

1 OPEN SESSION

2 BY MR. TOSCANO:

3 Q And how did you consider the
4 closeness from the perspective of advertisers?
5 How did you look at that issue?

6 A The question is the closeness of
7 competition. And one question is well, who
8 else do these channels compete with? And the
9 evidence is that they compete in a very broad
10 market. They're competing against other
11 sports networks, they're competing for the
12 advertiser dollars that would go to broadcast
13 stations when they broadcast sports, to TNT,
14 TBS, et cetera when they broadcast sports. So,
15 the evidence is that it's an extremely broad
16 market.

17 Given the nature, the breadth of
18 the market, any -- the incentive to
19 discriminate is de minimus because what would
20 be the benefit? You would still have to
21 compete against all of the other players in
22 the marketplace. And there's nothing unique,

1 or no evidence to suggest that there's any
2 special closeness between the Golf Channel and
3 Tennis Channel, or Golf Channel -- Versus and
4 the Tennis Channel.

5 Q And what, if anything, did you
6 conclude from the fact that they compete in a
7 broad market bearing on your opinions relating
8 to discrimination?

9 A It suggests that they would have
10 no incentive to discriminate, and as a result,
11 wouldn't engage in that practice.

12 Q I believe you also said you've
13 looked at competition for programming. What
14 is your conclusion regarding that?

15 A Well, first, I don't think there's
16 any evidence, or anybody who has suggested
17 that the Golf Channel and the Tennis Channel
18 have competed for programming. Obviously,
19 they're both single sport networks. I've not
20 been exposed to anything that suggests that
21 there's any overlap, or any competition for
22 any programming there.

1 In terms of Versus, the evidence
2 that I've been exposed to suggests that Versus
3 sees its biggest rival in acquiring the major
4 tennis rights has been ESPN. And that's who
5 they bid against for -- potentially were
6 bidding against. And that the examples that
7 have been given, it's not at all clear from
8 the evidence whether Versus and the Tennis
9 Channel in those examples were complements
10 working together, or substitutes. The
11 evidence hasn't supported either perspective.

12 Q Now, you also said that you
13 analyzed whether Comcast carriage of Tennis
14 Channel unreasonably restrains Tennis
15 Channel's ability to compete fairly. What did
16 you do to look at that issue?

17 A Again, this all detailed in a lot
18 of specificity in my direct testimony, but I
19 considered a variety of factors. One of which
20 was, it's not unreasonable for Comcast, as a
21 cable company, to look after its bottom line,
22 to try to maximize its profits. That is what

1 is good for consumer welfare.

2 If they keep costs down, that
3 helps them keep the cost of cable programming
4 down. So, it makes complete sense that they
5 are looking out for the interest there of
6 keeping their costs down, and accepting
7 programming that would cost them significantly
8 more without benefits would run counter to
9 that. So, it wouldn't be unreasonable for
10 Comcast to measure the costs and benefits, and
11 make a decision that the costs exceed the
12 benefits. That would not be unreasonable.

13 Second of all, in this case right
14 here, the Tennis Channel is seeking
15 distribution for [REDACTED] more subscribers
16 from Comcast. Right now it has carriage to
17 about [REDACTED] subscribers.

18 If you look at the MVPD
19 marketplace, there are tens of millions of
20 subscribers that Tennis Channel has access to,
21 that they could go out and get, that Comcast
22 has no effect on them. There is nothing that

1 stops -- Comcast isn't stopping the Board of
2 Directors, or whomever at the Tennis Channel
3 from lowering their price and offering a
4 better deal to say Time Warner, or lowering
5 their price and offering a better deal to
6 Cablevision, or lowering their price and
7 offering a better deal to DirectTV.

8 And through those increased
9 distribution deals, if they wanted increased
10 distribution, if that was their strategy, they
11 could obtain it, if they were willing to cut
12 their price in enough of a way to get
13 distribution.

14 So, that's not Comcast decision,
15 that is the business decision of the Tennis
16 Channel. So, that's not Comcast standing in
17 the way from them getting whatever
18 distribution level they ultimately are
19 seeking.

20 Q Now, you've already looked at Dr.
21 Singer's written direct. And many of your
22 opinions you've offered are in response to Dr.

