

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of: MB Docket No. 08-214

HERRING BROADCASTING, INC.
D/B/A WEALTHTV,
Complainant, File No. CSR-7709-P
v.

TIME WARNER CABLE, INC.
Defendant.

HERRING BROADCASTING, INC.
D/B/A WEALTHTV,
Complainant, File No. CSR-7822-P
v.

BRIGHT HOUSE NETWORKS, LLC,
Defendant.

HERRING BROADCASTING, INC.
D/B/A WEALTHTV,
Complainant, File No. CSR-7829-P
v.

COX COMMUNICATIONS, INC.,
Defendant.

HERRING BROADCASTING, INC.
D/B/A WEALTHTV,
Complainant, File No. CSR-7907-P
v.

COMCAST CORPORATION,
Defendant.

Volume 18

Friday, May 1, 2009

10:30 a.m.

The Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
Hearing Room TW-A363

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Chief Administrative Law Judge

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1 P R O C E E D I N G S

2 10:35 A.M.

3 JUDGE SIPPEL: Let's go on the
4 record. Good morning, everyone. We are in
5 our, I guess this is the last day of the
6 second week and I guess I'll just ask the
7 usual question. Do we have a witness?

8 MR. MILLS: Yes, sir. We do, Your
9 Honor.

10 JUDGE SIPPEL: That would be?

11 MR. MILLS: Cox calls Leo Brennan,
12 the Chief Operating Officer at Cox
13 Communications.

14 JUDGE SIPPEL: Mr. Brennan, please
15 come forward. Raise your right hand. Do you
16 swear or affirm the testimony you're about to
17 give in this case will be the truth, the whole
18 truth, and nothing but the truth?

19 THE WITNESS: Yes, I do.

20 JUDGE SIPPEL: Thank you.

21 WHEREUPON,

22 LEO BRENNAN

1 WAS CALLED FOR EXAMINATION BY COUNSEL FOR COX
2 COMMUNICATIONS, AND, HAVING FIRST BEEN DULY
3 SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

4 DIRECT EXAMINATION

5 BY MR. MILLS:

6 Q Good morning, Mr. Brennan.

7 A Good morning.

8 Q You'll get to know that chair a
9 little.

10 JUDGE SIPPEL: Please feel free to
11 use our glasses.

12 MR. MILLS: Thank you, Your Honor.

13 BY MR. MILLS:

14 Q Could you please give us your full
15 name and your title at Cox, please?

16 A Leo Brennan and I am the Chief
17 Operations Officer for Cox Communications.

18 Q How long have you held that
19 position at Cox?

20 A Since January of this year.

21 Q Okay, so you've only been there
22 for a couple of months. What position did you

1 hold at Cox before that?

2 A I was their general manager of
3 their Las Vegas operation.

4 Q And what years were you the
5 general manager of the Las Vegas operation?

6 A I started there in January of 2008
7 through -- or 2005 through December of 2008.

8 Q And that's -- you left there and
9 came to Atlanta?

10 A Yes.

11 Q To serve in your current capacity?

12 A Yes, I did.

13 Q Before you were in Las Vegas in
14 January of '05, what position did you hold at
15 Cox?

16 A General manager of Cox's Orange
17 County, California system.

18 Q And what years were you there?

19 A From 1990 through 2005.

20 Q The Orange County system and the
21 Las Vegas system, are these two of the 26 or
22 so Cox systems that we've referred to?

1 A Yes, they are.

2 Q Thank you. I'd like to show you

3 Cox Exhibit 81.

4 (Whereupon, the above-referred to
5 document was marked as Cox Exhibit
6 81 for identification.)

7 JUDGE SIPPEL: Thank you.

8 BY MR. MILLS:

9 Q Mr. Brennan, do you recognize Cox
10 Exhibit 81?

11 A Yes, I do.

12 Q What is it?

13 A It's my direct testimony.

14 Q Your direct testimony in this
15 case?

16 A Yes, it is.

17 Q Will you turn to the last page,
18 please. Is that your signature?

19 A Yes, it is.

20 Q Is everything in this statement
21 true?

22 A Yes, it is.

1 MR. MILLS: Your Honor, I move for
2 admission of Cox Exhibit 81 into evidence at
3 this time.

4 JUDGE SIPPEL: It's identified as
5 the direct testimony of Mr. Leo Brennan. Is
6 there any objection, Ms. Wallman?

7 MS. WALLMAN: No, Your Honor.

8 JUDGE SIPPEL: It's identified and
9 received this first day of May 2009 as Cox
10 Exhibit 81. Thank you.

11 (The document, having been marked
12 previously for identification as
13 Cox Exhibit 81, was received in
14 evidence.)

15 MR. MILLS: Thank you, Your Honor.

16 BY MR. MILLS:

17 Q Briefly, Mr. Brennan, I'd like to
18 ask you a couple of questions.

19 First, are you familiar with how
20 corporate decisions are made with regard to
21 programming at Cox Communications?

22 A Yes, I am.

1 Q Could you briefly describe that
2 for the Court?

3 A Well, if a program supplier has
4 interest in distribution on any of the Cox
5 Communications systems, they go see Bob Wilson
6 who heads our programming department to
7 negotiate an agreement for carriage.

8 Q Is there local system involvement
9 at all in the programming decisions at Cox?

10 A Rarely. There may be times when
11 Bob or Andy might call us and ask us for input
12 on some programming we're looking for and
13 there are those rare occasions where there may
14 be programming that isn't necessarily of
15 national interest across all the Cox property,
16 but it's more regionally focused and if we
17 would have an interest in that type of
18 program, we would contact Bob and let him know
19 that.

20 Q Can you think of an example of
21 something along those lines?

22 A Yes, when I was in the Las Vegas

1 system, a good example is College Sports
2 Television Network. This is a college sports
3 programming network and during the time I was
4 there they acquired rights to carry the
5 Mountain West Conference sports, basketball,
6 football, and the University of Las Vegas,
7 UNLV, is in the Mountain West Conference. And
8 as a result of that, we had a tremendous
9 amount of interest in us carrying that
10 product. Of course, that was our local team.
11 And so based on that, I gave Bob a call and
12 expressed to him our real interest to have him
13 take a look at that programming for us.

14 Q Bob meaning Bob Wilson?

15 A Bob Wilson.

16 Q And was that successful? Were you
17 able to get that programming?

18 A Yes, Bob was able to negotiate an
19 agreement for us to carry that product.

20 Q Do you have interactions with
21 programmers at the systems where you've been
22 general manager, Orange County and Las Vegas?

1 A Yes, we do from time to time.

2 Q Could you please briefly describe
3 that for the Court?

4 A Well, depending on the programmer,
5 in many cases the programmers that we carry
6 would come in to train some of our CSRs or
7 Customer Service Representatives on their
8 product. They might come in just to educate
9 us in some new product that they were
10 introducing as part of their lineup. In some
11 cases, somebody new to the programming
12 environment might come in to try to educate us
13 on their product or to build relationships,
14 network with us, those kind of things.

15 Q Do programmers ever come in to
16 negotiate deals in the systems that you've
17 been in?

18 A No.

19 Q Why is that?

20 A Because all agreements for
21 carriage are negotiated by Bob Wilson at the
22 corporate

1 office.

2 Q When is the first time you heard
3 of WealthTV?

4 A When I was in Orange County back
5 in maybe '04.

6 Q Do you know a gentleman by name of
7 Nico Fasano?

8 A Yes, I do.

9 Q And who is that?

10 A He was one of the sales
11 representatives for WealthTV.

12 Q Is that the person who first
13 brought WealthTV to your attention in 2004?

14 A Yes, he is.

15 Q Was that an in-person meeting or a
16 telephone call?

17 A Yes, he stopped by to see me.

18 Q And can you describe briefly for
19 the Court that conversation?

20 A Well, he came in and the main
21 purpose was to let me know about the network
22 and try to educate me on the network and

1 obviously drum up interest for the network.
2 He shared with me the fact that the network
3 was either on the air or going to be on the
4 air soon. I forget which. And talked about
5 the fact that it was a network that was
6 basically broad-based in terms of its appeal
7 and that was a network about wealth. And I
8 think in one case he referred to it as
9 lifestyles of the rich and famous, I think was
10 one adjective he used to describe it.

11 Q Did you form an impression of the
12 network based on that conversation?

13 A Well, it was difficult to form an
14 impression of the network. It was new and I
15 certainly hadn't seen the product, but I think
16 I made a comment to Nico that when he talked
17 about it, it was a product that would be
18 geared toward the wealthy, that a channel
19 toward the wealthy would probably appeal to
20 wealthy people.

21 Q And did you have wealthy people in
22 your system?

1 A We had some, yes.

2 Q Did you bring that WealthTV
3 network to the attention of the corporate
4 department at Cox?

5 A No.

6 Q Why is that?

7 A Well, at that point I didn't know
8 enough about the network and I really had no
9 interest in the network in terms of carriage
10 in our local system. As I explained to Nic
11 when we first met, we had a number of issues
12 going on. One was that we were pretty
13 strained in terms of our network capacity in
14 the Orange County system which is part of Los
15 Angeles. We had a tremendous amount of must-
16 carry signals that we were required to carry,
17 so bandwidth capacity was a big issue for us.

18 At the same time, I knew that Bob
19 Wilson was in the process of talking to a lot
20 of the existing programmers that we carried,
21 who were looking at possibly introducing a
22 high definition product and I didn't know what

1 the outcome of those negotiations were going
2 to be in terms of Bob calling to ask us to put
3 on some high definition product.

4 And also, it was pretty much a new
5 network that didn't have a lot of history and
6 that we didn't really know a lot about and so
7 for a lot of those reasons we really didn't --
8 I didn't have a major interest in it, so I
9 never called Bob.

10 Q Do you remember any contact with
11 anybody from WealthTV directly with you when
12 you went to the Las Vegas system in 2005?

13 A No.

14 Q You don't remember a meeting in
15 2005 with Nico Fasano after you had gotten to
16 the Las Vegas system?

17 A No, I don't.

18 Q Do you remember ever saying to him
19 that there was a strong likelihood of a
20 launch?

21 A No.

22 Q In the Las Vegas system?

1 JUDGE SIPPEL: Wait until he
2 finishes his question.

3 THE WITNESS: I'm sorry.

4 BY MR. MILLS:

5 Q Do you remember saying to him that
6 there was a strong likelihood of a launch
7 either of digital or high definition signal of
8 WealthTV in the Las Vegas system?

9 A No, I don't.

10 Q Do you have any reason to believe
11 you would have said that?

12 A No, quite to the contrary. I mean
13 when I went to Las Vegas, we were -- in fact,
14 it was pretty much the same situation. We
15 were -- although we weren't as constrained in
16 capacity as I was when I was running Orange
17 County, we still were pretty tight. Again,
18 Bob was looking at some high definition
19 product. I didn't know what we were going to
20 have to carry. Things had not changed. As I
21 had said to Nic when he first came in, the
22 only way to even be considered would be to

1 have a programming agreement with Bob Wilson
2 at corporate and they still had not had an
3 agreement to my knowledge, so there would be
4 no reason for that.

5 Q Let me turn to KLAS. Do you
6 remember having any contact with KLAS with
7 regard to WealthTV?

8 A Yes, I do.

9 Q First, can you tell us what KLAS
10 is?

11 A KLAS in Las Vegas is the local CBS
12 affiliate. They're the local CBS network.

13 Q Is it a broadcast station?

14 A Broadcast network.

15 Q Okay, and who -- tell us about the
16 content. Was this 2006?

17 A I believe it was in 2006. Yes,
18 because it was right after we had done a
19 retransmission consent agreement with them.

20 Q What is a retransmission consent
21 agreement?

22 A A retransmission consent agreement

1 is an agreement between the broadcaster and
2 the cable operator that dictates what the
3 terms of carriage are for their product in
4 that marketplace.

5 Q Did you have a retransmission
6 consent agreement with KLAS TV?

7 A Yes, we did.

8 Q Could you -- all right, just go
9 ahead and tell the Court briefly, if you
10 would, the contact you've had with KLAS.

11 A Well, I received a call from Emily
12 Nielson letting me know that --

13 Q I'm sorry to trouble you, could
14 you just tell us who Emily Nielson is?

15 A Emily Nielson was the general
16 manager responsible for KLAS, the CBA
17 affiliated, local affiliate in Las Vegas.

18 She called me and expressed an
19 interest in adding WealthTV as one of their
20 multicast channels were our retransmission
21 consent agreement to the system. That
22 agreement did call for us to carry their

1 primary video signal and it also allowed them
2 to carry two additional multicast signals as
3 long as they owned the product and programmed
4 those channels.

5 And so when Emily called and said
6 that she wanted to know if it would be okay if
7 she multicast WealthTV over the cable system
8 I told her no, that that would not be
9 appropriate for two reasons. I explained to
10 her that WealthTV was a national cable
11 programming network and that our policy was
12 that they needed to have a carriage agreement
13 by working with Bob Wilson at our corporate
14 office and they had not done that. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

20 Q Did you ever tell Emily Nielson or
21 KLAS that they could not carry WealthTV and
22 broadcast it as a broadcaster on their

1 multicast signals?

2 A No. I would have had no reason to
3 even be involved in an agreement between --

4 JUDGE SIPPPEL: That's too
5 speculative. Just recall what actually
6 happened to the best of your ability.

7 THE WITNESS: All right.

8 BY MR. MILLS:

9 Q Did you express that, communicate
10 that to her?

11 A I'm sorry, would you repeat that?

12 Q Sure. Did you ever tell KLAS or
13 Emily Nielson that there were any restrictions
14 on what they could carry with regard to
15 WealthTV?

16 A No.

17 Q Did you have any rights under your
18 retransmission consent agreement between Cox
19 and KLAS to restrict what KLAS could carry and
20 broadcast in Las Vegas?

21 A No.

22 Q [REDACTED]

1

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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JUDGE SIPPEL: Ms. Wallman?

1 MS. WALLMAN: Thank you, Your
2 Honor.

3 CROSS EXAMINATION

4 BY MS. WALLMAN:

5 Q I'm Kathy Wallman. I'm counsel to
6 WealthTV. You mentioned in your summary of
7 written direct testimony that Bob or Andy
8 might call to ask for your input. Were you
9 referring to Bob Wilson?

10 A Yes.

11 Q And were you referring to Andy
12 Albert?

13 A Andy Albert.

14 Q And do you know what Mr. Albert's
15 position is?

16 A Geez, I don't know his exact
17 title, but he works with Bob in terms of
18 negotiating programming agreements.

19 Q You would agree with me he's a key
20 person in the programming department at Cox
21 Corporate Headquarters?

22 A Yes, he is.

1 Q Now with your promotion, your the
2 number two person, is that fair to say at Cox?

3 A Yes, it's fair to say.

4 Q So does Bob Wilson report to you?

5 A No, he reports to Pat Esser.

6 JUDGE SIPPEL: I'm sorry, he what?

7 THE WITNESS: He reports to Pat
8 Esser.

9 BY MS. WALLMAN:

10 Q You indicated that you were the
11 general manager first in the San Diego --

12 A No.

13 Q What was your position in San
14 Diego, please?

15 A I'm sorry, I wasn't in San Diego.
16 I was in Orange County.

17 Q Orange County, pardon me.

18 A I was the general manager.

19 Q General manager in Orange County?

20 A Yes.

21 Q And then you were general manager
22 in Las Vegas?

1 A Yes, I was.

2 Q What are the responsibilities of a
3 general manager?

4 A They oversee the day-to-day
5 operations of the cable system.

6 Q And at least in Las Vegas you had
7 authority to sign a retransmission consent,
8 correct?

9 A Yes, I did.

10 Q Agreement, correct?

11 A Yes, I did.

12 Q And you did sign a retransmission
13 consent agreement with KLAS, correct?

14 A Yes, I did.

15 Q You also had authority to sign
16 modifications to that agreement, correct?

17 A I assume I would have.

18 JUDGE SIPPEL: Did you or did you
19 not? I think the question was did you have
20 authority to do that?

21 THE WITNESS: Yes, I did.

22 BY MS. WALLMAN:

1 Q Now back in Orange County, when
2 you were there, did any representative of
3 WealthTV meet with you?

4 A In Orange County, Nic Fasano met
5 with me.

6 Q And on that occasion did Mr.
7 Fasano give you a sizzle reel, a sample reel
8 of WealthTV's programming?

9 A I don't remember seeing a sample.

10 Q Do you know whether a
11 representative of WealthTV met with people who
12 worked for you in Palos Altos?

13 A I'm sorry, do you mean Palos
14 Verdes?

15 Q Yes.

16 A I am not aware of that.

17 Q Are you acquainted with a man
18 named Art Yoon?

19 A Yes, I am.

20 Q Did you ever speak with Mr. Yoon
21 about WealthTV?

22 A No, I didn't.

1 Q Now did there come a time when
2 WealthTV visited you in Las Vegas?

3 A No.

4 Q No representative of WealthTV
5 visited you when you were charge of the system
6 in Las Vegas?

7 MR. COHEN: Could you verbalize
8 your answers out loud.

9 THE WITNESS: You can't hear me?

10 JUDGE SIPPEL: I take it that the
11 court reporter, it's coming through the
12 transmission.

13 MR. COHEN: I think, Your Honor,
14 that last question he shook his head, but not
15 give a verbal answer.

16 JUDGE SIPPEL: I didn't see it.
17 You can't shake your head. You have to answer
18 yes or no and try and raise your voice a bit,
19 please.

20 BY MS. WALLMAN:

21 Q I asked you no representative of
22 WealthTV visited you in Las Vegas?

1 A No.

2 Q When you were the general manager
3 in Orange County, in fact was that 2004?

4 A 2005, 1990 through 2005.

5 Q When you were general manager
6 there, did Cox have a policy about carriage
7 decisions and who was authorized to make them?

8 A Oh yes, the carriage decisions
9 were always made by Bob Wilson in the
10 corporate programming department.

11 Q So you never had authority while
12 you were in Orange County to make a decision
13 about carrying a programmer?

14 A No.

15 Q You talk in your written summary,
16 written direct -- summary of written direct
17 testimony about retransmission consent. It's
18 also true, isn't it, that a licensed broadcast
19 station has the right to insist upon carriage
20 on a cable system, correct?

21 A Yes, they do. It's called must-
22 carry.

1 Q Must-carry.

2 A Yes.

3 Q So if a local broadcast station
4 can insist upon carriage with a cable system,
5 why would they go to the trouble of
6 negotiating a retransmission consent
7 agreement?

8 A Well, the way it works is they
9 have two options. One option is they just
10 claim a must-carry in which case there is no
11 negotiation and we just put them on. And the
12 second option is they can elect retransmission
13 consent which gives them the opportunity to
14 then negotiate with the cable operator for
15 terms and conditions of carriage.

16 And what normally happens is in
17 the marketplace, normally, the top four
18 networks which are very popular elect
19 retransmission consent with the understanding
20 that they're going to try to get added value
21 for carriage because there are stations that
22 are very popular in the community and stations

1 Q Well, if it's a standard
2 agreement, why is it not executed at
3 headquarters where other carriage decisions
4 were made?

5 A Because it's a negotiation that
6 sometimes can go on for three or four or five
7 or six months and so we do it at the local
8 level and interface with corporate to finalize
9 the agreement.

10 Q There came a time when Emily
11 Nielson, your counterpart at KLAS, called and
12 asked you about the prospect of carrying
13 WealthTV as one of these multicast feeds that
14 you had bargained about in arriving at the
15 retransmission consent agreement, correct?

16 A Correct.

17 Q To your knowledge, does she have a
18 copy of the agreement too?

19 A Oh sure. She executed it.

20 Q She had signed it, correct?

21 A Right.

22 Q And she signed it pretty recently

1 before the time that this call came to you,
2 correct?

