

**Before the
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Washington, D.C.**

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| <i>In re</i> |) | |
| |) | NO. 14-CRB-0011-SD (2010-13) |
| DISTRIBUTION OF SATELLITE |) | |
| ROYALTY FUNDS |) | |
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**WRITTEN DIRECT STATEMENT
OF THE JOINT SPORTS CLAIMANTS**

Volume III of III

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

2 (9:19 a.m.)

3 JUDGE BARNETT: You're new with us
4 today.

5 THE WITNESS: I am new today.

6 JUDGE BARNETT: That's what I thought.
7 Please raise your right hand.

8 Whereupon,

9 GREGORY CRAWFORD

10 was called as a witness and, having been first duly
11 sworn, was examined and testified as follows:

12 JUDGE BARNETT: Please be seated.

13 Mr. Stewart?

14 MR. STEWART: I have one housekeeping
15 matter. This relates to the third errata filed
16 by the Program Suppliers.

17 Before the hearing, we filed two
18 different versions of the rebuttal testimony of
19 each of two of our witnesses and we held all
20 four of them out of the original motion for
21 admission into evidence, pending the resolution
22 of the motions.

23 And now that those motions have been
24 resolved, I'll move for the admission of
25 Exhibit 2007, which is the September 2017

1 rebuttal testimony of Dr. Bennett, and
2 Exhibit 2009, which is the September 2017
3 rebuttal testimony of Ms. Shagrin. And I would
4 further move that -- request that you reject
5 the amended versions of those, which are 2008
6 and 2010.

7 JUDGE BARNETT: Any response from the
8 gallery? Hearing no response, Exhibits 2007
9 and 2009 are admitted. Exhibits 2008 and 2010
10 are rejected.

11 (Exhibit Numbers 2007 and 2009 were
12 marked and received into evidence.)

13 (Exhibit Numbers 2008 and 2010 were
14 rejected.)

15 MR. STEWART: Thank you, your Honor.

16 DIRECT EXAMINATION

17 BY MR. STEWART:

18 Q. Good morning. Would you state your
19 name, please.

20 A. Gregory S. Crawford. Can everyone
21 hear me?

22 Q. What is your current employment?

23 A. I'm a professor of economics at the
24 University of Zurich.

25 Q. And what is your educational

1 background?

2 A. I have a Bachelor's of Arts in
3 Economics from the University of Pennsylvania
4 that I received in 1991, and Ph.D. in Economics
5 from Stanford University that I received in
6 1998.

7 Q. Dr. Crawford, in what areas do you
8 teach?

9 A. I teach primarily in two areas in
10 economics. I teach in the area of industrial
11 organization, which is the study of consumer
12 demand and competition in product markets, and
13 then I also teach in the area of econometrics,
14 which is the application of statistical methods
15 to economic problems.

16 Q. In addition to your teaching
17 responsibilities, do you do independent
18 research?

19 A. I do.

20 Q. And what you kinds of research have
21 you done?

22 A. So over the course of my career, I
23 have looked a large number of competition and
24 policy issues, but much of my research has
25 focused on the cable and satellite television

1 industries.

2 Q. Have you done nonacademic work, as
3 well?

4 A. I have. In 2007 and '08, I was the
5 Chief Economist here in Washington at the
6 Federal Communications Commission. And I have
7 been engaged as an expert in a number of
8 private litigation matters.

9 Q. Now I'd like to ask you to summarize
10 your experience in topics related to media
11 industries in each of those three areas.
12 First, in connection with your academic
13 research, can you describe that, please?

14 A. I would be happy to. I've done a lot
15 of work on the economics of the bundling of
16 television channels for sale to consumers. And
17 the flip side of that, whether a la carte sales
18 or unbundled sales would be in consumers'
19 interest. I have looked at a large number of
20 regulatory matters in the cable and satellite
21 industry. And recently, I have been looking at
22 the consequences of vertical integration
23 between channel owners and cable and satellite
24 distributors in the industry.

25 Q. Now, as Chief Economist at the FCC,

1 what responsibilities did you have?

2 A. There, in terms of -- of course, my
3 duties covered all sorts of industries, but
4 within the media industries, I again looked at
5 that a la carte issue from specifically a
6 policy perspective. And then we looked at one
7 or two regulatory issues in the cable industry.

8 Q. In your consulting assignments, what
9 kind of media issues have you dealt with?

10 A. So I again -- in my private capacity
11 as a consultant, I again looked at this a la
12 carte issue. But what was interesting about
13 that engagement was that I had an opportunity
14 to study and see the contracts between many
15 large cable distributors and many large cable
16 owners. And then in addition, that was in the
17 mid-2000s -- in addition of late I've looked at
18 the structure for the sale of sports rights in
19 a major European country.

20 Q. So Dr. Crawford, what were you asked
21 to do in this on behalf of the Commercial
22 Television Claimants Group?

23 A. In this case, I was asked to recommend
24 a basis for the reasonable division of
25 royalties for the royalties paid by CSOs, cable

1 system operators, for the carriage of distant
2 signals among the Claimant Groups in the
3 proceeding.

4 Q. Did you provide a written report
5 describing your analysis?

6 A. I did.

7 Q. I placed in front of you -- if you
8 will take a look at it -- a copy of what has
9 been admitted into evidence as Exhibit 2004.
10 Is this your written statement?

11 A. It is.

12 Q. Do you have any corrections to
13 Exhibit 2004?

14 A. I have two corrections. They are in
15 the Appendix.

16 Q. Bob, would you bring up the first
17 page, A2.

18 A. So if you see here in paragraph 161,
19 this is part of my regression, the mathematical
20 representation of my regression specification.
21 And the first term after the equal sign there
22 was a typo. So that was previously included in
23 the earlier paragraph. So you can just scratch
24 out that first term, which is tau and gamma.

25 Q. I don't know Greek letters. But,

1 okay. And the next let's look at page 18.

2 A. And here on the next page, if you see
3 paragraph 165, that actually there was not
4 meant to be a paragraph break there.
5 Paragraph 165 was meant to be part of
6 paragraph 164.

7 Q. Do you have any other corrections?

8 A. I do not.

9 Q. Now, turning to Appendix B of
10 Exhibit 2004, what is this?

11 A. This that is my CV, my curriculum
12 vitae.

13 Q. Does that provide further details
14 about your publications, qualifications, and
15 experience?

16 A. It does.

17 Q. And you were also qualified as an
18 expert witness in the 2004-2005 Cable Royalty
19 Distribution proceeding before the Copyright
20 Royalty Judges; is that correct?

21 A. That's correct.

22 MR. STEWART: Your Honor, I would move
23 to proffer Dr. Crawford as an expert economist
24 and econometrician with experience in the
25 empirical analysis of media markets, including

1 cable television markets.

2 JUDGE BARNETT: Hearing no objection,
3 Dr. Crawford is so qualified.

4 BY MR. STEWART:

5 Q. So Dr. Crawford, what do you
6 understand to be the ultimate purpose of these
7 proceedings?

8 A. So I understand this proceeding is
9 ultimately about the allocation of the
10 royalties actually paid by cable operators for
11 the programming carried on the distant signals
12 they actually carried.

13 Q. And in approaching the question that
14 CTV asked to you evaluate, what criterion were
15 you seeking to evaluate?

16 A. I used the criterion of relative
17 marketplace value.

18 Q. In general, in developing any
19 framework for empirical analysis, is it
20 important for us to identify the features of
21 the particular market that you are going to
22 analyze?

23 A. Yes, that is very important.

24 Q. What is the relevant market?

25 A. The relevant market here is the

1 acquisition of distant programming by cable
2 operators.

3 Q. What are the important features of
4 that market for the purpose of developing your
5 economic analysis?

6 A. I think there are three essential
7 features in that market. So first is that it
8 is cable operators selecting the distant
9 signals to carry on their cable television
10 systems.

11 The second is that they do this in a
12 broader context where they are selecting a
13 large number of channels to carry, and just --
14 and they bundle these channels for sale to
15 subscribers. And just to give context in this
16 proceeding, a cable system in the data that I
17 look at there is about 2.5 distant signals that
18 they carry and about 15 or 16 local broadcast
19 stations, and about 350 or 400 overall channels
20 on the system.

21 And then the third feature is that,
22 because cable systems earn the vast majority of
23 their revenue from sales to subscribers -- over
24 93 percent of their revenue comes from sales to
25 subscribers, and 100 percent in the case of

1 distant signals -- the motivation for cable
2 systems to carry distant signals is virtue of
3 its ability to attract or retain subscribers.

4 Q. Just from a big picture perspective,
5 what attributes of programming channels are
6 important to CSOs given that economic framework
7 you just described?

8 A. Sure. Of course, distant signals are
9 carried in bundles. So when they are thinking
10 about a distant signal, they are naturally
11 going to think about what programming am I
12 interested in relative to the other programming
13 that is on the bundle that I already have
14 present? So cable operators are likely to look
15 for programming that is somehow differentiated
16 from the existing programming on their bundle.

17 And the way I think about this, this
18 is a little bit like how a restaurant owner
19 putting together a buffet, a fixed-price
20 buffet. Often they will start with a beef
21 dish, a chicken dish, a potato dish, dishes
22 that are generally of interest. But then when
23 they are thinking about the other dishes at the
24 end, they might try to target food that might
25 not be generally of interest, but that would be

1 differentiated that might be able to get
2 someone who wouldn't otherwise be attracted.
3 So, for example, a vegan dish, while not of
4 general interest, is very interesting to vegans
5 and might encourage them to come to the
6 restaurant.

7 Q. You followed a regression approach in
8 addressing the questions that we asked you to
9 address; is that correct?

10 A. That is correct.

11 Q. Would there be alternative ways,
12 consistent with economic theory and the
13 features of the market you've just described,
14 to address the relative marketplace value
15 question?

16 A. I think there are.

17 Q. Are there key features that would be
18 necessary to make such an alternative approach
19 appropriate?

20 A. Yes, I think the essence is an
21 approach should be a quantitative approach, but
22 seeking to measure relative CSO value for
23 programming. I understand there are cable
24 operator surveys that have also been put into
25 evidence and that is a perfectly reasonable

1 approach to evaluate relative cable operator
2 value, whereas I think studies of relative
3 viewing would not be appropriate.

4 Q. And we will discuss that later. Now,
5 are you familiar with the concept of a
6 hypothetical market as developed in prior
7 decisions throughout these distribution
8 proceedings?

9 A. I am.

10 Q. What do you understand as the purpose
11 of this concept?

12 A. So I think the hypothetical market is
13 a useful tool to frame what is the relative
14 marketplace value of distant signals
15 programming.

16 Q. I'd like to ask you to identify the
17 elements that would be included in a
18 hypothetical market, and then ask why you
19 believe each would be included.

20 So first, in your view, what would a
21 hypothetical market in the absence of a
22 compulsory license look like?

23 A. I think there would be three key
24 elements to the hypothetical market. First, I
25 think it would involve negotiations. So in the

1 absence of a statutory royalty, there would be
2 negotiations between content owners, and their
3 representatives, and cable operators.

4 Second, I think that the negotiations
5 would have channels as intermediaries on behalf
6 of the content owners. So there would be a
7 channel that would be negotiating with the
8 cable operator.

9 And third, I think that the specific
10 channel that would arise would be the existing
11 local broadcast station that carries that
12 programming in the local markets.

13 JUDGE STRICKLER: Excuse me,
14 Dr. Crawford. Good morning.

15 THE WITNESS: Good morning.

16 JUDGE STRICKLER: How are you?

17 THE WITNESS: Good, thank you.

18 JUDGE STRICKLER: Counsel's question
19 seem to relate, at least in part, to paragraph
20 8 of your written Direct Testimony where you
21 talk about the hypothetical market and you just
22 mentioned, consistent with that, that you see
23 the channels as being the intermediaries there.

24 Since we're talking about constructing
25 a hypothetical market, why would it be the case

1 that that would be the hypothetical market?
2 Because, again, it's hypothetical, why couldn't
3 the hypothetical market be dramatically
4 unbundled and there would be no intermediary
5 and it would just be the matter of negotiation
6 between the cable system and the individual
7 owners of the programming?

8 THE WITNESS: So I thought carefully
9 about that question. And I think the primary
10 reason for my belief that it would be channels
11 as the intermediary is that there is
12 essentially transaction costs for contracting.
13 As it is often stated, the reason for the
14 compulsory license was to mitigate or lessen
15 these transaction costs. And in the absence,
16 of course, those transaction costs would come
17 back into play, I feel.

18 But there are also marketplace
19 solutions for transaction cost. Just to give
20 you a sense, in the data I look at in this
21 study, the typical distant signal has about 300
22 programs. So if a cable operator wanted all
23 the programs on a distant signal, that would be
24 something on the order of 300 negotiations.

25 But if you look broadly the at

1 marketplace as a whole, cable operators can, of
2 course, contract directly for programming. And
3 whether you look in the distant signal
4 marketplace, where they could do and they
5 don't, or whether you look in the non-distant
6 signal marketplace, like for cable networks,
7 you overwhelmingly see cable operators
8 negotiating with channels. It's very, very
9 rare that you see cable operators negotiating
10 for individual content.

11 JUDGE STRICKLER: But those programs
12 that are on those stations, the payment for
13 those is one-to-one; right? The owner of the
14 individual program negotiates with the station
15 and then ends up with a deal. In a
16 hypothetical marketplace they could have
17 included in the rights to a payment in the
18 event that the station is retransmitted and
19 each company -- each owner of the program, of
20 each program, could have done that as well.
21 That would be another hypothetical, wouldn't
22 it?

23 THE WITNESS: In fact, that's exactly
24 how I conceive of the hypothetical market. And
25 that is why I think it would be the local

1 broadcast station that would serve as the
2 intermediary, because those local stations are
3 already in negotiation with the content owners.
4 Of course, there are negotiations for the
5 distribution -- the local distribution of that
6 content.

7 JUDGE STRICKLER: On a one-to-one
8 basis for each content.

9 THE WITNESS: Exactly.

10 JUDGE STRICKLER: But couldn't they
11 have put into that negotiation, hypothetically,
12 a payment for retransmission.