1 Singer. Correct?

2 A I don't know if I'd say many, but
3 there's a section in my report that is
4 responsive to him.

5 Q And could you give us some of your
6 principal responses to Dr. Singer?

7 A Well, Dr. Singer puts forward a
8 standard in his whole report that doesn't seem
9 to fit the data very well. Nothing in his
10 standard explains why does Time Warner, which
11 doesn't own Golf and Versus, carry the Tennis
12 Channel and Versus on a highly penetrated
13 tier, but carry the Tennis Channel to say [REDACTED]
14 [REDACTED] of its subscribers.

15 Nothing in Dr. Singer's analysis
16 supports the conclusion that why does Charter,
17 which also doesn't own Golf and Versus,
18 they're clearly making an independent
19 decision, they're distributing Golf and Versus
20 to [REDACTED] of their subscribers, and Tennis
21 Channel to a [REDACTED].

22 So, it seems to me that a

1 framework that claims that Comcast is
2 discriminating against the Tennis Channel
3 based on affiliation would have to explain why
4 these other cable MSOs are behaving in a very
5 similar way, or in a way more detrimental to
6 the Tennis Channel than Comcast, and it
7 doesn't do that.

8 Q Now, you're aware that Dr. Singer
9 offered some new opinions regarding what we've
10 been referring to as the Rovey data in his
11 testimony?

12 A Yes, I saw that for -- his
13 analysis for the first time in his written
14 direct testimony.

15 Q And do you have opinions about his
16 analysis?

17 A Yes, I do.

18 MR. TOSCANO: May I approach?

19 JUDGE SIPPEL: Thank you, yes.

20 MR. TOSCANO: I'd like to show you
21 Comcast Exhibit 1100.

22 JUDGE SIPPEL: Thank you.

1 (WHEREUPON, THE AFOREMENTIONED
2 DOCUMENT WAS MARKED COMCAST
3 EXHIBIT 1100 FOR IDENTIFICATION.)

4 MR. SCHMIDT: Your Honor, just for
5 the record, this is what we were referencing
6 when Mr. Carroll and I were talking earlier
7 this morning.

8 JUDGE SIPPEL: I see, okay. I
9 see.

10 MR. TOSCANO: So, these are the
11 rebuttal opinions that are set forth in a
12 separate document.

13 JUDGE SIPPEL: I see that, too.
14 Very well.

15 BY MR. TOSCANO:

16 Q Mr. Orszag, would you tell us what
17 Comcast Exhibit 1100 is?

18 A This is the key points in rebuttal
19 to Dr. Singer's Rovey analysis that I prepared
20 last night when asked to summarize my
21 opinions.

22 Q And you executed this under oath?

1 A Yes, I did.

2 MR. TOSCANO: Your Honor, subject
3 to cross-examination, we move to admit that as
4 Exhibit 1100.

5 JUDGE SIPPEL: Any objection?

6 MR. SCHMIDT: Yes, this we will
7 object to for the reasons I set forth this
8 morning. It's still not clear to us what
9 opinions from this -- Mr. Orszag is offering,
10 but I think maybe the better course would be
11 to conditionally let it in for now subject to
12 our objection, and our working out where we
13 stand at the end of Mr. Orszag's testimony,
14 and what the next steps might be along the
15 lines we discussed this morning in terms of
16 maybe a deposition, or a recall.

17 JUDGE SIPPEL: Okay. We'll let it
18 in on the second grounds that you've
19 articulated, Mr. Schmidt. So, it's received
20 as Comcast Exhibit 1100, subject to some
21 further work.

22 (WHEREUPON, THE DOCUMENT

1 PREVIOUSLY MARKED COMCAST EXHIBIT
2 1100 IDENTIFICATION, WAS
3 RECEIVED.)

4 MR. TOSCANO: Thank you, Your
5 Honor.

6 JUDGE SIPPEL: Okay.

7 BY MR. TOSCANO:

8 Q Mr. Orszag, could you tell us your
9 principal opinions regarding Dr. Singer's new
10 analysis?

11 A The new analysis does not comport
12 with sound scientific techniques.

13 Q And why do you say that?

14 A For a number of reasons, three
15 major ones. First, he uses a very simple
16 comparison of means, or comparison of averages
17 that is not the analysis that the FCC staff in
18 the technical appendix to the Comcast-NBC
19 order conducted at all. That's not -- they
20 were conducting a regression analysis. It was
21 controlling for a variety of factors. He is
22 just using a simple averages approach, which

1 does not take into account a variety of
2 factors that affect carriage. That's number
3 one.