3 A Probably wouldn't have been any
4 more than five or six months, I would think.

5 Q So she knew about the conditions
6 that pertained to a multicast feed, if you
7 know, she understood in your call, she
8 reflected that she understood?

9 A Yes, she did.

10 Q What the conditions were. Did she
11 ask you to allow KLAS to provide the feed
12 despite the terms and conditions that you had
13 bargained for with her?

14 A No, that wasn't the way she
15 positioned it.

16 Q How did she position it?

17 A She called and said we would like
18 to put on WealthTV as our multicast feed. Are
19 you okay with that?

20 Q And your response was?

21 A No. It doesn't meet the
22 requirements of our agreement. It's a

1 national cable network that hasn't signed an
2 agreement with our corporate office for
3 carriage. And secondarily, it doesn't meet
4 the requirement in terms of being program
5 produced by you locally.

6 Q What else do you remember about
7 that conversation?

8 A That's pretty well it.

9 Q She gave up at that point?

10 A Oh no. She didn't give up. She
11 said thank you and said she was going to talk
12 to her attorney, but she never called back
13 saying we want to put it on.

14 Q Did you understand her to be
15 asking you to modify the agreement to allow
16 this to happen?

17 A No.

18 Q You had authority to modify the
19 agreement, correct?

20 A Yes.

21 Q So you could have accommodated
22 KLAS in their desire to carry WealthTV if you

1 chose to, correct?

2 A If I chose to, I could have.

3 Q And the reason you did it is that
4 you wanted them to have to go through
5 headquarters if they were going to be seen on
6 the Cox system in Las Vegas, correct?

7 A I did. And they also didn't meet
8 one of the key requirements which was
9 programming that was owned and produced
10 locally.

11 Q The bandwidth that you allocate to
12 carriage of KLAS is locked in for that
13 purpose, correct?

14 A Yes.

15 Q Because even if you didn't reach
16 your retransmission consent agreement, you
17 would have to carry their main feed, correct?

18 A True.

19 Q On their must-carry, correct?

20 A Well, on a retransmission consent,
21 not must-carry.

22 Q Well, even if you didn't reach a

1 retransmission consent agreement, KLAS's
2 signal, at least the main feed would appear on
3 the Cox system by virtue of must-carry,
4 correct?

5 A Well, if we didn't reach an
6 agreement by way of retransmission consent,
7 unless they elected must-carry, we would not
8 be able to carry them. So we had two choices
9 if we didn't reach an agreement. They either
10 elect must-carry or they would have to be
11 dropped because we wouldn't have authority to
12 carry them on the system.

13 Q Well, a must-carry versus
14 retransmission consent election is not
15 permanent. It comes up periodically, correct?

16 A Yes.

17 Q It's not as though from the
18 beginning of time you have to make a choice
19 and you have to stick with it?

20 A No, normally it's an agreement
21 that will be at least three years, maybe a
22 little bit longer, depending on the

1 negotiation.

2 Q Why is retransmission consent
3 agreement valuable to a broadcaster? They can
4 broadcast their signal and have it received by
5 television sets throughout the area where your
6 subscribers pay for cable service, correct?

7 A Yes, they can.

8 Q Why bother to have a
9 retransmission consent agreement with the
10 cable company?

11 A Well, most times when people are
12 subscribers to cable television they don't
13 have antennas, and so it's not easy for them
14 to access a signal off the air. They count on
15 the cable distribution to get that signal and
16 KLAS and every other broadcaster in America
17 understands that.

18 Q So is it the case in the Las Vegas
19 market when you were general manager there
20 that most people who were looking at broadcast
21 signals, if you know, were doing that through
22 the Cox cable system, rather than over-the-

1 air?

2 A Well, our subscribers were and we
3 had about 54 percent of the market, so 54
4 percent were, 46 percent were not, roughly.

5 Q Did you ever reach an agreement
6 about which multicast signals would be carried
7 by KLAS through the Cox retransmission
8 agreement?

9 A Well, when I was there, they had
10 the option of two multicast channels. They
11 were using one of them to simulcast their
12 digital signal. In other words, they just
13 duplicated their primary feed on the
14 multicast, one of the multicast channels.

15 Q Do you have an understanding of
16 why they would do that?

17 A More exposure. Now people have
18 another channel, as people go through the
19 dial, they see they have another opportunity
20 to pick them up and since they weren't using
21 it for any other programming and since it met
22 the definition in our agreement, they had the

1 rights to do that.

2 Q Do you know whether they ever used
3 a second multicast channel while you were
4 there?

5 A While I was there, they did not.

6 Q And after you left, did you have
7 occasion to learn whether they did occupy that
8 other multicast channel?

9 A No, I have not.

10 Q Have you ever spoken to Mr.
11 Charles Herring?

12 A No.

13 Q Did you ever have a conversation
14 with him about the topic of CBS MarketWatch?

15 A CBS MarketWatch?

16 Q Yes.

17 A No. I'm not sure what that is.

18 Q And is it your testimony that you
19 had never spoken to him by phone or in person?

20 A My testimony was based on the fact
21 that I had never spoken to him about KLAS. I
22 may have spoken with Mr. Herring back when I

1 was in Orange County, but that was before the
2 KLAS issue came up. That came up in Vegas.

3 Q Understood. While you had the
4 responsibilities that you had in Las Vegas,
5 did you ever have a conversation with Charles
6 Herring?

7 A Not to my knowledge, no.

8 Q Do you recall having any
9 conversation with Mr. Herring concerning your
10 mother's health?

11 A No.

12 Q Did you ever receive an email from
13 Charles Herring?

14 A No.

15 Q You're quite definite about that?

16 A Yes, I am.

17 MS. WALLMAN: May I have a moment,
18 Your Honor?

19 JUDGE SIPPEL: You may.

20 (Pause.)

21 BY MS. WALLMAN:

22 Q Mr. Brennan, understanding your

1 testimony is you've never received an email
2 from Mr. Charles Herring, I'd like to show you
3 a document and see if you recognize it.

4 A Okay.

5 MS. WALLMAN: May I approach the
6 witness?

7 JUDGE SIPPEL: You may.

8 BY MS. WALLMAN:

9 Q This is marked as WealthTV Exhibit
10 11 and it is -- I'm sorry, 111. And it has
11 been admitted into evidence.

12 JUDGE SIPPEL: All right, you may
13 approach the witness certainly.

14 MR. MILLS: What number again was
15 it?

16 MS. WALLMAN: 111.

17 MR. MILLS: Of WealthTV?

18 MS. WALLMAN: Of WealthTV.

19 MR. MILLS: Your Honor, if this is
20 -- if I remember correctly, if this is the
21 email, the witness has already said he's
22 definite he didn't receive --

1 JUDGE SIPPEL: Wait a minute,
2 don't go into that because -- you can't do it
3 that way, Mr. Mills.

4 MR. MILLS: All right, we'll see
5 what he says.

6 JUDGE SIPPEL: Yes, sir.

7 MR. MILLS: Okay.

8 BY MS. WALLMAN:

9 Q Mr. Brennan, let me describe the
10 document for the record. This is a one-page
11 exhibit, an email from Charles Herring to
12 leo.brennan@cox.net dated Monday, May 15,
13 2006. And it reads, "Leo, thanks for your
14 returned call last week. Giving you a call
15 sa ved me some time. The KLAS
16 opportunity sounded interesting, although
17 without the picture ... and then there's some
18 social exchange that follows."

19 Have you ever seen this document?

20 A Yes, I saw this in terms of trial
21 preparation.

22 Q You had not seen it before you

1 started to prepare for your testimony?

2 A That is true.

3 Q Did the leo.brennan@cox.net email
4 belong to you?

5 A No. My email address was
6 leo.brennan@cox.com.

7 Q Was that email addressed assigned
8 to your home in some sense? The cox.net?

9 A It could have been. However, the
10 only email address I use was
11 leo.brennan@cox.com because I had a computer
12 at home that was VPNed into my office for work
13 purposes.

14 Q Well, as cox.net customer you're
15 familiar, aren't you, with the process for
16 setting up email addresses, correct?

17 MR. MILLS: Objection on
18 foundation.

19 THE WITNESS: Unfortunately, I --

20 JUDGE SIPPEL: Wait, wait, wait,
21 whoa, whoa, whoa.

22 MR. MILLS: The question was as a

1 cox.net customer?

2 MS. WALLMAN: Let me ask --

3 JUDGE SIPPEL: Go ahead. I

4 understand. I'm going to overrule the

5 objection. You can rephrase.

6 BY MS. WALLMAN:

7 Q Have you been a customer of the

8 Cox internet service?

9 A I was when I was in Las Vegas and
10 Orange County, yes.

11 Q Are you aware that if you're a Cox
12 internet customer you have an opportunity to
13 set up your own email addresses?

14 A Yes, I am.

15 Q Do you recall doing that when you
16 were a Cox customer in Las Vegas?

17 A I wouldn't have done that.

18 JUDGE SIPPEL: The question was
19 did you recall doing it?

20 THE WITNESS: No. No.

21 JUDGE SIPPEL: And he said he
22 wouldn't do it. So you can pursue that.

1 BY MS. WALLMAN:

2 Q So you don't recall doing that?

3 A No.

4 Q Do you know whether you ever
5 received email at that address?

6 A I don't know because I never would
7 have checked it because I used
8 leo.brennan@cox.com since I was VPNed into the
9 office.

10 Q Could you look at your testimony,
11 please.

12 JUDGE SIPPEL: Let me ask this.
13 Is there such an address as
14 leo.brennan@cox.net?

15 THE WITNESS: There might be.

16 JUDGE SIPPEL: There might be?

17 THE WITNESS: I mean --

18 JUDGE SIPPEL: For you? I'm
19 saying for you. Would there be some other Leo
20 Brennan?

21 THE WITNESS: No, when, in fact,
22 they hooked up our cable service at my house,

1 my technicians would do all the work, so they
2 may have hooked up a leo.brennan@cox.net
3 address, but I wouldn't have utilized it
4 because I was VPNed into the office so all my
5 email came to leo.brennan@cox.com.

6 JUDGE SIPPEL: Well, but your
7 testimony would be that you never used
8 leo.brennan@cox.net?

9 THE WITNESS: True.

10 JUDGE SIPPEL: And does the .net
11 mean a residence or can you use .net at a
12 commercial place of business?

13 THE WITNESS: I believe you can
14 use cox.net in a commercial business.

15 JUDGE SIPPEL: Well, okay. That's
16 enough for me. If you want to pursue it a
17 little bit that's fine. Blackberry alert.
18 And mine is upstairs.

19 (Laughter.)

20 Do you have a Blackberry, sir?

21 THE WITNESS: Yes, I do.

22 JUDGE SIPPEL: Even if it's not

1 on, it might be -- is it off or on?

2 THE WITNESS: It's off.

3 JUDGE SIPPEL: Do you want to pass
4 it to counsel, because you're in a direct line
5 and even if it's off, the transmission
6 sometimes gets -- go ahead.

7 BY MS. WALLMAN:

8 Q Mr. Brennan, could you please look
9 at your direct testimony which has been
10 entered into evidence as Cox Exhibit 81,
11 paragraph 23 on page 8, please?

12 JUDGE SIPPEL: Wait just a minute.
13 I'm going back to this Exhibit 111. I see --
14 all right, all right. Okay. Go ahead, sir.
15 It was shown to you in trial preparation, but
16 you otherwise have never seen this document
17 period?

18 THE WITNESS: Correct, yes.

19 JUDGE SIPPEL: Okay. I'm sorry,
20 ma'am.

21 BY MS. WALLMAN:

22 Q So in paragraph 23, you say in the

1 second sentence "that email address was
2 assigned to my home." Correct?

3 A Yes.

4 Q The earlier testimony reflected
5 some uncertainty, did it not, about whether it
6 belonged to you. Do you know?

7 A No, what I was suggesting was that
8 whenever we hook up somebody to our high-speed
9 data service, by default they use your first
10 name dot last name cox.net unless, in fact,
11 you have a different email address. My wife
12 used AOL and used bkbrennan@aol.com. But
13 given the fact that I was connected with my
14 computer to the VPN, the only email address I
15 ever used and ever gave out was
16 leo.brennan@cox.com because I didn't want to
17 have to go from one email address to the
18 other, so it's the only one I ever used.

19 Q Are you definite that that email
20 address was assigned to your home?

21 A Oh no. I'm not saying that it may
22 not have been assigned to my home. That was

1 not the point I was making. The point I was
2 making was if it was, I never utilized it.

3 Q So you never received any email
4 addressed to you at cox.net?

5 A No. Cox.com.

6 Q Only cox.com. When you were shown
7 this document prior to today --

8 JUDGE SIPPPEL: Which document,
9 111?

10 BY MS. WALLMAN:

11 Q I'm sorry, which had been entered
12 into evidence as WealthTV Exhibit 111, did
13 that first sentence "thanks for your returned
14 call last week." Does that remind you at all
15 of
16 a call that you had with Mr. Herring?

17 A No, it didn't.

18 Q If I could have just a moment.

19 (Pause.)

20 Understanding that this email is
21 addressed to leo.brennan@cox.net, do you know
22 whether emails from this account, cox.net,

1 which you acknowledge was assigned to your
2 home, was your system set up to forward them
3 to cox.com?

4 A No.

5 Q And you're definite that it was
6 not set up to do that?

7 A Pretty definite. Never got one.

8 Q When you say you never got one,
9 you mean you never got an email that was
10 forwarded from the cox.net account?

11 A Yes.

12 MS. WALLMAN: I have nothing
13 further, Your Honor.

14 JUDGE SIPPEL: Mr. Schonman?

15 MR. SCHONMAN: Thank you.

16 BY MR. SCHONMAN:

17 Q Mr. Brennan, good morning.

18 A Good morning.

19 Q My name is Gary Schonman. I'm co-
20 counsel for the Enforcement Bureau. I have a
21 few questions for you.

22 I'd like to start with an

1 examination concerning the culture at Cox
2 regarding how the various systems, there were
3 26?

4 A I can't tell you the exact number
5 at that time. There's 18 today, but --

6 Q I'm sorry to hear that.

7 A Eighteen operations, in other
8 words.

9 Q The relationship between the
10 various systems and the corporate office
11 regarding what latitude the local systems had
12 for adding or negotiating affiliation
13 agreements. You testified earlier that at the
14 current time all negotiations and affiliation
15 agreements have to go through the corporate
16 office in Atlanta. Is that correct?

17 A Yes.

18 Q Has that always been the culture
19 or policy at Cox?

20 A Ever since I've been there it has,
21 yes.

22 JUDGE SIPPEL: Wait a minute, wait

1 a minute. What's the difference between
2 culture and policy?

3 Do you know anything about that?
4 Is there a culture or is there a policy at
5 Cox?

6 THE WITNESS: It would be a
7 policy.

8 JUDGE SIPPEL: Is there any such
9 thing as a culture?

10 THE WITNESS: There's such a thing
11 as a culture. I'm not sure how it relates to
12 that.

13 JUDGE SIPPEL: I mean in your
14 business at Cox, have you ever -- is there a
15 culture there?

16 Don't smile. That's a legitimate
17 question.

18 (Laughter.)

19 THE WITNESS: We feel like we have
20 a culture at Cox.

21 JUDGE SIPPEL: Do you talk about
22 it that way?

1 THE WITNESS: Yes, we talk about
2 it. We do. But we talk about it more as it
3 relates to making sure we're taking care of
4 our customers, making sure we're taking care
5 of our employees, very much employee-focused,
6 open, honest dialogue. That from a cultural
7 perspective.

8 JUDGE SIPPEL: The reason I ask I
9 was at a Marine Corps reunion the other night
10 and they have a culture.

11 (Laughter.)

12 But you don't want to hear about
13 that.

14 (Laughter.)

15 And Comcast has a culture. Okay,
16 you answered the question very well. We did
17 have testimony in this case, by the way, about
18 a culture and it's never been clarified until
19 now the difference between culture and policy,
20 at least for my purposes. Thank you. You did
21 a good job. That's fine, Mr. Schonman.

22 MR. SCHONMAN: Thank you.

1 BY MR. SCHONMAN:

2 Q Just to recap, the policy, from
3 your experience since 1990, has always been
4 that affiliation agreements were negotiated
5 and signed on the corporate level?

6 A Yes.

7 Q Could the individual system, could
8 individuals at the individual systems make
9 decisions on carriage at any time during your
10 experience since 1990?

11 A No.

12 Q Could individuals at the various
13 systems make recommendations to the corporate
14 office?

15 A Yes.

16 Q How would that work? Would it be
17 done by phone? Was it casual, was it formal?

18 A It might be by phone or email, a
19 call to Bob or an email to Bob if you had an
20 interest in a certain programming network for
21 whatever reason, and you wanted to let him
22 know.

1 Q Can you give me an example of --
2 well, let me ask you, was there ever an
3 occasion when you had a reason to call the
4 corporate office and make a recommendation,
5 one way or the other about a particular
6 program?

7 A Yes, I stated earlier, when I was
8 in Las Vegas and there was a college sports
9 television had negotiated an agreement to
10 carry the Mountain West Conference which
11 included UNLV sports. And we had a lot of
12 interest in our community, obviously, because
13 UNLV was in the heart of our service area and
14 so based on that, I called Bob and suggested
15 that it would be good for him to start trying
16 to negotiate an agreement for carriage in Las
17 Vegas.

18 Q Did your system eventually carry
19 that service, based on your recommendation?

20 A Yes, we did.

21 Q Signed an agreement?

22 A Yes.

1 Q Are you a lawyer by any chance?

2 A No.

3 Q I'd like to talk about your
4 experience as general manager of the Orange
5 County and Las Vegas systems and the range of
6 -- the matters that you were authorized to get
7 into. Is it true that you were not authorized
8 to sign affiliation agreements on behalf of
9 Cox when you were general manager of either
10 system?

11 A Yes.

12 Q You were not authorized to sign?

13 A I was not authorized to sign
14 affiliation agreements with national cable
15 programs.

16 JUDGE SIPPEL: Let me just ask
17 this one, is that true of all the general
18 managers in all the systems?

19 THE WITNESS: Yes, it is.

20 JUDGE SIPPEL: Now would that be a
21 company policy?

22 THE WITNESS: Yes, it is.

1 JUDGE SIPPEL: And a company
2 culture as well?

3 THE WITNESS: Yes, it is.

4 BY MR. SCHONMAN:

5 Q And has that always been the
6 company policy/culture?

7 A Ever since I've been with Cox.

8 Q With respect to retransmission
9 agreements, did you personally sign
10 retransmission agreements or did that have to
11 go through corporate?

12 A No, I signed those.

13 Q Did you run these agreements
14 through the lawyers at the corporate office
15 first before signing it?

16 A Yes, I did.

17 Q And then the lawyers and
18 executives in the corporate office would say
19 go ahead, Mr. Brennan, go ahead, Leo, go ahead
20 and ink it?

21 A That is correct.

22 Q Were you allowed to sign

1 retransmission agreements without going
2 through the corporate office first?

3 A No.

4 Q Let's move into the area of KLAS.

5 A Okay.

6 Q In Vegas. I'd like you to clarify
7 for me, if you will, what a multicast channel
8 is. I'm a little unclear. I know what a main
9 channel is. What is a multicast channel?

10 A With the switch from analog to
11 digital, all of the over-the-air broadcasters,
12 as we go through this -- once we go through
13 this DTV transition which ends June 12th I
14 think is the date.

15 Q We hope.

16 A Once we go through that date, all
17 of them will have switched their over-the-air
18 signal from analog to digital. The difference
19 between the analog and the digital signal is
20 the digital signal gives them the capacity to
21 broadcast up to six streams of programming,
22 one of them being their primary network feed

1 and then if they have the desire, they have
2 the capacity with that digital signal to add
3 up to six more streams of programming or five
4 more, I should say, a total of six.

