

1 Q You don't think that that raises
2 serious questions of bias for you in this case
3 just as it did in the Dish case?

4 A No, because I did it both ways
5 here and the outcome didn't -- didn't change
6 depending on how I did the weighting.

7 MR. CARROLL: Your Honor, those
8 are our questions at this time.

9 Thank you for your patience.

10 THE WITNESS: Thanks.

11 JUDGE SIPPEL: Mr. Oshinsky, go
12 right ahead, sir.

13 CROSS-EXAMINATION

14 BY MR. OSHINSKY:

15 Q Dr. Singer, in response to some
16 questions by Mr. Carroll you talked a
17 methodology whereby you did not consider those
18 markets where Comcast didn't carry Tennis
19 Channel at all?

20 A Correct.

21 Q And I think you offered an
22 explanation as to why. Could you repeat that?

1 A Sure. So, again, I was -- I was
2 trying to re-aim the FCC's approach which
3 looked at Comcast's favoritism of its own
4 networks to something different, which is can
5 we re-aim that -- that machinery towards
6 Comcast's disfavoritism towards unaffiliates?

7 And what I -- what I was most
8 interested in was I was trying to understand
9 what caused Comcast to take you off the sports
10 tier, to take -- take Tennis Channel off
11 sports tier and do something better.

12 So sports tier kind of became the
13 benchmark.

14 And Mr. Carroll properly asked why
15 -- you know why -- why not look at the -- at
16 the markets in which they were not -- not
17 included in.

18 And I -- I went back last night
19 and looked at those markets, and I'm happy to
20 offer this -- this into evidence. But
21 basically this is what I found that although--
22 although they represent in terms of the

1 observations in the sample [REDACTED] plus
2 observations, on a population weighted
3 basis, like if you just take the POPs that are
4 covered according to the Census Bureau for
5 each of those headends in which Comcast
6 doesn't carry Tennis Channel at all, then
7 those POPs represent about [REDACTED] of
8 Comcast's total POPs.

9 So in other words, we're talking
10 about headends that generally speaking don't
11 serve a lot of people.

12 Moreover, I did a computation of
13 the -- because Comcast provided to me the
14 number of channels at each headend. And I
15 found something that I thought was remarkable,
16 but it confirmed exactly, you know my
17 suspicion that of -- of the headends that
18 don't carry Tennis Channel at all, the average
19 number of channels was 160, okay?

20 In contrast, in the headends in
21 which Comcast carried Tennis Channel
22 somewhere, whether it be in the sports or

1 something better, it was over 360; it was more
2 than double the number of channels, okay?

3 And what does that tell you? It
4 tells you that these are very idiosyncratic
5 headends. They're headends that haven't yet
6 been developed, on average.

7 Of course, I'm sure Mr. Carroll
8 can find a handful that have 300 channels,
9 just like the normal headends. But on average
10 these headends that don't carry Tennis Channel
11 at all have less than half of the channels
12 that -- of the headends that do carry Tennis
13 which tells me that Comcast just hasn't
14 deployed these -- these headends yet. They're
15 not up to speed with the rest of the network
16 for whatever reason: The people living there,
17 there's just too few people living there, they
18 don't have the necessary income to justify the
19 investment, or whatever reason.

20 So when I look at that I'm not --
21 I'm not so sure that the reason why we don't
22 see Tennis Channel carried there is because

1 Comcast is doing something nefarious. I just
2 don't think that that's the place to look to
3 test the FCC's methodology. I thought a
4 better place to test it.

5 In other words, let me just state
6 what I think is going on there. I don't -- I
7 think the reason why Comcast isn't carrying
8 Tennis Channel there is because they're not
9 carrying much of anything in those -- in those
10 headends. Okay?

11 And -- but -- but if you want to
12 test the FCC's methodology, which is taking
13 advantage of the variations in favoritism, or
14 in this case it would be of the variations in
15 disfavoritism, right? Then you -- you conduct
16 the approach the way that I did it.

17 Q So in other words under the
18 Commission test, does that apply to predict
19 Comcast's behavior and where they're not
20 carried? In other words, in the --

21 A Remember, just to remind
22 ourselves, what the Commission is looking at

1 is they're trying to explain the favoritism
2 that Comcast gives its own, right? So they
3 see that it gives favoritism to Golf and
4 Versus relative to other MVPDs, right? But --
5 but it notices that the extent of the
6 favoritism varies as you move across
7 geography, right? And what they wanted to see
8 was could you explain that variation in the
9 degree of favoritism by Comcast market share,
10 and they found that you could. And they --
11 and the direction that allowed them to
12 conclude that Comcast was -- was giving
13 discriminatory treatment in favor its own for
14 anti-competitive reasons.