4 Number two, he makes a fundamental
5 error in how he measures competition in the
6 marketplace. And three, the one regression
7 that he does include as I heard this morning,
8 I think it was -- he said is the sensitivity
9 analysis, where he controls for one factor,
10 shows the weakness of his conclusion. It
11 shows no statistical relationship.

12 Dr. Singer was trying to show that
13 there is a relationship between, a statistical
14 relationship between competition and Comcast
15 carriage of the Tennis Channel. In his
16 footnote, when he just includes income, one
17 variable that affects carriage, it shows that
18 there is no statistically significant
19 relationship. And, in fact, it has a very
20 common sense kind of result. He tries to
21 downplay it, that in areas where there are
22 higher income, Comcast carries the Tennis

1 Channel on a sports tier. That makes sense.
2 That's a plausible result. And that is his
3 one sensitivity analysis, just shows that this
4 whole approach doesn't support the conclusion
5 that he says he reaches.

6 Q Now, why do you say it's a
7 plausible result that Comcast carries the
8 Tennis Channel on a tier, places where they're
9 higher income?

10 A People can afford it.

11 Q Now, you also mentioned a
12 fundamental error in how he measures
13 competition.

14 MR. TOSCANO: May I approach?

15 JUDGE SIPPEL: Please do, yes.

16 MR. TOSCANO: I'd like to show you
17 what's been marked as Comcast Exhibit 1008. I
18 believe this is already in.

19 (WHEREUPON, THE AFOREMENTIONED
20 DOCUMENT WAS MARKED COMCAST
21 EXHIBIT 1008 FOR IDENTIFICATION.)

22 BY MR. TOSCANO:

1 Q Mr. Orszag, could you tell us what
2 this is?

3 A What this shows is for a sampling
4 of markets, it shows Comcast market share,
5 that is the share of Comcast subscribers, of
6 total MVPD subscribers in the DMA; that is the
7 second column, the first column over from the
8 market name.

9 It then shows the combined DBS-
10 teleco share, so that would be EchoStar,
11 DirectTV, AT&T, and Verizon, their combined
12 share. It then shows the other MSO, that's the
13 other cable company share within the DMA.
14 And, lastly, it shows Comcast's carriage level
15 of the Tennis Channel in those markets.

16 Q Now, you've referred to the column
17 all the way to the left as the DMA. What does
18 DMA stand for, again?

19 A Designated Market Area, so there
20 are 210 designated market areas throughout the
21 country, so it's just a term of art, one that
22 is used throughout the FCC, and in the

1 telecommunications world.

2 Q And you said that the second
3 column shows the Comcast share. What did you
4 mean by that?

5 A So, that is Comcast subscribers as
6 a share of total MVPD subscribers in the DMA.

7 Q And you said the third column
8 shows the DBS-teleco share. What do you mean
9 by that?

10 A Well, that's the total share that
11 the satellite companies have, the market
12 share, so it's the four companies, their
13 subscribers divided by DMA-wide MVPD
14 subscribership.

15 Q And, finally, what is meant by the
16 other MSO share?

17 A So, in lots of areas, like
18 Washington, D.C., which is the Washington,
19 D.C. DMA, has multiple cable companies who
20 serve next to each other. They don't overlap.
21 They serve next to each other, who provide
22 service. So, for example, in Washington, D.C.,

1 Comcast may have the cable franchise within
2 the District of Columbia, but Cox has it, for
3 example, in Fairfax. So, this is measuring
4 the market share of those other cable
5 companies that are within the DMA, that are
6 not competing with Comcast.

7 Q Now, looking at the column
8 entitled "Comcast Share," how does that number
9 factor into Dr. Singer's analysis?

10 A Dr. Singer is using this measure,
11 Comcast share, as his measure of competition.
12 So, what he's saying is in a place like
13 Norfolk, where Comcast has a ■ percent share,
14 he would say that is a highly competitive
15 market, because Comcast has such a small
16 share.

17 Whereas, in a place like
18 Lafayette, Indiana, the share is, Comcast
19 share is ■ percent, and he would say that's
20 a less competitive market. But the reality is
21 that the degree of competition is roughly
22 equivalent in all of these markets, because

1 the competitors to Comcast are the DBS and
2 teleco providers.

3 The error, the fundamental error
4 is that Dr. Singer, in his comparison of means
5 analysis, is including other MSOs as
6 competitors, but they are not competitors.

7 Q Let me take this a step at a time.
8 Where in this chart, Comcast Exhibit 1008, can
9 we see that the level of competition is
10 roughly the same in these markets?