5 Q When you talk about streams, do
6 you mean after this transition or after a
7 station goes digital, a TV station goes
8 digital, and we're talking about a broadcast
9 station?

10 A Yes, we are.

11 Q It will continue to broadcast its
12 primary channel which everybody has received
13 for years.

14 A Right.

15 Q But it will also have the
16 opportunity, if it chooses, to also broadcast
17 other channels with different programming?

18 A Others with different programming
19 if they want.

20 Q Now let's go back to
21 retransmission arrangements with cable
22 systems. You said that there were two options

1 that a broadcast station has for carriage on
2 a cable system, correct?

3 A That is correct.

4 Q One is must-carry?

5 A Right.

6 Q And the other is a negotiated
7 arrangement or a retransmission consent
8 agreement?

9 A That is correct.

10 Q Let's talk about must-carry, the
11 first option.

12 A Okay.

13 Q Under must-carry, well, what does
14 must-carry mean?

15 A Must-carry means that the over-
16 the-air broadcaster makes a decision to elect
17 must-carry carriage and what that means is
18 there is no negotiation. There is no exchange
19 of compensation. They simply exercise their
20 right under the FCC rules to be carried as a
21 channel on our cable system. It ensures
22 carriage.

1 Q When you talk about carriage, does
2 must-carry contemplate that only the main
3 channel will be carried or does it also
4 contemplate that the main channel plus any
5 number of the other multicast subsidiary
6 channels will also be carried?

7 A Only the main channel.

8 Q So if a broadcast station enters
9 into a must-carry arrangement with the cable
10 system, only the main channel will be carried?

11 A True. Unless --

12 Q Go ahead.

13 A Unless there's an agreement made
14 afterwards where the local broadcaster and the
15 cable operator agree that there's additional
16 product they put on that would be of local
17 interest and the cable operator wants to carry
18 it. But there's no requirement to.

19 Q Under the scenario you were just
20 describing, you would be moving into the
21 retransmission consent option?

22 A Not necessarily. It would just be

1 programming that a local cable operator felt
2 was good for his customer base is all I'm
3 saying. There wouldn't be a requirement to
4 carry it, but you may want to because it made
5 good business sense.

6 Q But just to be clear, under must-
7 carry, a cable system would carry only the
8 primary system?

9 A That is true. Correct.

10 Q The primary channel.

11 A Right.

12 Q Of the broadcast station. And
13 under that scenario, that scenario alone, if
14 viewers wanted to see any of the other
15 multicast or subsidiary channels that this
16 digital broadcast station may be airing, they
17 would have to have a roof antenna or rabbit
18 ears?

19 A That is correct.

20 Q That's must-carry. Let's move to
21 the negotiated arrangement, the retransmission
22 consent form. That's an agreement between the

1 broadcast station and the cable operator?

2 A Yes, it is.

3 Q And under that scenario, am I
4 correct that the broadcast station can
5 arrange, if it's mutually agreed to, for the
6 carriage of the primary channel plus any
7 number of the multicast channels, if it's
8 mutually agreed to?

9 A That is correct.

10 Q Mr. Brennan, there were some
11 questions about your authority to modify a
12 rebroadcast agreement, a retransmission
13 consent agreement.

14 A Sure.

15 Q As general manager of the Orange
16 County and Las Vegas systems over a period of
17 lots of years, did you ever have -- did you
18 ever enter into a modification of a
19 rebroadcast agreement with a broadcast
20 station?

21 A No.

22 Q Were you ever asked to do so at

1 cox.net, it would never get opened, it would
2 never get viewed?

3 A That is true.

4 Q It would just sit on some server,
5 I guess.

6 A I don't know the time period, but
7 if you don't use that address after a while I
8 think it goes into limbo or something. I'm
9 not sure exactly how it works, but I don't
10 think they leave email addresses unused out
11 there forever.

12 JUDGE SIPPEL: Sounds like annual
13 leave, use or lose.

14 (Laughter.)

15 MR. SCHONMAN: Just like it. I
16 have no further questions, Your Honor.

17 JUDGE SIPPEL: Does anybody else
18 have anything more. Redirect?

19 MR. MILLS: Brief redirect, Your
20 Honor.

21 JUDGE SIPPEL: Yes, sir.

22 REDIRECT EXAMINATION

1 BY MR. MILLS:

2 Q Just to understand this last point
3 Mr. Schonman was asking about, is it your
4 understanding that when somebody signs up for
5 the Cox internet service, it's automatically
6 assigned, it may be automatically assigned to
7 that person in that home, may be automatically
8 assigned, the .net address?

9 A You know it may be, but I'm not
10 100 percent sure. My guys would have set it
11 up because they came out to my house to do it
12 for me. I don't know -- I honestly don't know
13 if that's a default email.

14 Q But you never used it, opened it,
15 or corresponded with it?

16 A No.

17 Q Just to be clear, this email, this
18 WealthTV Exhibit 111, do you still have that
19 in front of you?

20 A Yes, I do.

21 Q If you had received this, have you
22 had a chance to look at it?

1 A Yes, I have.

2 Q Would that have made any
3 difference in your thinking about your
4 decision with regard to WealthTV or your view
5 of whether to carry WealthTV or the KLAS
6 arrangement?

7 JUDGE SIPPEL: That's got nothing
8 to do with any of his testimony. This is
9 simply -- I don't think that this email calls
10 for that question.

11 MR. MILLS: I'm just asking
12 whether this -- the implication is that had he
13 received this email something else, something
14 might have been relevant with regard to this
15 email and --

16 JUDGE SIPPEL: Would it have
17 triggered some kind of a response from you if
18 you had seen it at the time? I'm sorry, I'm
19 taking your question away from you. Is that
20 basically it?

21 BY MR. MILLS:

22 Q Would it have made any difference?

1 A I assume I would have responded,
2 but it certainly wouldn't have made any
3 difference in terms of my decision.

4 Q Okay. With regard to KLAS?

5 A Yes, with regard to carriage as a
6 multicast channel for KLAS.

7 Q You were asked some questions
8 about whether you could have modified the
9 retransmission consent agreement and I believe
10 you testified that corporate would have had to
11 approve that? Is that right?

12 A Yes.

13 Q Did you view WealthTV as a
14 national programming network?

15 A Oh yes.

16 Q And was it your testimony that any
17 carriage of a national programming network,
18 even WealthTV, would have had to be approved
19 through Bob Wilson's office?

20 A Yes.

21 Q Have you ever seen a national
22 programming network in your experience in Las

1 Vegas or in Orange County obtain carriage on
2 a cable system of Cox's or any others that
3 you're aware of through a retransmission
4 consent agreement like this for a national
5 cable programming network?

6 A Not that I'm aware of, no.

7 MR. MILLS: Thank you. Nothing
8 further, Your Honor.

9 MS. WALLMAN: Just briefly, Your
10 Honor.

11 JUDGE SIPPEL: Yes, ma'am.

12 RECROSS EXAMINATION

13 BY MS. WALLMAN:

14 Q You testified earlier that you had
15 authority to sign retransmission consent
16 agreements, correct?

17 A Correct.

18 Q You testified that these were more
19 or less standard forms, but could vary from
20 market to market, correct?

21 A Yes.

22 Q And isn't it true that

1 [REDACTED]

2 [REDACTED]

3 MR. SCHONMAN: That's my only
4 question.

5 JUDGE SIPPEL: Nothing else?
6 Okay, Mr. Brennan. You're relieved from your
7 oath and just don't talk to any of the fact
8 witnesses in the case yet.

9 (The witness was excused.)

10 JUDGE SIPPEL: Is there another
11 witness?

12 MR. COHEN: Your Honor, should we
13 take a five minute break while we get Dr.
14 Ordoover?

15 JUDGE SIPPEL: We don't take five
16 minutes breaks unless it's five minutes.
17 We're not going to really do that, are we? Do
18 you want to? We'll wait five minutes and you
19 can bring the witness in.

20 MR. COHEN: It's Mr. Beckner's
21 witness. I'm sorry, I was just asking for a
22 different break.

1 JUDGE SIPPEL: Well, let Mr.
2 Beckner -- you want more time or what?

3 MR. FELD: Your Honor, if I may,
4 I'm actually still waiting for our assistant
5 to produce some of the documents. If we could
6 take a 15-minute break, I believe he'll be
7 back.

8 JUDGE SIPPEL: Let's go off the
9 record. Let's do this. Let's take a 15-
10 minute break. Ten-minute break, but we'll be
11 back in 15 minutes, okay?

12 (Laughter.)

13 Off the record.

14 (Off the record.)

15 JUDGE SIPPEL: Let's go back on
16 the record.

17 MR. MILLS: Your Honor, there is
18 one thing we want to let you know about for
19 the Defendants. There are a couple of
20 witnesses and there are a couple of different
21 Defendants involved. For Cox, because of some
22 of the direct testimony, Mr. Herring was cut

1 out and for various reasons we do not any
2 longer intend to call two witnesses also from
3 the field, from the systems. So we've
4 shortened the trial.

5 JUDGE SIPPEL: Thank you.

6 MR. MILLS: Two witnesses will not
7 be called. William Geppart and Joyce Arcand
8 and the prefiled direct testimony which was
9 marked for identification purposes only are
10 Cox Exhibits 80 and 81 and we do not intend to
11 introduce those because those witnesses aren't
12 going to be presented.

13 JUDGE SIPPEL: That's Geppart and
14 what was the other one?

15 MR. MILLS: The other one is
16 Arcand, A-R-C-A-N-D.

17 JUDGE SIPPEL: And so they're
18 basically being withdrawn as witnesses?

19 MR. MILLS: Correct.

20 JUDGE SIPPEL: That's good news.

21 MR. SOLOMON: In addition, Your
22 Honor, Comcast is withdrawing Larry Gerbrandt

1 as a witness. We won't be presenting him and
2 we're withdrawing Exhibits 10 through 19.

3 JUDGE SIPPEL: Exhibits 10 through
4 19.

5 MR. SOLOMON: Comcast Exhibits 10
6 through 19.

7 JUDGE SIPPEL: And they're already
8 in.

9 MR. SOLOMON: Some of them are in.

10 JUDGE SIPPEL: Some are in, some
11 are not.

12 MR. SOLOMON: We're withdrawing
13 all of them.

14 JUDGE SIPPEL: Thank you.

15 (Whereupon, the above-referred to
16 documents marked as Comcast 10
17 through 19 were withdrawn.)
18 identification.)

19 JUDGE SIPPEL: Thank you. Then we
20 just have Dr. Ordoover and we had Leo Brennan.
21 So it's just the next witness.

22 MR. MILLS: This could be it, Your

1 Honor.

2 JUDGE SIPPEL: All right, is this
3 the doctor on the stand?

4 Please rise, sir, while I
5 administer the oath. Do you swear or affirm
6 the testimony you're about to give in this
7 case will be the truth, the whole truth, and
8 nothing but the truth.

9 THE WITNESS: I do.

10 JUDGE SIPPEL: Thank you very
11 much. Good voice. You'll be able to hear him
12 from the back of the room, Mr. Cohen.

13 WHEREUPON,

14 JANUSZ ORDOVER
15 WAS CALLED FOR EXAMINATION BY COUNSEL ON
16 BEHALF OF BRIGHT HOUSE NETWORKS AND COX
17 COMMUNICATIONS, AND HAVING FIRST BEEN DULY
18 SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

19 MR. BECKNER: Your Honor, before I
20 begin my questioning of the witness, I just
21 want to advise you that, as you may know, this
22 witness has been identified by both Bright

1 House Networks and by Cox and will be
2 testifying on behalf of both of those parties.
3 I'm going to handle the questioning for both
4 parties so this will not be a situation where
5 I'll be asking this witness questions and Mr.
6 Mills will be asking. We'll do it all in one
7 package.

8 JUDGE SIPPEL: I'm sure that Mr.
9 Mills trusts you beyond a shadow of a doubt.
10 He's just sitting next to you just because
11 it's a good seat.

12 (Laughter.)

13 MR. BECKNER: I haven't checked
14 his pockets to see what's pointed at me.

15 (Laughters.)

16 JUDGE SIPPEL: That's all right.
17 K.C. will pick it up on her machine. We've
18 got a good system here. Thank you very much.
19 Well, okay, then yes, sir, Mr. Beckner, then
20 you may proceed with your witness.

21 MR. BECKNER: Thank you very much.

22 JUDGE SIPPEL: Or your mutual

1 witness.

2 DIRECT EXAMINATION

3 BY MR. BECKNER:

4 Q Dr. Ordover, could you spell your
5 first and last names for the court reporter,
6 please?

7 A Yes, my first name is Janusz, J-A-
8 N-U-S-Z. Middle initial A. Last name
9 Ordover, O-R-D-O-V-E-R.

10 Q Thank you, Dr. Ordover. Could you
11 tell us who employs you today, sir?

12 A Well, I'm a full professor of
13 Economics at New York University and I'm also
14 special consultant or senior consultant to
15 Compass Lexecon.

16 Q Can you tell us briefly what
17 Compass Lexecon is?

18 A Yes. It's a consulting firm with
19 locations in various cities that specializes
20 in antitrust, competition, regulatory and
21 other economic matters.

22 Q Well, you told us you teach

1 economics at New York University. Do you hold
2 an advanced degree in economics?

3 A Yes. I have a Ph.D. in economics
4 from Columbia University, 1973.

5 Q Have you had any employment, other
6 than this case, that is focused specifically
7 on antitrust law, either academic or
8 otherwise?

9 A Well, I taught as a visiting
10 professor at Yale and at Columbia University
11 teaching antitrust, co-teaching antitrust law.
12 And I was a Deputy Assistant Attorney General
13 for Economics in the Justice Department.

14 Q When were you Deputy Assistant
15 Attorney General?

16 A '91, '92, 18 months about.

17 Q Okay, is competition one of the
18 concerns of antitrust law?

19 A I would say it's the concern of
20 antitrust law.

21 Q During the course of your career,
22 have you had occasion to study the effect of

1 various actions of marketplace participants on
2 competition in that marketplace?

3 A Yes. I had the opportunity to do
4 that. I also had the opportunity to testify
5 about those things in courts, in front of
6 courts and regulatory agencies in a variety of
7 jurisdictions.

8 Q And during the course of your
9 career, have you had occasion to study the
10 cable television industry?

11 A Yes, I have.

12 Q And have you had occasion to
13 testify as an expert about competitive aspects
14 of the cable television industry?

15 A Yes, I have. I testified via
16 affidavits on numerous occasions in front of
17 the FCC, as well as I've testified in front of
18 the Congress on the question of relaxing
19 regulatory constraints and pricing of cable
20 services.

21 MR. BECKNER: Your Honor, may I
22 approach the witness?

1 JUDGE SIPPEL: You may.

2 MR. BECKNER: Thank you.

3 (Pause.)

4 JUDGE SIPPEL: Do you know the
5 story about President Truman and his dealings
6 with economists. You know who President
7 Truman is.

8 THE WITNESS: I'm from Poland, so

9 --

10 (Laughter.)

11 JUDGE SIPPEL: We had a story
12 about Poland the other day.

13 THE WITNESS: I heard. It was a
14 very nice story.

15 JUDGE SIPPEL: We didn't invade.

16 THE WITNESS: I was born after
17 that.

18 JUDGE SIPPEL: Anyway, President
19 Truman, he was running out of patience with
20 the Congress when they were explaining to him
21 about
22 -- he wanted to take over the steel industry

1 or something and he said to his chief, he said
2 get him out of here and get me a one-armed
3 economist. When there's one hand in the other
4 hand, I can't deal with that.

5 THE WITNESS: Polish logicians
6 invented something called three value logic,
7 so if you talk to a Polish economist he would
8 say yes, no, and maybe.

9 (Laughter.)

10 JUDGE SIPPEL: That will go
11 towards your qualifications, sir.

12 (Laughter.)

13 Go ahead.

14 BY MR. BECKNER:

15 Q On the subject of qualifications,
16 I have one more question. Dr. Ordover, I'm
17 going to show you a copy of what's been marked
18 as Bright House Networks Exhibit 8 and in
19 particular I've turned to Appendix A of the
20 report that's part of that exhibit and the
21 only question I want to ask you is whether or
22 not Appendix A is a copy of your current

1 curriculum vitae?

2 (Whereupon, the above-referred to
3 document was marked as BHN Exhibit
4 8 for identification.)

5 A Well, I think it's pretty current.
6 It says March 2008. Now it's March 2009, so
7 there might have been some changes since then,
8 but I don't think anything --

9 Q Is that the latest that you
10 prepared?

11 A I don't think so. I think I
12 prepared a 2009 CV, but as I said I don't
13 believe there any material changes.

14 MR. BECKNER: Your Honor, I'm
15 going to offer Dr. Ordover as an expert on
16 comparative issues in the cable television
17 industry whose opinions would be admissible,
18 in evidence in this case and invite counsel
19 for WealthTV to voir dire the witness if it
20 chooses to do so.

21 JUDGE SIPPEL: Thank you, Mr.
22 Beckner.

1 Are there any voir dire questions?

2 MR. FELD: No, Your Honor. No

3 objection.

4 JUDGE SIPPEL: No objections.

5 You're received as an expert. It's just a

6 question now of his testimony.

7 MR. BECKNER: Right. Before I

8 move the next set of questions, Your Honor, I

9 hope you can bear with me. I have two

10 different reports and so it will take a little

11 bit of time to go through and authenticate

12 each one which is what I'm going to do.

13 JUDGE SIPPEL: Because he had

14 different companies?

15 MR. BECKNER: Correct.

16 JUDGE SIPPEL: I didn't mean to

17 get ahead of you.

18 Go ahead, Mr. Beckner. We

19 appreciate --

20 MR. BECKNER: I was only concerned

21 that at some point you'll be thinking to

22 yourself when is this going to end.

1 JUDGE SIPPEL: After Mr. Solomon's
2 report, I'm in good shape.

3 MR. BECKNER: All right.

4 BY MR. BECKNER:

5 Q Did you execute a declaration in
6 this case on behalf of Cox Cable and Bright
7 House Networks that you signed on April 3,
8 2009, sir?

9 A Yes.

10 Q And taking a look at BHN Exhibit 8
11 which is in front of you, do you recognize the
12 first few pages as a copy, Exhibit 8, as a
13 copy of that declaration?

14 A Yes, that's my direct testimony.

15 Q Okay. And the declaration refers
16 to a "Cox Expert Report" and a "Bright House
17 Expert Report" that are attached as exhibits
18 to the declaration. Do you see that?

19 A Yes.

20 Q Is either one of those reports
21 attached to the declaration in BHN Exhibit 8
22 which is in front of you?

1 A Yes, I see an expert report also
2 by me that's Herring Broadcasting versus
3 Bright House Networks. I don't have one
4 dealing with Cox.

5 MR. MILLS: I'll show the witness.

6 MR. BECKNER: Thank you very much.

7 BY MR. BECKNER:

8 Q We'll get to the other one in a
9 minute, Dr. Ordover. I'm going to wait just
10 a second on my colleague as Mr. Mills hands
11 out copies of BHN Exhibit 8.

12 JUDGE SIPPEL: So this is the one
13 that's marked as BHN Exhibit 8?

14 MR. BECKNER: That's correct.

15 JUDGE SIPPEL: In its totality?

16 MR. BECKNER: Yes.

17 JUDGE SIPPEL: For identification.
18 It hasn't been received yet.

19 MR. BECKNER: Yes, and this is the
20 one we're discussing.

21 BY MR. BECKNER:

22 Q Okay, and if you just take a look

1 at the last page of the report which is
2 attached as part of BHN Exhibit 8, is that
3 your signature on the last page that's dated
4 February 27, 2009?