15 Q Now you found that there was a [REDACTED]
16 [REDACTED] difference in Comcast's carriage -- or
17 distribution, I'm sorry.

18 A Can I state it?

19 Q Yes, please.

20 A It's [REDACTED] points is the
21 difference in Comcast's average market share
22 in -- in those market carries Tennis on the

1 sports tier compared to those markets where it
2 carries Tennis Channel more favorably. The
3 difference in Comcast's market share is [REDACTED]
4 [REDACTED].

5 Q Now, can you translate that to
6 instead of in the abstract that way, can you
7 translate it into real world numbers that --

8 A Sure. Sure.

9 So what we know from Comcast's 10-
10 K, and we talked about this yesterday, from --
11 well, from SNL Kagan, is that if you just look
12 at the markets in which Comcast operates, all
13 right, we know for the entire country their
14 market share is only [REDACTED] percent. Why? Because
15 that includes a bunch of markets in which
16 Comcast doesn't even operate, right?

17 So but if we focus and we change
18 our universe and just focus on the local
19 markets that Comcast serves, it's market share
20 is a lot higher. It has to be, right? Because
21 to get an average of [REDACTED] when you have zero in
22 some part of the average; if the weighted

1 average is [REDACTED] it must be the case that you're
2 higher than [REDACTED] in the markets that you serve,
3 right?

4 So Comcast gives a percent, if I
5 recall correctly, in its 10-K of video
6 penetration. But we can also do that with SNL
7 Kagan data. And if I recall correctly, the
8 average is in the 40's. That is in region in
9 the markets that it serves, it's in the 40's.

10 We had examples of Boston,
11 Philadelphia, Miami where it goes up into the
12 [REDACTED], right? In some cases they're -- they're
13 truly dominant under -- under an antitrust
14 standard, right?

15 So now -- so now I want you just
16 to drive that [REDACTED] percent point wedge, you
17 know into the average. And so recognizing
18 that there's more in my sample markets that --
19 where -- where it carries it on the sports
20 tier, so you know that's -- that's what's
21 happening. It's off of a base of around -- of
22 around 40 or maybe higher. Forty starts --

1 maybe 45. I'd have to go back in. But
2 there's a base of around 45 was the average,
3 and you have to drive that wedge in there of
4 ■ percent -- percentage points.

5 And I -- I give the statistics in
6 my -- in my report.

7 Q All right. Just one more.

8 Have you formed an opinion, and
9 maybe you haven't, through your review and
10 your analysis as to what -- well, let me back
11 up for a second.

12 We heard testimony to the effect
13 that equity was offered in the Tennis Channel
14 to Comcast in 2006 and 2007. Were you able to
15 form an opinion as to why based on your
16 overall analysis why they would have refused
17 that deal? I understand there could have been
18 other factors involves, obviously there
19 probably are. But were you able to form an
20 opinion as to why Comcast might have taken
21 that position at the time?

22 A Sure. Sure. I mean, I studied

1 the -- Comcast's internal valuation documents
2 where they tried to compare to value the
3 equity, their share of the equity, and they
4 tried to compare that against the incremental
5 expenditures that they would have to incur to
6 carry Tennis Channel more broadly. And I cite
7 those -- I cite those documents in my report.
8 And -- and I'll try to just summarize here
9 what I found.

10 Was that in their opinion that was
11 the appropriate calculus, that that's -- that
12 was -- that was the benefits of the costs.
13 And they thought that what you should do is on
14 -- on one side of the ledger, take the value
15 of Tennis Channel, the pro rata value of
16 Tennis Channel that they would be receiving as
17 part of the equity offer. And on the other
18 side of the equation they looked at the
19 incremental license fees that they'd have to
20 pay Tennis Channel as a result of the broader
21 distribution.