11 A It is measured by the DBS-teleco
12 share. So, those are the entities that are
13 competing directly with Comcast, and who are
14 trying to take a share away from Comcast. So,
15 those entities, if you see, it ranges from
16 [REDACTED] percent to [REDACTED] percent as a range of
17 market shares, so they're roughly in the same
18 ballpark. There is, obviously, some
19 difference, but the difference in DBS-teleco
20 share is quite small. The differences in
21 competition are quite small relative to the
22 vast differences in Comcast share there shown

1 in the first column of numbers.

2 Q Now, given that, as shown in the
3 DBS-teleco share column, that the level of
4 competition is roughly the same in these
5 markets, how is it that Dr. Singer's measure
6 of competition varies so greatly?

7 A It's simple. He's assuming the
8 other MSOs, the other cable companies, are
9 competing with Comcast, and that is just not
10 so. That is not a true fact, so the reality is
11 since he's mismeasuring competition, that
12 renders the whole analysis inappropriate, and
13 really renders the conclusion incorrect.

14 Q Did you conduct your own analysis
15 to test Dr. Singer's findings?

16 A I want to be careful here, because
17 I'm not endorsing the approach, the Goolsbee
18 approach or the FCC staff approach. And I
19 talk about in my direct testimony the
20 potential issues, methodological issues with
21 such an approach. So, I'm doing this for the
22 purpose of response to show that there is no

1 significant effect, because Dr. Singer made
2 another error that we heard about this
3 morning. So, part of my then trying to
4 replicate what the FCC has done, and the
5 Goolsbee approach, is to replicate it in a
6 more appropriate way, but one that I still
7 believe is flawed as a matter of econometrics
8 and economics.

9 Q Could you please describe your
10 analysis?

11 A So, Dr. Singer, we heard this
12 morning, ignored all of the cable headends
13 that Comcast did not carry the Tennis Channel.
14 And he said the reason was because they are --
15 -- they tended to be areas where there was less
16 capacity.

17 That is not an appropriate
18 methodology. One could actually use the
19 scientific technique of regression analysis
20 and include those elements in the model, and
21 take the information that one can get from the
22 fact that there's not carriage, and control

1 for the capacity of the system. And that's
2 precisely what the FCC did in its technical
3 appendix. They didn't do a comparison of means
4 in the technical appendix. They ran a
5 regression, and the main regression that they
6 ran was focused on the decision to carry the
7 programming, or not to carry the programming.
8 And that's what I do.

9 I look at the FCC technical
10 appendix, I attempt to use precisely the same
11 control variables that are described in the
12 footnote in the technical appendix. And the
13 only difference that I make to the best of my
14 knowledge from the redacted version of the
15 technical appendix is that I use, where the
16 FCC staff appendix has the four Comcast
17 affiliated networks regressed as a group, so
18 they look at G4, Style, Golf, and Versus
19 together. I separate those out, because the
20 question here is really Golf and Versus, and
21 the Tennis Channel.

22 So, I look at each of those

1 individually, that's the starting point of my
2 analysis. And I ask the question of using all
3 of the data, and trying to replicate the FCC
4 analysis, and I find no statistical
5 relationship between the degree of competition
6 measured correctly and Comcast carriage of the
7 Tennis Channel, Comcast carriage of the Golf
8 Channel, and Comcast carriage of Versus.

9 What does that tell us? That
10 tells us there is no evidence from this
11 analysis that Comcast carriage of these
12 networks was for an anti-competitive purpose.
13 And the FCC in its staff appendix doesn't make
14 a conclusion with regard to the Tennis
15 Channel, or Golf and Versus as individual
16 channels, because the only analysis they put
17 forward is Golf and Versus in a group of
18 channels, in four channels together. So, they
19 never conduct that analysis at the level
20 that's relevant here.

21 I do, also, I extend it. It's
22 included in my backup material. I've talked

1 about this a lot. This is one of my
2 criticisms of the whole modeling approach that
3 the FCC has used, that they don't use what's
4 called an Instrumental Variables Approach.
5 This we heard a little bit about this morning.

6 The model assumes that the degree
7 of competition affects carriage, but what
8 happens, theoretically, if carriage affects
9 the degree of competition? And one has to
10 take that into account, or attempt to.