5 That would be page 24 of the report, Your
6 Honor.

7 A Yes, it is.

8 JUDGE SIPPPEL: I'm with you.

9 BY MR. BECKNER:

10 Q And the report, as included in BHN
11 Exhibit 8 has two appendices and three
12 exhibits at the end. Are those part of the
13 original report that you prepared?

14 A Yes.

15 Q Was the report, including the
16 exhibits and appendices we've just mentioned
17 either prepared by you personally or by others
18 working under your direct supervision?

19 A Well, the report was written by
20 me, but there were other people working under
21 my supervision in preparation of the report.

22 MR. BECKNER: Okay. At this time,

1 Your Honor, I'd like to move BHN Exhibit 8
2 into evidence.

3 JUDGE SIPPEL: And this will be
4 for the purpose of what issue, is this on
5 competition?

6 MR. BECKNER: Yes, this -- when I
7 get through the questions about the summary of
8 the testimony, about competition and what the
9 witness is going to talk about. I just want
10 to get the document in evidence as his report.

11 JUDGE SIPPEL: There's no
12 objection. Mr. Feld, go right ahead, please.

13 MR. FELD: With regard to this --
14 never mind, withdraw it. No objection.

15 JUDGE SIPPEL: Well, it's received
16 in evidence and this will be BHN Exhibit 8.
17 Is that correct?

18 MR. BECKNER: That's correct.

19 JUDGE SIPPEL: It's received,
20 identified and received. And that is the
21 direct testimony of Janusz Ordoover.

22 Am I pronouncing that correctly?

1 THE WITNESS: Close enough. Good
2 enough for government work, as they say.

3 JUDGE SIPPEL: That's beautiful.
4 I can identify with that.

5 THE WITNESS: My wife couldn't
6 pronounce my name either, but we're happily
7 married.

8 (The document, having been marked
9 previously for identification as
10 BHN Exhibit 8, was received in
11 evidence.)

12 MR. BECKNER: Your Honor, if I
13 could approach the witness again and hand him
14 a couple more exhibits?

15 JUDGE SIPPEL: Yes, sir.

16 BY MR. BECKNER:

17 Q Dr. Ordover, I'm going to hand you
18 two exhibits. One is marked Cox Exhibit 85
19 which is a document of a few pages that called
20 "Direct Testimony of Janusz A. Ordover" a
21 four-page document. And Cox Exhibit 44 which
22 is entitled "Expert Report of Janusz A.

1 Ordover" and it includes some exhibits and
2 appendices at the rear.

3 Mr. Mills has just handed those
4 out to everyone.

5 (Whereupon, the above-referred to
6 document was marked as Cox Exhibit
7 85 for identification.)

8 Dr. Ordover, I'd like for you just
9 to first take a look at Cox Exhibit 85.

10 A Yes.

11 Q Do you recognize that as a copy of
12 the declaration that you executed in this case
13 on behalf of Cox Cable and Bright House
14 Networks on April 3rd?

15 A Yes, sir. It is.

16 Q And is that your signature on the
17 fourth page?

18 A Yes.

19 Q All right. And this is the same
20 declaration that we just looked at as part of
21 BHN Exhibit 8. Is that correct?

22 A Yes.

1 Q Okay.

2 JUDGE SIPPEL: What about the
3 confidential designation that this has on 85?

4 MR. BECKNER: Well, the only --
5 the question on confidentiality, Your Honor,
6 has to do with the report of WealthTV's report
7 of the number of subscribers it has, so I
8 think it's their call as to whether or not
9 they want to remove the confidential
10 designation.

11 MR. FELD: Moment to confer?

12 MR. BECKNER: It's in paragraph 7
13 of this declaration.

14 MR. SCHONMAN: Your Honor --

15 JUDGE SIPPEL: One thing at a
16 time. Go ahead, Mr. Feld.

17 MR. FELD: Your Honor, my client
18 would like to have that information remain
19 confidential.

20 JUDGE SIPPEL: All right. Okay,
21 we'll keep the designation.

22 Mr. Schonman?

1 MR. SCHONMAN: Thank you. Just by
2 way of housekeeping matters, the last witness
3 who testified, his direct testimony, at least
4 the copy that I had is identified as being
5 confidential. That would be Cox Exhibit 81.

6 JUDGE SIPPEL: Is that Mr.
7 Brennan?

8 MR. SCHONMAN: My copy is labeled
9 highly confidential.

10 MR. MILLS: Let me go back to
11 that.

12 MR. FELD: Just a moment. Could
13 you please say where the subscriber
14 information is because paragraph 7 to which
15 you referred has general discussion, but no
16 actual numbers.

17 MR. BECKNER: Your Honor, can we
18 do one of these at a time?

19 JUDGE SIPPEL: Yes, we've got to
20 do them one at a time. Thank you.

21 MR. MILLS: Mr. Schonman was
22 asking about Cox Exhibit 81 which the

1 testimony of Leo Brennan. Shall I address
2 that first?

3 JUDGE SIPPEL: Yes, Leo Brennan,
4 please.

5 I'm sorry, Mr. Feld, we've just
6 got too many things.

7 MR. FELD: I'm sorry also. I was
8 distracted.

9 MR. BECKNER: Your Honor, if I
10 could just see Mr. Feld, I think I could help
11 him out.

12 JUDGE SIPPEL: Let's go off the
13 record.

14 (Off the record.)

15 JUDGE SIPPEL: So we'll go back on
16 the record. So let's see. Is there anything
17 else now that we have it straightened out?

18 MR. BECKNER: Do we have a final
19 decision on Cox Exhibit 85?

20 MR. FELD: Cox Exhibit 85, yes.
21 My client would like it to remain
22 confidential.

1 JUDGE SIPPEL: All right, well
2 then we'll just keep the document
3 confidential. What's the next one, 44 is
4 another one?

5 MR. BECKNER: Yes, 44 has the same
6 information in it that 85 has so I assume
7 that's going to be --

8 JUDGE SIPPEL: Is that right?

9 MR. BECKNER: Well, no. I strike
10 that. 44 doesn't. It was some other
11 nonpublic information.

12 JUDGE SIPPEL: Mr. Feld or
13 somebody on your team -- do you want to take
14 a look at that while we're -- we can defer on
15 that exhibit until we get finished?

16 MR. BECKNER: It's Exhibit 4, I
17 believe --

18 JUDGE SIPPEL: 44 is the one I'm
19 dealing with.

20 MR. BECKNER: Yes, I know. I
21 apologize, Your Honor. There are exhibits to
22 this report --

1 JUDGE SIPPEL: I'm sorry.

2 MR. BECKNER: And -- all right.

3 Exhibit 4 to the Cox expert report and I think
4 it's Exhibit 3 to the Bright House Networks
5 expert report are subscriber numbers for Mojo
6 that also carried WealthTV and that's what we
7 have marked as confidential. And that's a
8 Mojo iN DEMAND issue. It's not a WealthTV
9 issue. I think we're going to have to
10 continue to keep that as confidential.

11 JUDGE SIPPEL: So is that part of
12 the 44 package?

13 MR. BECKNER: Yes, it is.

14 JUDGE SIPPEL: Let's just leave 44
15 the way it is. Let's leave 85 the way it is.

16 MR. BECKNER: And also BHN Exhibit
17 8 which has the same information should also
18 continue to be --

19 JUDGE SIPPEL: Are we dealing with
20 that with this witness?

21 MR. BECKNER: Yes, we are. BHN
22 Exhibit 8.

1 JUDGE SIPPEL: Oh, I see, I see.
2 That one doesn't have -- the one I copy I have
3 anyway doesn't have it.

4 MR. BECKNER: And that's an
5 oversight, Your Honor, that we should have had
6 BHN Exhibit 8 marked as confidential and we'll
7 post-mark it.

8 JUDGE SIPPEL: That's enough for
9 now. I don't want to hold this witness. He's
10 patiently waiting to testify.

11 Let's go back on the record. And
12 I just want to indicate that we have with
13 respect to the direct testimony of Leo
14 Brennan, are we on?

15 COURT REPORTER: I thought we went
16 back on the record a few minutes ago.

17 JUDGE SIPPEL: That's fine. K.C.,
18 you put us on whenever you're ready. If we're
19 on, we're on. That won't hurt.

20 Leo Brennan, we know that. Leo
21 Brennan has the designation of high
22 confidential for Leo Brennan. That's been

1 eliminated. But we're going to keep with
2 respect to Cox 85, Cox 84, and BNH 8 which
3 have to do with this witness, Dr. Ordover,
4 we're going to keep them confidential and for
5 the time being anyway, and let's go forward.

6 MR. BECKNER: Thank you, Your
7 Honor.

8 BY MR. BECKNER:

9 Q Dr. Ordover, before the break, I
10 think I had asked you about Cox Exhibit 85 and
11 I think you had testified that you recognize
12 it as a copy of the declaration you executed
13 in this case on behalf of Cox Cable and Bright
14 House Networks on April 3rd, and page 4, the
15 signature there is your signature, correct?

16 A Yes.

17 Q And just so we can coordinate
18 these two exhibits, Cox Exhibit 85 is the same
19 declaration as it attached to the -- is the
20 front four pages of BHN Exhibit 8.

21 JUDGE SIPPEL: We'll accept that
22 representation.

1 MR. BECKNER: Okay, all right.

2 JUDGE SIPPEL: So with that in
3 mind, can we then receive Exhibit 85 into
4 evidence?

5 MR. BECKNER: Sure, I move 85 into
6 evidence.

7 JUDGE SIPPEL: Any objection to
8 85, since it's the same thing as 8?

9 MR. FELD: No object.

10 JUDGE SIPPEL: All right, next
11 one.

12 (The document, having been marked
13 previously for identification as
14 Cox Exhibit 85, was received in
15 evidence.)

16 BY MR. BECKNER:

17 Q Now I'd like for you to take a
18 look, Dr. Ordover, at what's been marked as
19 Cox Exhibit 44 which is in front of you. And
20 just take a look at page 24 of the exhibit.
21 Is that your signature there above the date,
22 February 27, 2009?

1 (Whereupon, the above-referred to
2 document was marked as Cox Exhibit
3 44 for identification.)

4 A Yes.

5 Q Okay, was Cox Exhibit 44,
6 including the exhibits to the report, which
7 are attached in the appendices which are
8 attached, were they prepared by you personally
9 or by others working under your supervision?

10 A Yes.

11 Q And does this constitute your
12 direct testimony and report in this case?

13 A Yes.

14 Q All right.

15 MR. BECKNER: Your Honor, I move
16 Cox Exhibit 44 into evidence.

17 JUDGE SIPPEL: Any objection?

18 MR. FELD: No objection.

19 JUDGE SIPPEL: It's received as
20 Cox Exhibit 44 which is identified as Cox
21 Exhibit 44.

22 (The document, having been marked

1 previously for identification as
2 Cox Exhibit 44, was received in
3 evidence.)

4 BY MR. BECKNER:

5 Q Dr. Ordover, do you understand
6 that one of the issues in this case is over
7 the fact that Cox Cable and Bright House
8 Networks elected not to carry WealthTV,
9 whether that fact unreasonably interfered with
10 WealthTV's ability to compete fairly?

11 A Yes, that's one of the two major
12 allegations as I understand them.

13 Q And did your assignment in this
14 case have anything to do with this issue?

15 A Yes. I endeavored to examine
16 whether or not the refusal to carry WealthTV
17 had indeed the effect claimed.

18 Q All right, and Dr. Ordover, do you
19 also understand that another issue in this
20 case is whether or not either Cox or Bright
21 House Networks discrimination against WealthTV
22 to favor an allegedly substantially similar

1 program in which they each had an ownership
2 interest?

3 A Yes, I do and I took that to mean
4 whether or not they had an incentive, an
5 individual incentive to engage in such
6 conduct.

7 Q And is that one of the things that
8 you examined, whether or not they had such an
9 incentive?

10 A Yes, I did.

11 Q Okay. Did you conclude from your
12 analysis that the action of either Cox or
13 Bright House Networks unreasonably interfered
14 with the ability of WealthTV to compete?

15 A Yes, I reached an ultimate, over-
16 arching conclusion vis-a-vis Cox and Bright
17 House that their refusals, unilateral refusals
18 not to carry WealthTV did not have the effect
19 claimed, i.e., did not unreasonably restrain
20 the ability of WealthTV to compete in the
21 relevant markets.

22 Q Do you find that WealthTV's lack

1 of access to Bright House Networks'
2 subscribers unreasonably interferes with the
3 ability of WealthTV to sell advertising?

4 A Well, my conclusion is again that
5 it has not had that kind of effect.

6 Q And you in a summary way tell us
7 why you reached that conclusion?

8 A Vis-a-vis advertising alone?

9 Q Yes, vis-a-vis advertising.

10 A Well, I reached that conclusion
11 predominantly because WealthTV had the ability
12 to gain carriage on other systems and by
13 virtue of gaining carriage on other systems it
14 could have become an attractive channel for
15 advertisers. And I also concluded that given
16 the actual claims as to the demographics for
17 its channel, I did not think that either
18 Bright House's or Cox's systems were
19 particularly and uniquely well suited to the
20 kind of advertising that WealthTV wanted to --
21 the kind of demographics that WealthTV wanted
22 to address and therefore the kind of

1 advertising that WealthTV wanted to attract to
2 its channel.

3 Q Did you find that WealthTV's lack
4 of access to either Bright House or Cox
5 Cable's subscribers unreasonably interfered
6 with WealthTV's ability to obtain carriage on
7 other multi-channel video programming
8 distributor systems?

9 A No. I mean the answer would be
10 no. Obviously, WealthTV did not have access,
11 direct access to Cox and Bright House
12 subscribers, but first of all it does not mean
13 that it did not have ability to access these
14 same subscribers through other means such as
15 trying to offer its channel on DBS or on the
16 available alternatives such as broadband
17 delivery.

18 And moreover, from the economic
19 perspective, it's clear that the case because
20 of the share of households that subscribe to -
21 - TV household that subscribe to Cox and
22 Bright House, there was a huge pool of other

1 households that were accessible to WealthTV.

2 Q Do you have an opinion on the
3 question of whether or not the facts that Cox
4 and Bright House Networks did not carry
5 WealthTV influenced other MVPDs not to carry
6 the WealthTV channel?

7 A Yes, I understand there is that
8 claim in the complaint. I couldn't quite find
9 any substantiation for that claim. And I also
10 concluded that the decisions of individual
11 MVPDs to carry a particular channel is
12 actually an individual decision that is driven
13 by a variety of considerations specific or
14 particular to a particular MVPD and maybe the
15 demographics, maybe the cost of the channel,
16 maybe the future needs for capacity of MVPD
17 and so on and so forth.

18 Q And do you have an opinion as to
19 whether or not Bright House Networks' five
20 percent ownership in the company that provides
21 a program service alleged to be substantially
22 similar to WealthTV gives Bright House

1 Networks an incentive to discriminate against
2 WealthTV in deciding whether or not to carry
3 the channel?

4 A Well, I studied that issue and my
5 answer would be that again I concluded that
6 five percent ownership, five and a half
7 percent ownership would not have been enough
8 to create an incentive to discriminate against
9 WealthTV in a way that the statute seems to
10 prohibit.

11 Q And can you just summarize the
12 basis for that conclusion?

13 A Yes, I think that the main reason
14 is that given the small share of ownership
15 that Bright House would have to weigh the
16 costs and benefits of engaging in
17 discriminatory conduct. There are costs of
18 doing so and the main cost that one can
19 consider is adverse impact on its own systems
20 where it allegedly excludes a valuable
21 channel. So one has to examine whether or not
22 what are the costs, what are the impacts of

1 such a decision on the MVPD subscriber base
2 and try to gauge that against alleged benefits
3 from exclusion.

4 I conclude that these alleged
5 benefits would be quite insignificant by
6 virtue of competitive constraints that operate
7 on Mojo and that operate on WealthTV in the
8 cable market.

9 Q Dr. Ordover, I'm going to ask you
10 essentially the same question with respect to
11 Cox Cable's ownership interest in the company
12 that produced the Mojo program service. Did
13 you find whether or not in your opinion that
14 ownership would give Cox Cable an incentive to
15 discriminate against WealthTV?

16 A Again, I looked at the same issue
17 using the same economic tools and I've reached
18 a similar conclusion, especially the fact that
19 Cox had a bigger share of ownership of Mojo.
20 It was not enough to swing the calculus from
21 one side to the other.

22 Q Summing up, in your opinion have

1 the actions of Cox unreasonably interfered
2 with WealthTV's abilities to compete fairly?

3 A My conclusion is the same vis-a-
4 vis Cox and Bright House and that is the
5 decision not to carry WealthTV did not have
6 the prohibitive effect of impeding WealthTV's
7 long run ability to compete fairly in
8 developing markets, i.e., markets for
9 households, for viewers, as well as the market
10 for advertisers. There are two markets one
11 has to think about. It's the viewers and the
12 advertisers. They are linked, obviously, but
13 neither of these markets taken separately
14 would be an adverse factor.

15 Q And so in your opinion have the
16 actions of either Bright House Networks or Cox
17 with respect to WealthTV made either of the
18 markets that you just described less
19 competitive?

20 A I would say none of these actions
21 did not diminish competition in these two
22 markets or on the two sides of the channel, a

1 platform, just the current lingo. It's two-
2 sided platforms or two-sided markets. And
3 first of all, I found that in terms of entry
4 into the provision of channels, there's been
5 a substantial amount of entry even since the
6 time of filing of the complaint and I offered
7 the figures. I found that the number of
8 channels that increased was not only channels
9 linked or related to the MVPD owners, but in
10 fact, independent channels have gained
11 traction.

12 And of course, on the advertising
13 side, there's a huge number of traces that
14 advertisers have to reach similar demographics
15 that are alleged by WealthTV as being their
16 focal demographics which is males over 29
17 between 25 or 29 and 43 with bachelor degrees
18 or higher and earning income of over \$100,000,
19 whether that was actually their target
20 demographics, there's some dispute I
21 understand, but at least that's my
22 understanding from the files. I showed that

1 by some examples that that demographic can be
2 reached in other ways, possibly more
3 efficiently than through WealthTV.

4 Q And in your opinion, have the
5 actions of either Bright House Networks or Cox
6 with respect to WealthTV had a harmful effect
7 on consumers?

8 A No, the answer obviously is no. I
9 have found no evidence in any of the filings
10 by WealthTV that such impact actually did
11 occur. From competition perspective which is
12 the one I practice, that's the key question,
13 whether there was such an adverse impact.

14 I understand that the WealthTV
15 claims that adverse impact was on it, but
16 offers no evidence that consumers also
17 suffered as a result. Consumer harm would be
18 tantamount to paying higher prices for
19 programming and potentially receiving less
20 attractive programming. But I don't believe
21 again there is any evidence that these harms
22 did occur.

1 Q Finally, Dr. Ordover, are the two
2 reports that have been in evidence, now
3 entered into evidence in this case, that is
4 BHN Exhibit 8 and Cox Exhibit 44, do those two
5 reports contain a more elaborate discussion of
6 the conclusions that you've just elicited in
7 your testimony this morning?

8 A Yes, they provide the bases for my
9 conclusions that I explained just now, this
10 afternoon.

11 MR. BECKNER: All right, Your
12 Honor, that concludes my direct of Dr. Ordover
13 and I'll pass him for cross examination.

14 JUDGE SIPPEL: Okay, who's going
15 to conduct the cross?

16 Mr. Feld.

17 MR. FELD: Your Honor, before I
18 begin, if I may ask Dr. Ordover, I would have
19 a proposal that I'm hoping will speed things
20 along. As Mr. Beckner has explained there's
21 substantial similarity between the two reports
22 submitted by Dr. Ordover. In the interest of

1 time I would like to go through essentially
2 both of them simultaneously. Where there is
3 any difference between the two, I will ask
4 separate questions with regard to Cox and
5 Bright House, but for the most part, if I
6 could just simply refer to say paragraph 9 or
7 paragraph 11 and so forth, if we could just go
8 through simultaneously, rather than have me go
9 first through the Cox and then through the
10 Bright House reports.