13 THE WITNESS: Oh, you are saying even
14 in the current market?

15 JUDGE STRICKLER: Well, in a
16 hypothetical market where we wouldn't have
17 royalties paid in this matter, if I'm the owner
18 of a program that's going to be put on a local
19 station I say: And if this gets retransmitted
20 for any reason, here is how I am going to be
21 repaid. And that would have been a different
22 hypothetical than treating it as a bundled and
23 retransmitted signal in its entirety.

24 THE WITNESS: I think we are agreeing
25 on the structure of the hypothetical market

1 actually. I guess the way I would describe it
2 is the CSO would negotiate with the broadcast
3 station for carriage in the distant market. So
4 that would be a single negotiation. But then
5 the negotiation with the individual content
6 owners would be between the local broadcast
7 station and the content owners not only, as you
8 said, for distribution in the local market, but
9 also for the incremental right to distribute in
10 the distant market.

11 JUDGE STRICKLER: So the payment that
12 would go to the individual owner of the program
13 would already be, in some sense, predetermined
14 in the individual negotiations between the
15 content owner and the local station, however
16 they decide to do it.

17 THE WITNESS: I could imagine -- I
18 could imagine their negotiating -- having two
19 parts of the negotiation. Okay. This is sort
20 of the price -- the station would say to the
21 content owner: This is the price we will give
22 you for distribution in the local market and
23 then this is the price we will give you in the
24 event we are carried in a distant market.
25 Something like that.

1 JUDGE STRICKLER: Thank you.

2 THE WITNESS: Sure.

3 BY MR. STEWART:

4 Q. Judge Strickler asked my next two
5 questions.

6 (Laughter.)

7 BY MR. STEWART:

8 Q. What would determine relative
9 marketplace value in such a hypothetical
10 market?

11 A. So in such a market, because I viewed
12 that it would be the distant -- the local
13 station serving as the intermediary, there
14 would then be a fixed supply of distant signals
15 sort of on-the-shelf for cable operators to
16 consider. Of course, they would have to
17 negotiate a royalty with those distant signals.
18 But because there would be no incremental or
19 marginal resource costs, then it would be
20 relative CSO value that would ultimately
21 determine the relative value of the programming
22 on the distant signal.

23 Q. Okay. Now, let's look at your
24 development of your regression study approach.
25 Under the statutory license, CSOs freely

1 selected those signals, but they paid royalties
2 under statutory formula; correct?

3 A. That's correct.

4 Q. So how can an econometric study, given
5 that market condition, measure the marketplace
6 value of programs?

7 A. As I just gave in answer to my last
8 question, it is relative CSO value that would
9 determine relative marketplace value in the
10 hypothetical market. And the existing
11 statutory rate allows the recovery of CSO
12 value.

13 Q. But aren't the statutory rates flat
14 prices or regulated prices?

15 A. The rate is a flat rate, but it is a
16 share of gross receipts and, of course, gross
17 receipts vary across cable systems for reasons
18 other than distant signal carriage. So that
19 provides some variability.

20 And furthermore, if a CSO successfully
21 selects a distant signal that is attractive to
22 its subscribers, its gross receipts will also
23 rise. And so these gross receipts provide
24 variability about the value that CSOs place on
25 the distant signals.

1 Q. Why are you focusing on the
2 variability? What does that have to do with
3 the regression design?

4 A. The essence of a regression is that it
5 connects the variability in royalties -- which
6 are here a measure -- would be a measure of CSO
7 value, relative CSO value -- with features of
8 the distant signals, features of the quantity
9 of programming of the different Claimant
10 categories on the distant signals.

11 Q. So the other aspect of the current
12 market is that the CSOs acquire bundles of
13 programs channel by channel; is that correct?

14 A. Yes, that's correct.

15 Q. And does that mean that you're not
16 able, then, to use your regression analysis to
17 extract the relative value of individual
18 program categories?

19 A. Not at all. Because signals are
20 themselves bundles of programming of different
21 types, that makes it more difficult for the
22 regression to identify the relative value. But
23 as long as one has relatively rich data, then
24 one can tease out from the price -- or the
25 royalty paid for a bundle -- the incremental

1 value associated with the components of the
2 bundle.

3 Q. So let's talk about data. What data
4 did you have available for your regression
5 analysis?

6 A. So there were three key pieces of
7 data. First was royalty data that cable
8 operators paid for distant signals from the
9 Cable Data Corporation. Second was the
10 identification of subscriber groups, which are
11 defined by cable operators according to the set
12 of distant signals that they carry, as well as
13 the particular distant signals that they
14 carried on those subscriber groups. That was
15 also from the Cable Data Corporation. And then
16 finally programming data from FYI, which was
17 then categorized into the Claimant categories
18 in this proceeding.

19 Q. Now, did you use a sample of stations
20 or sample of systems?

21 A. No, I used the full population of
22 stations and systems and programming.

23 Q. And so how do the data that you used
24 compare with the data that was used in
25 regression analyses presented in prior

1 proceedings?

2 A. It's much richer data. It's both more
3 data and better data.

4 Q. How so?

5 A. So it's more data. First, there are
6 four years at issue in this proceeding relative
7 to previous proceedings. But also there is
8 much more use of subscriber groups by cable
9 systems and this provides more observations to
10 use in a regression analysis. But it's also
11 the subscriber group is better data, because
12 cable systems -- those that use subscriber
13 groups -- are selected distant signals at that
14 level. So the regression is able to connect
15 the variation in the data to the same level of
16 decisionmaking that the cable operator is
17 making.

18 Q. What effect does the availability of
19 that data have on your bottom line analysis for
20 2010 to '13?

21 A. It makes it more reliable and more
22 robust. In essence, I always try to let the
23 data tell its story and better data can more
24 easily tell its story.

25 Q. Who actually performed the data

1 collection and ran the data analyses?

2 A. Dr. Chris Bennett and his team at
3 Bates White Economic Consulting here in
4 Washington.

5 Q. Did Dr. Bennett and other Bates White
6 staff do so under your supervision and control?

7 A. They did.

8 Q. Now, let's look at Figure 9 of your
9 Direct Testimony of Exhibit 2004. First,
10 regarding the distant signal carriage data you
11 used, would you please describe the information
12 that is in this Figure 9?

13 A. Of course. This figure shows -- gives
14 a little bit of information about subscriber
15 groups in the data. So it shows for each year
16 in the data, the total number of systems active
17 in that year, the total number of subscriber
18 groups across all of those systems in that
19 year, and then in the final column the average
20 number of subscriber groups per system. And
21 you can see across all the years in the data,
22 it's about 3-1/2 subscriber groups per system
23 in the data.

24 Q. And let's look at Figure 10, please.
25 And, Dr. Crawford, could you describe the

1 information in Figure 10?

2 A. Sure. So the third column in Figure 9
3 was just the average subscriber groups per
4 system. This figure gives the full
5 distribution of subscriber groups per system.
6 And you can see that over the course of the
7 four years of data, there is ever fewer systems
8 reporting at the system level, just having a
9 single subscriber group. You can see that in
10 the top row where it falls from 58.7 percent to
11 49.6.

12 And you can see there are some
13 systems, and an increasing number of systems,
14 in the bottom row that are reporting over 21
15 subscriber groups within their system.

16 Q. Let's look at next Figure 11 on page
17 25 of Exhibit 2004. This relates to the
18 programming data that you used, Dr. Crawford.
19 Would you please describe what is set forth in
20 Figure 11?

21 A. So Figure 11 -- I mentioned that the
22 programming was categorized according to the
23 various Claimant groups. And what is reported
24 here is the share of the total minutes carried
25 on distant stations across the six Claimant

1 categories. And there you notice there is a
2 seventh category for Big Three or off-air
3 programming. Of course, that is
4 non-compensable but part of the total minutes
5 carried on distant signals.

6 Q. And next, Figure 12. Dr. Crawford,
7 would you describe what is in Figure 12?

8 A. Figure 12 is the analogous table, but
9 instead of looking at total minutes, this is
10 just the share of compensable minutes across
11 the various Claimant categories.

12 Q. And I noticed that Program Suppliers'
13 percentage dropped from 60, or so, percent in
14 the prior Figure to 33 percent in this figure.
15 Do you see that?

16 A. I do.

17 Q. What is the explanation for that?

18 A. My understanding is that much of that
19 is due to the presence of a large number of
20 non-compensable programming on WGN that is
21 Program Supplier programming.

22 Q. Okay. Let's turn to your study
23 design. First, is a regression a largely
24 accepted approach for analyzing economic
25 questions like the ones that are presented in

1 this proceeding?

2 A. Yes, it is.

3 Q. And let me tackle some jargon. First,
4 what is a dependent variable?

5 A. So a dependent variable is what we
6 often call an outcome variable. It is the
7 variable of interest for the regression study.

8 Q. What is an independent variable?

9 A. An independent variable is often also
10 called an explanatory variable. It is a set of
11 variables that an econometrician uses to try to
12 explain the outcome of interest.

13 Q. And finally, what is a parameter or a
14 coefficient?

15 A. So often, if an explanatory variable
16 is to have an impact on an outcome variable,
17 that impact is measured by what we call a
18 parameter or a coefficient.

19 Q. And, now, you've done many regression
20 analyses and evaluated regression analyses
21 during the course of your career; is that
22 right?

23 A. That's correct.

24 Q. Can regressions be used for different
25 purposes?

1 A. Yes.

2 Q. What are they?

3 A. So there are broadly two purposes of a
4 regression. And I think of them as -- the
5 first one is what I would call a prediction
6 regression. And in a prediction regression you
7 are just interested in predicting an outcome
8 variable, like house prices. So, for example,
9 the Department of Census might be interested in
10 house prices, but houses aren't sold every
11 year. So if they wanted an estimate of a price
12 of a house now for every house, they might run
13 a regression for house prices for houses that
14 were sold this year on a bunch of
15 characteristics of houses and use that
16 regression model to predict what prices would
17 have been for houses that weren't sold.

18 Q. Is there another purpose?

19 A. There is another purpose called an
20 effects regression where, again thinking about
21 house prices, if someone was interested in
22 building an addition to their house, they might
23 be interested in the effect on the price of
24 their house of, say, an additional bedroom. So
25 the number of bedrooms would be then an

1 important regressor in such a regression.

2 Q. Do these different purposes affect the
3 design of a regression?

4 A. Very much so.

5 Q. First, what would be the key elements
6 of a design for a prediction model regression?

7 A. In a prediction model, the sole focus
8 is on how well you predict your outcome
9 variable, your dependent variable. And so
10 there is no particular care or concern about
11 which variables are included as explanatory
12 variables -- whether they have positive
13 effects, negative effects, big effects, small
14 effects. And so -- and often the methods that
15 are used in prediction regressions are purely
16 statistical to choose the variables.

17 So it is possible that some of these
18 statistical methods might say: Well, the
19 number of bedrooms is actually not very
20 important for explaining house prices. And in
21 a prediction regression, you might drop that
22 explanatory variable.

23 Q. How about an effects model?

24 A. In an effects model, we are often
25 keenly interested in the effect of certain

1 explanatory variables and here the focus is
2 very different. So if you were building your
3 addition on the house, you definitely don't
4 want to drop the number of bedrooms. That is
5 the key effect you are interested in. And
6 furthermore, in general, one has to be careful
7 about the selection of variables to ensure that
8 including some variable does not contaminate
9 the interpretation of the key effects of
10 interest. And so that is one key consideration
11 in an effects regression that is different from
12 a prediction regression.

13 And the other one is one also tries to
14 include control variables that can also explain
15 house prices so as to ensure that there is no
16 bias on the measurement of the key effects of
17 interest, but also to get a more precise
18 estimate of the key effects of interest.

19 Q. Which of these two models is our case?

20 A. Our case is an effects regression.

21 Q. Why is that?

22 A. Because at issue in this proceeding is
23 to understand what is the incremental value of
24 different program categories. And so those are
25 the key effects of interest in the regression.

1 Q. Let's look at Figure 21 on page 86
2 Exhibit 2004. This is labeled Summary
3 Statistics, and let's look at just the top
4 collection of those here.

5 Dr. Crawford, could you explain what
6 is in these particular rows?

7 A. Sure. The first row is the royalty,
8 which is labeled there as the dependent
9 variable in my analysis. And then the next
10 group of rows are what I would consider to be
11 the key explanatory variables, especially the
12 next six rows are measures of the numbers of
13 minutes of programming of the six Claimant
14 categories at issue in the proceeding.

15 Q. Let's look at the next chunk of rows.
16 This begins with number of channels. And what
17 are these -- they're all labeled regressors.
18 What are these rows?

19 A. So these are examples of explanatory
20 variables. The minutes of programming were
21 also explanatory variables. They were the key
22 explanatory variables. These are now control
23 variables. So other variables that can
24 influence the royalty paid by a cable system
25 that I, as an econometrician, want to account

1 for so as to get a better estimate of the
2 effects of the key explanatory variables.

3 Q. The third row there says, "Indicator
4 for whether the subscriber group's system is
5 paying the minimum fee." Do you see that?

6 A. I do.

7 Q. That was your original regression that
8 you filed in December of 2016; is that right?

9 A. That's right.

10 Q. Why is that in this formula or in this
11 design?

12 A. Well, in specifying my regression
13 model, I wanted to allow for the fact that
14 systems that paid a minimum fee may have lower
15 total value for distant signals. And so I
16 include as a regressor an explanatory variable
17 in the regression an indicator to tell me these
18 are the systems that paid the minimum fee.

19 Q. Next is, "Indicator for whether the
20 subscriber groups' system is within the Canada
21 zone." What is that?

22 A. Again, because systems that lie
23 between the Canada zone face a slightly
24 different environment for their selection of
25 distant signals, they are able to carry

1 Canadian signals, I again wanted allow for an
2 effect of that on their decision-making and on
3 the royalty that they might pay for distant
4 signals.

5 Q. Let's look at the next bunch of rows,
6 the bottom part of the chart of Figure 21.
7 What are these?

8 A. These, you'll notice for variable type
9 in the second column it says "other." These
10 are not regressors, these were not included in
11 the regression. But I used them after the
12 regression in order to calculate my recommended
13 share of royalties. And these are the share of
14 the compensable minutes of each of the program
15 categories.