22 And I opined in -- in my report

1 that -- that Tennis was almost rigged to fail
2 in the sense that the calculus that I would
3 have liked them to have performed is a
4 comparison of the incremental costs on the one
5 side of these programming expenditures with
6 the incremental revenues. Remember the --
7 what would those incremental revenues be? It
8 would be greater advertising sales that they
9 get to share in on -- on the Tennis Channel
10 plus to the extent that having Tennis Channel
11 in certain markets that are highly competitive
12 and were a bunch of avid tennis fans where
13 they're going up against Dish and DirectTV, and
14 AT&T or Verizon that has broader carriage of
15 Tennis Channel to the extent that that could
16 help them retain certain customers. That's a
17 benefit, could be small. But it should be --
18 it should be quantified.

19 And my -- my review of their -- of
20 their analysis was that the analysis was: (a)
21 Incomplete, and; (b) discriminatorily applied
22 to Tennis Channel. There was no -- I haven't

1 seen anything in the record that suggests that
2 they'd subjected their -- their own networks
3 to the same test.

4 Q And do you know whether any of
5 those discussions were present during the 2009
6 negotiations?

7 A In terms of equity discussions?

8 A Yes.

9 Q I don't think -- I don't think
10 they were. I think -- you know, I read Mr.
11 Solomon's testimony. And there's this word
12 "financial incentive" that keeps showing up in
13 quotes. And only he could know -- you know,
14 he had an interpretation of what he thought
15 financial incentive was. And he interpreted
16 it to mean lower prices. So he never -- if my
17 reading of what happened is that never put
18 equity back on the table in the 2009
19 negotiations.

20 Q Thank you.

21 MR. OSHINSKY: That's all I have,
22 Your Honor.

1 JUDGE SIPPEL: I am sorry. I am
2 sorry.

3 MR. PHILLIPS: Your Honor, would
4 you like me to start or it's 12:25, would you
5 like a break?

6 JUDGE SIPPEL: Let's do it.

7 MR. PHILLIPS: I will be happy to.

8 REDIRECT EXAMINATION

9 BY MR. PHILLIPS:

10 Q I'm going to start by showing you
11 another exhibit.

12 MR. PHILLIPS: If I may, Your
13 Honor, may I approach?

14 JUDGE SIPPEL: Please. Please do.

15 MR. PHILLIPS: This is Tennis
16 Channel Exhibit 308.

17 JUDGE SIPPEL: Exhibit 308. Okay.

18 (Whereupon, the document was
19 identified as Exhibit 308.)

20 BY MR. PHILLIPS:

21 Q It's the 10-K. Thank you.

22 Dr. Singer, have you seen this

1 document before, Exhibit 308.

2 A I -- I have. It's -- it's the
3 famous 10-K that I kept trying to pull of my -
4 - of the recesses of my memory. But I -- I now
5 am refreshed and I'm on page 3 of this video
6 penetration and -- video penetration that I
7 kept recalling, yes.

8 Q Now, sir, you're getting slightly
9 ahead of me. This is the Comcast 10-K of
10 which you and Mr. Carroll were discussing
11 yesterday?

12 A Yes, sir.

13 Q And as I recall, you and Mr.
14 Carroll had an argument about Comcast's market
15 share video penetration and the like. Seeing
16 this form 10-K can you tell me what the video
17 penetration is in homes for Comcast?

18 A Sure. In territories that Comcast
19 serves --

20 Q I'm sorry.

21 A Yes.

22 Q What page are you referring to?

1 A I'm on page 3, it's -- it's the
2 table. I'm looking at the column 2010. but I'm
3 happy to look at any column you like. But the
4 row that's important is "Video Penetration."
5 And this just confirms with what -- you know,
6 what I said yesterday, which is that -- that
7 in the markets in which it serves Comcast's
8 market share on an average is █████ percent.

9 MR. CARROLL: Your Honor, I object
10 to selective use of the 10-K. I think the
11 witness should also look at page 13.

12 MR. PHILLIPS: I saw. Mr. Carroll
13 you'll have your chance.

14 MR. CARROLL: I just mention it
15 because it's only a piece --

16 MR. PHILLIPS: I certainly didn't
17 object, sir, when you were showing documents
18 that I thought you selectively showed the
19 witness without telling other things in the
20 documents.

21 JUDGE SIPPEL: Wait a minute.
22 This is one thing, that's the other thing.

1 I'll rule the objection for own
2 and let the witness proceed the way he's doing
3 on the record.

4 BY MR. PHILLIPS:

5 Q What is the significance of that
6 number that you just quoted to me, Dr. Singer?

7 A Well, one -- one take away is that
8 it suggests that the results that I was
9 finding and the weighting -- the weighting
10 scheme that I ended up imposing by the
11 approach that I took was reasonable and it
12 gave us an average in region market shares
13 that are close to the actual market shares of
14 -- of Comcast.