11 THE WITNESS: If I could just
12 interject, not an objection, but really
13 clarifying a suggestion to you, sir.

14 JUDGE SIPPPEL: You're talking to
15 Mr. Feld?

16 THE WITNESS: Yes, can I do that?

17 JUDGE SIPPPEL: Sure.

18 THE WITNESS: When you refer, for
19 example, to paragraph 9, I have not verified
20 that paragraph 9 in Cox is equal to paragraph
21 9 in Bright House. So the only issue has to
22 be whether they are parallel or not. If not,

1 we'll have to figure while you're asking the
2 questions how to sort it out.

3 MR. FELD: Certainly and we can
4 pause at each paragraph just to make sure
5 they're the same paragraph. Would that work?

6 THE WITNESS: Thank you very much.
7 Yes, I hope so.

8 JUDGE SIPPEL: Would it help if
9 you asked him to describe, for starters, what
10 methodology he used for the 44 and which one
11 he used in 8, what were the differences in
12 terms of how he approached his analysis, if
13 any? Wold that help you or not?

14 MR. FELD: I'm prepared to ask,
15 but I believe he just testified that he
16 applied the same economic analysis in both
17 reports.

18 JUDGE SIPPEL: All right. You do
19 it your way, Mr. Feld. Go ahead.

20 CROSS EXAMINATION

21 BY MR. FELD:

22 Q Just to verify, is that correct,

1 you used the same economic analysis in both
2 reports?

3 A Yes, Your Honor, I think that the
4 tools I applied as well as the basic empirical
5 evidence that I brought in to bear on the
6 questions posed are quite the same. There are
7 some differences because Cox and Bright House
8 are not the same in terms of their subscriber
9 base, in terms of their locations and there
10 are some differences in demographics and there
11 are some differences in the presence of
12 alternative distributors of programming to the
13 households located within these MVPD service
14 areas.

15 So there are some differences, but
16 I don't believe they're of the sort that will
17 require separate analyses of the key issues
18 and thereby there's a grading of similarities
19 between these two reports.

20 JUDGE SIPPEL: What you've just
21 outlined are basically the differences, in
22 short, your methodology, your approach is the

1 same, it's just that you had these differences
2 as you pointed them out.

3 THE WITNESS: Yes, Your Honor.

4 JUDGE SIPPEL: I'm not going to
5 try to repeat them here.

6 Let me ask you one question.

7 THE WITNESS: Sure.

8 JUDGE SIPPEL: But you did make a
9 statement about no evidence that consumers
10 were damaged. Is that right?

11 THE WITNESS: Yes.

12 JUDGE SIPPEL: No harm to
13 consumers?

14 THE WITNESS: That's right.

15 JUDGE SIPPEL: Is that part of the
16 test under this statute? Now this is an FCC
17 statute. This isn't Clayton or something like
18 that.

19 MR. BECKNER: No, I'm not
20 suggesting it is, but I thought that the Court
21 might be interested in this expert's
22 conclusion about that since ultimately the

1 whole reason we're here is because of
2 consumers.

3 JUDGE SIPPEL: Let me say it
4 another way. Well, does the statute and the
5 regulation read that way? It says you can't
6 discriminate, but -- okay. It says you can't
7 discriminate and it does use some general
8 language that would be applicable in an anti-
9 trust.

10 But you say that the statute --
11 the statutory purpose is to ultimately protect
12 consumers and not to protect programmers?

13 MR. BECKNER: No, the primary
14 purpose is to protect the programmers.

15 JUDGE SIPPEL: But the consumers
16 benefit from that.

17 MR. BECKNER: But the presumption
18 is the consumers benefit from it.

19 JUDGE SIPPEL: So if the consumers
20 aren't being hurt by what the carriers'
21 conduct is, then the fact that the programmer
22 is not making the profits that it would like

1 to make that really -- you think it becomes
2 legally irrelevant? I'm trying to figure out
3 what's going to be the relevance of that
4 conclusion if we can draw it. I'm talking
5 about consumers.

6 MR. BECKNER: The statutory
7 language specifically refers to conduct the
8 effect of which is to unreasonably interfere
9 with the ability of the programmer to compete
10 fairly. That's as good as I can do off from
11 memory.

12 JUDGE SIPPEL: I know.

13 MR. BECKNER: And you're probably
14 right, a million times.

15 JUDGE SIPPEL: Not a mission.

16 MR. FELD: Your Honor, if --

17 JUDGE SIPPEL: I'm confusing more
18 than I'm helping I think here, but I want to
19 try and figure out which -- what this is
20 supposed to lead to at the end. That's what
21 I'm trying to understand.

22 MR. BECKNER: Well, Your Honor, if

1 I could continue answering your question.

2 JUDGE SIPPEL: Yes, sir. Please,
3 Mr. Beckner.

4 MR. BECKNER: So the question
5 posed by the statute itself is does this
6 action, assuming it happened, unreasonably
7 interfere with the ability of the programmer,
8 WealthTV, to compete fairly. And that's what
9 Dr. Ordover was testifying about. You just
10 heard an answer to a series of questions it's
11 not that.

12 JUDGE SIPPEL: Yes, I understand
13 that.

14 MR. BECKNER: His analysis, as I
15 think he's already explained, and I don't want
16 to put words in his mouth is that when he's
17 looking at the question on unreasonably
18 interfering with the ability to compete, he's
19 looking at competition because that's what he
20 says economists do. And he's looking at the
21 overall health or state of the market, that
22 is, is the market more or less competitive he

1 said and the presumption underneath all of
2 that and that's the only reason I brought it
3 up is that a competitive market that's healthy
4 is one that ultimately benefits consumers.
5 The existence of a competitive market benefits
6 consumers. That's the only tie that I'm
7 trying to make and the witness introduced in
8 his testimony, so I hope that helps answer the
9 question.

10 JUDGE SIPPEL: I'm not completely
11 I don't want to say satisfied. There's an
12 element here that -- and I have to go back and
13 think and read the statute more carefully.
14 But if you had, with or without WealthTV, with
15 a market like this, are consumers going to be
16 helped or hindered without WealthTV? You can
17 take any company you want, any program company
18 that wants to get on.

19 I'll try to say it another way.
20 If you have two companies that are competing
21 and they join together, that means you only
22 have one company that can't compete. Clearly,

1 you've got consumers that are going to be hurt
2 by that. With all the other market factors
3 thrown in -- I'm just trying to do it as a
4 quick --

5 THE WITNESS: First of all, I
6 don't believe that two firms combining
7 necessarily will hurt consumers. It may
8 actually advance competition if it makes the
9 combined firm stronger, financially has a
10 better reach, more able to offer attractive
11 programming where taken separately each and
12 every one of them might be struggling and so
13 on and so forth.

14 So sometimes, frequently in fact,
15 mergers of that sort are efficiency-enhancing
16 for consumers.

17 JUDGE SIPPEL: No, I understand
18 that, but my hypothetical is if you have and
19 it's just for purposes of just setting up the
20 other side of this, if you only have two
21 companies in an industry and they're competing
22 to a degree and all of a sudden they decide to

1 merge, joint, meaning that there's no
2 competition, that's almost an inference that
3 the consumer is going to be hurt by that. I
4 know there's a lot of factors that go into
5 that. I am not asking you to agree with that.

6 THE WITNESS: Right.

7 JUDGE SIPPEL: Is that true as a
8 general proposition?

9 THE WITNESS: I think as a general
10 proposition, the Department of Justice under
11 the 1992 merger guidelines which I actually
12 co-drafted would take a very hard look on a
13 merger to monopoly. It would ask, in
14 particular, whether, in fact, consumers would
15 be harmed and the answer might be yes or no
16 with one of the important considerations being
17 whether or not other firms could indeed come
18 in and offer --

19 JUDGE SIPPEL: Potential
20 competition.

21 THE WITNESS: Exactly. Or closely
22 already in the same space and therefore can

1 somewhat redefine their programming, let's
2 focus on channels in a way that would offer a
3 constraining effect on the two merging
4 parties.

5 JUDGE SIPPPEL: Okay, but for
6 purposes of my question I'm trying to give you
7 a worst case scenario and posit it on this
8 side of the scale. Worst case, no potential
9 competition. The product is something like
10 something that you can't get anyplace else and
11 no substitution. Put that there, and then you
12 take a situation like it is in the cable
13 broadcast, cable communication, cable carriage
14 programming, the whole structure and how
15 that's set up, if a programmer does not get
16 on, to get carriage on a particular cable
17 company or any particular half a dozen cable
18 companies, all right, doesn't get on, and life
19 goes on without that particular program, are
20 consumers going to be -- could consumers be
21 hurt by that?

22 THE WITNESS: They could be, but I

1 need to clarify. This is a very interesting
2 set of issues that I sort of readdress as a
3 part of this particular inquiry, but in your
4 hypothetical are you suggesting that every MSO
5 would have both of those? Consumers may only
6 have access to one, even though the two are
7 out there available, any particular carrier
8 may only choose to carry one. They don't have
9 to carry both.

10 Or is your question that if the
11 channel has not gotten on the number of
12 particular MVPDs, it will simply exit because
13 I think my main conclusion here, going to that
14 point was that I do not believe that WealthTV
15 would, in fact, be caused to exit and be
16 impeded in its ability to compete for carriage
17 and advertisers merely by the purported
18 exclusion from or the actual non-carriage on
19 Cox and BH. That's all I was --

20 JUDGE SIPPEL: This is helping me
21 focus. I think that's -- if there was proven
22 conspiracy to drive a productive, I mean in

1 other words, a program producer that had a
 2 good product, might not be the best. There
 3 was a concerted effort to drive that person
 4 off the cable, off the carriage, obviously,
 5 there would be damage to consumers, aside from
 6 the violation of the law. I would almost make
 7 that assumption.

8 THE WITNESS: I think that almost
 9 --

10 JUDGE SIPPEL: But when you get
 11 into these other variables that you're saying,
 12 that there might be some alternative means to
 13 carry, not just these four, five, or six cable
 14 carriers. There might be 20 down the road.
 15 If he knocks on the door of these five and
 16 they say no, he can go down the road to the
 17 other ten and consumers aren't really going to
 18 be, one way or the other, going to be hurt.

19 THE WITNESS: My point --

20 JUDGE SIPPEL: Hypothetically.

21 THE WITNESS: Yes.

22 JUDGE SIPPEL: That's all I'm

1 saying.

2 THE WITNESS: Not hypothetically,
3 actually more than that, realistically, if
4 there were evidence which I have not seen in
5 this case that the owners of IN DEMAND just to
6 make a name up, were to conspire through some
7 means to drive WealthTV out of the market, I
8 would not be sitting here testifying because
9 I spent a good deal of my life when I was at
10 Justice Department fighting cartels. And I
11 believe that cartels are in many sense very
12 worse features of economic landscape. And
13 therefore, if that were the evidence, as I
14 said, I wouldn't be testifying. We are
15 talking about what I consider to be unilateral
16 decisions of Cox and BH to simply do not
17 extend carriage to WealthTV.

18 JUDGE SIPPEL: My question wasn't
19 suggesting a cartel. I'm just saying
20 hypothetically there's that kind of conduct
21 that's different from the situation that
22 you're referring to where you don't get taken

1 on to a system for a variety of reasons, but
2 it's not because you've been -- there's been
3 a concerted agreement to keep you off.

4 THE WITNESS: Exactly.

5 JUDGE SIPPEL: To freeze you out,
6 in effect.

7 THE WITNESS: Exactly.

8 JUDGE SIPPEL: Different
9 situations.

10 THE WITNESS: Right, so if the
11 decisions are unilateral and if whatever they
12 might be, and if after the wake of these
13 decisions they excluded channel, the channel
14 is excluded from these particular
15 distribution, from this particular MVPDs,
16 still can be viable, attract other
17 distributors and can attract advertising, then
18 I believe that this is just a frequently and
19 normal development in markets which are
20 perfectly well functioning.

21 You go to a supermarket and not
22 every supermarket carries exactly the same

1 range of frozen food or peas which are my
2 frequently favorable example. I don't know
3 why but I always use peas. I talk about peas
4 when I give examples. So not every
5 supermarket has the same collection of canned
6 peas. And therefore not everybody is on every
7 shelf. That does not, by itself, diminish
8 competition to the detriment of consumers
9 which is to me almost the ultimate stand.

10 JUDGE SIPPPEL: Supposing that
11 there's a payoff, say Safeway gets some kind
12 of a benefit from the pea manufacturer,
13 whatever they do. They don't manufacture
14 them. They package them.

15 THE WITNESS: Yes.

16 JUDGE SIPPPEL: And well, if you
17 package mine, and you put yours up towards the
18 front of the shelf and push the other guys to
19 the back, we'll put some kind of fancy doilies
20 on your shelving so that it looks better. Is
21 that fair?

22 THE WITNESS: Well, fair is not an

1 economic term. Maybe President Truman would
2 have been upset.

3 JUDGE SIPPEL: Life isn't fair.

4 THE WITNESS: Life isn't fair and
5 then you die.

6 (Laughter.)

7 THE WITNESS: The point being that
8 yes, users continuously -- going back to the
9 supermarket about which we know a fair amount,
10 continuously are trying to get superior
11 carriage. They pay to be in the front of the
12 store. They pay to be put into the weekly
13 circular. They offer shelf -- what they call
14 slotting fees or slotting allowances so
15 there's a huge amount of competition between
16 pea manufacturers, frozen soup manufacturers,
17 ice cream manufacturers, to get shelf space,
18 and not only shelf space, but also the
19 location on the shelf.

20 Why? Because these are valuable
21 things that a supermarket has to offer and
22 clearly, that is part and parcel of

1 competitive interactions among the suppliers
2 to the supermarkets against each other. Some
3 have a better product, some have a better
4 marketing campaign, some have whatever it is
5 and all of those things shake themselves out
6 and the distribution and carriage which they
7 receive from competing supermarkets.

8 JUDGE SIPPEL: I'm taking you far
9 afield, Mr. Feld, but I'm satisfied that I
10 understand where the witness is going.

11 THE WITNESS: And I am enjoying
12 this probably more than Mr. Feld is.

13 MR. FELD: I like a good economic
14 argument as much as the next policy wonk, but
15 if I may respond to one or two points that
16 were made.

17 JUDGE SIPPEL: Go right ahead.

18 MR. FELD: The statute itself does
19 not contain a public interest answer. I would
20 like to clarify that. Further, as I think we
21 may have addressed in our trial brief and
22 certainly we can address with regard to this

1 issue of the public interest, we have raised
2 the diversity concern which, as the Turner
3 case says in regard to cable is a government
4 interest of the highest order and in our legal
5 brief offer that as a type of consumer harm
6 which Dr. Ordovery, I do not believe addresses
7 in his testimony, but I can certainly waive
8 that on cross, if it is relevant.

9 We further could, if this is a
10 matter where, as I say, the legislative
11 history of the statute -- we discussed that in
12 our briefs. We can go on at length in the
13 post-brief about that. But certainly our
14 understanding is that there is not a public
15 interest test here and that the purpose of the
16 statute is to protect programmers and the
17 programming market and to ensure
18 prophylactically a competitive programming
19 market.

20 With regard to the last statement
21 of Dr. Ordovery's, if I could just ask one
22 question with regard to that discussion.

1 BY MR. FELD:

2 Q Are you testifying that the same
3 market dynamics that occur in supermarkets
4 occur in the MVPD programming market?

5 A No.

6 Q Thank you.

7 A But I made certain links that I
8 believe are quite apt. For example, every
9 household in the United States, almost every
10 household, I can't say every, but a
11 preponderance of TV households at this time
12 have access to both cable and DVS and they may
13 choose to subscribe to one or the other and
14 therefore that's equivalent to the fact that
15 in the town that I live, there are two
16 supermarkets. There used to be three. One
17 went bankrupt. So I have access to those two
18 and I will go to the one that offers me a
19 better selection at a competitive price as
20 compared to the other one.

21 Q And I would say rest assured, Dr.
22 Ordover, I do intend to explore that aspect of

1 the market dynamic as we proceed through the
2 cross examination.

3 MR. FELD: I would just like to
4 point out, Your Honor, it's now a quarter to
5 1. I believe that it will only take me about
6 45 minutes, possibly even less, to do the
7 cross. This would be a convenient to stop for
8 lunch if that is what you would like to do.
9 Or in the alternative, I'm pleased to begin
10 the cross.

11 JUDGE SIPPEL: Well, let's go off
12 the record.

13 (Off the record.)

14 JUDGE SIPPEL: Why don't we go
15 back on the record. Let's keep pushing
16 forward until somebody complains. We're back
17 on the record.

18 You may go forward, Mr. Feld. You
19 may go forward.

20 MR. FELD: Thank you.

21 BY MR. FELD:

22 Q Dr. Ordoover, if I could address

1 your attention to page 6, paragraph 10 in your
2 expert report, just to check if these are the
3 same for both the expert report on Bright
4 House and expert report for Cox. This is
5 Bright House Exhibit 8 and --

6 JUDGE SIPPEL: Yes, you're right.
7 It's Bright House 8 and Cox 44. Those are the
8 pages.

9 BY MR. FELD:

10 Q Cox 44, yes. Thank you. Just
11 take a quick look to make sure they're
12 parallel.

13 MR. MILLS: Paragraph 10.

14 THE WITNESS: The reason it gets a
15 little confusing is because Cox has pages
16 somewhat --

17 MR. MILLS: If you just use the
18 paragraph numbers, it should work.

19 THE WITNESS: Yes, got it.

20 JUDGE SIPPEL: This is in regards
21 to similarly?

22 MR. FELD: Similarly.

1 JUDGE SIPPEL: And that's the same
2 as 44.

3 Yes, sir.

4 BY MR. FELD:

5 Q I'm sorry. I'm just -- both of
6 mine say similarly exit -- I believe our
7 exhibits have become a bit confused, but I
8 think -- now with regard to paragraph 10, you
9 base your opinion in these paragraphs on the
10 available census data?

11 A Yes, may I first clarify what this
12 paragraph is about. I don't know if Your Honor

13 -- Q I would prefer if we could just
14 address the questions that I'm asking.

15 JUDGE SIPPEL: You'll save time
16 and he's entitled to do it this way.

17 THE WITNESS: Sorry, I'm relying
18 on the census data.

19 MR. MILLS: I do have an objection
20 just because I thought the question was
21 whether these paragraphs are similar.

22 JUDGE SIPPEL: That's a generic --

1 but let him go about it his way. Let him do
2 it.

3 BY MR. FELD:

4 Q And indeed in these paragraphs,
5 there actually are some differences between
6 the Cox and the Bright House testimony, but
7 they discuss -- let me -- this paragraph,
8 paragraph 10, could you summarize paragraph 10
9 then in the Cox report?

10 A Yes. The purpose of paragraph 10
11 or the summary of paragraph 10 is that I
12 describe the demographics of certain markets
13 that WealthTV claims were of the sort that
14 were particularly well suited to the
15 programming content of the channel, both in
16 terms of the viewers, but also I presume in
17 attracting advertisers.

18 Q And you conducted the same sort of
19 analysis with regard to Bright House in
20 paragraph 10 of the Bright House --

21 A Yes, sir.

22 Q Thank you. And to perform this

1 analysis, you relied on the census data for
2 the markets that you identified?

3 A Yes.

4 Q And with regard to the Cox report,
5 did you have actual demographic information
6 for Cox's subscribers for any of these
7 markets?

8 A The answer is that I did not rely
9 on any internal information at all. I tried -
10 - the purpose was to compare the overall
11 demographics of these markets as described
12 against the U.S. average numbers for these
13 categories of consumers.