16 Q. And you used total minutes in each
17 category, compensable and non-compensable, as
18 your key variables in your regression?

19 A. That's correct.

20 Q. Now, in your Exhibit 2004 you also
21 discuss something called fixed effects. What
22 is the fixed effects approach?

23 A. The fixed effects are particularly
24 important control variables and they are, in
25 essence, a dummy variable for every cable

1 system in every accounting period that are
2 included in the regression.

3 So to give you an idea -- dummy
4 variable just means a variable that turns on,
5 we call it an indicator variable, if a subgroup
6 is part of one subsystem. So there are an
7 additional 7,000 variables in my regression,
8 beyond the ones listed in the table. These are
9 very important to help control for any
10 unobserved factors that might otherwise
11 contaminate or bias my estimates of the key
12 effects of interest.

13 Q. So how does the use of the fixed
14 effects approach affect the validity and
15 precision of the regression?

16 A. It makes it much more robust. If
17 there is anything that is not in my regression,
18 but that varies at the level of the cable
19 system -- for example, maybe local
20 entertainment options in some markets are
21 better or worse -- these will be captured by
22 the fixed effect. And therefore all the
23 variability that identifies the effects of the
24 minutes is driven by variability across the
25 subgroups within each cable system.

1 Q. Okay. Now I'm going to give myself a
2 gift of not trying to read Greek formulas and
3 ask you: Are the details of your regression
4 set forth in Appendix A to your -- to Exhibit
5 2004?

6 A. They are.

7 Q. Thank you. Now, let's look at
8 Figure 22, on page D1. We are now moving to
9 discussing the results of your regression. And
10 are they set forth in this Appendix B?

11 A. They are.

12 Q. And could we look at the first chunk
13 of rows there. Now these are all distant
14 minutes rows; is that correct?

15 A. That's correct. These are the
16 parameters or coefficients which measure the
17 effect of the distant minutes of each of the
18 Claimant categories on the dependent variable.

19 Q. And we will discuss the third column
20 in a moment. But all of these coefficients or
21 parameters are statistically significant; is
22 that correct?

23 A. That's correct.

24 Q. What is the parenthetical below the
25 first number in each of those analyses?

1 A. So in each cell -- there are two
2 numbers in each cell. The top number is the
3 measure of the effect of that variable on
4 royalty, the log of royalty. And then the
5 second number is the measure of how much
6 variability there is in that estimate. And the
7 strong statistical significance suggests, with
8 the -- indicated by three stars, suggests that
9 the data are able to very clearly identify what
10 is the effect of each of the minutes of
11 programming.

12 Q. Let's look at the rest of the rows on
13 this Figure 22. And these similarly have
14 coefficients for other variables, including
15 control variables, that you included; is that
16 correct?

17 A. That's correct.

18 Q. Are there any variables that are not
19 shown on this table?

20 A. There are two variables that we
21 discussed earlier; the minimum fee variable and
22 the Canada zone variable you might notice are
23 not here. And the reason they are not here is
24 because they vary only at the level of the
25 system. And so these fixed effects that I

1 mentioned will absorb the effect of the minimum
2 fee and the Canada zone.

3 So the effect of the minimum fee and
4 the Canada zone are still in the regression;
5 they just don't show up as parameter estimates.
6 They show up as 7,000-plus parameters that are
7 not shown in the table.

8 Q. You have 7,000 more of these rows with
9 coefficients; is that right?

10 A. That's right. But we decided not to
11 present them.

12 Q. Okay. Now, let's turn to Figure 16 on
13 page 48, Exhibit 2004. Dr. Crawford, what does
14 this figure show?

15 A. What this figure does is it just does
16 a mathematical transformation of those first
17 six key parameters attached to the key
18 explanatory variables, and it turns into
19 something that is a little more interpretable,
20 which is average marginal value of the distant
21 minute in each of the Claimant categories.

22 Q. So looking at the bottom line, 2010 to
23 '13 for the first three columns, would you just
24 explain what they are?

25 A. What this says is -- and again in each

1 cell there is an estimate of the average value
2 of a distant minute and the estimate of the
3 average variability there is in that estimate.
4 For Program Suppliers, I estimate that in this
5 initial analysis an additional minute of
6 Program Supplier programming is worth
7 approximately 6.4 cents, whereas for Sports
8 programming I have an estimate of 89.6 cents
9 per minute of Sports programming. And for
10 Commercial Television programming, 13.4 cents
11 per minute.

12 Q. We have had discussions in this
13 proceeding of compensable programming. Do
14 these average marginal values in Figure 16
15 measure all the value of all the programming on
16 the distant signals or just the compensable
17 programming?

18 A. All the programming.

19 Q. Why did you design the study in that
20 way?

21 A. Because CSOs are choosing entire
22 distant signals and, presumably, value --
23 aren't aware or care, even, about the mix
24 between compensable and non-compensable
25 programming. So I wanted to include all of the

1 programming.

2 Q. Let's now look at Figure 17 on page 41
3 of Exhibit 2004. How do you use the results we
4 just looked at on Figure 16 in calculating the
5 relative value for distant signal program
6 categories presented here?

7 A. So just taking Program Suppliers in
8 the first column as an example. So I take that
9 marginal value in each subscriber group and
10 each cable system and each time period and
11 multiply it by the minutes of program supplier
12 compensable programming in that subscriber
13 group. And then I do that across all the other
14 subscriber groups and add it up.

15 And then that gives you sort of the
16 group total value of program supplier
17 programming. I do that then for all the other
18 Claimant categories and what is reported here
19 is the sort of share of the group values in the
20 overall total value.

21 Q. So why do you use the compensable
22 minutes totals to calculate these shares as
23 opposed to all the minutes that are used in the
24 regression?

25 A. Because my understanding is that the

1 statute requires royalty payments only for
2 compensable minutes.

3 Q. Did you also perform a refined version
4 of this regression?

5 A. I did.

6 Q. Why did you do that?

7 A. In the course of the analysis, I
8 recognized that there was some programming
9 carried on distant signals that duplicated
10 existing programming carried by the cable
11 system. And one of the principles of economics
12 is that consumers that only want one good are
13 not going to value a second duplicate signal.
14 And, therefore, cable operators aren't going to
15 value that duplicate signal either. And so it
16 is then appropriate to remove that duplicate
17 programming from both the regression and the
18 share calculations.

19 Q. So what exactly was excluded in the
20 non-duplication regression from the regression?

21 A. So, basically, I excluded duplicate
22 network programming. So it was network
23 programming that was -- had the same nongeneric
24 title that was aired at exactly the same time
25 on the same network. And so examples of

1 networks would be the big three networks, but
2 also Fox, PBS, CW, smaller networks like
3 Univision or Ion.

4 Q. So those were identical programs at
5 exact same time on two stations?

6 A. On two stations carried by the cable
7 system.

8 Q. One of which was --

9 A. At least one of which was a distant
10 signal.

11 Q. Let's turn to Figure 20 on page 45 of
12 Exhibit 2004. Are the share calculations of
13 your nonduplicated minutes analysis shown in
14 this chart?

15 A. They are.

16 Q. And are these -- just considering the
17 bottom line supplier shares, are these shares
18 significantly different from the ones that we
19 looked at in Figure 17?

20 A. No, there is no -- both share
21 estimates lie within the confidence intervals
22 of each other.

23 Q. So they are not statistically
24 different. First, do you recommend these
25 shares over the Figure 17 shares?

1 A. I do.

2 Q. And why do you?

3 A. Well, as you suggested in your
4 question, there is no statistical difference to
5 distinguish them. But my understanding of the
6 purpose of this proceeding is to understand
7 relative CSO value for different types of
8 programming. So by including minutes in the
9 initial analysis that has zero value to cable
10 operators, that in some sense muddies the
11 water. So by taking those minutes out of both
12 the regression and the share calculations, I'm
13 able to get an estimate more tied to the
14 economic reality of the decisions cable
15 operators are making about how they value
16 different categories of programming on distant
17 signals.

18 Q. And just to be clear, did you omit the
19 duplicated network programming, even though it
20 was compensable, from the share calculations in
21 this chart?

22 A. Yes, I eliminated it both from the
23 regression and from the share calculation.

24 Q. Right. Now, did you perform tests to
25 determine the robustness of your regression

1 analysis?

2 A. I did.

3 Q. And that is in Appendix C to your --
4 to Exhibit 2004; is that correct?

5 A. That's correct.

6 Q. What did you test?

7 A. The test was to test whether the
8 coefficients on the key explanatory variables
9 were the same across time.

10 Q. And was what was the result of the
11 final test?

12 A. The test could not reject, so
13 basically the data said that the coefficients
14 on the key programming variables appear to be
15 the same across time.

16 Q. Why did you perform that particular
17 test?

18 A. So, I performed that test because in
19 previous proceedings there has been an issue
20 about the stability of regression analyses or
21 regression coefficients across the time. And
22 so I wanted to naturally assess whether my
23 analysis in this proceeding had coefficients
24 that were stable across time.

25 Q. So bottom line to this part of your

1 testimony, Dr. Crawford, do you have an
2 opinion, based on your experience and expertise
3 and the analyses that you have done, regarding
4 the relative marketplace value in 2010 to '13
5 of the six categories of programs presented in
6 this proceeding?

7 A. I do.

8 Q. And what is that opinion?

9 A. The figures you see in front of you in
10 Figure 20 from my non-duplicate analysis would
11 be my recommendation for a basis for the
12 division of royalties.

13 Q. All right. Now let's turn to your
14 rebuttal testimony. Dr. Crawford, did CTV also
15 ask you to provide testimony in the rebuttal
16 case of this proceeding?

17 A. They did.

18 Q. What did CTV ask you to do?

19 A. They asked me to do two things.
20 First, they asked me to evaluate the
21 proposition put forward by a number of Program
22 Supplier experts that relative viewing is an
23 appropriate measure of relative marketplace
24 value. And furthermore, they asked me to
25 evaluate the Direct Testimony of Dr. Erdem who

1 provided opinions about the usefulness of
2 regression approaches, both in general and in
3 the specific regression of Dr. Israel.

4 Q. And did you provide a written rebuttal
5 statement reporting your analysis?

6 A. Yes.

7 Q. I placed before you as part of that
8 binder a copy of what's been entered into
9 evidence as Exhibit 2005. Is this your written
10 rebuttal statement?

11 A. It is.

12 Q. Do you have any corrections to Exhibit
13 2005?

14 A. I have one correction.

15 Q. Let's look at page 24, paragraph 79.

16 A. So if you look at the third line in
17 this paragraph, at the end there is a quote
18 there that says, "number of distant broadcast
19 signals." That was a typo. What it should
20 have said is "number of distant subscribers."
21 So you should scratch out "broadcast signals"
22 and put in "subscribers."

23 Q. All right. Now, with regard to the
24 first question you were asked to address on
25 rebuttal, you understand Dr. Gray's Direct

1 Testimony as arguing that a viewing related
2 approach is the proper way to measure growth in
3 marketplace value in distant programming?

4 A. Yes, that's correct.

5 Q. First, are you generally familiar with
6 how the market participants in the broadcast
7 marketplace use and rely on viewing data?

8 A. I am.

9 Q. So isn't viewing equally important in
10 the cable distant signal marketplace?

11 A. No, in the local marketplace, of
12 course, local stations earn revenue from sales
13 of advertising and viewing is critically
14 important for advertising sales. But in the
15 distant market, cable operators are interested
16 in selecting programming to attract and retain
17 subscribers.

18 Q. Dr. Gray also appears to argue that
19 CSO demand is derived from subscriber demand.
20 Given that premise, wouldn't it be appropriate
21 to measure subscriber viewing levels to
22 determine that?

23 A. No, because the economics are just
24 different. Consumer viewing isn't the same
25 thing as consumer value. And even if it were,

1 consumer value is not the same thing as cable
2 operator value.

3 So it is a little bit like if you go
4 to the restaurant and you order the same amount
5 of water and wine -- I used this example in my
6 rebuttal testimony -- and you expect to pay the
7 same amount for both, and you just wouldn't.

8 Q. Because there are different values,
9 notwithstanding the amount of consumption?

10 A. As I say in my testimony, volume isn't
11 value any more than viewing.

12 Q. I usually buy the water-priced wine.

13 (Laughter.)

14 BY MR. STEWART:

15 Q. If you followed Dr. Gray's assumptions
16 that the amount of viewing by subscribers
17 directly measures value, what kind of results
18 would you reach?

19 A. You would tend to undervalue
20 high-value programming. And you can see that
21 in Dr. Gray's estimates, especially for Sports
22 programming. I showed earlier that I estimate
23 that Sports programming had the highest value
24 per minute. And he gets much lower shares in
25 the low single digits proposed royalty shares

1 using a viewing measure.

2 Q. Do you have market-based evidence that
3 consumer viewing is not directly linked to CSO
4 value?

5 A. I do.

6 Q. Let's look at Figure 1 from your
7 rebuttal statement on page 11 of Exhibit 2005.
8 What does this figure show?

9 A. This figure is actually adapted from a
10 figure I produced in academic research that I
11 started before this proceeding began, but I
12 adapted it to the years --

13 Q. That is a long time ago.

14 A. Yeah. Academic time scales are even
15 longer.

16 Q. I take that.

17 A. The data in that paper were from 2000
18 to 2010, so I just updated it using 2010 to
19 2013 data, but otherwise it is the same figure.
20 And what it shows here on the Y axis, on the
21 vertical axis, is the average affiliate fee
22 paid by cable systems. So this is the average
23 amount averaging across cable systems, that
24 cable systems pay to particular channel owners.

25 And there are two types of dots in the

1 figure. The red triangles are the average fees
2 they pay for individual Sports networks. So
3 the highest dot up around \$5, in the middle of
4 the figure, is for ESPN, just as an example.
5 And the blue circles are the average fees they
6 pay for non-Sports cable networks.

7 And the point here is that even for
8 the same average level of viewing. So if you
9 just go along any vertical line where there are
10 both red diamonds and blue dots, you see that
11 cable operators are willing to pay much more
12 for access to Sports networks than they are for
13 access to non-Sports networks.

