

1 makers, and may have an effect.

2 Q My question's a little simpler  
3 than that. My question is simply if someone  
4 goes to Cox and says we get [REDACTED] percent  
5 coverage from Comcast, are they in a better  
6 position than if they go to Cox and have zero  
7 percent coverage from Comcast, all other facts  
8 being equal?

9 A It's not clear to me why it should  
10 have a direct effect, if it's Cox and Comcast.  
11 If a programmer comes to both, why it should  
12 have an effect, unless it's imparting new  
13 information on the decision-makers.

14 Q So you would not expect the flip  
15 side of that equation, if Comcast decides to  
16 tier a network. Absent more facts, you would  
17 not expect that to impact another MVPD's  
18 decisions on tiering that network?

19 A Unless it provides them more  
20 information or a change in price, it  
21 shouldn't, as a matter of economic theory,  
22 affect their decisions.

1           Q       Can a negative change in  
2 penetration signal to the industry that a  
3 network is not worthy of broad distribution?

4           A       As a matter of theory, it's  
5 possible, yes.

6           Q       Well, do you believe that applies  
7 in actual practice in carriage decisions?

8           A       Well, if as a result of that  
9 carriage there aren't subscriber losses, it  
10 would reveal information to decision-makers  
11 that they could negatively tier something  
12 without an adverse effect. So somebody taking  
13 that first risk, could then spur that kind of  
14 effect you're talking about. But it's because  
15 it provides additional information.  
16 Additional information is revealed to the  
17 decision-makers, so that they can then make a  
18 more informed decision.

19          Q       Have you seen documents from  
20 Comcast, where they're concerned about the  
21 market effect of their channels being tiered?

22          A       Well, I'm aware of public

1 statements they have made with regard to  
2 decisions that DirecTV made. But I'm not sure  
3 if I know. But I've not seen all the  
4 documents. That would be a better question  
5 for a fact witness.

6 Q Let me ask you about a document,  
7 and ask you if this is something you took into  
8 account, in your determinations. May I  
9 approach, Your Honor?

10 JUDGE SIPPEL: You may.

11 BY MR. SCHMIDT:

12 Q This is Tennis Channel Exhibit 38,  
13 which is in evidence. While you're looking at  
14 that, while I'm passing that out, let me ask  
15 you if you've seen that before.

16 A The cover page doesn't look  
17 familiar to me.

18 Q Let's look at -- I will represent  
19 to you. Do you know -- I won't represent  
20 anything. Do you know who Steve Burke is?

21 A Yes, I do.

22 Q President of Comcast, or former

1 president of Comcast?

2 A I'm not sure his precise title,  
3 but it's something along those lines.

4 Q Do you know who Jeff Shell is?

5 A Yes, I do.

6 Q Head of the Programming side at  
7 Comcast?

8 A I don't know if he still has that  
9 job, but he at one point did.

10 Q Around this time he did, correct,  
11 in 2007?

12 A I can't tell you with certainty.

13 Q Do you know who Dan Finnerty is?

14 A Nope.

15 Q Do you see on the second page, do  
16 you see on the first page, Mr. Finnerty writes  
17 "Steve, Jeff asked that I send you a deck  
18 summarizing the Charter negotiations in  
19 advance of your 11:00 a.m. meeting with Neil  
20 Smith." Do you see that?

21 A I do see that.

22 Q And it then includes a slide deck

1 that discusses negotiations with Charter, as  
2 an attachment to the email?

3 A I see that.

4 Q If you want to take a moment to  
5 look at it, please do. I want to ask you a  
6 question about page seven of this document.

7 A I'm to page seven.

8 Q There's a heading that says

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13 A Yes.

14 Q [REDACTED]  
15 [REDACTED]

16 Did I read that correctly?

17 A You did.

18 Q Do you agree with that concern?

19 A I believe that's a valid concern  
20 for them, as a risk.

21 Q It then says [REDACTED]

22 [REDACTED]

1 [REDACTED] Do you agree  
2 with that concern?

3 A [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 Q Yes. Is that what it appears to  
8 you?

9 A That appears to be the concern,  
10 [REDACTED]  
11 [REDACTED]

12 Q And is that a reasonable concern  
13 to you?

14 A Well, if it provides -- I think  
15 they're looking at risk, and if this provides  
16 new information to decision-makers in the  
17 content acquisition side of cable companies,  
18 or DBS firms, then of course that's a risk, if  
19 that provides negative information.

