while refusing such
7 carriage for MASN." Do you see that?

8 A I see that.

9 Q Okay. Now question: You
10 understand that the fact witnesses from
11 Comcast, Mr. Bond and others, have presented
12 testimony and will be presenting testimony on
13 why they have the carriage decision they've
14 made, correct?

15 A Mmm --

16 Q Just a yes or no. Are you familiar
17 with the fact that they've given that
18 testimony?

19 A I'm -- I'm familiar, but what I'm
20 -- what I'm stumbling over is, and maybe you
21 tell me, are they giving testimony with
22 respect to why they carried golf and why they

1 carried tennis, certainly, or just tennis?

2 Q Do you know that? The answer to
3 that?

4 A I'm not sure, no.

5 Q Because you haven't studied that
6 testimony, have you?

7 A I've not studied their testimony,
8 no.

9 Q Okay. You can put that to the
10 side.

11 We talked earlier about some
12 language you used to describe the equity piece
13 of Direct and Dish as a slice, a small slice.
14 We talked about that subject already. Do you
15 remember that subject?

16 A Yes.

17 Q I want just follow-up a few other
18 occasions in which you use language that to my
19 ears sound the same and I want to make sure we
20 understand it.

21 At one point in your testimony
22 yesterday I think you referred to the eight

1 year time period between when Versus and Golf
2 was launched and when Tennis Channel was
3 launched as not that different in time. Is
4 that your testimony?

5 A I think -- I think that in the
6 scheme of if you -- if you think about the
7 years of -- of cable networks, the history of
8 cable networks spanning back decades and you
9 run it through 2011, to find two networks that
10 -- that launch within eight years within each
11 other, it -- it strikes me as not being that
12 big of a difference in time. It is -- this is
13 -- but it's -- it's a relative term. It's a
14 relative concept.

15 Q Are you familiar with the fact
16 that Mr. Solomon -- were you here for his
17 testimony?

18 A Yes.

19 Q Did you hear his view of the time
20 periods and whether events before 2003, for
21 example, were a small difference in time?

22 A I don't recall his exact testimony

1 on that point.

2 Q This was at page 258 of his
3 testimony just the other day. I've lost track
4 of days, Your Honor.

5 A It must have been Monday.

6 JUDGE SIPPEL: I'll go with
7 Monday.

8 MR. CARROLL: I'll with that if
9 everybody else does.

10 BY MR. CARROLL:

11 Q Mr. Solomon testified about the
12 fact that Time Warner was a deal that was done
13 back, he says "I believe, in pre-2003 when we
14 launched a long time ago by today's
15 standards." Do you disagree with his
16 characterization?

17 A I don't know what the context of
18 the question was. And if -- if he was
19 answering the same question that I was
20 answering.

21 Q But do you think whether eights
22 years is a long time or not depends on whether

1 it's Time Warner or Versus and Golf?

2 A No. I think he -- what he is
3 saying is eight years depends a lot in the
4 comparison of the Tennis Channel over time.
5 That that is -- if I understand correctly, I'd
6 like to read the whole thing, but the Tennis
7 Channel is a different entity, a different
8 animal in 2003 as it is today.

9 Q So for Tennis Channel eight years
10 is a very long time, correct?

11 A For a given network, if you start
12 the network from its birth and you roll
13 forward eight years, those are very important
14 and you have an eight year stretch. If you
15 take another network that's been around 30
16 years and you look at the last eight, it may
17 not be as important.

18 Q And Golf and Versus were started
19 in 1995, correct?

20 A Correct.

21 Q And eight years after that 2003
22 would be not a small insignificant time

1 period; it would be a very significant time
2 period for them, wouldn't it?

3 A I would agree with over years --
4 the first eight years of Golf and Versus. A
5 lot -- a lot of important things happened to
6 them.

7 Q Okay. You also at one point
8 yesterday I thought said that five percent was
9 a sort of rough rule of thumb for determining
10 significance in comparing percentages. Do you
11 remember that?

12 A I remember discussing it, and how
13 much significance and statistical
14 significance. And maybe you can help me out
15 and tell me which one we're talking about.

16 Q Well, this is from your transcript
17 yesterday, which we just got about an hour
18 ago. So in fairness, you probably haven't had
19 a chance to see it. I'm coming back to it to
20 give you that chance.

21 You were asked yesterday about the
22 fact that in the averaging that you did in the

1 models that we've talked at great length
2 about, we're not redoing that, you measured an
3 eight percentage point difference in the
4 average. And your counsel asked you whether
5 that was significant or not and your testimony
6 was: "Well, I mean it seems material in an
7 economic sense, in that it's not [REDACTED]
8 [REDACTED]. You
9 know, [REDACTED] percent
10 seemed, you know, economists use kind of as a
11 rule of thumb, [REDACTED] percent as some measure of
12 significance." That's at page 729.