14 And furthermore, you can get
15 non-Sports networks that have very high levels
16 of average viewing, at the lower right, that
17 receive lower fees than Sports networks that
18 have much lower levels of average viewing. And
19 this is marketplace evidence that different
20 types of programming have different value to
21 operators.

22 Q. And in this case, particularly Sports
23 programming?

24 A. Exactly.

25 Q. Has your research identified similar

1 patterns for non-Sports programming?

2 A. Yes. If you look at the average fee
3 paid per amount of viewing, and you rank all
4 the networks -- of course, most of the top
5 networks are Sports networks, as this figure
6 suggests -- but there are also what I would
7 call niche networks programming. And so the
8 top five non-Sports networks in terms of
9 average affiliate fee per viewing are the
10 network Al Jazeera; the network at that time
11 NuvoTV which provided Spanish language
12 programming; MTV Classic; and then the two
13 business networks -- business news networks,
14 CNBC and Fox Business News.

15 Q. You used the term "niche channel."
16 What in your view is a niche channel?

17 A. A niche channel is, in my view, a
18 channel -- or niche programming in general is
19 programming that appeals to a narrow segment of
20 the population for which there may be fairly
21 high value in that population.

22 Q. You've been talking about channels,
23 each of which you have identified as a Sports
24 channel or a non-Sports channel, and the like.
25 Do you see the same pattern in your regression

1 results.

2 A. I do.

3 Q. Let's look at Figure 19 on page 44 of
4 Exhibit 2004. Now, this is a figure that is
5 similar to one we looked at before, but this is
6 the average marginal value that was produced
7 from your nonduplicate analysis; is that
8 correct?

9 A. That's correct.

10 Q. Where do you see this pattern that you
11 talked about?

12 A. So if you look at across the bottom
13 row, the three Claimant categories that I
14 estimate have the highest value for per minute
15 are the Sports category at 96.3 cents, the
16 Commercial Television Claimant category at 15.9
17 cents, and the Canadian category at 11.7 cents.

18 And I think all three of these can be
19 characterized as niche programming. And the
20 reason for that is even though Canadian
21 programming might be general interest
22 programming in Canada, in the United States I
23 think you could argue it would be niche
24 programming, appealing to a narrow set of
25 interests.

1 And similarly Sports and Commercial
2 Television, which is largely news programming,
3 even though, for example, Arkansas sports and
4 Arkansas news might be general news programming
5 in Arkansas, if you look at an adjacent DMA in
6 Missouri, that would be niche programming. And
7 because we are looking at programming on
8 distant signals, it is that programming outside
9 of the local market that we are talking about.

10 Q. So you looked in your research at the
11 relationship between the amount of viewing and
12 relative value as expressed in the marketplace.
13 Do you have an opinion based on those analyses
14 and on your expertise and experience as to
15 whether a viewing -- a study of the amount of
16 viewing done to various types of programs on
17 distant signals is an appropriate -- provides
18 any useful information for the determination of
19 relative marketplace value?

20 A. No, I don't believe it can provide any
21 useful information.

22 Q. Now, let's turn to the other part of
23 your rebuttal testimony, which is to address
24 criticisms stated by other parties of the use
25 of regression analyses in this proceeding.

1 Okay? First -- and we are going to include
2 some responses to rebuttal testimony by other
3 parties making similar criticisms. Okay?

4 So first, Dr. Erdem argued that
5 regression analyses cannot be a measure of
6 relative value, and Dr. Gray as well agreed
7 with this for a variety of reasons. First,
8 they argued that regressions can't be used
9 because of the fact that there is a statutory
10 royalty formula or that the marketplace uses
11 regulated prices. Do you agree with this
12 criticism?

13 A. I don't.

14 Q. Why not?

15 A. I don't agree with it for the same
16 reasons I mentioned earlier. Basically,
17 because I think in the hypothetical market it's
18 the relative CSO value that would determine
19 relative marketplace value. And by exploiting
20 decisions about which signals to carry, and the
21 minutes of programming on those signals, and
22 the royalties that are paid, my regression is
23 able to recover relative CSO value.

24 Q. Dr. Erdem also argues that regressions
25 can't measure relative value -- and other

1 witnesses have made this point as well --
2 because they are, quote-unquote, volume-based
3 studies or, quote-unquote, time-based studies.
4 Do you agree with that?

5 A. I don't.

6 Q. Why not?

7 A. So even though the key explanatory
8 variables in the regression are minutes of
9 programming, the key outputs of the regression
10 are the coefficients which translate -- which
11 measure the incremental value of those minutes
12 of programming on royalties.

13 And so it translates a volume measure
14 into a value measure. So regression is not a
15 volume approach; it's a value approach.

16 Q. Let's look at Figures 12 and 20 from
17 your Direct Testimony, which are the volume and
18 value summaries. Let's bring it up. Give us a
19 moment.

20 Does this support your answer to that
21 criticism.

22 A. It does.

23 Q. How so?

24 A. Figure 12 is the figure which -- we
25 showed both of these figures before -- the

1 bottom row and the highlighted row in yellow
2 shows the care of compensable minutes. And for
3 convenience, let's just focus on the Sports
4 category Claimant. You can see in the data
5 that I use in my analysis, there is only --
6 Sports programming only accounts for 5.9
7 percent of the volume of compensable minutes.
8 But you can see in my suggested shares of
9 royalty shares, they have the highest proposed
10 royalty share of over 35 percent of the royalty
11 pool.

12 Q. Next, Dr. Gray argued that a
13 regression can't properly measure royalty
14 marketplace value because it includes systems
15 that pay the minimum royalty fee. Do you agree
16 with that?

17 A. I don't.

18 Q. First, what is the minimum royalty
19 fee?

20 A. The minimum royalty fee is that some
21 large systems must pay a minimum fee,
22 regardless of how many distant stations they
23 carry, and this minimum fee is a little over
24 1 percent of their gross receipts.

25 Q. And that is a system basis?

1 A. That's on a system basis.

2 Q. Do you think that the fact that the
3 royalty fee structure includes a minimum fee
4 makes your analytical approach invalid?

5 A. Not at all.

6 Q. Why not?

7 A. Because systems are selecting the
8 distant signals to carry as a subscriber group
9 level, those are active decisions about which
10 systems to carry and which subscriber groups.
11 And so they calculate royalties at that
12 subscriber group level. It may be that the sum
13 of those royalties is less than the minimum
14 fee. So it is possible that some systems have
15 a lower overall value for distant signal
16 carriage than others, and that's why I account
17 for that in my regression.

18 But still, we can exploit the
19 selection of which distant signals they chose
20 to carry as informative of how they -- what
21 relative value they put on their different
22 programming categories.

23 Q. And how did your regression design
24 address the minimum fee?

25 A. So as I mentioned earlier, I included

1 a dummy variable in the regression, which was
2 ultimately absorbed by the fixed effects. But
3 it allows systems that pay the minimum fee to
4 have a lower average value.

5 Q. Have you reviewed the example that
6 Dr. Gray provided in his rebuttal testimony of
7 a minimum fee cable system in Bethel, New York?

8 A. I have.

9 Q. Does that example support his
10 criticism?

11 A. I don't think it does.

12 Q. Why not?

13 A. Because this system has 21 subscriber
14 groups, some of which have no distant signals
15 and some of which have as many as 17. And so
16 there is a large variety of different
17 subscriber groups and it reveals that the cable
18 system in Bethel, New York, is making an active
19 choice about what distant signals to carry in
20 which subscriber groups, which I can exploit in
21 the my regression analysis.

22 Q. Let's look at Table 3 from Dr. Gray's
23 rebuttal testimony, Exhibit 1637. Have you
24 reviewed this portion of Dr. Gray's testimony
25 in which he argues -- in which he says that he

1 replicates your regression analysis excluding
2 the minimum fee systems?

3 A. I have.

4 Q. Is his testimony correct in this
5 regard?

6 A. It is not.

7 Q. Why not?

8 A. So first he claims to replicate my
9 study, but he doesn't. A key element of my
10 regression analysis is the subscriber group
11 variation. But in his regression, he
12 aggregates that subscriber group level
13 information up to the level of the systems,
14 which means right away that he cannot do fixed
15 effects anymore, so he doesn't do fixed
16 effects, and he then adds additional variables.
17 So it is not at all a replication of my study.

18 Q. Did you check what the results would
19 be if he had actually replicated your study
20 omitting the minimum fee system?

21 A. I did.

22 Q. What were the results?

23 A. Based on his criticism --

24 MR. MacLEAN: Your Honor, this is a
25 new analysis. There has been no written

1 testimony submitted in answer to Mr. Stewart's
2 questioning.

3 MR. STEWART: Your Honor, according to
4 the stipulation that was entered by the Judges,
5 our witnesses are permitted to address
6 responses to rebuttal, unlike the supplement
7 that the Settling Devotional Claimants put
8 in --

9 JUDGE BARNETT: Well, we don't need to
10 go into who shot John. Just give me the
11 response to his objection.

12 MR. STEWART: Our response is that
13 this is not a new analysis. We are not
14 presenting any numbers here. We are not going
15 to present this as a basis for the allocation.
16 We are simply responding to correct this error,
17 this gross error that Dr. Gray has put in his
18 rebuttal testimony.

19 JUDGE BARNETT: Overruled. The
20 witness can respond to a critique by another
21 expert. I think that is an agreed procedure
22 here. Not in writing, we don't need any
23 surrebuttals, but that is why they are here to
24 testify.

25 BY MR. STEWART:

1 Q. So did you test what would have
2 happened if Dr. Gray had actually replicated
3 your study omitting minimum fee systems?

4 A. I did.

5 Q. What were the results?

6 A. So not -- I dropped the minimum fee
7 systems from the regression analysis and reran
8 the regression. And not only were the implied
9 royalty shares within the confidence intervals,
10 they were very, very close. The largest
11 percentage point difference across all the
12 categories was 1 percent, and well within the
13 confidence intervals of my final analysis.

14 Q. Dr. Gray's rebuttal testimony
15 criticizes the omission of the non-compensable
16 programming on WGNA from a different regression
17 design. Did your regression omit
18 non-compensable programming on WGNA?

19 A. Not in the regression analysis, no.

20 Q. Have you also reviewed -- and we can
21 put this down. Have you also reviewed Canadian
22 Claimants Group witness Dr. Lisa George's
23 rebuttal testimony criticizing your regression
24 design?

25 A. I have.

1 Q. What alternative analysis did she
2 propose?

3 A. So she proposed that the key effects
4 of interest, these effects of the programming
5 minutes, might differ within the Canada zone
6 versus outside the Canada zone.

7 Q. And your own regression didn't
8 separately analyze in-zone and out-of-zone
9 values?

10 A. That's correct.

11 Q. Does her analysis then undermine the
12 validity of your approach?

13 A. It doesn't.

14 Q. Why not?

15 A. Based on her analysis, I tested
16 whether the data could reject, for each minute
17 category, whether the effect of each type of
18 programming was the same inside or outside the
19 zone, and the data cannot tell them apart. So
20 there is no statistical basis -- no statistical
21 support for the view that they should be
22 different.

23 Q. Have you also reviewed the rebuttal
24 testimony of Program Suppliers witness
25 Ms. Hamilton arguing that your refined

1 regression improperly ascribed zero value to
2 duplicate programming?

3 A. I have.

4 Q. And does her rebuttal testimony affect
5 your opinion about the validity of your
6 nonduplicated minutes regression study?

7 A. It does not.

8 Q. Why not?

9 A. She made two criticisms. First, she
10 criticized that some viewers might wish to view
11 the same programming at different times. But
12 that is not germane here. I only dropped from
13 my regression analysis network programming that
14 was shown at exactly the same time.

15 And the second criticism was to claim
16 that CSOs value all programming, and that is
17 just contrary to economic principles that, with
18 perfectly substitutable goods, they only value
19 one and, therefore, there is no reason for them
20 to value a second version of an identical
21 signal.

22 Q. At the same time?

23 A. At the same time.

24 Q. Now, let's finally turn to the second
25 kind of criticism that Dr. Erdem raised in his

1 Direct Testimony and then in his rebuttal,
2 which I will characterize as adding variables
3 to the regression design in order to seek to
4 demonstrate that they are volatile or unstable.
5 Do you have that in mind?

6 A. I do.

7 Q. Can you characterize the effect of the
8 approach that Dr. Erdem appeared to take in
9 making this criticism?

10 A. Dr. Erdem appeared to take the
11 approach of a prediction progression, as I
12 described earlier, rather than the approach of
13 an effects regression.

14 Q. Is that approach that he used
15 appropriate here?

16 A. No, because the key question at issue
17 is what is the effect -- what is the CSO value
18 of different types of programming minutes. And
19 so one wants to be sure to take an effects
20 approach to that question.

21 Q. Turning now to the specific
22 manipulations that Dr. Erdem performed -- and
23 we will look at his Direct Testimony in which
24 he touches on manipulations of Dr. Israel's
25 regression. What exactly was his new variable

1 measuring the number of distant subscribers?

2 A. Dr. Erdem introduced this new
3 variable, number of distant subscribers. And
4 regardless of its name, its practice -- as I
5 have shown in my rebuttal testimony -- it is
6 the product of two variables. It is the
7 product of the number of subscribers at the
8 system level, which will not be the focus of my
9 discussion, and the number of different
10 signals, the weighted number of distant signals
11 carried on that system. And it is that second
12 variable that is the problematic addition.

13 Q. Why is it problematic?

14 A. So it's problematic because the number
15 of distant signals is proportional to the
16 number of total minutes. Every distant signal
17 has a little over 500,000 minutes of
18 programming. And so by including that variable
19 he was, in essence, including into Dr. Israel's
20 regression a measure of total number of
21 minutes. But Dr. Israel already had the
22 minutes of the different Claimant categories in
23 his regression. And if you added up all of the
24 minutes in Dr. Israel's regression, you would
25 also get the total number of minutes.

1 So in essence, what Dr. Erdem did was
2 to double-count minutes. There was a total
3 from the original programming variables and
4 then he added another variable, which also
5 measured the total. And unfortunately, this
6 has -- when you include two variables in a
7 regression that measure the same concept, the
8 regression necessarily has to apportion the
9 effect.