15 Q Well now I want to turn to the
16 analysis that you did that was based upon --
17 because Mr. Carroll gave you a lot of
18 questions about that yesterday, and I just
19 want to try to clear up some things.

20 A Okay.

21 Q Why did you not include the
22 headings that didn't carry Tennis Channel in

1 the analysis?

2 A All right. I don't know if I can
3 -- if I can say anything different from --
4 from the exchange that we just had. But to --
5 you know to reiterate, I'm trying to test a
6 theory of harm that is implicated by the
7 conduct here. And the theory of harm is that--
8 is that Comcast won't move Tennis Channel down
9 from the sports tier to some more broadly
10 distributed tier as it does its affiliated
11 networks, right? And that -- that guided the
12 hypothesis to be tested at this stage.

13 And I was also influence by what--
14 by what Professor Goolsbee did, by what the
15 FCC did. And to be fair, they looked at
16 something related but different. They were
17 trying to take advantage of changes in the
18 degree of favoritism and I was looking at the
19 opposite. I was looking at changes in the
20 degree of disfavoritism, okay?

21 So -- but -- but Mr. Carroll
22 raised a very valid and legitimate point. And

1 I went home last night and I -- I checked the
2 statistics on the -- on the markets that were
3 excluded and I -- and I saw that they weren't
4 important in an economic sense, in a sense
5 that they represent only ■ percent of the
6 total Comcast subscribers. But more
7 importantly, these markets are special.
8 They're -- they're not developed. They have
9 half the -- the number of channels as the --
10 the markets in which Tennis Channel is carried
11 somewhere by Comcast.

12 And I -- I just - I don't even
13 think that the theory of harm here can be --
14 can be properly tested by -- by focusing on
15 those markets as the benchmark.

16 Q Let me ask you to turn to Exhibit
17 1055 for a moment. We had a lot of testimony
18 yesterday afternoon.

19 A Can you -- can you tell me what
20 the exhibit is because I got so many. I'll
21 look for 1055, but what is it?

22 Q It's the DMAs with Singer

1 Multiplier of Number of Comcast Share
2 Subscribers.

3 A Okay. I got there. Okay.

4 MR. PHILLIPS: Judge, do you have
5 it?

6 JUDGE SIPPEL: Yes.

7 MR. PHILLIPS: Okay.

8 BY MR. PHILLIPS:

9 Q So, Dr. Singer, one of the things
10 Mr. Carroll asked you about yesterday is you
11 didn't compute a correlation coefficient. Can
12 you explain why you didn't compute the
13 correlation coefficient?

14 A I thought that given the way that
15 the data was presented to me, which was
16 decisions made at the headend level, but
17 market shares made at the DMA level, this was
18 the absolutely best that I could do. I can't--
19 I can't conceive of a better way possible.

20 Now what I -- certainly with the
21 benefit of hindsight and having -- having
22 heard this critique, I would like to calculate

1 a correlation coefficient. But I can just
2 tell by -- by looking at it while -- while we
3 certainly find pair-wise outliers, if you
4 will, even though there is no such thing in
5 statistics, when I -- when I see, you know the
6 first as you just move down it, it appears all
7 things equal. The more headends there are,
8 you know the more number of-- of subscribers
9 there are.

10 So, I -- I -- I still feel -- I
11 mean, that was the only thing that I could do,
12 but I also think that it turns out that it was
13 the right thing to do.

14 Q Dr. Singer, Mr. Carroll also spent
15 a lot of time on the footnote in the FCC
16 report and the alternative method that the FCC
17 had suggested there. Did you try various
18 weights and sensitivities in your analysis?

19 A Yes, I did. As I explained, I --
20 I tried see if I could turn around the
21 results. I even suggested it through
22 regression analysis, right? I tried to see if

1 I could turn the -- the direction of the -- of
2 the sign, right?

3 Q And when you performed these
4 various sensitivity analysis did the results
5 change?

6 A To my -- to the best of my
7 recollection, no.

8 Q Now Mr. Carroll challenged you
9 with a number of analyses you did when he
10 pulled out specific examples of the much
11 larger dataset that you used and asked you
12 about those specific examples, do you recall
13 that

14 A Yes, I -- I -- I was trying to
15 wash away those memories. But now you've
16 brought them back in.

17 Q In Exhibit 1005, I think, are four
18 of those, and that's the exhibit that's called
19 Sample DMAs With Different Market Shares?