13 Does that jog your memory?

14 A Sure.

15 Q Okay. You stand by that?

16 A I do. I tried to be clear about
17 the economic significance versus statistical
18 significance.

19 Yes, I stand by that.

20 Q At page 23 of your report, which
21 is Exhibit 13, I think, Your Honor. Is that
22 right?

1 JUDGE SIPPEL: Exhibit 13.

2 MR. CARROLL: Have I got it right,
3 Your Honor?

4 JUDGE SIPPEL: No, I think it's
5 15. 15?

6 MR. CARROLL: Sixteen.

7 MR. KNOWLES-KELLET: Sixteen.

8 JUDGE SIPPEL: Sixteen. I'm
9 sorry. Thank you.

10 MR. CARROLL: Sixteen.

11 JUDGE SIPPEL: That you, Mr.
12 Knowles-Kellett. Thank you.

13 BY MR. CARROLL:

14 Q Exhibit 16 which is your direct
15 testimony --

16 A I still don't have it in front of
17 me, but I -- I am -- I mean I have it at my
18 fingertips.

19 Q Probably the thickest thing in the
20 file.

21 JUDGE SIPPEL: What page is his
22 testimony.

1 MR. CARROLL: Page 23 is where I'm
2 going, Your Honor.

3 THE WITNESS: I found it. Okay.

4 23. BY MR. CARROLL:

5 Q At page 32 --

6 JUDGE SIPPEL: Twenty-three, 32?

7 MR. CARROLL: It's page 23
8 paragraph 32, Your Honor.

9 JUDGE SIPPEL: Okay.

10 BY MR. CARROLL:

11 Q This is where you're talking about
12 whether the Tennis Channel is similarly
13 situated to Golf and Versus. Do you see that,
14 sir?

15 A Yes.

16 Q And you write "To suggest the
17 Tennis Channel is not similarly situated with
18 Comcast affiliated networks, Comcast's
19 economic expert Jonathan Orszag cites 'slight
20 differences in gender.'" Do you see those
21 words "slight differences in gender"?

22 A I'm sorry. Paragraph 45?

1 Q No, sir. Page 23 --

2 A Oh, page 23. I'm not even close.
3 I want 23.

4 Q Paragraph 32.

5 A Okay. I'm there.

6 Q You're referring to our expert on
7 our side, Mr. Orszag. You know r. Orszag,
8 right?

9 A Yes.

10 Q Do you have a lot of respect for
11 Mr. Orszag?

12 A Sure.

13 Q Okay. And you refer to his work
14 and you say: "Mr. Orszag cites" and you use
15 the words "slight differences in gender."
16 First of all, those are your words, right?

17 A Yes.

18 Q And you say "Slight differences in
19 gender approximately ■ percent of Tennis
20 Channel's viewers are male, whereas as
21 approximately ■ an ■ percent of Golf
22 Channel's and Versus' viewers respectively are

1 male." Have I read it correctly?

2 A Yes.

3 Q Now the difference between ■
4 percent and ■ is how much?

5 A Oh, ■.

6 Q ■ percent. And what's
7 the difference between ■ and ■?

8 A Now you're testing me. ■.

9 Q Correct. So here you're saying
10 that ■ and ■ percent is a slight difference,
11 but a moment ago you described five percent as
12 a general standard economists use for some
13 measure of significance, is that correct?

14 A Correct.

15 Q You think that that's being
16 objective and unbiased in your presentation?

17 A Well, the issue here is we have--
18 we're comparing ratios. And there's something
19 special about ratios that -- that bears
20 noting, which is that a small shift in the --
21 the success of, say, women, approaching women
22 for Tennis Channel it's not just going lift --

1 give them a lift for women, but -- but on a
2 ratio it's going to -- it's going to create a
3 fairly large swing in ratio.

4 So, I think with ratios you just
5 have to be careful and I was -- I was trying
6 to be careful here in my -- my explanation as
7 to why those differences didn't cause me to
8 think that they're pursuing an economically
9 significantly different class of -- of -- of
10 customers.

11 Q You referred to ratios as being
12 the reason for your language, is that right?

13 A Well --

14 Q Let me frame that question, a
15 better question following up on ratios.

16 Isn't a percentage a ratio? Yes
17 or no.

18 A This -- no. This -- this -- well,
19 this is a special type of ratio where when you
20 change -- when you change one, there's a --
21 there's a fairly more radical affect then if
22 you just take a standard percentage.