10 So there is some value of total
11 minutes, and some of it will go to Dr. Erdem's
12 new variable and some of it will go to Dr.
13 Israel's original variables. But since those
14 are the key variables of interest, this biases
15 their ability to correctly reveal relative CSO
16 value.

17 Q. Okay. And now in Dr. Erdem's own
18 written rebuttal testimony, does he write
19 similar criticisms of your regression?

20 A. He raises two criticisms, one of which
21 is similar.

22 Q. First, he argued that you have used --
23 and I hate to say this -- log subscribers as an
24 explanatory variable, rather than linear
25 subscribers. Do you agree that that should be

1 a criticism of your study?

2 A. No, I disagree.

3 Q. Why not? Why do you disagree?

4 A. So if one were to use log subscribers
5 instead of linear subscribers in my regression
6 analysis, it would essentially approximate the
7 royalty formula. And while that would give a
8 high R-squared, which is a measure of how well
9 the regression predicts the dependent variable,
10 that is not the purpose of the regression. We
11 don't want to just predict royalties; we want
12 to understand what is the effect of different
13 minutes of programming on royalty.

14 So by including log subscribers, he
15 doesn't let the minutes variables do their job
16 of revealing the relative value of the
17 different programming categories.

18 Q. Does this, in effect, approximate the
19 royalty formula itself?

20 A. It does.

21 Q. What effect does that have on the
22 analysis?

23 A. If you approximate the royalty
24 formula, you can predict very well royalties,
25 but you can't necessarily reveal relative CSO

1 value.

2 Q. Second, he adds a series of covariants
3 to your regression in succession and they all
4 produce different results. Are the variables
5 that he adds in his multiple manipulations of
6 your regression appropriate?

7 A. No.

8 Q. Why not?

9 A. Well, as a preliminary matter, all of
10 his subsequent regressions started with this
11 log subscriber variable. So for the reasons I
12 said, that would be inappropriate.

13 But even putting that aside, all the
14 subsequent regressions included -- again, as it
15 did for Dr. Israel's regression -- the number
16 of distant subscribers. Again, he adds an
17 another measure of the total minutes to a
18 regression like mine -- not like mine, mine --
19 that has measured of total minutes, so again it
20 is effectively double-counting.

21 MR. STEWART: Thank you. I have no
22 further questions. Thank you.

23 THE WITNESS: Thank you.

24 JUDGE BARNETT: Who is questioning
25 first?

1 MR. MacLEAN: I'm happy to go first.
2 I thought maybe JSC would go first, because I
3 think they have friendly cross. But if not --

4 MR. LAANE: I may not have any,
5 depending on what I hear.

6 JUDGE BARNETT: How much time do you
7 anticipate, Mr. MacLean?

8 MR. MacLEAN: It may be -- it is hard
9 to estimate, but it could be two hours.

10 JUDGE BARNETT: Okay. It is a little
11 early, but let's take our morning recess. We
12 got off to a little rocky start this morning.
13 We all need a chance to regroup. So we will
14 take a recess of 15 minutes.

15 (A recess was taken at 10:25 a.m.,
16 after which the trial resumed at 10:46 a.m.)

17 JUDGE BARNETT: Mr. MacLean.

18 CROSS-EXAMINATION

19 BY MR. MacLEAN:

20 Q. Good morning, Dr. Crawford.

21 A. Good morning.

22 Q. I'm Matthew MacLEAN, I represent the
23 Settling Devotional Claimants.

24 A. I know.

25 Q. You may have heard me earlier suggest

1 that JSC might have had some friendly
2 cross-examination. I certainly did not mean to
3 imply that this is going to be unfriendly
4 cross-examination. We are friendly here.

5 (Laughter.)

6 BY MR. MacLEAN:

7 Q. Speaking of friends, I understand that
8 you used to work with Dr. Erdem at one point;
9 isn't that right?

10 A. I don't know that I did.

11 Q. No? Okay. I heard you taught him
12 everything he knows. No?

13 A. I don't believe so.

14 Q. So in front of you, I've put a
15 cross-examination binder which will have -- has
16 most of the main exhibits that I'll be
17 referring to during this cross-examination.
18 And so those of you following along at home, if
19 you want to have these at your fingertips, we
20 will try to put them on the screen.

21 But I will be referring principally to
22 Exhibits 2004, 2005, 5002, 5007, and possibly a
23 little bit to 1003 and 1087.

24 Okay. I want to start with your
25 regression specification, which is at

1 Exhibit 20004, Appendix A1, and if anyone in
2 here is math-phobic, now is the time to leave.

3 JUDGE BARNETT: Thank you, so much.

4 BY MR. MacLEAN:

5 Q. I actually want to start by making
6 this a little less daunting to what it might
7 appear to those of us who don't spend our days
8 looking at mathematical statements like this.
9 So this is your regression specification;
10 correct?

11 A. That's correct.

12 Q. So we start out -- and some of this
13 Mr. Stewart went through with you, but I want
14 to break it down to make sure that everyone can
15 understand exactly what this is doing here.
16 Your dependent variable is the log of royalties
17 paid; correct?

18 A. That is correct.

19 Q. And then the GST down here, this
20 simply means the log of royalties paid of a
21 particular -- as to a particular GS group?

22 A. Subgroup.

23 Q. Subscriber group; right?

24 A. That's correct.

25 Q. S is system; correct?

1 A. That's correct.

2 Q. And T is the accounting period;
3 correct?

4 A. That's correct.

5 Q. So T is X plus time and you mean that
6 in terms of an accounting period?

7 A. That's correct.

8 Q. There are two accounting periods in
9 each year?

10 A. That's correct.

11 Q. So your regression specification
12 basically expects that the log of the royalties
13 that are paid to the Licensing Division on
14 behalf of that subscriber group of that system
15 in that time period is going to be the
16 dependent variable of what we are trying to
17 estimate with your regression; is that right?

18 A. That's right.

19 Q. So over on the right-hand side of the
20 equal sign, I am just going to try to interpret
21 this and you tell me if I get it wrong.

22 A. Okay.

23 Q. What this says -- and it is divided
24 into several groups, I'm going to focus on this
25 first term here.

1 A. Okay.

2 Q. This says the sum of, for each
3 Claimant category -- that is each Claimant
4 category within a set of Claimant categories --
5 the number of minutes that's retransmitted of
6 that category within that subscriber group,
7 within that system, in that time period,
8 multiplied by the coefficient for that
9 particular Claimant group; is that correct?

10 A. That is correct.

11 Q. And the beta here -- pardon my
12 Greek -- is the coefficient?

13 A. That is correct, and it is beta.

14 Q. And so each claimant category in this
15 part of the specification has its own beta, its
16 own coefficient?

17 A. That's correct.

18 Q. Now, you could have written out -- I'm
19 not saying you should have, but if you had
20 wanted to, you could have written this all out.
21 So instead of saying the sum of this, that, so
22 forth, it could have just said Program
23 Suppliers minutes times its beta, plus JSC
24 minutes times its beta, on through the six
25 program categories; correct?

1 A. That's correct.

2 Q. It would be the same thing, it would
3 just be longer on the page?

4 A. That's correct.

5 Q. Okay. So those are your sort of your
6 coefficients of interest. That's what you're
7 trying to find out through this regression
8 specification; correct?

9 A. I call those my key explanatory
10 variables.

11 Q. Key explanatory variables. Okay.
12 This next term here, plus Z prime GST gamma --
13 really exercising my Greek here -- Z prime GST
14 gamma, this is basically your vector. That
15 prime means -- notes that this is a vector;
16 correct?

17 A. That is correct.

18 Q. Which means it is an array of
19 variables with their own associated
20 coefficients?

21 A. That is correct.

22 Q. So this is a vector of your control
23 variables; correct?

24 A. That is correct.

25 Q. So within that vector -- and we will

1 get to that in a second -- but within that
2 vector there, are similar to this first
3 summation; it's simply the sum of all of your
4 control variables each with its own -- and here
5 you use gamma instead of beta?

6 A. Each with its own coefficient. That's
7 correct.

8 Q. Just like the betas, the gammas are
9 coefficients?

10 A. Correct.

11 Q. You could have just said beta, if you
12 wanted to.

13 A. That's correct.

14 Q. But to distinguish those explanatory
15 variables of interest from those that are
16 controls, you used gamma just to keep it
17 separate on the page?

18 A. That's correct.

19 Q. Okay. Then you've got plus tau,
20 system time period; correct?

21 A. That's correct.

22 Q. That's your fixed effect for a
23 particular system time period?

24 A. That's correct.

25 Q. Every system time period has its own

1 fixed effect?

2 A. That's correct.

3 Q. Here this tau is basically another
4 coefficient?

5 A. It's 7,000 coefficients.

6 Q. One for every system?

7 A. One for every system.

8 Q. So if you wanted to write this all
9 out, you could have done it. But you would
10 have to write out 7,000 variables --

11 A. Exactly.

12 Q. -- which is why you used mathematical
13 notation?

14 A. That's true. And this is the standard
15 mathematical notation for a fixed effect.

16 Q. But every single system time period
17 has its own number, it's basically a
18 coefficient associated with it that adds or
19 subtracts for that system or time period;
20 correct?

21 A. I mean, the data tell me what the
22 value is, but that is correct.

23 Q. So you put it into -- did you use
24 Stata?

25 A. Yes.

1 Q. Did you personally do Stata or did
2 Dr. Crawford and his team?

3 A. Dr. Bennett and his team.

4 Q. I'm sorry; you're Dr. Crawford.
5 Dr. Bennett and his team did it, but you
6 basically said: Hey, here is my
7 specifications. You guys run it?

8 A. That's correct.

9 Q. Okay. So they don't literally enter
10 the specification, put it into computer code in
11 Stata; right?

12 A. That's right.

13 Q. And then the computer, Stata, will
14 come up with all of the coefficients, including
15 a fixed effect for every system time period; is
16 that right?

17 A. That's right.

18 Q. And then the expectation is that the
19 log -- well, all those coefficients will be
20 related basically to the log of royalties paid?

21 A. That's correct. The log of royalties
22 is the dependent variable.

23 Q. This last term, the epsilon, is the
24 error term?

25 A. That's correct.

1 Q. So once you do this prediction -- not
2 prediction, sorry, explanation. Okay? Each --
3 you know, you will have -- you will have
4 observations that are either above or below
5 your regression line and you just want it to
6 associate with its own epsilon error; correct?

7 A. The right-hand side variables will not
8 generally perfectly predict royalties. So the
9 epsilon captures the deviation from what the
10 model can predict and the true royalties.

11 Q. And the software, what the regression
12 is trying to do is to find the values of all
13 those coefficients that will minimize the sum
14 of squared errors?

15 A. That's correct.

16 Q. Let's take a look at your vector. Let
17 me back it up a little bit. So this is the
18 next page where you define your Z prime vector.
19 These are your control variables; correct?

20 A. That's correct.

21 Q. You've already said that this is
22 actually a typo, this tau at the beginning is a
23 typo?

24 A. That's right.

25 Q. And I'm not going to bust your chops

1 over it. But you don't know how long I spent
2 staring at that second tau. All right.

3 I want to dwell here for a second,
4 though, not because you made an error, okay?
5 But this actually would be an alternative way
6 of expressing the fixed effects; right? Here
7 you are expressing the fixed effects as a
8 vector in and of itself with the vector sign?

9 A. It would not work, because tau itself
10 is estimated. And so this error would have an
11 estimated value next to another estimated value
12 and you could not estimate both.

13 Q. That's if tau -- that's if tau had
14 been, as you used it in your main
15 specification, if tau had been a coefficient.

16 A. Oh, I see.

17 Q. But if alternatively you conceived of
18 tau as an indicator variable, either a one or a
19 zero; right? And each with its own associated
20 gamma; correct?

21 A. In that case, the gamma would have to
22 have an estimate T, as well.

23 Q. Well, I mean if you take a look at
24 your notation of your Z vector, you don't give
25 a GST to your gamma?

1 A. No, but there is a difference there,
2 because -- oh, I see what you are saying. I
3 see what you are saying.

4 Q. This just shows that within the vector
5 every variable its an own gamma; correct?

6 A. That's correct.

7 Q. This is actually an array of gammas.

8 A. A vector of gammas.

9 Q. This isn't to say that, like, you're
10 estimating -- if you had used this notation
11 instead, this wouldn't mean that you are
12 estimating an array of taus and then within the
13 vector, and then multiplying by -- scaling by a
14 single gamma; right?

15 A. That's what I wanted to make sure you
16 weren't assuming. I wanted to make sure that
17 even in this representation, that gamma would
18 have to have the 7,000 elements.

19 Q. Exactly. You wouldn't scale the
20 vector with a --

21 A. With a gamma.

22 Q. Because it's like the old joke. What
23 do you get when you cross a mountain goat with
24 a mosquito; right?

25 A. I don't know this joke.

1 Q. Nothing. Everybody knows that you
2 can't combine a scale with a vector.

3 (Laughter.)

4 MR. MacLEAN: I've been waiting my
5 whole life for an opportunity to use that joke.

6 JUDGE BARNETT: And you are now on
7 record.

8 (Laughter.)

9 BY MR. MacLEAN:

10 Q. Let's get back on track here. Okay.
11 But I just wanted to use this opportunity to
12 show, this could be an alternative way of
13 noting it, if every tau were its own indicator
14 variable and had its own gamma associated with
15 it.

16 A. Yeah, I agree with that, but of
17 course, one would only have this one or the
18 other one in the previous equation. One would
19 not have both.

20 Q. Absolutely. Understood. But what
21 this essentially means -- and I think you said
22 there are 7,000-something taus -- every single
23 system accounting period -- I'm sorry,
24 subscriber group -- no system -- every single
25 system accounting period has its own tau?

1 A. That's correct. Every system and
2 every accounting period has its own tau.

3 Q. Which in essence means every system
4 and every accounting period has its own
5 indicator variable?

6 A. That's correct.

7 Q. So one effect -- and we are still
8 looking at your control -- I'll call it your
9 control vector here; okay? One effect of
10 having an indicator variable for every system
11 accounting period is that indicator variables
12 that operate at the system level are going to
13 be kicked out by Stata; correct?