14 Q But in terms of the -- I
15 understand that's what you did, but with
16 regard to the impact for WealthTV for being on
17 the Cox system, and the market that is
18 describes that it wishes to reach, did you
19 look at the actual demographics of the Cox
20 subscribers?

21 A The answer is no. As I just said
22 I tried to rely on publicly available data and

1 I did not think there was any particularly
2 strong reason to think that the census-based
3 comparisons would be so materially off as to
4 render my analysis unreliable.

5 Q If there was a significant
6 difference between the actual demographic of
7 Cox's subscribers and the demographics of the
8 census data, would that have an impact on your
9 analysis?

10 A I would have to understand what
11 the differences were, what was the source of
12 these differences, and whether they were of
13 the magnitude that would potentially have an
14 impact of my over-arching conclusion. But I
15 haven't seen any such evidence and you did not
16 provide it to me during my deposition.

17 Q And the same for Bright House?

18 A Yes, I think it holds for
19 everybody, but again, as I said, I do not
20 believe that demographics, based on what I
21 have seen in the data, that there will be such
22 material differences. There might be in one

1 MVPD, but not in the other, so one has to look
2 more of the aggregated look.

3 Q I'd like to proceed to the next
4 question.

5 JUDGE SIPPEL: Thank you, you may.
6 Another area, I hope so.

7 BY MR. FELD:

8 Q Yes, paragraph 11, if I may move
9 on, please, and first if I can ask --

10 JUDGE SIPPEL: You want to look at
11 both at the same time?

12 MR. FELD: That's what I was about
13 to ask the witness.

14 JUDGE SIPPEL: Thank you.

15 THE WITNESS: Okay.

16 BY MR. FELD:

17 Q Could you please summarize the
18 purpose of paragraph 11?

19 A Yes, the purpose of that paragraph
20 in both of the affidavits is to point out that
21 Cox and Bright House subscribers in their
22 service areas have ability albeit

1 differentiated to some extent, to access other
2 distributors of cable programming or actually
3 MVPD programming.

4 Q And did you look at the -- for the
5 Cox territories, did you look at actual
6 penetration numbers?

7 A You mean penetration numbers for
8 DBS?

9 Q Penetration numbers for any of the
10 alternative distributors that you mention
11 here. Did you look, for example, in any of
12 the Cox markets at the actual penetration
13 levels of Cox versus AT&T?

14 A No. I have not done such micro
15 studies. I did not have the kind of data
16 available to me at that time.

17 Q Thank you. Just to move this
18 along, and the same thing for Bright House,
19 you didn't look at actual penetration numbers
20 for Bright House either? I'll add if it is
21 repetitive to establish for both in this way
22 I'm happy to phrase the questions a different

1 way, but since there are two, I do just wish
2 to confirm that for Bright House, the same,
3 correct?

4 A Is the same. I offer qualitative
5 evidence, i.e., on the presence of DBS and on
6 the presence of broadband distribution as well
7 as on the presence of overbuilders.

8 Q Now with regard to that point, do
9 you know how many Cox subscribers actually
10 have access to FiOS which I believe you list
11 as one of the possible competing delivery
12 systems?

13 A I don't know the exact number, no
14 sir. But I do know that FiOS is being rolled
15 out pretty quickly across different
16 geographies, at least according to press
17 reports.

18 Q But with regard to Cox and Bright
19 House, again, you don't have any specific
20 information about whether Cox -- how many Cox
21 subscribers actually have access to FiOS?

22 A That is true. All I know is how

1 many people are actually subscribing, but how
2 many actually have elected to subscribe in any
3 particular geography, I don't have that level
4 of detail.

5 Q And the same is true for the other
6 MPVD alternatives that you list. There is no
7 -- you didn't look to see if -- how many have
8 access to an overbuilder or other royal form
9 of MVPD?

10 A Well, the answer is I have not
11 done that kind of analysis, but I want to make
12 sure that we are not putting DBS and broadband
13 in the same box, because DBS is available
14 everywhere in principle. I don't know of any
15 area where it's not. I certainly have no
16 information that it's not available in the Cox
17 and Bright House service areas.

18 Q But you anticipate me, Dr.
19 Ordover, since I did indeed wish to address
20 DBS and broadband separately. I'm pleased to
21 move on to that.

22 Now are there physical reasons why

1 a person might not have access to DBS?

2 A Yes. I understand that in some
3 areas, DBS signal may not be as good as a
4 cable signal, but in general, I don't believe
5 that there is any evidence on the record that
6 in the Bright House and Cox service areas DBS
7 is a substantially inferior source of
8 programming.

9 Q With all due respect, Dr. Ordovery,
10 I'm not asking you about my evidence. I'm
11 asking you about yours. And just to ask are
12 you aware that if you do not have a clear view
13 of the southern sky that you cannot receive a
14 DBS signal?

15 A I am aware of technical
16 limitations, yes, sir. I testified to those
17 before. The point I'm making --

18 Q If I may just proceed. I know
19 it's
20 -- but there is the technical limitation about
21 the southern sky. There will be opportunity
22 to elaborate certainly and you've already done

1 so and there will be the opportunity on
2 redirect, if necessary, but just to try to
3 move here.

4 I'm sorry, now I've lost my place.
5 With regard to these technical limitations,
6 you do not have any information about how many
7 subscribers lack a view of the southern sky
8 within either the Cox of Bright House
9 territories?

10 A And answer is I don't have that
11 kind of level of detail to answer your
12 question.

13 MR. FELD: I'd like to approach to
14 show the witness a document.

15 JUDGE SIPPEL: Sure. There might
16 be some deprived people in places like Chevy
17 Chase or something, they have so much --

18 THE WITNESS: Not the buildings,
19 trees. Buildings is not an issue.

20 JUDGE SIPPEL: I can assure you,
21 the people in Chevy Chase are not worried
22 about it. They can handle themselves fine

1 without DBS.

2 THE WITNESS: Chevy Chase can
3 handle a lot of stuff from what I understand,
4 Your Honor.

5 JUDGE SIPPEL: I think you're
6 right.

7 MR. FELD: May it please the
8 Court, I would like to ask that this be marked
9 for identification purposes only as WealthTV
10 265, simply for identification at the moment.

11 JUDGE SIPPEL: 265 WTV.

12 (Whereupon, the above-referred to
13 document was marked as WTV Exhibit
14 265 for identification.)

15 Go ahead. Do you want to ask the
16 witness if he's familiar with this at all?

17 BY MR. FELD:

18 Q Dr. Ordoover, do you recognize this
19 document?

20 A Yes, I do.

21 Q Could you describe it, please?

22 A Well, just reading the title it is

1 a Government Accountability Office report,
2 dated April 2005 called "Direct Broadcast
3 Satellite Subscribership Has Grown Rapidly,
4 But Varies Across Different Types of Markets."

5 Q Have you seen this before?

6 A Yes.

7 Q When?

8 A Well, I've seen it at least twice,
9 once when you showed it to me at my
10 deposition, but also prior to that.

11 Q And if I could ask you to turn to
12 what is numbered in the right hand corner as
13 page 18, it's internally numbered page 14.

14 A Yes.

15 Q If I could ask you to read the
16 heading of this section?

17 A "Key Geographic Factors Influence
18 DBS Penetration Rates."

19 Q If I may ask you to read the first
20 bullet point, please?

21 JUDGE SIPPEL: To himself or out
22 loud?

1 THE WITNESS: Do you want me to
2 read it into the record?

3 BY MR. FELD:

4 Q I'm hoping that won't be
5 necessary. If you could just read it to
6 yourself then.

7 JUDGE SIPPEL: Where it starts,
8 "The DBS penetration rate"?

9 MR. FELD: "The DBS penetration
10 rate is lower in areas with relatively large"
11 -- yes.

12 JUDGE SIPPEL: Why don't you try
13 asking him a question on it. And then see if
14 he has to read it to answer the question.
15 Maybe he's familiar enough for this. Would
16 that be okay, Doctor?

17 THE WITNESS: I'm familiar with
18 this.

19 JUDGE SIPPEL: Ask him a question.

20 BY MR. FELD:

21 Q Dr. Ordoover, do you see that the
22 first bullet point says that DBS penetration

1 rates are lower in areas with housing units
2 and multiple dwelling units?

3 A Yes, I see that. GAO conducted an
4 econometrics study based on, by now, fairly
5 outdated data because it was 2005. So it's my
6 understanding that technologies have improved
7 actually to some extent and thereby, I have no
8 idea how robust these findings are through the
9 passage of the time, but I will not argue that
10 some factors do not impede receipt of a
11 satellite signal.

12 Q And if I can direct your attention
13 to the second bullet point which makes the
14 same geographic concern with regard to the
15 difficulty, whether you are in the northern or
16 southern part of the country?

17 A Yes, there are some differences to
18 that effect as well.

19 Q And just again, to finish this
20 line of questioning, no specific information
21 with regard to either Cox of Bright House with
22 regard to how many of their subscribers are

1 impacted by these geographic concerns
2 discussed here?

3 A That is true.

4 JUDGE SIPPEL: Is there an
5 objection?

6 MR. BECKNER: Object to the form
7 of the question.

8 MR. FELD: I'm sorry.

9 MR. BECKNER: I don't know what it
10 means.

11 JUDGE SIPPEL: Let's try it again.
12 Let's try it again. Mr. Feld?

13 BY MR. FELD:

14 Q I'll try it again. You don't know
15 how many multiple dwelling units can't receive
16 a DBS signal?

17 A In each and every one of Cox's
18 Bright House's service areas?

19 Q Yes. Do you know how many
20 multiple dwelling units in each and every one
21 of Cox's service areas cannot receive a
22 signal?

1 JUDGE SIPPET: A DBS signal?

2 BY MR. FELD:

3 Q A DBS signal?

4 A I have no idea as I sit here what
5 the percentage is, but again, the study does
6 not say that the share of total households
7 which cannot receive such signal is
8 necessarily very large. One cannot make
9 inferences regarding that fact, simply from
10 the rates of penetration because these rates
11 of penetration reflect the variety of economic
12 decisions by households in the areas in which
13 they are located.

14 Q And --

15 JUDGE SIPPET: Try and keep your
16 questions focused on the question, not
17 preliminary to the question. Go ahead.

18 MR. FELD: I may be done with this
19 line of questioning. Let me just take one
20 moment here.

21 JUDGE SIPPET: Sure.

22 MR. FELD: Let me move on. I'm

1 done with this document for the moment.

2 I ask that this document be --
3 well, I don't -- we don't need to move this
4 into evidence, Your Honor. I simply ask that
5 it be kept with the record.

6 JUDGE SIPPEL: Well, I'm not sure
7 -- do you want to cite it -- I'll take
8 judicial official notice of it. It's a
9 government document if you want to cite it.

10 MR. FELD: Thank you, Your Honor.

11 JUDGE SIPPEL: Does anybody else
12 have any objection to that?

13 MR. BECKNER: Actually, Your
14 Honor, the witness has testified that he
15 thinks the data in this report is outdated.

16 JUDGE SIPPEL: I understand. I'm
17 not trying to push it into the record at all.
18 I'm simply saying that I can still take
19 official notice of the document, but the
20 witness has characterized his -- the value of
21 it. If he wants to cite it in his findings,
22 he can cite it in his findings for what it's

1 worth.

2 MR. FELD: And Your Honor, if I
3 may add since 2005 is one of the years in
4 which the conduct of the Defendants is
5 relevant, it has some value.

6 JUDGE SIPPEL: Well, I don't have
7 to determine whether it has any value. All I
8 have to decide is whether or not it's in any
9 way, shape, or form going to be a part of the
10 case.

11 MR. MILLS: I'm sorry. I don't
12 think that's accurate that 2005 is a relevant
13 time period with regard to the conduct of the
14 Defendants. I don't think Mojo existed in
15 2005, so I think that statement just isn't
16 accurate. But --

17 JUDGE SIPPEL: But the
18 predecessors of Mojo did.

19 MR. MILLS: Yes, but there's no
20 allegation that there was discrimination in
21 favor of INHD over WealthTV. The only
22 allegation --

1 JUDGE SIPPEL: Mojo is another
2 one?

3 MR. MILLS: Yes, sir.

4 MS. WALLMAN: Well, Your Honor,
5 denial of carriage by Cox which occurred in
6 2005 is an issue in the case.

7 MR. MILLS: I don't understand
8 that to be true. I just don't agree. Mojo
9 wasn't even in existence. It's not consistent
10 with the theory of the case at all.

11 JUDGE SIPPEL: I mean I think
12 we're getting down to something that you're
13 certainly wasting your time, if nothing else.
14 As I said right now my ruling, I'm not going
15 to receive this into the record. I'm not even
16 going to keep it in as an identified exhibit,
17 simply because of the fact that it's just too
18 bulky. We don't need all that paper going
19 down to the chute, wherever they put these
20 things. But you certainly can cite it as you
21 could an article or anything.

22 MR. FELD: Thank you, Your Honor.

1 THE WITNESS: May I make a
2 comment.

3 JUDGE SIPPEL: Absolutely, Doctor.

4 THE WITNESS: The one point I
5 would like to make, whether it's worth
6 anything or not. The document was published
7 in April 2005, but just quick perusal of the
8 document such as they did not use any data
9 past 2004, so I don't know whether it makes
10 any difference to anything, but the data set
11 I think ends in January 2004 and that may be
12 relevant to Your Honor.

13 JUDGE SIPPEL: That would permit a
14 way to start a whole new line of argument.

15 (Laughter.)

16 THE WITNESS: I apologize.

17 JUDGE SIPPEL: You're doing a
18 great job though. No, let's just leave it the
19 way I ruled.

20 MR. FELD: Let's leave this behind
21 us, yes.

22 JUDGE SIPPEL: Go ahead.

1 MR. FELD: We'll move on.

2 JUDGE SIPPEL: Please.

3 BY MR. FELD:

4 Q Now also still in paragraph 11,
5 you say that WealthTV could have marketed
6 itself directly to get people to switch. Can
7 you find that in paragraph 11?

8 A Right.

9 Q Have you ever participated in a
10 marketing campaign?

11 A Not in the cable space, no.

12 Q Do you have any information when
13 you prepared this analysis on what that might
14 cost?

15 A No, I just simply stated what it
16 is.

17 Q Now, when we talk about consumer
18 switching from one service to another, getting
19 us back perhaps to the conversation we had at
20 the beginning, programming isn't the only
21 consideration for consumers in switching from
22 cable to DBS or cable to an overbuilder, is

1 it?

2 A The programming lineup? No.

3 There are other considerations for sure.

4 Q What are the other considerations
5 for consumers?

6 A One might be the fees that one has
7 to pay, whether they stay on cable or go to
8 DBS or you move to the overbuilder, if
9 overbuilder is available or to FiOS if FiOS or
10 broadband is available. So the rates matter.
11 The incentives that you may receive through
12 the marketing campaign of the competing
13 distributor may matter. For example, a DBS
14 vendor may underwrite a switch by giving away
15 free receiving antennas. So this would be
16 three additional considerations that I have
17 mentioned already.

18 Q Is it correct to refer generally
19 to these costs associated with switching as
20 switching costs?

21 A Yes. There is a cost to switch
22 and the magnitude of that cost will vary over

1 time and across households. They're not the
2 same for everybody.

3 Q And would it be fair to say that
4 there are aspects of the switching costs that
5 would not be in WealthTV's control?

6 A The answer would be yes, to some
7 extent. If WealthTV, if the switching costs
8 to someone may involve purchasing an antenna,
9 for example, to switch the DBS, it may not be
10 possible or easy -- everything is possible
11 with money, I guess, making a rather cruelty
12 of life, to induce people to buy antennas so
13 that it can receive WealthTV and in
14 particular, given the alleged demographics to
15 these alleged demographics, maybe the cost of
16 the antenna may not be a major issue relative
17 to the huge benefits that one can get from
18 watching, allegedly from watching WealthTV.

19 Q That's true, but I actually was
20 asking about what was in WealthTV's control
21 since you, I believe say, here that WealthTV
22 could have conducted a marketing campaign?

1 A Well, what could have been, I
2 guess we're just hypothesizing so I don't know
3 whether WealthTV tried anything or not, would
4 be to -- for example, mail vouchers to the
5 targeted demographics, \$25 off of your
6 purchase of the DBS antenna or we'll pay your
7 first month's subscription fee so you can try
8 our product. I don't know. There are clever
9 people out there who market things all the
10 time to consumers and to TV households.

11 Q But if the switching costs were
12 high, would that make a difference to any
13 effort to get consumers to switch?

14 A As I said, high is a relative
15 number and it also has to be compared relative
16 to the benefits. So you cannot just look at
17 one side of the equation because the decision
18 to switch is a cost-benefit calculation and
19 one has to consider both. As I pointed out,
20 the demographics allegedly attracted to
21 WealthTV may not find a switching cost of \$100
22 to be large relative to what another type of

1 demographics would find prohibitive.

2 Q If I can move on now to the last
3 sentence in this paragraph that begins "absent
4 any persuasive evidence that WealthTV could
5 not possibly achieve a viable scale of
6 operation."

7 A I'm just reading to see if they
8 are the same. Yes. Got it.

9 Q Is it your -- now, how many
10 subscribers does Cox have? I believe you gave
11 us a subscriber figure?

12 A I think it was around 5 million.
13 It probably changes from day to day because of
14 the churn between cable and DBS, but the
15 numbers are probably in excess of 5.5 million.

16 Q And just to clarify, your opinion
17 here is that unless there was no way to
18 achieve viability without those 5 million
19 subscribers, WealthTV cannot reliably
20 demonstrate that a lack of access to Cox's
21 subscribers had harmed its ability to compete
22 for advertising and/or offer attractive

1 competing programming?

2 A I think you're probably reading it
3 more aggressively than I meant it to say. I
4 am saying look, you have to show from the
5 economic standpoint which is the kind of
6 exercise we do all the time in matters
7 involving foreclosure, that's the foreclosure
8 for a particular set of customers is of the
9 sort that is close to fatal to the firm. Of
10 course, being foreclosed may make it a little
11 more difficult to be a competitive force or
12 may not. But absent the showing that this is
13 critical, I would say there is no evidence
14 that, in fact, Cox or Bright House were
15 critical from that perspective and even that
16 both of them combined were critical to the
17 competitive viability of WealthTV.

18 Q So you're not saying since this
19 was -- you're not saying that Cox and Bright
20 House are just generically too small to matter
21 for WealthTV in terms of achieving viability,
22 but you need to show some kind of -- well, let

1 me -- you're not saying that under all
2 circumstances, Cox TV or Bright House TV are
3 too small to matter?

4 A I am saying that as a presumption
5 and given the size of the demand side in the
6 United States, I would say they are close to
7 being irrelevant. Now you perhaps may conjure
8 up some circumstances in which life depends on
9 having access to 2.5 million Bright House
10 subscribers, but if one makes their claim to
11 an economist, that's a very drastic and
12 radical claim that will have to be
13 substantiated with something more than simply
14 saying so. I would not take it on board as
15 having any probative value from the standpoint
16 of economic analysis.

17 Q I understand, Dr. Ordover, and I
18 need to ask, you have not reviewed the
19 evidence that was introduced in the last two
20 weeks of trial, have you?

21 A I have not reviewed that evidence,
22 no.

1 Q And does -- to clarify, this is
2 with regard to your opinion on viability?

3 A Comparative viability which is of
4 the sort that is at issue, I understand, in
5 this particular proceeding. That is whether
6 or not exclusion from Bright House and Cox,
7 separately, would have the substantially
8 negative impact on the ability of WealthTV to
9 compete fairly in the relevant markets.