20 That is, there's no adverse effect  
21 to Charter. That would provide new  
22 information to the decision-makers reviewing

1 that information, which is important, which is  
2 precisely the kind of analysis that I  
3 undertake.

4 Q [REDACTED]  
5 [REDACTED], if it can  
6 signal to the industry that these networks are  
7 worthy of broad distribution, would you agree  
8 with me that Comcast, as a much larger  
9 company, can have that effect?

10 A If Comcast can provide new  
11 information to other cable companies and  
12 decision-makers about the value of  
13 programming? I agree with that. But that's  
14 information that helps determine the value of  
15 programming.

16 Q Am I correct, that you have not  
17 made a point of going back and reviewing the  
18 Comcast documents, regarding their decisions  
19 about carriage of Versus and Golf?

20 A I have not come back to those. We  
21 talked about that earlier.

22 Q Let me approach with another

1 document, if I may.

2 MR. PHILLIPS: Are you close to  
3 the end?

4 MR. SCHMIDT: I may be getting  
5 close to the end, yes.

6 THE WITNESS: That doesn't seem  
7 like a very certain statement.

8 MR. SCHMIDT: Mr. Orszag knows me  
9 enough that I'm bad at counting time.

10 (Simultaneous speaking.)

11 JUDGE SIPPEL: It's pretty good  
12 for timeliness, isn't there?

13 MR. SCHMIDT: I'm hopeful it won't  
14 be much more time.

15 JUDGE SIPPEL: Are you  
16 comfortable, Mr. Orszag?

17 THE WITNESS: So far.

18 JUDGE SIPPEL: So far.

19 BY MR. SCHMIDT:

20 Q This is a document that was  
21 produced during this litigation, and it's in  
22 evidence. Is it something you've seen before?

1           A       I have seen this document.

2           Q       When did you see this document?

3           A       I think when I reading Mr. Shell's  
4 deposition, I looked at his exhibits, and I  
5 believe this was an exhibit to Mr. Shell's  
6 deposition.

7           Q       Okay. The January 12th, 2006  
8 email at 6:44 a.m. from Mr. Shell to Blythe  
9 Holbrooke starts about a third of the way down  
10 the page. Are you there with me?

11          A       I am.

12          Q       He writes, responding to an  
13 earlier note from her, and if you want to read  
14 through the email chain to familiarize  
15 yourself with it, please do. I'm going to  
16 focus on this one email.

17          A       Okay.

18          Q       Tell me when you're ready to  
19 answer my question. It says "I'm flat. I'm  
20 on a roll. Sign Ryan Seacrest at EN. Ratings  
21 are up there for the first time in six years,"  
22 and then this is the language I'd like to

1 focus on. "Signed hockey for OLN." That's  
2 Versus, right?

3 A That is Versus.

4 Q Are you aware of when that  
5 happened?

6 A I believe it was late 2005 or  
7 early 2006. I'm not sure precisely the time,  
8 precisely the time line.

9 Q Around that time period?

10 A I believe that to be the case,  
11 yes.

12 Q "Signed hockey for Versus," and  
13 uses an expletive, "channel that was dead in  
14 the water is now a competitor of ESPN." Did  
15 I read that correctly?

16 A Yes, you did.

17 Q Did you see any consideration by  
18 Comcast? Mr. Shell is the head of Programming  
19 at Comcast; correct?

20 A I'm not sure what that timing was,  
21 but at some time he was.

22 Q In charge of all the channels for

1 Comcast; correct?

2 A At some point he was, yes.

3 Q And did you see any consideration  
4 as to whether a channel, that the head of  
5 Programming for all of Comcast calls "dead in  
6 the water" merited the broad coverage that it  
7 received at the time that it was dead in the  
8 water?

9 A If he's speaking in 2006, I  
10 believe their agreement was from many years  
11 earlier, so they were bound by, I believe, the  
12 terms of that agreement, although it's not  
13 something I've studied.

14 Q You didn't see if they ever  
15 reconsidered their tiering, in light of the  
16 fact that the channel was dead in the water,  
17 in the views of Mr. Shell, did you?