14 A. That is correct.

15 Q. So for example, because Stata can't
16 calculate a coefficient for indicators that
17 operate at the system level, if every system
18 accounting period has its own indicator?

19 A. That is correct. In my testimony, I
20 mentioned the Canadian zone and the minimum fee
21 as an example of this.

22 Q. Right. So for example, here in your
23 vector you've got it's paying a minimum fee,
24 like you said, Stata kicked that out. Stata is
25 not using that indicator at all, is it?

1 A. The effect of that indicator -- so,
2 Stata will not estimate the parameter there.
3 But the effect of paying the minimum fee will
4 be included into the tau that it cites for each
5 system from each time period.

6 Q. I understand. That is why Stata
7 basically will not estimate a coefficient for
8 this particular indicator paying a minimum fee?

9 A. That's true.

10 Q. Likewise, Stata will not estimate a
11 coefficient for the Canada zone that you just
12 said; right?

13 A. Exactly.

14 Q. So that indicator variable also, as
15 far as Stata is concerned, it just ignores it;
16 right?

17 A. That's correct.

18 Q. Similarly, your -- down here you've
19 got another sum, but again this is just a sum
20 of variables, each with its own associated
21 gamma; correct?

22 A. That's correct.

23 Q. So each of those variables, since
24 those all work at the system level, also gets
25 thrown out; correct?

1 A. That's correct. The effects of each
2 of those variables is measured by the fixed
3 effect in that system.

4 Q. And so therefore you get no
5 coefficient for any of those
6 indicator variables?

7 A. No separate coefficient. That's
8 correct.

9 Q. So when you wrote this specification
10 in the first place, you knew that these
11 indicators that worked on the system level were
12 going to be, in your words, absorbed by the
13 fixed effects; right?

14 A. That's correct.

15 Q. So why would you write these
16 indicators when you know the inclusion of fixed
17 effects is going to cause them to be kicked
18 out?

19 A. Because I think there are two purposes
20 of a regression model. One is to articulate
21 what one thinks are the important economic
22 factors that should enter the model. And
23 that's the purpose by which -- that purpose is
24 fulfilled by including these variables, even if
25 ultimately, by virtue of including the fixed

1 effects, the effects of these specific
2 variables are then incapsulated within the
3 fixed effect.

4 So essentially, it makes clear that
5 even though separate variables -- separate
6 parameters aren't estimated attached to each of
7 these variables, their effects are still being
8 accommodated in the regression model.

9 Q. But when you wrote this -- this
10 specification, then, when you wrote the
11 specification then, you must not have known
12 that you were going to include mixed effects?

13 A. No, I did, because the fixed effects
14 are in the previous paragraph.

15 Q. So you just wrote these indicator
16 variables into your specification, even though
17 you knew they weren't going to serve a purpose
18 at the end of the day?

19 A. I disagree. They do serve a purpose.
20 They serve the purpose of communicating that
21 these variables are important in the market.
22 But when the regression is ultimately run,
23 those effects are then captured by other
24 elements in the regression.

25 Q. They don't do anything in the

1 regression statement, do they? Other than to
2 show that you were thinking about them?

3 A. They showed that I thought they were
4 important factors to incorporate into the
5 econometric model.

6 Q. Did you try a regression specification
7 that included these indicator variables before
8 you decided to include fixed effects?

9 A. To be honest, I don't recall. Because
10 by virtue of having the subscriber group data,
11 we -- I settled quickly on the idea of
12 estimating with fixed effects.

13 Q. But you don't recall if you ever tried
14 this specification before adding your vector
15 for fixed effects?

16 A. No, because if one has data rich
17 enough to estimate a fixed effect model, one
18 generally prefers it, because it has such nice
19 properties -- nice econometric properties.

20 Q. So you didn't just write this
21 specification down, run with this these
22 indicator variables, but without fixed effects,
23 and then decided later: We'll put in fixed
24 effects?

25 A. No.

1 Q. Did you run a specification where you
2 used fixed effects, but not at the system
3 accounting period level?

4 A. That I'm sure we did not do.

5 JUDGE FEDER: Why not?

6 THE WITNESS: In general, when one
7 uses fixed effects, one tries to go the most
8 geographical -- the most disaggregated as
9 possible. And so there is always a trade-off
10 with fixed effects, in that they have this
11 property that they can prevent bias in the key
12 effects of interest, but if you have too many
13 of them, then they can make those effects of
14 interest quite imprecise.

15 So when one has a fixed effects
16 specification, you always try to include as
17 many possible first and see is it too
18 imprecise. In this case I was getting very
19 precise parameter estimates, so there was no
20 reason to go to a more geographically
21 aggregated version of the fixed effect, which
22 would have then lesser properties. It would be
23 more susceptible to potential bias.

24 BY MR. MacLEAN:

25 Q. Well, the most, I suppose

1 geographically disaggregated fixed effects you
2 could have used would be fixed effects at the
3 subscriber group system time period level;
4 correct?

5 A. So, the --

6 Q. Well, first of all, is that correct?

7 A. No, that's not correct, because if one
8 has a fixed effect for each subscriber group
9 system and time period, that's exactly how many
10 observations one has in the data and,
11 therefore, you would have a dummy variable for
12 every observation in the data and I would not
13 be able to measure the relative effect of any
14 of the programming minutes.

15 Q. All of your coefficients would be
16 statistically insignificant, basically?

17 A. I mean, you would basically just
18 replicate the data. I have 26,000 data points;
19 I would have 26,000 parameters, and that is not
20 an informative exercise.

21 Q. Okay. Let's take a look if we could
22 put up on the screen Exhibit 2004, at page 22.
23 -- I'm sorry. Can we go back to the ELMO for
24 just a second. I have one more question for
25 you about your main specification. Where is

1 your constant?

2 A. Oh, the constant is often implicit.
3 So there is a constant term in the regression
4 and I should have included it in the list of
5 the control variables.

6 Q. So even with your correction of your
7 extra tau, this is actually not a correct -- a
8 fully correct statement of your regression
9 specification statement?

10 A. I should have put in a constant term
11 in the Z prime gamma. Thank you for that
12 correction.

13 Q. Stata basically put it in for you, and
14 said: I'm sure he meant it. Include a
15 constant; right?

16 A. The default in Stata is to include a
17 constant.

18 Q. Okay. Let's now go to Exhibit 2004 at
19 page 22.

20 If you could zoom in a little bit on
21 paragraph 71 there. You've got between 800 and
22 1,100 cable systems per accounting period in
23 this data; right?

24 A. Upon reflection, I was thinking more
25 about my last answer. So by virtue of

1 including the fixed effects for every system
2 and every accounting period, the linear
3 combination of all of those fixed effects is
4 equal to the constant. So even if I had
5 written the constant, it too would have dropped
6 out of the specification.

7 Q. I think the average of all of those
8 coefficients would be equal to the constant;
9 correct?

10 A. It may be, but whether it is an
11 average -- but there is some linear
12 relationship between the sum total of the 7,000
13 coefficients and the constant term.

14 Q. But without a constant, your standard
15 errors would have been incorrect; right?

16 A. But essentially, by virtue of having
17 -- let me answer your question. Can you repeat
18 your question?

19 Q. Well, let's say for example -- I'm
20 assuming you know how to code in Stata?

21 A. I do.

22 Q. Let's say you went into Stata and you
23 decided, you know what, I don't want a constant
24 here, you would have to use the no constant
25 parameter; correct?

1 A. The no constant command; correct.

2 Q. Stata would have been able to
3 calculate coefficients without a constant,
4 because you have fixed effects, the
5 coefficients would be presumably the same as
6 with a constant; correct?

7 A. So when you tell Stata, or any
8 command, to add fixed effects, typically they
9 will include the constant and then drop one of
10 the fixed effects, or they will include all the
11 fixed effects and drop the constant. It's an
12 equivalent model.

13 Q. Uh-huh. All right. I won't argue
14 with you, but I think Stata calculates the
15 average of the fixed effects.

16 A. As the constant.

17 Q. Yes.

18 A. Yes.

19 Q. And without that average, without
20 doing that, without coming to a constant, the
21 coefficients won't change, but your standard
22 error will be off; correct?

23 A. But there -- if one doesn't include a
24 constant when one should include a constant,
25 there are many bad things that can happen, so

1 in general, the coefficient estimates could be
2 biased.

3 But in answer to your previous point,
4 even if Stata reports the average of the fixed
5 effect as the constant, that's -- it's --
6 that's the essence of the idea of including all
7 the fixed effects is the same -- is capturing
8 the effect of a constant. So one could either
9 include all the fixed effects, Stata will
10 report the average of the constant, or one
11 could drop one of the fixed effects, and then
12 the constant would measure the effect of the
13 excluded subscriber group time period and all
14 the other fixed effects would measure the
15 effects relative to that.

16 Q. Okay. I'm with you.

17 A. I'm sure everyone is.

18 (Laughter.)

19 BY MR. MacLEAN:

20 Q. You've got 800 to 1,100 cable systems
21 per accounting period; right?

22 A. That's correct.

23 Q. There are, of course, eight accounting
24 periods in 2010 to 2013 time period?

25 A. That's correct.

1 Q. Okay. So if you're relying on -- I
2 think you said 7,369, basically, indicator
3 variables; right?

4 A. That's correct. For the fixed
5 effects.

6 Q. The fixed effects. Plus your -- of
7 course, there are other variables that you have
8 in your control vector I'll call it.

9 A. Well, in the control vector and in, of
10 course, the key parameters of interest.

11 Q. Right. Let's go to Exhibit 2004, page
12 21, Figure 10. And let's blow up that first
13 line. Go ahead and blow up the whole thing.
14 That's fine.

15 All right. First line of this figure,
16 subscriber groups per system, one. Okay?
17 Every one of these systems in that line has
18 only one subscriber group; correct?

19 A. That's correct.

20 Q. And you have a fixed effect, you have
21 basically an indicator variable, for every
22 subscriber group in every time period; correct?

23 A. That's correct.

24 Q. So for roughly half, going over of the
25 four years, roughly half of the systems out

1 there, every observation has its own indicator
2 variable; correct?

3 A. Roughly half of the systems, but not
4 roughly half of the data. Because the data are
5 at the subscriber group level.

6 Q. But for half the systems, the
7 observations from those systems will -- each
8 observation will have its own indicator
9 variable?

10 A. That's correct. But I believe it
11 varies by year, but it is about 8 to 11 percent
12 of the total observations in the data.

13 Q. It wouldn't be hard to calculate,
14 because there are other systems that have more
15 than one subscriber group; right?

16 A. Yes, many systems have, as you can see
17 in the figure, many systems have more than one
18 subscriber group.

19 Q. A little less than half the systems
20 have more than one subscriber group; right?

21 A. Depending by year. In 2013, a little
22 more than half of the systems have more than
23 one subscriber group.

24 Q. .4 percent more than half. Okay.

25 A. A little.

1 Q. A little. So taking those systems
2 that have only one subscriber group each, each
3 of which has its own indicator variable in
4 every accounting period, what that effectively
5 means is it will get its own coefficient that
6 goes with the fixed effect and will have no
7 influence on any of the other coefficients that
8 you estimated; is that correct?

9 A. That's correct.

10 Q. So, again, for the half -- for the
11 observations of half the systems out there,
12 they have no effect whatsoever on your
13 coefficients; is that right?

14 A. For the observations -- so -- for the
15 observations -- it is correct that for the
16 observations of half the systems, but it's
17 approximately 8 percent of the overall
18 observations.

19 Q. Okay.

20 A. 8 to 10. Something like that.

21 Q. I came up with 15, but again I won't
22 quibble.

23 A. Okay.

24 Q. For the other half, roughly half of
25 the systems that have more than one subscriber

1 group each, you still have each of those
2 systems with its own indicator variable in
3 every accounting period; is that right?

4 A. I'm sorry; could you repeat the
5 question?

6 Q. For the other half of the systems,
7 those systems with more than one subscriber
8 group, each of those systems has its own
9 indicator variable in each accounting period;
10 right?

11 A. That's correct.

12 Q. Which effectively means your
13 regression isn't looking at, isn't influenced
14 by variation over system, but own variation
15 within a system; correct?

16 A. That's correct.

17 Q. Another way to say it, and if you try
18 to visualize it -- because, again, a lot of us
19 in this room aren't accustomed to thinking
20 about this on a day-to-day basis -- but in
21 essence, each system is allowed to have its own
22 constant is a way to look at it?

23 A. Yes, that's correct. Each system in
24 each accounting period.

25 Q. Let's take a look at Figure 9 on the

1 page prior to this, page 20, I believe. And so
2 let's look at this figure at the very bottom
3 right-hand corner of this table, it's your
4 average; right? Average number of subscriber
5 groups per system over the four years; right?

6 A. That's right.

7 Q. A little more than 3.5 average systems
8 per subscriber group -- subscriber groups per
9 system?

10 A. That's correct.

11 Q. Thank you. Can you explain to the
12 Judges the concept of overfitting?

13 A. Sure. So overfitting is an issue
14 often in a prediction context, where suppose
15 you had a dataset with 100 observations and you
16 include a model with 100 parameters. No matter
17 what were the variables on the model, they
18 could be nonsensical variables, you would
19 perfectly predict your data.

20 So there is always a tension between
21 which variables to include, ensuring one
22 doesn't want to include too many variables so
23 as to avoid overfitting. But this concept is
24 largely used in prediction regression context,
25 in my opinion.

1 Q. Well, have you ever heard of the
2 One-in-Ten Rule? One-in-Ten?

3 A. Not -- if you could describe it,
4 perhaps I have.

5 Q. A rule of thumb -- not saying it is
6 precise -- a rule of thumb that you should have
7 at least ten observations per -- at least ten
8 observation per coefficient.

9 A. So sometimes -- I have not heard that
10 specific rule, but I understand the idea behind
11 it. And generally the idea behind that is if
12 you don't have ten observations per
13 coefficient, one tends to get imprecise
14 parameter estimates.

15 Q. Well, the observation in an overfitted
16 model with parameter estimates could be very
17 precise; right?

18 A. As a general rule in an overfitted
19 model, the parameter estimates would not be
20 very precise.

21 Q. Well, maybe I'm not saying this right.
22 An overfitted model will be able to estimate
23 the parameters. And you might not be able to
24 project it to other data, but will be able to
25 estimate the parameters with great precision.