11 I've tried to. The instrumental
12 variables don't -- the traditional one using
13 latitude doesn't work particularly well.
14 That's one that's been used many times by the
15 FCC, but the results don't change. I think
16 it's one of the three regressions, actually,
17 I may be misguided on that. My memory may be
18 off on that. But the result doesn't
19 fundamentally change, and that's what's
20 important, is that using an alternative
21 approach, one comes up with the same analysis,
22 that there's no relationship between

1 competition and Comcast carriage of Golf,
2 Versus, or the Tennis Channel for an anti-
3 competitive purpose.

4 Q And what do you conclude from the
5 lack of that relationship?

6 A From the lack of that
7 relationship, I conclude that the FCC's staff
8 appendix, or the Goolsbee approach, doesn't
9 support a conclusion in this case, in this
10 specific matter. And the FCC was quite
11 careful in the appendix to note that they
12 weren't making a decision about any individual
13 case. And when you apply that model to this
14 case, it does not support a conclusion that
15 Comcast engaged in anti-competitive behavior
16 either in its carriage of Golf or Versus, or
17 the Tennis Channel.

18 Q Finally, you mentioned a redacted
19 version of the technical appendix. Why were
20 you working with a redacted version of the
21 technical appendix?

22 A Because I don't have access to

1 personally the unredacted version where I can
2 see all of the details.

3 MR. TOSCANO: Your Honor, we
4 tender this --

5 JUDGE SIPPEL: That's covered by
6 the protective order not related directly to
7 this case.

8 MR. TOSCANO: That's correct, Your
9 Honor. I don't have access to the unredacted
10 version either.

11 JUDGE SIPPEL: I just want the
12 record to reflect that, so I don't forget.

13 MR. TOSCANO: We tender this
14 witness for cross-examination.

15 JUDGE SIPPEL: Thank you very
16 much. That's very good. Mr. Schmidt?

17 MR. SCHMIDT: Thank you.

18 JUDGE SIPPEL: Did you offer 27
19 into evidence? I'm sorry, not 27, but 1008?

20 MR. TOSCANO: That's already in
21 evidence.

22 JUDGE SIPPEL: Thank you. That's

1 already in. Thank you.

2 MR. SCHMIDT: Mr. Orszag, good
3 morning, or good afternoon.

4 THE WITNESS: Good afternoon to
5 you. Nice to see you again.

6 MR. SCHMIDT: Good to see you,
7 too.

8 CROSS-EXAMINATION

9 BY MR. SCHMIDT:

10 Q You're serving as the economist
11 for Comcast in this case. Correct?

12 A That is correct.

13 Q You're the only economist for
14 Comcast in this case. Correct?

15 A I believe that to be the case,
16 yes.

17 Q Did you do any econometric
18 analysis in this case that you subjected to
19 peer review outside of your firm?

20 A No, I did not.

21 Q We talked about Dr. Goolsbee
22 yesterday. Do you know Dr. Goolsbee?

1 A Yes, I've actually written a paper
2 with Dr. Goolsbee.

3 Q Okay. Did you say to Dr.
4 Goolsbee, what do you think of my report in
5 this case?

6 A Dr. Goolsbee has his hands full
7 right now I think trying to help get our
8 economy moving, so the answer is no.

9 Q The answer is no. Did you ask
10 anybody else outside of your firm to look at
11 your report, your criticisms of Dr. Singer's
12 work, or your criticisms of the FCC's
13 technical appendix? Did you subject them to
14 any form of peer review outside your firm?
15 Yes or no?

16 A Well, my analysis, no.

17 Q Okay. Thank you. Let me ask you
18 one other question that came up yesterday. You
19 rely repeatedly on newspaper articles, and on
20 internet pages in your report. Correct?

21 A I don't know if I'd say
22 repeatedly. I certainly have cited newspaper

1 articles or internet sources when they are
2 primary documents for a point.

3 Q Numerous occasions, right, in your
4 report?

5 A I don't know if it's numerous. I
6 haven't gone through to count, but I'm not
7 sure if I've cited them for opinions, as much
8 as for facts.

9 Q For facts, you've relied on them
10 for facts. Correct?

11 A To the extent that a fact isn't
12 available elsewhere, I've used them.

13 Q Including facts like a newspaper
14 article you cited on a point involving
15 distribution levels of the NHL network.
16 Correct?

17 A I need to look, but that -- I'm
18 familiar with the article, yes.

19 Q And would it be fair for me to
20 criticize you, or your opinions, simply for
21 the fact that you cited these news articles
22 for facts?