18 A I'm not sure if they have the  
19 right to retier. That's not something I've  
20 studied.

21 Q Who was the agreement between?

22 A Sitting here today, again, I

1 didn't study that agreement. So I don't know  
2 that issue. This is a question that seems to  
3 be better geared towards Mr. Shell and what he  
4 meant by this.

5 Q I'm sorry. The agreement was  
6 between Versus and who, the one that you just  
7 referred to?

8 A What do you mean?

9 Q You just referred to the agreement  
10 had been signed in the past.

11 A I believe they were working under  
12 an agreement at this time.

13 Q With who?

14 A With Comcast.

15 Q And did you ever see any -- was  
16 there something that changed negatively for  
17 Versus that you know of, that led Mr. Shell to  
18 say it was dead in the water, before the  
19 signing of hockey in late 2005 or early 2006?

20 A I don't know if they had lost  
21 content in late 2005 -- in this period, 2005.

22 Q You don't know one way or the

1 other?

2 A One way or the other.

3 Q Did you see any analysis, either  
4 at the time of the signing or later, of  
5 whether a channel that the head of Programming  
6 at Comcast calls "dead in the water" merited  
7 the broad penetration that it gets?

8 A Well, at this point, he's now  
9 thinking it's actually quite successful, if  
10 it's going to be a competitor of ESPN. So I'm  
11 not sure I understand your question.

12 Q Let me try to ask it again. He's  
13 referring to it having been dead in the water  
14 in the past; correct?

15 A He says in the past tense, it was  
16 dead in the water.

17 Q So that's an easy yes, right?

18 A Yes.

19 Q Thank you, and the time he refers  
20 to is before they got hockey; correct?

21 A That is correct.

22 Q 2005, 2006, some time before that

1 window?

2 A That is correct.

3 Q Did you see any analysis by  
4 Comcast of whether a channel that the head of  
5 all programming at Comcast calls "dead in the  
6 water," merited the broad penetration that it  
7 gets, yes or no?

8 A It's not something I have seen.

9 Q Let me try to run through very  
10 quickly some other aspects of your testimony,  
11 so that I can try to get us finished today,  
12 subject to my reopener, based on this new  
13 analysis. You talk in your report, and I'm  
14 looking at pages 20 through 24, about the  
15 breadth of appeal of sports, the popularity of  
16 the underlying sports; correct?

17 A I include that. Yes, I included a  
18 discussion of that.

19 Q Do you agree with me that that's  
20 pretty far down the list of factors that MSOs  
21 consider in granting carriage?

22 A I believe it's a factor, but it's

1 not the key factor. I would say price and  
2 distribution are the, sort of the most  
3 important factors?

4 Q Certainly not near the top of the  
5 list, right?

6 A And quality of the program.

7 Q Certainly not near the top of the  
8 list; correct?

9 A I would say it's on the list. I  
10 wouldn't know where precisely -- it's not one  
11 of the top three, I'd put it that way.

12 Q You analyzed programming  
13 expenditures on pages 25 through 30 of your  
14 direct testimony?

15 A That is correct.

16 Q That's also reflected on Exhibit  
17 1101; correct?

18 A That is correct.

19 Q Are you aware that Comcast did not  
20 consider those programming expenditures when  
21 it rejected Tennis Channel's offer in 2009?  
22 Have you seen that testimony from Ms. Gaiski?

1           A       I saw her testimony, and you know,  
2 I wouldn't expect it's because they make an  
3 intuitive business decision about the quality  
4 of the programming, based on the information  
5 they have. I'm an outside analyst informing  
6 the quality of the programming from the  
7 programming expenditures. So it doesn't  
8 surprise me at all that she didn't look at it.

9           Q       Okay, but that's my question.  
10 Comcast didn't look at programming  
11 expenditures when it rejected Tennis Channel's  
12 offer in 2009, did it?

13          A       She said that she did not.

14          Q       You understand that there's  
15 programing that's very popular, that does not  
16 involve a great deal of expense to produce;  
17 correct?

18          A       Outside of sports, or total?

19          Q       Any area.

20          A       Outside of sports, I'm aware that  
21 there is programming that is relatively cheap,  
22 that is quite popular with consumers. But not

1       inside of sports. I have yet to see that.