1 For example, to use your example, if every
2 observation has its own indicator variable,
3 every single one of those indicator variables
4 would be very precisely estimated.

5 A. You are actually mistaken on this one.
6 So any time we estimate a regression we will
7 get a coefficient estimate, and associated with
8 it is the standard error, which is the estimate
9 from the data of how much variability -- or how
10 much confidence, in some sense, the regression
11 has in that estimate.

12 In an overfitted model, the standard
13 errors will tend to be very, very large. So if
14 you have 100 data points and 90 observations,
15 there is not much -- that is 90 parameters out
16 of 100 data points. So it will come up with
17 estimates, but it will have no confidence
18 whatsoever -- the standard errors -- it will
19 not be able to estimate those coefficients with
20 any precision whatsoever.

21 Q. And now you're talking about your
22 coefficients of interest, so to speak?

23 A. No, in any regression. If you overfit
24 the data, the primary consequence will tend to
25 be large standard errors on the coefficient.

1 Q. You have here in this -- in your
2 model, you've got about 3.5, a little more than
3 3.5 observations per variable; is that right?

4 A. That's correct.

5 Q. If there were a One-in-Ten Test Rule,
6 that would fail the One-in-Ten Test; would you
7 agree with that?

8 A. I mean, I don't subscribe to the
9 One-in-Ten Rule, so -- but if that is the rule,
10 it would assume that that would fail that test.

11 Q. Did you conduct any other tests -- and
12 I'll acknowledge that it's a rule of thumb, but
13 did you conduct any other test for overfitting?

14 A. As I say, I didn't specifically look
15 for overfitting, because I think that's an
16 approach that's appropriate in prediction
17 projections and not effects regression, which
18 was the focus of the study.

19 Q. Let's talk about this distinction.
20 Whether you characterize a regression as a
21 prediction regression or an effects regression,
22 ultimately what you are measuring is the
23 correlation between variables; right?

24 A. Any regression measures the
25 correlation between variables, but the -- in an

1 effects regression, we care very much on the
2 interpretation of the parameters attached to
3 certain variables. So you want to be very
4 careful that you don't include variables that
5 distort the interpretation that you are
6 interested in recovering from the data.

7 Q. Well, we have all heard the expression
8 correlation doesn't equal causation; right?

9 A. That's true.

10 Q. In an effects regression, you are
11 trying to figure -- you are trying to estimate
12 a causal effect?

13 A. No.

14 Q. No?

15 A. No.

16 Q. So let's talk about then what you are
17 trying to do with this regression. As I
18 understand it, you're trying to estimate the
19 effect -- and the causal effect; right -- of
20 adding more minutes of some category of
21 programming or another?

22 A. No, we are not particularly interested
23 in the causal effect. We are interested in the
24 incremental effect on the royalty of an
25 additional minute of programming of certain

1 type.

2 Q. So the mere fact that -- let's say
3 that it's a fact, let's assume one of your
4 conclusions is accurate, let's say it's a
5 fact -- that Commercial Television programming
6 has a higher correlation with the log of fees
7 paid than, say, Devotional programming?

8 A. Okay.

9 Q. Let's assume. That's one of the
10 conclusions of your model; right?

11 A. That's consistent with the results I
12 report.

13 Q. So are you saying -- and so let's say
14 that's true. Let's say there's a correlation
15 between the number of minutes of Commercial
16 Television programming, a positive correlation
17 with the number of minutes of Commercial
18 Television programming with the amount of fees
19 paid. Okay?

20 What is it that that correlation tells
21 you about -- putting it in your own words, what
22 does that correlation tell you?

23 A. That correlation tells me that the
24 royalties paid by CSOs are higher by -- are
25 estimated to be higher by a particular amount

1 when there's additional minutes of Commercial
2 Television programming of that amount. So in
3 essence, the coefficient measures the
4 incremental contribution or the contributing
5 value to the royalties of different minutes of
6 programming.

7 Q. Wait a minute. You said contribution
8 of value. All the regression measured was
9 correlation; right?

10 A. But an interpretation of the
11 regression is the expected value of the
12 dependent variable. It's just as a -- as the
13 expected value of the royalty associated with
14 different program areas. And so this
15 contributing value is then the measure of the
16 increment to the depended variable to the
17 expected value of the dependent variable, when
18 you change one of the regression predictions.

19 Q. Well, it's --

20 A. Change one of the regression
21 regressors.

22 Q. It's a measure of the marginal change
23 in the dependent variable, on average; right?

24 A. That's correct.

25 Q. But whether that's actually a

1 contribution of value or not, that's a judgment
2 call?

3 A. I disagree.

4 Q. Let's take a -- let's go to this
5 basic. First of all, are you -- is it your
6 opinion, are you asserting that your dependent
7 variable, the log of royalties paid, is a
8 measure of value?

9 A. It is indicative of CSO value for
10 distant signals.

11 Q. The log of royalties paid?

12 A. That's correct.

13 Q. If it were not, if the log of
14 royalties paid were not indicative of CSO
15 values, then your regression would be finding a
16 correlation with someone other than value;
17 correct?

18 A. I don't agree with the premise, but if
19 it were the case that the log of royalties were
20 not indicative of CSO values, then I would --
21 then -- then I guess --

22 Q. Then your regression would be showing
23 something else?

24 A. Then my regression would measure the
25 -- it will always measure the contribution of

1 minutes of programming associated with
2 royalties.

3 Q. You're using "contribution" in a very
4 specific way here. When you say contribution,
5 you mean correlation; right?

6 A. Formally -- with my apologies to the
7 room -- I mean the derivative of the expected
8 value with respect to the explanatory variable,
9 the marginal effect.

10 Q. And, again, when you say marginal
11 effect, you don't mean that in the "cause and
12 effect" sense; right?

13 A. That's correct, but one doesn't need
14 that.

15 Q. It might be causal or it might not be
16 causal?

17 A. It might be. I mean, it might be
18 causal; it might not be causal. But I don't
19 think that is particularly needed.

20 Q. How are the -- in your understanding,
21 how are the royalty fees actually determined?

22 A. I mean, there is a statutory formula,
23 and that formula depends on the number and
24 characteristics of the signals in terms of
25 distant signal equivalence and the gross

1 receipts of the system, as well as additional
2 fees for if it's a special station with the
3 3.75 and the surcharges of 2.75 -- excuse me?
4 And the other surcharge, whose name I forget at
5 the moment.

6 Q. Every Form 3 system has to pay a
7 percentage of its receipts; is that right?

8 A. That's correct. There is a minimum
9 fee.

10 Q. And that's what you mean by the
11 minimum fee. The amount that every single
12 Form 3 system -- your data only uses Form 3
13 systems; correct?

14 A. That's correct.

15 Q. So in your data, every single system
16 must pay a percentage of its receipts as a
17 minimum fee; correct?

18 A. That's correct.

19 Q. And then those systems that retransmit
20 more than one DSE, or that retransmit a 3.75 --
21 a station in a 3.75 situation, they also pay a
22 percentage of their -- of their receipts. It's
23 just a higher percentage?

24 A. That's correct. That's my
25 understanding.

1 Q. Something like 80-some percent or
2 almost 90 percent of systems out there pay
3 between 1 and 3 percent of their receipts?

4 A. I don't have that number, but if you
5 showed me that number -- that's broadly
6 consistent with my understanding, but I don't
7 have direct evidence of that.

8 Q. So it's always a function of receipts,
9 and then there are other -- basically the type
10 and number of systems will determine exactly
11 what the percentage is. But it's always going
12 to be some percentage of receipts; right?

13 A. That's my understanding.

14 Q. Okay. So if it were the case that
15 those systems out there that, for whatever
16 reason, are retransmitting more minutes of,
17 say, Commercial Television programming than
18 other systems average systems out there, then
19 that would yield a positive correlation in your
20 regression; is that right?

21 A. I mean, if systems that were
22 transmitting more than the average amount of
23 Commercial Television programming and paid more
24 than the average royalties, that would --
25 controlling for all the other variables in the

1 model, that would yield a positive partial
2 correlation.

3 Q. You pay partial correlation. If this
4 were the case, that systems with higher
5 receipts were retransmitting more minutes of
6 Commercial Television programming, and
7 controlling for all the variables, that would
8 be the correlation that you're measuring;
9 right?

10 A. Well, I mean the correlation I'm
11 measuring is between Commercial Television
12 minutes and royalties. So you've articulated a
13 view where receipts are higher and implicitly
14 assumed that royalties are higher. But the key
15 thing is that royalties have to be higher.

16 Q. But royalties are in all cases some
17 percentage of receipts?

18 A. That's true.

19 Q. Let's -- do you know how many Form 3
20 systems were paying the minimum fee as a
21 percentage?

22 A. In my Appendix -- my Figure 21 we
23 looked at today, I think it's 22 percent when
24 averaged across subscriber groups.

25 Q. Can we pull up Figure 21? Oh, okay.

1 I see it. Your summary statistics?

2 A. Exactly.

3 Q. This is something saying a little bit
4 different than what I asked, but if you look at
5 the indicator of whether the subscriber groups
6 system is paying the fee, that is about
7 22 percent of subscriber groups are part of
8 systems that are paying the minimum fee?

9 A. That's exactly correct.

10 Q. Do you know how many systems are
11 paying the minimum fee?

12 A. Not off the top of my head.

13 Q. Let me pull up an equivalent exhibit
14 from Dr. Israel that should have that
15 information. Let's look at Exhibit 1003 -- I'm
16 sorry -- yes, Exhibit 1003, Appendix B12.

17 So as it is coming up, just as a
18 little bit of background, you used data at the
19 subscriber group level. Dr. Israel used data
20 at the system level; correct?

21 A. That's my understanding.

22 Q. And Dr. Israel, like you, included an
23 indicator variable for paying the minimum fee?

24 A. I mean, I didn't review Dr. Israel's
25 testimony in close detail, but I would not be

1 surprised if he did that.

2 Q. Okay. So good. Bottom line -- not
3 the very bottom line, but the indicator for
4 minimum payment and this is an indicator
5 variable, so .44 would mean 44 percent?

6 A. Yeah, that's correct.

7 Q. So 44 percent of all Form 3 systems
8 were paying the minimum fee, at least according
9 to this?

10 A. According to this. But a slight -- I
11 think Dr. Israel has only three years of data,
12 not four. But I doubt it is very different in
13 2013.

14 Q. Okay. But these systems, these
15 systems that were paying the minimum fee, they
16 had no choice as to how much to pay; right?

17 A. Well, they -- I mean, they -- I
18 disagree.

19 Q. What choice did a system -- you mean
20 just the choice not to retransmit more?

21 A. Exactly. So they choose the distant
22 signals to carry. And if the distant signals
23 to carry -- that they chose to carry, if the
24 royalties on them exceeded the minimum fee,
25 then they would have paid more than the minimum

1 fee. But it is true that they had to at least
2 pay the minimum fee.

3 Q. But the choices that they made,
4 though, were which signals to retransmit;
5 right.

6 A. That's correct. And which subscriber
7 groups.

8 Q. And which subscriber groups. And
9 whether to retransmit more. I mean, if they
10 chose to retransmit more signals, then they
11 would have paid more than the minimum fee?

12 A. That's true.

13 Q. So of those choices, did the choice --
14 does the choice which signal to retransmit have
15 any influence on the amount of the fee?

16 A. So it has an influence on the amount
17 of fee at the subgroup level. But ultimately,
18 the system may pay -- if that subgroup total is
19 less than the minimum fee, then the system
20 would ultimately pay the minimum fee.

21 Q. So if a system is only retransmitting
22 one signal, maybe in some subscriber groups
23 maybe in all subscriber groups, that minimum
24 fee is going to be the same?

25 A. Yeah, if they pay one DSE, they pay

1 the minimum fee. Or even if it is a less than
2 DSE, they will pay the minimum fee.

3 Q. A system, either on the system level
4 or subscriber group level, couldn't say, for
5 example: That's too much, I'm going to choose
6 a cheaper signal to retransmit?

7 A. Well, they could choose a cheaper
8 signal to retransmit, but that wouldn't
9 necessarily change the royalty that they would
10 have to pay.

11 Q. They couldn't say: That's too much
12 for me. Every system is going to choose,
13 presumably, whatever signal is most valuable to
14 that system?

15 A. That's exactly right. I think they
16 choose at the subscriber group level the set of
17 signals that are most valuable to them and that
18 reflects their understanding of the relative
19 value to them of the programming on those
20 signals.

21 Q. And that regardless of which signal
22 that they have chosen to retransmit; right?

23 A. What is regardless? That they pay the
24 minimum fee?

25 Q. The amount of the fee that they pay as

1 the minimum fee?

2 A. Yes, that's true.

3 Q. Now, in your hypothetical market, it's
4 the system that's the buyer; correct? The
5 buyer has the right to retransmit; right?

6 A. That's correct, yes.

7 Q. So the buyer in your hypothetical
8 market has no choice but to buy. They must buy
9 the right to retransmit at least one DSE;
10 right?

11 A. They don't have to retransmit any
12 DSEs. We saw an example in Bethel, New York,
13 there are some subscriber groups where they
14 don't transmit any DSEs.

15 Q. But they must pay for the right to
16 retransmit one DSE?

17 A. That's correct.

18 Q. The Copyright Owner in this
19 hypothetical market, whether or not you
20 envision a station as an intermediary, the
21 Copyright Owner compulsory license has no
22 choice but to sell?

23 A. In the current market, that's my
24 understanding.

25 Q. This isn't a situation where the buyer

1 an say: No, it's too expensive for me. No
2 thanks. I'll do without.

3 A. In the current market?

4 Q. Right.

5 A. Correct. Well, no, I mean -- I think
6 we're dancing around two issues. I'm saying
7 that the system can choose the portfolio of
8 distant signals it carries across subscriber
9 groups. But if the royalty is less than the
10 minimum fee, then they system will pay the
11 minimum fee. I agree with that.

12 Q. And the Copyright Owner can't say no,
13 that's not enough. I need more. I'm not going
14 to sell to you at that price?