10 Q So even if it hurt them, but not
11 to death, that would not be relevant?

12 A I don't know what you mean by
13 relevant. I think it's for His Honor to weigh
14 all of the kind of evidence. I'm saying from
15 a comparative standpoint, any decision,
16 whether it's to carry or not, is going to have
17 some impact. The question is is it going to
18 have the kind of impact that is actually laid
19 out in the statute, i.e., whether it's going
20 to substantially impede or impair the ability
21 of WealthTV to compete fairly in the relevant
22 markets which I understand markets for

1 carriage and markets for advertising.

2 Q And losing revenue that could have
3 gone to advertising campaigns and those sorts
4 of things is not a competitive disadvantage?

5 A No. Again, I think you are
6 misinterpreting what I am saying.

7 Q Let me try to clarify then so we
8 don't go back and forth. I understand you
9 think I'm misinterpreting, but let me just
10 ask, if we got past the question of whether
11 they did something wrong, if we found that it
12 was -- this is a hypothetical, if we found
13 that Cox had the wrong motivation, that they
14 had violated that part of the statute and now
15 we were on the question of just the did it
16 unfairly harm because we -- does that lack of
17 revenue from Cox unfairly harm WealthTV's
18 ability to compete?

19 MR. MILLS: Objection, Your Honor.
20 I don't mind the hypothetical, a hypothetical,
21 but the standard is not unfairly harmed. It's
22 not about harm. It's unreasonably restrain

1 the ability to compete fairly. I just want to
2 make sure the witness answers the question
3 that's relevant in this case.

4 JUDGE SIPPEL: If we're going to
5 parallel the statute --

6 MR. FELD: I'm sorry --

7 JUDGE SIPPEL: I'll sustain the
8 objection.

9 BY MR. FELD:

10 Q Let me try to wrap this up then.
11 So your opinion in paragraph 11 is limited to
12 critical damage, not just lost revenue?

13 A My opinion in paragraph 11 and
14 throughout the report, not just paragraph 11,
15 is related to the statutory language, whether
16 or not WealthTV was impaired unreasonably in
17 its ability to compete fairly and in
18 particular whether denial of access to Cox
19 and/or Bright House would undermine it's long-
20 run viability. And I concluded based on the
21 evidence and my economic training that there
22 was no such substantial impairment period.

1 That's what I concluded.

2 JUDGE SIPPEL: He's answered the
3 question.

4 MR. FELD: I'm moving on.

5 JUDGE SIPPEL: Thank you.

6 BY MR. FELD:

7 Q I'm going to ask you to turn to
8 page 12, the entire section. Paragraph 17,
9 the section covers paragraph 17 through 22.

10 A Right.

11 Q Just a very generic question --

12 JUDGE SIPPEL: Well, would it help
13 to just start off by stating what's in the
14 bold print on top? That seems to be a good
15 direction?

16 BY MR. FELD:

17 Q For the purpose of this section,
18 is I take it captured in the heading in bold?

19 JUDGE SIPPEL: Well, let's read it
20 in the record, "The decision to carry a
21 station is an individual decision for each
22 MVPD and is based on a variety of factors."

1 And paragraph 17, 18, etcetera.

2 BY MR. FELD:

3 Q Have you ever actually negotiated
4 a carriage agreement?

5 A No, sir. As an expert witness in
6 one dispute regarding carriage, but I never
7 negotiated them.

8 Q If I may direct your attention now
9 to paragraph 26.

10 THE WITNESS: That's page 19, Your
11 Honor.

12 JUDGE SIPPEL: Thank you. I got
13 that one.

14 BY MR. FELD:

15 Q Could you please summarize the
16 purpose of paragraph 26?

17 A Right, well, the purpose of this
18 paragraph is to point out that there are
19 likely a number of other programming channels
20 other than Mojo or WealthTV that would be
21 attractive to the type of advertisers that
22 apparently advertised on WealthTV and Mojo.

1 The only information I have on the specific
2 campaign is that relating to Grey Goose Vodka,
3 I think it's because you have actually raised
4 it in your complaint, so I tried to follow the
5 thread relating to that campaign.

6 Q Now you did not actually watch any
7 Mojo programming to prepare your opinion
8 paragraph 26?

9 A That's fair to say. I'm not -- I
10 don't think that I have Mojo on Cablevision in
11 my home in New Canaan.

12 Q Did you watch any, even if it
13 wasn't at your home in New Canaan?

14 A No.

15 Q Did you watch any WealthTV
16 programming in preparation for this?

17 A No. But then again I didn't watch
18 any programming at all because I don't watch
19 much television.

20 Q If I may just direct your
21 attention to paragraph 29. Could you please
22 give the purpose of paragraph 29, summarize

1 it, please?

2 A Let me just take a look.

3 Q Yes, I'm sorry. Please.

4 A Yes, this is going to the point
5 that we discussed at the beginning of my
6 testimony and that is whether or not the harm
7 to consumers should be somehow factored in,
8 into the analysis of the issues raised in this
9 dispute, this litigation, whatever you want to
10 call it. And so all -- what I do in paragraph
11 29 and the subsequent paragraph is to briefly
12 point out, very briefly, actually this
13 paragraph, one paragraph section, that there
14 has been a good deal of entry in competition
15 in the provision of channels, programming
16 channels, including channels that are not
17 related in any form or fashion to the owners
18 of -- to the MVPD owners.

19 Q Could you state how many of those
20 channels competed directly with Mojo?

21 A That I cannot say because
22 competition that Mojo faces is not only from

1 the new channels, but also from the legacy
2 channels. There's a lot of competition for
3 people's eyeballs and viewing hours and it's
4 my view that Mojo competes given the nature of
5 its programming as described with other
6 channels, including there might be some new
7 channels that have entered that offer similar
8 fare.

9 Q And are you aware of what is
10 referred to in -- I withdraw. No further
11 questions.

12 JUDGE SIPPEL: Let me just -- I
13 just have one point. This is the bright
14 language that appears above paragraph 29 and
15 I'll say it one time with both Cox and Bright
16 House. It says -- this is what you're saying
17 now. "There is no basis for WealthTV's claim
18 that consumers suffered harm as a direct
19 consequence of Bright House's or of Cox's
20 failure to carry WealthTV." Is that your
21 opinion? Is that the bottom line of your
22 opinion?

1 THE WITNESS: That's the bottom
2 line of my opinion.

3 JUDGE SIPPEL: On that section.

4 THE WITNESS: On the section, yes.

5 JUDGE SIPPEL: Okay, that's all we
6 need.

7 Mr. Schonman?

8 MR. SCHONMAN: A few questions.

9 JUDGE SIPPEL: Be careful.

10 BY MR. SCHONMAN:

11 Q Dr. Ordoover, good afternoon. My
12 name is Gary Schonman and I'm co-counsel for
13 the Enforcement Bureau and as a person who --
14 I can't even remember taking Economics 101, so
15 this --

16 A Neither can I.

17 (Laughter.)

18 At this point, I'm afraid.

19 Q But I did like your example about
20 the supermarket and peas, so I'd like to focus
21 on that for a minute because that is something
22 that I can understand.

1 You had, in your earlier testimony
2 to Mr. Beckner, in response to questions for
3 Mr. Beckner, you talked about the incentives
4 that a company might have or not have to
5 engage in anti-competitive behavior. Do you
6 recall that?

7 A Yes, I recall that.

8 Q If I understand your testimony
9 correctly, you had indicated to Mr. Beckner
10 that Bright House's interest in Mojo or in the
11 company that owned Mojo, iN DEMAND, was so
12 small, I forget the percentage, but it was so
13 small that it didn't have an incentive to
14 engage in anti-competitive behavior?

15 JUDGE SIPPEL: About five percent,
16 right?

17 THE WITNESS: That's my
18 understanding.

19 BY MR. SCHONMAN:

20 Q Am I characterizing your earlier
21 testimony correctly?

22 A Yes, I probably said more than

1 just that, but five percent was an element of
2 my answer, the smallness of the profits share.

3 Q Okay, so keeping in mind the focus
4 of my questioning is on the incentive of
5 companies to engage in anti-competitive
6 behavior, that's the area.

7 A Right.

8 Q And switching now to the
9 supermarket model that you used, we were
10 talking about shelf height and things like
11 that. From my experience doing the food
12 shopping in my family, supermarkets, at least
13 the one I go to and I assume, for example, A
14 & P or whatever in New Canaan, has its own
15 brand?

16 A Yes, it does.

17 Q And --

18 A America's Choice. It's Food
19 Emporium.

20 Q And it's a brand that that
21 particular supermarket has a financial
22 interest in, as opposed to Green Giant, okay?

1 A Yes.

2 Q In which I'm assuming for the sake
3 of our discussion, it doesn't have a financial
4 interest in. And my question for you is does
5 it matter -- does the size of the supermarket
6 or the store, matter in terms of its incentive
7 to push its own brand over that of another
8 brand?

9 A Just one clarifying question to
10 you, if you don't mind. When you say size of
11 the supermarket matters, there will be the
12 share of the Food Emporium in New Canaan, is
13 that what you have in mind or how large it is?
14 Or which aspect of the size that you want me
15 to keep in mind? It probably matters in some
16 way, but I want to make sure that I address
17 your concern.

18 Q I didn't anticipate your question.
19 I was thinking in terms of a large supermarket
20 compared to a small local grocery store, a mom
21 and pop store. But --

22 A Let me help you out if I can.

1 Q Please.

2 A I think --

3 Q Maybe the size of the store, Mom
4 and Pop compared to a large supermarket is not
5 the appropriate comparison.

6 A I think what matters in my view,
7 the size perhaps you had in mind such as its
8 overall size relative to the relevant universe
9 in which size is being measured, may have a
10 bearing on whether or not the store would have
11 the incentive to engage in the comeback that
12 is anti-competitive. And the answer to that,
13 the reason behind that answer is that if you
14 are a particularly small or relatively small
15 store, if you're trying to evict a competing
16 supplier of peas, then you may have -- you
17 may not be able to do that.

18 Why? Because if you evict that
19 competitor supplier of peas from your store
20 and if there is another store next door where
21 those peas are available in attractive terms,
22 because the evicted pea manufacturer only got

1 kicked out of one supermarket, but if there's
2 another supermarket, then there is a good
3 chance that some of your customers will simply
4 go across the street in New Canaan and
5 actually two supermarkets are right across the
6 street from each other, and will buy the peas
7 there.

8 So what have you accomplished?

9 You sustained the cost of the eviction
10 campaign. You lost some customers. And you
11 gained potentially very little which is why
12 historically a large number of economists were
13 of the view which I don't share at all, that
14 these kinds of attempts to engage in anti-
15 competitive conduct through exclusionary
16 practices make no business sense.

17 The school of economists
18 associated with that view is called The
19 Chicago School of Economics. You may probably
20 have heard about that. For the past 30 years
21 I've been railing against this view because
22 one can conjure up scenarios in which actually

1 does make sense for someone to engage in such
2 anti-competitive conduct. And I have written
3 about it in a number of articles.

4 But from the standpoint of the
5 calculations that we have -- that you asked me
6 to comment on, the share of profits that one
7 captures from the campaign is an important
8 element of the calculation because that has to
9 be weighed against the costs of engaging in
10 such a campaign. If I evict a pea
11 manufacturer, about 90 percent of the people
12 who cease to buy that firm's peas go to some
13 other supermarket to buy somebody else's peas,
14 I've made no money on it. I only incurred the
15 cost. What was my cost? Well, I have to do
16 something to get this guy out of my
17 supermarket. I have to forego some sales that
18 I otherwise would have had.

19 So if I don't put a channel on my
20 -- on my MSO, on my MVPD, then there is
21 potential costs and those costs are that my
22 consumers may not -- my subscribers may be

1 disgruntled. My customers who were
2 subscribers who were on the verge of switching
3 to DBS may decide to switch or whatever it is.
4 These things are not costless and because
5 they're not costless, I have to assure myself
6 of a recovery of these costs on the back end.
7 And the smaller is my share of the back end,
8 the less likely I am going to be able to cover
9 the cost of the campaign which to me are
10 direct. And that's why I wanted to draw
11 attention to the fact that the share of
12 profits is of relevance of interest. It's not
13 dispositive because it goes to a lot of other
14 elements of calculation which in this industry
15 is probably more complicated than the peas
16 example. But they are not dissimilar.

17 Q And it was also your opinion that
18 Cox's interest in Mojo or its owner, IN
19 DEMAND, was also too little to give Cox an
20 incentive to engage in anti-competitive
21 behavior?

22 A Cox has 15 percent share and I

1 also, I think my view is that Cox is also not
2 particularly large owner of this -- or has a
3 substantial ability to control decisions of
4 others or no ability to control the decisions
5 of others as to carriage. So its profit
6 motive would not be sufficiently potent to
7 engage in such anti-competitive behavior. I
8 want to make it clear that people may decide
9 not to carry for reasons that are not anti-
10 competitive. They may be purely the channel
11 is simply not a good channel to carry.

12 Q Along the lines of the level of
13 interest, relative to the incentive to engage
14 in anti-competitive behavior, my question is
15 is there a level of financial interest that
16 would create an incentive? For example, 40
17 percent or 50 percent in Mojo or in IN DEMAND?

18 MR. COHEN: Your Honor, I'm going
19 to object to the question.

20 JUDGE SIPPEL: Sustained. Stick
21 to what we have.

22 MR. SCHONMAN: I'm sorry, I don't

1 understand the nature of the objection.

2 JUDGE SIPPEL: Explain, Mr. Cohen.

3 MR. COHEN: Yes, the witness has
4 not opined about anything other than with
5 respect to Cox and Bright House. You ask him
6 an open-ended question about what level of
7 ownership would be required, would require, I
8 assume an analysis that is not performed. He
9 did not simply say Cox has 11 percent. That's
10 it. And Bright House has 5 percent. That's
11 it. And since I actually represent a client
12 who has a larger interest, I don't think the
13 witness has engaged in any kind of meaningful
14 analysis and I don't want the record to be
15 misleading because he hasn't reached any
16 conclusion. So I understand what you're
17 trying to do, but I think it's outside the
18 scope of this witness's testimony.

19 MR. SCHONMAN: Your Honor, I think
20 it's within the scope of his testimony so far.
21 He's been talking about the relative levels of
22 interest that would cause an entity to have an

1 incentive to engage in anti-competitive
2 behavior. In his professional opinion, he has
3 indicated that a small percentage does not
4 create that incentive. A small financial
5 interest does not create that incentive.

6 I'm asking Dr. Ordover, in his
7 expert opinion, is there a level that would
8 cause an entity, that is, is there a level of
9 financial interest that would cause a company
10 to have a financial interest? I think it's
11 perfectly reasonable to ask this witness that
12 question.

13 JUDGE SIPPEL: I disagree. If the
14 Bureau wants to retain the Doctor and pay him
15 for that analysis that would be fine. There's
16 nothing in the record that he's testified to
17 except the percentages, the 5 percent of
18 Bright House in a very specific way. I don't
19 know, what about Cox? Was there a percentage
20 there that you worked with?

21 THE WITNESS: Well, I think I
22 expressed the same opinion, vis-a-vis Cox. I

1 may also be conflicted in working for the
2 Bureau on the subject that you retained me on
3 your behalf.

4 MR. SCHONMAN: I don't have that
5 kind of money.

6 (Laughter.)

7 THE WITNESS: I do things pro
8 bono.

9 JUDGE SIPPEL: Anyway, I think
10 that's where we are. I don't see anything
11 that warrants a hypothetical question in that
12 area. That's all. I think Mr. Cohen has a
13 valid point.

14 MR. MILLS: The answer to your
15 question is yes, you did opine as to Cox and
16 Bright House, both?

17 MR. BECKNER: And their separate
18 percentages.

19 JUDGE SIPPEL: So you want to ask
20 him about Bright House percentage?

21 MR. SCHONMAN: No, he's already
22 rendered an opinion on the Bright House

1 percentage.

2 JUDGE SIPPEL: That's all we need
3 to hear.

4 MR. SCHONMAN: And he's already
5 rendered an opinion, expressed an opinion on
6 Cox's.

7 JUDGE SIPPEL: Okay, that's all we
8 need, as far as I'm -- yes, Mr. Feld?

9 MR. FELD: I don't want to cut off
10 Mr. Schonberg --

11 MR. SCHONMAN: Schonman.

12 MR. FELD: I'm sorry, I'm very bad
13 with names.

14 JUDGE SIPPEL: Go ahead. Let's do
15 it the usual way. Do you have more questions,
16 Mr. Schonman? Do you want to pursue another
17 line?

18 We'll come back to you, Mr. Feld.

19 BY MR. SCHONMAN:

20 Q Getting back to the supermarket,
21 in your answer to my questions earlier, you
22 had indicated that a customer could go to

1 another store if that customer wanted, so
2 you're assuming the marketplace in that
3 example, is the marketplace of available
4 supermarkets.

5 A Yes, yes. I'm sorry. I didn't
6 know that was your question.

7 JUDGE SIPPEL: It's really the
8 places that, the availability of the peas.
9 The peas might be sold at other supermarkets.

10 BY MR. SCHONMAN:

11 Q For the sake of -- can I raise a
12 theoretical example -- if we assume that the
13 marketplace was the marketplace for that one
14 store, of all the consumers who shop at store
15 A, if that store excludes another brand and
16 promotes only that brand that generic brand in
17 which it has an interest, is that -- would
18 that constitute anti-competitive behavior in
19 your opinion?

20 A I think you raise an issue which
21 is quite vexing and that is the notion that
22 there is a relevant market that only consists

1 of one store. From the economic standpoint,
2 it's not easy to conjure unless you're
3 thinking of maybe one supermarket or store in
4 the middle of some desert where you have to
5 drive 500 miles to the next supermarket, but
6 if that were the case you would think that
7 that store in the desert that is 500 miles
8 away from civilization would charge prices for
9 products that reflect its geographic advantage
10 and therefore there will be some customers who
11 would -- might find it desirable for the rate
12 on the bunch of products, in fact, travel the
13 distance.

14 In economic literature, there is
15 very strong resistance to positing relevant
16 markets which consist of a single entity
17 whether it be a single supplier or a single
18 product, because generally, the view is that
19 having obtained such a position the firm is
20 going to try to take advantage of that in a
21 variety of ways, not necessarily by slotting
22 its own peas where it could have slotted

1 somebody else's, precisely because it made
2 actually much more money on overpricing the
3 independent peas. The market power from being
4 alone comes in the aggregate fee that the
5 supermarket can charge for the products on its
6 shelves and then within that fee he's going to
7 try to optimize what it is going to carry and
8 has no incentive to shoot itself in the head
9 by carrying an inferior product and thereby
10 undermining its ability to use a technical
11 word, to screw the customers even more than it
12 already is doing. Highly technical.

13 See my point? It's a better thing
14 to over price and then choose the products
15 than to somehow muck around potentially with
16 the choice of products because that can indeed
17 be harmful to the overall profitability and
18 that's the point I was making to begin with
19 which is that from someone to try to evict a
20 rival, it has to be a profit aesthetic, i.e.,
21 cannot be too costly and it has to render some
22 benefit at the back end and the benefit at the

1 back end has not been shown to exist in this
2 case.

3 And also, there are costs to
4 eviction because of dissatisfied customers and
5 whatever it is that potentially could be an
6 issue.

7 JUDGE SIPPEL: Aside from a strong
8 law. Is that a consideration?

9 THE WITNESS: It is a
10 consideration if you're talking about cartels.
11 In fact, cartels are deterred by the strong
12 arm of the law. One of the most successful
13 cartel deterrents that we have seen lately is
14 increasing jail time for violators. And
15 econometrical studies do show that indeed that
16 works.

17 I don't know why, but it seems to.

18 (Laughter.)