20 A Yes.

21 Q And those are four examples out of
22 a database that's how large, sir?

1 A Well, to be fair you should sum
2 up -- to get the comparison that you want, is
3 you should sum up the headends in that -- in
4 that column. So [REDACTED] and [REDACTED], so let's call it
5 [REDACTED].

6 So he's picked [REDACTED] observations out
7 of about [REDACTED] observations to try to prove
8 that, you know you can find outliers. You can
9 find cases in which -- you know, Comcast
10 doesn't perform according to their general
11 tendencies. You will always find that. You
12 will always be able to find -- in fact, you
13 should find way more than [REDACTED] -- [REDACTED] such
14 observations.

15 I don't even know if all of these
16 are outliers.

17 Again, the way that I would do an
18 outlier test is I would do a scatter plot and
19 I would see how well, you know the data were
20 lined up according to your hypothesis.

21 But you'd look at all [REDACTED]
22 observations, but you wouldn't pull out [REDACTED].

1 I mean, this is the opposite of the scientific
2 method.

3 Q Well, the fact that they're
4 individual exemplars that vary from the
5 general import of your analysis, do you
6 believe that that affects your analysis?

7 A No, it does not. In fact, in every
8 statistical analysis that you do you would get
9 outliers. It's very rare that a data -- that
10 a dataset is going to conform precisely
11 according to some formula or some preconceived
12 hypothesis.

13 Q Now you were also asked about
14 whether there might be alternative
15 explanations for your results. Do you recall
16 that testimony?

17 A Yes.

18 Q When you look at all the analysis
19 together, the docs you reviewed and everything
20 that you put together in your very lengthy
21 opinion what was the explanation that you saw
22 best fit Comcast's differential treatment of

1 Golfing Channel versus on the one hand and the
2 Tennis Channel on the other hand?

3 A Sure. When I -- when I looked at
4 the entirety of the data, the entirety of the
5 documents, all of the analyses that I
6 performed when I considered all of Comcast's
7 efficiency justifications, I conclude that the
8 best explanation of the -- of the pattern of
9 conduct that we observe here is discrimination
10 of the basis of affiliation.

11 Q Stick with that for one second,
12 Dr. Singer. In everything that you've looked
13 at would you agree with the statement that
14 equity in a network affects the carriage
15 decision?

16 A Sure.

17 Q Okay. And the carriage decision
18 is being made by whom, sir?

19 A By anyone. I mean, it's when
20 Comcast's has equity, that affects its
21 decision, when DirecTV has equity that affects
22 its decision, when Dish has equity. And if

1 you and I started a MVPD and some network gave
2 us equity, it would affect our decision too.

3 Q Yes. And the decision in this case
4 has to do with the distributors and whether or
5 not we give them carriage, not with the
6 decision by Tennis Channel, correct, sir

7 A Right. It's we're looking at the
8 decision making of Comcast here, not the
9 decision making of Tennis Channel.

10 Q And so would you consider the
11 decisions made by the Board of Directors of
12 Tennis Channel in any way relevant to the
13 decisions made by Comcast or Dish, or Time
14 Warner, or any of the other distributors?

15 A Not relevant at all. Oh, with
16 respect to carriage decision. I want to put
17 that -- I want -- I think that's important.
18 Okay.

19 Q Okay. Have you seen any evidence
20 -- I think either you or the Judge on this
21 yesterday, that Dish and DirecTV are in fact
22 fierce competitors. I'm sure we've all seen

1 those commercials.

2 Have you seen any evidence in this
3 case of them acting in any form of collusion?

4 A You mean Direct and Dish?

5 Q Yes.

6 A No.

7 Q Okay. Mr. Carroll took you
8 through some examination of whether or not
9 eight years mattered, sir. Do you recall
10 that?

11 A Yes.

12 Q And I think you said that eight
13 years could matter a lot to the life of a
14 channel, correct?

15 A Correct.

16 Q Does eight years matter as much in
17 terms of the affect on the marketplace for
18 distribution?

19 A Not as much on the marketplace as
20 it would for an individual channel.

21 Q And he also looked and, I believe,
22 argued with you about whether or not your