2               Q       Have you done any analysis of what  
3       financial impact, any specific analysis of  
4       what financial impact it would have on Tennis  
5       Channel, if it cut its rates? Have you done  
6       that kind of financial analysis?

7               A       I have not conducted a financial  
8       analysis.

9               Q       So you're not in a position to say  
10       how it would affect the viability of the  
11       operation, if it lowered or increased its  
12       rates, are you?

13              A       If distribution is what they want,  
14       they have that choice available to them. It's  
15       not an analysis I have conducted.

16              Q       Okay. That's my question. You  
17       have not done a financial analysis of whether  
18       Tennis Channel, Tennis Channel's financial  
19       viability would be improved or decreased,  
20       based on whether it raises or lowers rates,  
21       have you?

22              A       It would depend on how much

1 distribution they get.

2 Q And you haven't done that  
3 analysis?

4 A I have not done that analysis.

5 Q You can't say if they reduced it  
6 by this much, they'd get this much more  
7 distribution, right?

8 A I assume that they -- that you're  
9 correct. Just give you a yes or no.

10 Q Thank you. Do you acknowledge  
11 that Tennis Channel and Versus compete for  
12 programming?

13 A It is not clear to me that they  
14 have ever bid directly to each other, from the  
15 evidence that I have seen.

16 Q Have they competed for the same  
17 kind of tennis programming?

18 A You just inserted the word "kind."  
19 So I just -- it's not clear that they've ever  
20 been in the same competitive bidding process,  
21 from the data I've seen.

22 Q Do you rule that out?

1           A       I don't rule that out.

2           Q       Did you ask anyone at Comcast  
3 whether they were competing for Tennis Channel  
4 rates, for tennis rates with Tennis Channel?

5           A       Competing directly or -- I've  
6 reviewed all the record evidence, and this is  
7 why there's a little bit of uncertainty about  
8 who was ever the actual bidders, versus  
9 potential bidders.

10          Q       Did you try to resolve that  
11 uncertainty?

12          A       It wasn't -- didn't change my  
13 analysis, because the single most important  
14 bidder in that context was ESPN. They are the  
15 ones that won, which means they were the  
16 closest competitor.

17                   They were the constraint. So  
18 nothing that Comcast was going to do was going  
19 to change, in essence, that fact. So it  
20 wasn't, it wasn't a relevant fact for my  
21 analysis.

22          Q       So you didn't consider it?

1           A       I considered it, and I rejected it  
2 as relevant.

3           Q       Did you find the answer to the  
4 question, of whether Tennis Channel and Versus  
5 actually competed for tennis events?

6           A       I did not find whether they  
7 actually have ever actually competed head to  
8 head for tennis events. I have not found that  
9 answer.

10           MR. SCHMIDT: Are you aware that  
11 even as we speak today, and I'll rely on you  
12 to tell me if we need to close the court for  
13 what I'm about to ask. I think you know what  
14 I'm about to ask.

15           MR. TOSCANO: I think I do.

16           THE WITNESS: Mike?

17           MR. SCHMIDT: He said yesterday he  
18 didn't mind.

19           MR. TOSCANO: Forgive me, Your  
20 Honor. The stipulation, Mr. Carroll.

21           MR. CARROLL: I think it is fine,  
22 as long as you're not going to go beyond an

1 area of the stipulation.

2 BY MR. SCHMIDT:

3 Q Are you aware that even today,  
4 Versus is attempting to secure some of the  
5 most valuable tennis programing that exists?

6 A I understand that Versus, when  
7 Wimbledon rights, which I assume is what you  
8 mean by one of the most valuable tennis  
9 programs.

10 Q That's correct.

11 A That it's unclear to me when  
12 they're actually available. It's a few years  
13 into the future, I believe, that they will at  
14 that time be looking at trying to acquire  
15 those rights. But I do not know the details  
16 of that, and it's something that is in the  
17 future, and so it's hard to sort of speculate  
18 about what will happen.

19 Q So do you have an understanding as  
20 to whether right now Versus is pursuing those  
21 rights?

22 A That's not something I, sitting

1 here today, know whether they are right now,  
2 looking to the future, for the future rights.