19 JUDGE SIPPEL: Mr. Schonman.

20 BY MR. SCHONMAN:

21 Q Just a few more questions, Dr.

22 Ordover, you're aware that WealthTV has been

1 trying to gain carriage since 2004 on Cox and
2 Bright House's facilities?

3 A Yes, I understand that when they
4 launched they went to a variety of MVPDs
5 looking to get carriage, yes.

6 Q And is it your understanding from
7 your background, I think you stated you had a
8 background in cable industry. Is it your
9 understanding that the cable industry has
10 changed in the last five years in terms of
11 channel capacity, subscribership, and
12 available MVPDs?

13 A Well, my understanding that a
14 number of subscribers both to cable and DBS
15 has grown over the years. It's my
16 understanding that the delivery technologies
17 are changing to some extent. The capacity on
18 systems has grown. At the same time, as I say
19 in my report while the capacity of the system
20 has grown, the bandwidth requirements for some
21 of the channels has grown as well because of
22 the high definition channels and whatever else

1 is going on out there. And also, there has
2 been a substantial growth in the number of
3 available channels. So all of these things
4 have been happening over the past several
5 years to the substantial benefit of the
6 viewing public, in my opinion. Others may
7 have a different view of that.

8 Q Given the changes that have taken
9 place in the cable industry over the last five
10 years, in your opinion, has that changed
11 WealthTV's competitive posture over time or
12 has its competitive posture remained static?

13 A I have no ability to comment on
14 WealthTV's competitive posture. I understand
15 that they have gained -- there are a number of
16 subscribers as of March of this year. I have
17 it some place. I know there was an issue.

18 MR. FELD: The subscribers, the
19 subscriber numbers are --

20 JUDGE SIPPEL: That's
21 confidential.

22 THE WITNESS: But they have shown

1 some growth in subscriber base and so whether
2 or not it means anything about the competitive
3 postures, is that how you characterized it, I
4 just don't know. I think they are gaining
5 some carriage and some subscribers, but I have
6 no access to Mr. Herring's business plans or
7 how he intends to execute them, those business
8 plans.

9 JUDGE SIPPEL: Is that your --

10 MR. SCHONMAN: That's it.

11 JUDGE SIPPEL: Mr. Feld, you go
12 next.

13 BY MR. FELD:

14 Q With regard to the incentive
15 discussion that you had with Mr. Schonman, are
16 you aware that Bright House Networks has an
17 agreement with Time Warner Cable to rely on
18 Time Warner Cable programming agreements for
19 national programmers?

20 MR. COHEN: Objection, Your Honor.
21 It's beyond the scope of his expert opinion.
22 It's beyond the scope of the report. I don't

1 know how that bears in any way --

2 JUDGE SIPPEL: Do you want to
3 respond to that?

4 MR. FELD: Yes, Your Honor, we had
5 an extended discussion about the nature of
6 incentives and the witness also testified that
7 a key assumption was that all of these parties
8 were acting individually and making individual
9 programming decisions, particularly with
10 regard to what the incentives of the parties
11 may be and whether this would impact his
12 testimony at all, it seems to me that the
13 question of disagreement is relevant.

14 JUDGE SIPPEL: Are you inferring
15 that there's some kind of an agreement or a
16 parallel conduct here that's in issue?

17 MR. COHEN: Your Honor, Mr. Feld
18 is mischaracterizing the record. There is, in
19 fact, a programming agreement between Time
20 Warner and Bright House under which Bright
21 House can avail itself of the terms, the
22 economic terms that Time Warner achieves. Mr.

1 Miron testified and the record -- Mr. Beckner
2 can correct me if I'm wrong, but I think the
3 record is quite clear that Bright House makes
4 decisions with respect to what Bright House
5 carries and that's my objection.

6 Am I correct, Mr. Beckner? Am I
7 correctly remembering Mr. Miron's testimony?

8 MR. BECKNER: Well, yes, and let
9 me join in the objection.

10 JUDGE SIPPEL: I recall it, too.

11 MR. BECKNER: I mean I think where
12 Mr. Feld is trying to go, he's trying to
13 hypothesize the fact that in fact isn't true
14 which is namely that Time Warner and Bright
15 House are locked together in terms of their
16 program purchases and that's simply not a
17 fact. In fact, the evidence, unrebutted
18 evidence is that they are not locked together.

19 JUDGE SIPPEL: It's one of those
20 very words like collusion?

21 MR. BECKNER: I'm not going to go

22 --

1 JUDGE SIPPEL: You're not even
2 going to say that.

3 (Laughter.)

4 MS. WALLMAN: Your Honor, I think
5 he's allowed to ask a hypothetical question.

6 JUDGE SIPPEL: Well, we've been
7 asking a lot of hypotheticals and I don't like
8 to cut him off. I'm going to ask him to
9 rephrase it and let's try it one more time. I
10 sustain the objection.

11 BY MR. FELD:

12 Q Hypothetically, if an agreement
13 existed in which -- I'm trying to find a way
14 to phrase this.

15 JUDGE SIPPEL: Take some company
16 that's outside, that's not here. Make one up
17 or something.

18 BY MR. FELD:

19 Q If we assume two MVPDs, one of
20 which has the ability to avail itself of
21 agreements negotiated by the other one, does
22 that change the incentive structure at all?

1 MR. COHEN: Your Honor, I'm going
2 to object again. With all due respect to Ms.
3 Wallman, a hypothetical that's not based on
4 the record evidence is not a meaningful
5 hypothetical.

6 JUDGE SIPPEL: I recognize that.
7 It does go to the weight and all, but I'm
8 trying to permit WealthTV to try its case the
9 way it sees fit without prejudicing anybody
10 and I don't see where this does.

11 MR. COHEN: And all I'm trying to
12 say is that it's an argumentative point. They
13 can argue it in their findings if they want
14 to, when they comment on Professor Ordoover's
15 testimony. I don't think it's an appropriate
16 question. I've made my objection, Your Honor.

17 JUDGE SIPPEL: All right, I'm
18 going to overrule the objection.

19 Go ahead, Mr. Feld.

20 Can you answer? Do you understand
21 the question?

22 THE WITNESS: More or less I

1 understand the question, but let me just
2 answer it very bluntly and that is that the
3 hypothetical does not at all speak to the
4 issue of the incentive.

5 The incentive for one of the MVPDs
6 is separate from the incentive for the other
7 one. What you are hypothesizing is that it
8 has -- it is in the joint interest of the two
9 companies to have more heft in bargaining
10 against potentially very large suppliers of
11 content and because they are large, they have
12 certain bargaining leverage that perhaps a
13 small system in northern New England does not.
14 It is the same way as the drug stores form
15 buying chains and they go and negotiate for
16 attractive drug prices with very large pharma
17 companies. It is standard practice. It does
18 not speak, as far as I can tell, one iota to
19 the issues I think we have been discussing and
20 that is whether or not that kind of a
21 negotiating relationship creates or distorts
22 the incentive to carry WealthTV or not. In my

1 view, it does not.

2 BY MR. FELD:

3 Q If I may, accepting Mr. Cohen's
4 characterization of what is in the record,
5 which is that there was an agreement that Time
6 Warner could go and negotiate with national
7 programmers and that Bright House would then
8 have the option to get that -- to avail itself
9 of the programming on those terms. Does that
10 have --

11 MR. COHEN: I have to ask Mr.
12 Beckner with respect to Bright House.

13 MR. BECKNER: I was waiting for
14 the end of the question.

15 JUDGE SIPPEL: It's like German,
16 you want the verb. Then you can answer the
17 question.

18 MR. BECKNER: Within a week.

19 (Laughter.)

20 MR. FELD: Let us assume a
21 hypothetical agreement of the nature that you
22 just spoke about which is you have a larger

1 MVPD, a much smaller MVPD. They form an
2 agreement where the larger MVPD will go and
3 negotiate programming terms so that they can
4 avail themselves of this greater size.

5 MR. BECKNER: I didn't want to
6 interrupt Mr. Feld's question with the
7 objection. I think he's finished, so I'll make
8 the objection. There's really two objections.
9 The first objection is that's the same
10 question that he asked the witness and the
11 witness answered. So I don't know why we have
12 to ask it again and get the answer the second
13 time.

14 MR. FELD: I have to --

15 JUDGE SIPPEL: Wait a minute.
16 He's not finished.

17 MR. BECKNER: The second objection
18 is that again, it misstates the record, it
19 mischaracterizes the record. Because now the
20 question is not hypothetical. It's
21 purportedly based on the facts in evidence,
22 but it incorrectly states those facts and the

1 facts in evidence are simply that Bright House
2 Networks has the opportunity to buy
3 programming through Time Warner's contracts if
4 it chooses to exercise that. It's not that
5 they somehow join together in some sort of co-
6 op and said oh, let's go out together as a co-
7 op and buy programming. And that's what Mr.
8 Feld's question implies.

9 JUDGE SIPPEL: All right, now Mr.
10 Beckner made that very clear. Is that the
11 scenario you want to ask the question on?

12 MR. FELD: That is the scenario I
13 wish to ask this question about.

14 JUDGE SIPPEL: Just ask the
15 question. Just cut through and just ask the
16 question.

17 BY MR. FELD:

18 Q Given that scenario, the cost-
19 benefit analysis that you described, does that
20 change the cost-benefit analysis that the
21 smaller MVPD has with regard to programming?

22 A No.

1 Q Thank you.

2 A You're welcome.

3 JUDGE SIPPEL: That's it.

4 Anything more? No.

5 THE WITNESS: No redirect.

6 MR. BECKNER: No redirect.

7 JUDGE SIPPEL: No redirect. Thank
8 you very much.

9 THE WITNESS: Thank you, Your
10 Honor.

11 JUDGE SIPPEL: Does that conclude
12 everything? That concludes the testimony in
13 this case now. Is that correct?

14 MR. BECKNER: That's correct, Your
15 Honor.

16 MR. COHEN: Yes, Your Honor.

17 JUDGE SIPPEL: Thank you very
18 much. Everybody has worked very hard. I
19 appreciate where we are today, but just to be
20 careful I'm going to just close the record.

21 MR. COHEN: Your Honor, we have
22 one matter unrelated to the testimony.

1 JUDGE SIPPEL: Are we on the
2 record?

3 MR. MILLS: There's one more
4 thing. I want to be clear -- we're still on
5 the record.

6 JUDGE SIPPEL: Yes, go ahead.

7 MR. MILLS: I wanted to give you a
8 list of the call reports so that you would
9 have exhibit numbers.

10 JUDGE SIPPEL: Thank you, Doctor.

11 THE WITNESS: Thank you.

12 (The witness was excused.)

13 MR. MILLS: And I can give you
14 that last now on the record.

15 There are some WealthTV exhibits
16 and some Cox exhibits. I just want to be clear
17 what they are. So I'll list them off if
18 that's okay with you?

19 JUDGE SIPPEL: No problem, yes.

20 MR. MILLS: All right, WealthTV
21 Exhibits 50, 51 --

22 JUDGE SIPPEL: Wait a minute, 50,

1 51.

2 MR. MILLS: 99.

3 JUDGE SIPPEL: 99.

4 MR. MILLS: Through 104.

5 JUDGE SIPPEL: 104.

6 MR. MILLS: 123 and 124. And then
7 Cox Exhibits 50 and 51, 63, 86 through 92.

8 JUDGE SIPPEL: All right.

9 MR. MILLS: And then there were
10 those charts that included the information
11 that was provided that only offered not for
12 the truth of the matter as asserted in the
13 charts and that's Cox Exhibits 10, 23, and 56.

14 JUDGE SIPPEL: 10 -- give me that
15 again.

16 MR. MILLS: Cox Exhibit 10, Cox
17 Exhibit 23, and Cox Exhibit 56 and I believe
18 it's also now WealthTV Exhibit 116 includes
19 that same slide. I just wanted to be clear.

20 JUDGE SIPPEL: 116.

21 MR. MILLS: 116, WealthTV Exhibit
22 116.

1 JUDGE SIPPEL: I hear you.

2 MR. MILLS: Thank you, Your Honor.

3 JUDGE SIPPEL: All right now, what
4 is supposed to be done with all of those
5 exhibits?

6 MR. MILLS: All of those exhibits
7 include the material that Your Honor had
8 excluded because it was from the call reports
9 and I just wanted to be clear that I promised
10 to give you a comprehensive list of the
11 exhibits I believe were covered by that
12 ruling.

13 JUDGE SIPPEL: All right, I see.
14 So you feel that based on my ruling all of
15 those exhibits are excluded from
16 consideration. They're rejected.

17 MR. MILLS: The three Cox exhibits
18 I mentioned at the end and the WealthTV
19 exhibit at the end, Cox 10, 23, and 56 and
20 WealthTV Exhibit 116 are admitted for other
21 purposes. Those are presentations and the
22 only thing that's excluded there is the

1 content of that slide about alleged strong Cox
2 support.

3 JUDGE SIPPEL: Okay.

4 MR. MILLS: Thank you, Your Honor.

5 JUDGE SIPPEL: What I'm going to
6 do is ask you to do this and I'm sorry, but if
7 you would just put this in an email to me and
8 everybody else so that I don't lose focus of
9 exactly what you want.

10 MR. MILLS: I'd be happy to do
11 that. Thank you.

12 JUDGE SIPPEL: I appreciate that
13 very much, but this is very helpful.

14 Does anybody else have anything
15 else, any housekeeping items?

16 MS. WALLMAN: Yes, Your Honor, for
17 WealthTV there are two things. We had
18 promised to supply a substitute WealthTV
19 Exhibit 97.

20 JUDGE SIPPEL: Was that the
21 transcript of the deposition?

22 MS. WALLMAN: No, I was just going

1 to come to that.

2 JUDGE SIPPEL: Let's do what
3 you're doing. What is 97?

4 MS. WALLMAN: 97 was a deck that
5 was supplied to Time Warner and when we were
6 doing admission session we discussed it. The
7 one that would include it is 97, looked as
8 though it may have come from a discussion that
9 was in the nature of compromise. We took that
10 out and I think we have agreement from Time
11 Warner to use

12 --

13 MR. COHEN: It's the July 18.

14 MS. WALLMAN: July 18, 2007.

15 MR. COHEN: No objection to the
16 admission of this revised edition.

17 JUDGE SIPPEL: Is this going to be
18 a substitute?

19 MR. COHEN: Yes, Your Honor.

20 JUDGE SIPPEL: Can you pass them
21 up then and we'll take care of that.

22 Thank you. Yes, this is July 18,

1 2007. It's just a question of just all you
2 have to do is just substitute this 97 for the
3 97 that's already in the record, is that
4 right?

5 MS. WALLMAN: That's what I'm
6 asking, Your Honor.

7 JUDGE SIPPEL: Thank you very
8 much. We will take care of that.

9 MS. WALLMAN: The second issue,
10 Your Honor, that you just mentioned is
11 WealthTV owes you, owes the record the two
12 pages from the Egan deposition that were read
13 into the record yesterday.

14 JUDGE SIPPEL: Please.

15 MS. WALLMAN: I had intended to
16 produce those for you today and that didn't
17 happen. May I have permission to follow up on
18 that?

19 JUDGE SIPPEL: Follow up on it.

20 MS. WALLMAN: It's two pages and
21 the identifying cover pages.

22 JUDGE SIPPEL: Some time next week

1 will be fine.

2 MS. WALLMAN: Yes, Your Honor.

3 Thank you.

4 JUDGE SIPPEL: Probably the best
5 thing to do would be just mail them to us,
6 wouldn't it? That way you don't have to go
7 through the guard and all that stuff.

8 MS. WALLMAN: Thank you.

9 JUDGE SIPPEL: They're very small
10 documents.

11 MS. WALLMAN: Yes.

12 JUDGE SIPPEL: We'll see that it's
13 taken care of. That's it. Anybody else have
14 anything more? I don't and I thank you very
15 much.

16 Now what we have to do is come up
17 with some kind of a schedule, a briefing
18 schedule.

19 MR. COHEN: Your Honor, we've
20 actually reached an agreement.

21 JUDGE SIPPEL: Really?

22 MR. COHEN: Yes.

1 JUDGE SIPPEL: Everybody?

2 MR. COHEN: Everybody. Including

3 Mr. Harding.

4 (Laughter.)

5 MR. COHEN: Mr. Harding and I have

6 worked this out. We have six months and Ms.

7 Wallman's findings are due tomorrow.

8 (Laughter.)

9 MR. COHEN: Defendants and

10 WealthTV and the Enforcement Bureau have

11 talked and this is what we would propose to

12 Your Honor, just to put it in context. The

13 earlier schedule had provided for 15 business

14 days for findings and then 10 business days

15 for reply findings. What we have agreed upon

16 in an effort to move this thing along is to

17 extend those days slightly in a way that

18 Defendants will have an opportunity to

19 actually try to submit one set of documents,

20 so you don't get four sets of Defendants'

21 findings and WealthTV having to respond to

22 each of one of those.

1 So here is our agreed proposal,
2 that the initial findings and conclusions
3 would be filed on June 2nd; that the reply
4 findings and conclusions would be filed on
5 June 24th; that the recommended decisions
6 would be filed on July 1; and then following
7 the convention that Your Honor used in the NFL
8 case, that the Enforcement Bureau's comments
9 would be due a week later which would be July
10 8.

11 And then with respect to the
12 length of these documents, we understand that
13 less is more. It's possible that there was in
14 a prior order that might govern by Judge
15 Steinberg that said 40 pages and then a
16 shorter amount for the reply. We won't be
17 able to do that, Your Honor, with respect to
18 combining these four Defendants, but we have
19 agreed -- we have agreed with Ms. Wallman that
20 whatever works will have to work for them as
21 well.

22 JUDGE SIPPEL: There will be no

1 limits.

2 MR. COHEN: Okay.

3 JUDGE SIPPEL: As long as we get
4 it in a format which is -- what is it called?
5 Work prep or something? You know, where we
6 can eliminate half of what you give us or
7 something like that.

8 MR. COHEN: Is Word what you want
9 us to put them in, Your Honor?

10 JUDGE SIPPEL: Is that right?
11 Will Word work for you? All right, my brain
12 trust has been consulted.

13 MR. COHEN: If that's acceptable,
14 Your Honor.

15 JUDGE SIPPEL: That would make
16 sense. That would make sense. Try to
17 eliminate as much as you can of the concerns
18 about having to redact. You know, if we've
19 gotten there. I'm sorry, I've got something
20 here to ask you. Three copies of redacted
21 transcripts?

22 MS. GOSSE: Yes.

1 JUDGE SIPPEL: All right. Do you
2 want it on the first table? I don't know
3 what the ground rules on that are.

4 MS. GOSSE: It's probably the
5 press table if they want to redact the
6 testimony, Your Honor.

7 JUDGE SIPPEL: Well, has there
8 been a call from the press office?

9 MS. GOSSE: Not for Phase 2.

10 JUDGE SIPPEL: If we get a call
11 from the press office, we'll let you know, but
12 I wouldn't volunteer anything.

13 MS. GOSSE: No, just three copies.
14 They'll go into the official record, by the
15 way.

16 JUDGE SIPPEL: All right, all
17 right, that's fine. That's fine. So I've got
18 these dates, June 2, June 24, July 1, and July
19 8th Okay and we will be, we'll probably be
20 pretty busy with the mass, but anyway, we'll
21 do the best we can to accommodate where we
22 can.

1 As I say, fortunately, I've got at
2 my own request, I asked for the -- I said I
3 need help and I've got an excellent attorney
4 assigned, detailed to my office for the
5 duration of this case, Ms. Laurel Bergold and
6 many of you know Laurel. It makes -- it's
7 going to make a big difference because even if
8 I could write with both hands, enough is
9 enough.

10 Thank you all very much. We're
11 going to close the hearing, the testimonial
12 part of the case is now closed and have a good
13 weekend.

14 (Whereupon, at 2:09 p.m., the
15 hearing was concluded.)

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