1 Q Is a percentage a ratio?

2 A A percentage is a ratio.

3 Q Thank you, sir.

4 You can put that to the side.

5 Now I want to come back to a
6 subject I started with and ask about now that
7 we've been through your approach on averages
8 and some of the questions I've asked about the
9 way you described various differences.

10 Do you still think you've been
11 objective and unbiased in this?

12 A Yes.

13 Q Now you've had recently another
14 case in which you were criticized by the Judge
15 for having serious questions of bias, correct?

16 A The -- the regression model was --
17 was called into question, that's correct.

18 Q On grounds of bias?

19 A Well, that's a technical term of
20 art, yes.

21 Q And the regression model is what
22 you've done here as well? You've done a

1 regression model?

2 A Ah --

3 Q Have you done a regression model
4 in this case?

5 A I have done one, but I haven't
6 offered it as -- as my -- I put in a footnote
7 as a sensitivity test to the comparison of the
8 means.

9 Q And the criticism of your serious
10 questions of bias with respect to you was in
11 a case involving Dish, correct?

12 A Correct.

13 Q And this is a case of Dish against
14 my client, and you were hired by Dish to be
15 their expert in that case, correct?

16 A Correct.

17 Q And you gave testimony about
18 pricing in that case on behalf of Dish,
19 correct?

20 A Correct.

21 Q You did a regression analysis,
22 correct?

1 A Correct.

2 Q And the serious question of bias
3 had to do with your averaging approach, didn't
4 it? Yes or no.

5 A I -- I don't recall if -- if it
6 had to do with the averaging. The --

7 Q You calculated a median in that
8 case. You're familiar with the term "median"?

9 A Yes.

10 Q A median is a different way of
11 doing an average where you take the middle
12 data point where you have an even number above
13 and an even number below, correct?

14 A You don't necessarily need an even
15 number -- oh, that's the result of a median.
16 But you can take a median of any distribution.

17 Q Okay. And you did a median
18 analysis, it's a certain type of average, a
19 different way of looking at an average; you
20 did a median study as part of your regression
21 in Dish, didn't you?

22 A I remember calculating medians for

1 something after the regression. I don't think
2 that we calculated it medians as part of the
3 regression.

4 Q And the Judge in that case found
5 after looking at your work serious questions
6 of bias because you had changed the data?
7 You'd essentially weighted your median by
8 collapsing data points from, say, ten data
9 points down to one, is that the essence of it?

10 A I -- I know that there was a --
11 there was a controversy over how to treat
12 something. It's -- it's a bit foggy now. But,
13 yes, I remember median being the -- at the
14 center.

15 Q Right. And median was at the
16 center because you had done what I just
17 described. You had taken a number of data
18 points and changed the median result by
19 collapsing some of them into one, about ten of
20 them into one data point?

21 A Well -- well, I'm sorry. This is
22 coming back to me.

1 Yes, the problem is that we had a
2 contract, and I won't -- I won't say who --
3 who it was with, because I'm not -- I don't
4 think I'm -- I'm allowed to. But we had a
5 bundled contract where one -- one programmer
6 in a single contract sold 20 odd sports
7 networks. And -- and there was a -- a question
8 of how to -- how to deal with that. And it
9 was a -- it was a difficult question.

10 You could -- you could -- there
11 were a lot of different judgment calls on how
12 you should handle it.

13 Q And you took, the contract, it was
14 a 20 some contracts and you collapsed them
15 into one?

16 A Well, we only had -- if -- if I
17 recall correctly, we only had one data point.
18 The -- the bundled contract didn't breakout
19 the individual -- the sports networks that
20 were being sold. So we only had one data
21 point. And so it was my decision that -- it
22 was -- it was obviously a mess. I mean, it

1 was -- it was messy -- it was a messy
2 assignment to begin with. And -- and the
3 question was: How do you treat this bundled
4 contract? And the bundled contract was an
5 important observation in my regression
6 analysis and it, obviously, caused the -- the
7 Arbitrator in that -- in that proceeding a lot
8 of discomfort.

9 Q Well, so much discomfort that the
10 Arbitrator who rendered the ruling there said
11 that your regression and analysis raised
12 serious questions as to validity, reliability
13 and bias, correct?

14 A Correct.

15 Q And here in this case you have in
16 the way we've examined calculated averages by
17 applying weighting factors in the way we
18 discussed a moment ago this morning, that are
19 different than the weighting factors that were
20 used by the FCC, correct.

21 A In one specification. But I think
22 the same in others.