3 Q Do you know whether they're  
4 specifically trying to acquire cable rights  
5 from the Tennis Channel presently, as the  
6 license holder?

7 A I do not know specifically the  
8 question.

9 Q That's not something you  
10 considered in your analysis, whether Versus  
11 and Tennis Channel are similarly situated?

12 A Again, it would go to the question  
13 of how close -- similarly situated is a legal  
14 term. The question is the closeness of  
15 competition, and the question is who else are  
16 the other competitors for that product, and  
17 that's not something that I've analyzed,  
18 because that is a prospective competition, and  
19 I don't think the other potential bidders have  
20 been revealed.

21 Q Could you ask that question? Did  
22 you try to find the answer to that question?

1           A       I did try to find some answers,  
2       but there was -- it was complex about what --  
3       no one knows what the other bidders are going  
4       to do, because that's not publicly available  
5       information, if there's anyone else who will  
6       try to enter into the negotiations.

7           Q       Recognize that Wimbledon rights  
8       generally are some of the Tennis Channel's  
9       most valuable content?

10          A       I don't know precisely they  
11       consider to be the most valuable versus the  
12       less valuable. Wimbledon is a highly -- of  
13       the tennis events, which tend to have lower  
14       viewership, Wimbledon is one of the more  
15       highly viewed programs.

16          Q       Would you expect that to be, those  
17       to be rights that the Tennis Channel would  
18       care greatly about?

19          A       I would expect those to be rights  
20       the Tennis Channel is interested in, yes.

21          Q       Would you expect, to the extent  
22       that they're able, based on their available

1 funding to bid for programming, that they  
2 would bid for Wimbledon rights, given that  
3 they are the Tennis Channel?

4 A I wouldn't be surprised if they  
5 bid for a certain set of rights.

6 Q Would you be surprised if they  
7 wanted to get as many Wimbledon rights as they  
8 wanted, given that they are the Tennis  
9 Channel?

10 A I think your statement was a  
11 truism, so I'll say I agree with it, because  
12 --

13 MR. SCHMIDT: Let me approach if I  
14 may, Your Honor.

15 JUDGE SIPPEL: You may. The  
16 Tennis Channel. Are you talking about  
17 prospective competition?

18 THE WITNESS: I'm talking about  
19 competition today, Your Honor.

20 JUDGE SIPPEL: Pardon?

21 THE WITNESS: I'm talking about  
22 competition today, Your Honor.

1 JUDGE SIPPEL: Because this is  
2 future plans you're talking about.

3 THE WITNESS: It's competition  
4 today for future tournaments. So tournaments  
5 get bid on, obviously several years out. This  
6 is current competition for future rights.

7 JUDGE SIPPEL: All right. Well,  
8 I'm trying to keep this in perspective, at  
9 least in my own mind. This is not like a --  
10 I mean it's similar to an antitrust violation  
11 or enforcement or what it would violate. I  
12 just don't know what.

13 But this is an act of  
14 discrimination in connection with, addressed  
15 to another competitor, and it doesn't  
16 necessarily have to carry forward, is that  
17 right?

18 I mean if there was an act of  
19 discrimination in connection with the  
20 assigning Tennis Channel to a tier, to a  
21 disadvantaged tier, prospective, except for  
22 perhaps at the relief stage.

1                   But the prospective possibility of  
2                   other. I mean these are aspects of other,  
3                   maybe another violation or maybe putting  
4                   another aspect to the violation, if it has  
5                   been committed.

6                   MR. CARROLL: Your Honor, that's  
7                   our view then. That's right. They're making  
8                   a discrimination claim for 2009. Prospective  
9                   would be, might relate to some remedy issue,  
10                  if we got there. But we're suing for a claim  
11                  supposedly for an act of discrimination in the  
12                  past. That's our view of it.

13                  JUDGE SIPPEL: Yes. I'm trying to  
14                  carefully articulate, because all I'm trying  
15                  to do is do we need to go into all of this  
16                  now?

17                  MR. SCHMIDT: I think we do, Your  
18                  Honor, and I intend to brief on this with this  
19                  witness. Here's why we think it's relevant.  
20                  Our position is that Comcast discriminated  
21                  against Tennis Channel in 2009 when it  
22                  rejected our offer, that that discrimination