15 A. In the current environment, that's my
16 understanding.

17 Q. In your Direct Testimony you gave a
18 salad bar as an example, which I thought was a
19 good one. Fixed price for the salad bar;
20 right?

21 A. It wasn't a salad bar. It was a
22 fixed-price buffet.

23 (Laughter.)

24 BY MR. MacLEAN:

25 Q. Oh, buffet. Fine. Absolutely. I

1 stand corrected.

2 A. A salad bar would be completely
3 needed, I think.

4 Q. That's a perfect example. So a
5 fixed-price buffet. Okay. Everybody --
6 everybody pays the same price. Goes in and you
7 can load up your plate with whatever is in the
8 bar, beef, chicken, pork, lettuce, tomatoes;
9 right?

10 A. In the analogy; yes.

11 Q. And then in the end everybody is
12 paying the same price and different people have
13 different -- have loaded their plates with
14 whatever they have chosen to put on their
15 plates; right?

16 A. That's correct.

17 Q. The price didn't vary based on what
18 they chose; right?

19 A. That's correct.

20 Q. So your regression would suggest,
21 what? That people are going to pay more for
22 putting more of more valuable food on?

23 A. The analogy breaks down, because even
24 in the restaurant context even if they pay a
25 fixed price, if the restaurant chooses good

1 items on the buffet, they will get more
2 customers. So they will attract more
3 subscribers. They will attract more customers.
4 And therefore, their revenues would go up.

5 Q. The revenues would go up?

6 A. Exactly.

7 Q. Based on the number of customers who
8 are coming in through the door?

9 A. Exactly.

10 Q. Are you suggesting that variation
11 among subscriber groups in terms of the number
12 of customers of subscribers is caused by the
13 distant signals they choose to carry?

14 A. There is variation in gross receipts
15 at -- or royalties at the subscriber level that
16 is potentially correlated with -- which my
17 regression reveals to be correlated with the
18 different minutes of programming carried on
19 that subscriber group, controlling for all the
20 other variables in the regression.

21 Q. And you regard those variations among
22 subscriber groups to be caused by the number of
23 subscribers that are joining that subscriber
24 group, so to speak?

25 A. Well, I mean, its royalties are

1 varying, and there are different factors that
2 can cause royalties to vary; right? So the
3 number of subscribers can cause it to vary.
4 The average price at the subscriber group level
5 could cause it to vary. And the set of DSEs
6 that influence the royalty that is paid on the
7 DSEs that are carried could cause it to vary.

8 Q. So what is causing it to vary?

9 A. The -- the -- I don't know.

10 Q. It's kind of important, isn't it? I
11 mean, you are measuring a correlation with
12 variation. Isn't it important to know why
13 there is variation in the amount of fees paid
14 for a subscriber group?

15 A. But the key element from the point of
16 view of CSO value is the royalty they pay. The
17 combination of all the sources of variation is
18 reflective of CSO value.

19 So whether it is from subscribers,
20 prices, or the royalties, it's reflective of
21 the CSO's value for the distant signals that
22 they are carrying.

23 Q. Okay. Let's go back to the buffet
24 example.

25 A. Okay.

1 Q. Let me have the ELMO, please. Do I
2 have to give PT a royalty every time I say
3 "ELMO"? I'll go with document camera.

4 (Laughter.)

5 BY MR. MacLEAN:

6 Q. Let's say I've got a really great new
7 restaurant idea. I'm going to have a buffet,
8 but instead of charging everybody a fixed
9 price, I'm going to charge everybody a
10 percentage of their income. Let's say I have
11 great lobbyists who have now made it a law that
12 everybody has to eat at my restaurant. Okay?

13 A. Okay.

14 Q. Everybody has to pay a fixed
15 percentage of their income to eat at my
16 restaurant, but they can load up their plate
17 with anything on my buffet. So we've got my
18 costs; right?

19 A. I can't see this on my screen.

20 Q. Oh, all right. So I've got my cost.
21 This is going to be a percentage of a person's
22 income coming through my door. And then, let's
23 say, I'm going -- I want to measure the
24 coefficient for beef. Okay?

25 A. Okay.

1 Q. All right. What would you expect the
2 relationship to be? Why don't we say we are
3 going to do beef and lettuce. Okay? We will
4 do two separate curves here. What would you
5 expect the relationship to be between cost and
6 the amount of beef that somebody puts on their
7 plate? I'm using your example, so work with me
8 here.

9 A. Okay. I will try to work with you
10 here. So You mean the cost to the restaurant
11 owner for the beef?

12 Q. No, no, I'm talking about the amount
13 paid for the person who had to come into my
14 restaurant and pay a percentage of their
15 income.

16 A. The cost to the subscriber -- the cost
17 to the customer?

18 Q. Right, the customer, the buyer.

19 A. Yeah, I mean the cost to the customer
20 is, I believe, in this interesting
21 hypothetical, a share of the income. So are we
22 drawing the picture for a single individual?

23 Q. No, we're going to -- no, we will have
24 some data points here. Okay? I'm trying to
25 figure out, would you expect -- what do you

1 think in your opinion as an economist, what do
2 you expect to be more valuable, beef or
3 lettuce?

4 A. To customers of the restaurant?

5 Q. Yeah.

6 A. Probably beef --

7 Q. Beef.

8 A. -- would be my guess.

9 Q. So your expectation, assuming that the
10 amount paid is collated with what people put on
11 their plate, is that customers who are paying
12 less -- we will give some error here, and this
13 will be a beef regression line -- customers who
14 are paying less are going to put less beef on
15 their plate and customers who are paying more
16 are going to put more beef on their plate?

17 A. I think in this hypothetical, I think
18 the cost to each customer is just a share of
19 their income. It would not be related to the
20 amount of beef or lettuce.

21 Q. Well, it might be related. It could
22 be related; right? What if we were in a
23 community where the uptown people, you know,
24 with the higher average income are more vegan;
25 right? More likely to be vegan.

1 Now we will do the same thing.

2 Remember, every customer is paying a percentage
3 of their receipts. This is now a multimedia
4 presentation. Let's say we've got our more
5 uptown customers tend to be more vegan, they
6 don't eat meat. I don't know if it's true.

7 A. For the most I'm just following your
8 hypothetical.

9 Q. I understand.

10 A. Trying to follow your hypothetical.

11 Q. So in that circumstance, the higher
12 income people are going to be -- are going to
13 be ordering -- buying less lettuce at lower
14 income levels, more lettuce at the higher
15 income levels. And the opposite is going to be
16 true with beef, because the non-vegan people
17 are going to eat more beef; right? You might
18 plausibly find a correlation between the amount
19 of lettuce purchased versus the amount of beef
20 purchased; right -- versus -- with the amount
21 of income; correct?

22 A. Let me make sure I understand what's
23 in front of me.

24 Q. Go ahead.

25 A. Just for purposes of clarity, so I

1 gather you're saying that it's just the
2 quantity consumed of the beef or the lettuce is
3 correlated with the income.

4 Q. Positively correlated in the case of
5 lettuce; negatively with beef; right?

6 A. Okay. I could imagine that is
7 possible in your restaurant analogy.

8 Q. It is possible if you were to do a
9 regression in this very unique environment that
10 I imagined for you, where everybody, every
11 buyer is required to pay a percentage of their
12 receipts, that you might find a correlation
13 between basically the volume purchased of
14 various types of things that you might find in
15 a buffet with the amount paid, which is a
16 percentage of receipts; right?

17 A. In this example, I suppose that's
18 possible.

19 Q. That would not necessarily tell you
20 that lettuce has a positive value and beef in
21 this example would have, in fact, a negative
22 coefficient; correct? It would just tell you
23 that the volume purchased is correlated with
24 the receipts of the buyer?

25 A. Well, I mean in this example, I mean,

1 from the -- you know, from the perspective of
2 the restaurant, it's telling me that the
3 low-income households are valuing beef and
4 high-income households are valuing lettuce. If
5 this is the market environment that the
6 restaurant is facing, that is what it is
7 facing.

8 Q. Excellent. So right now let's do the
9 same thing, but with cable systems. Okay? So
10 now we actually have a market environment in
11 which the buyer, the cable system, is required
12 to pay for the right to come to our restaurant
13 of stations and select those stations that they
14 want; right?

15 A. Okay.

16 Q. And the amount that they're required
17 to pay, whether they want to or not, is a
18 percentage of their receipts; correct? Right?

19 A. Yes, but of course the percentage of
20 the receipts is itself a function of the things
21 that they buy.

22 Q. Well, it may be in part a function of
23 the number of things that they buy; right?

24 A. Yes.

25 Q. Right. And in very limited

1 circumstance, a function of the types of things
2 that they buy only in the sense of a Public
3 Television station is worth a quarter of a DSE.
4 You could get more than one Public Television
5 station for the same price, so to speak, you
6 might say.

7 A. Right.

8 Q. Same with a network station; right?

9 A. Right.

10 Q. But aside from those kind of special
11 circumstances --

12 A. But those are important circumstances.

13 Q. Well, it's not important to Devotional
14 or to CTV; right? Because we are not on Public
15 Television stations.

16 A. I mean, the general point is important
17 to the circumstances. The fact that a cable
18 operator's royalty depends on the number and
19 types of DSEs that it pays is important in
20 terms of revealing the value that they place on
21 the types of programming and --

22 JUDGE STRICKLER: And in the other
23 example he gave with lettuce versus beef, the
24 income is not determined by the value of the
25 beef or the lettuce.

1 THE WITNESS: Exactly. So there is a
2 distinction here.

3 BY MR. MacLEAN:

4 Q. So you're saying -- you really are
5 saying that the variation in receipts -- in
6 receipts is driven by the content of the
7 distant signals?

8 A. I mean, driven -- it means that -- it
9 is an imprecise term, I think. I think the
10 distant signals are part of a cable bundle
11 whose gross receipts are put into the royalty
12 formula.

13 But if a cable system is effective at
14 choosing the distant signals that is attractive
15 to its subscribers, it will either attract or
16 retain subscribers and that will influence
17 receipts.

18 Q. And is that what you think the
19 variation between different subscriber groups
20 in terms of what is paid for their
21 retransmission, you think that is what is
22 driving it?

23 A. Quite possibly.

24 Q. So let's graph this out. Okay? We've
25 got the same thing, CTV, Devotional; all right?

1 If I find that my lower receipt systems are
2 paying -- are getting less Devotional minutes
3 -- I'm sorry, CTV minutes, and the higher
4 receipt systems tend to be getting more CTV
5 minutes, and if I were to find the opposite
6 with respect to Devotional, if this is the
7 relationship that a regression were to
8 determine, then your conclusion is what?

9 A. I mean, in this case, it appears that
10 -- I mean, I'm losing the -- I don't know that
11 it's necessarily productive for me to try to
12 comment on your analogy, which I don't fully
13 understand, versus --

14 Q. Just tell me if this is what your
15 regression found, or what a regression found,
16 what would your interpretation of this
17 regression be?

18 A. If as you show that -- it is
19 important, by the way, in a regression that we
20 are accounting for all the other variables.

21 Q. Let's assume that we are. This is
22 properly controlling for all of your other --

23 A. Look, I mean, a regression reveals
24 correlations. So it would reveal that minutes
25 of Devotional programming are negatively

1 associated -- in this figure, there is a
2 negative line, so it would reveal a negative
3 coefficient for Devotional.

4 Q. It would reveal that those -- that
5 those subscriber groups, those systems, those
6 subscriber groups that are paying less in fees
7 are choosing to retransmit signals with
8 comparatively more Devotional content; right?

9 A. Yeah.

10 Q. Why would a subscriber group with
11 lower receipts choose out of the menu of
12 stations out there, out of the menu of signals
13 out there, why would they use those that have
14 more Devotional minutes?

15 A. The CSOs are the ones making the
16 decisions. I rely on the variation in the data
17 that reflects CSO decisions. So I can't speak
18 to necessarily why -- I mean, what the data
19 reveal is they tend to carry distant signals --
20 the relatively more Sports minutes that the
21 signal has, the relatively more that those
22 subscriber groups pay in royalties. And the
23 relatively more Devotional minutes, still
24 relatively more they pay in royalties, but it's
25 just that the relationship is less.

1 Q. So you don't like my example. Okay?

2 Let's use one of yours. Okay?

3 A. Okay.

4 Q. So this is from Figure 3, which is
5 located on page 15 of your Direct Examination.
6 Okay?

7 A. Okay.

8 Q. I'm putting on the document camera,
9 because I want -- I might want to draw
10 something. So I'm just going to read from your
11 Direct where you describe this. But if you
12 want to open it up, you are welcome to do so.

13 A. I think I will.

14 Q. But I promise I will read it
15 accurately. It's on page 14 of your Direct, if
16 you want to see it.

17 A. I see it.

18 Q. So you say, "An example illustrates
19 this idea. Suppose there are only two types of
20 content a distant broadcast signal can carry,
21 news and sitcoms. Further, suppose that there
22 were three distant broadcast stations available
23 to a cable system in this market with 100 total
24 minutes of programming offering on each signal.
25 Further, suppose that these stations elected to

1 show 20, 50, and 80 minutes of news content."

2 And just so that everybody has this in
3 their head, this is what it says here in this
4 table.

5 A. Uh-huh.

6 Q. "And thus, 80, 50, and 20 minutes
7 respectively of sitcom content. And that news
8 minutes were valued by cable subscribers in a
9 particular market at 20 cents a minutes, while
10 sitcom minutes were valued at 10 cents a
11 minute. I call these Stations A, B and C."

12 A. Uh-huh.

13 Q. Now, under your assumption here,
14 applying it to your table, Station A is not
15 going to be retransmitted at all; correct?

16 A. Well, I mean it depends what the fee
17 would be. If the value to the station -- this
18 example was meaning to illustrate the relative
19 value of different stations. So Station C is
20 the most valuable, so Station A would certainly
21 not be the first station that would be carried.

22 Q. Okay. Fair enough. Station C would
23 be the first station. If you have to buy a
24 station, you have no choice but to buy the
25 right to retransmit a station, the rational

1 cable system is going to retransmit Station C?

2 A. That's correct, in this example.

3 Q. If the value of Station B exceeds the
4 marginal -- the marginal, say, cost, the
5 marginal amount of fees that it costs to
6 retransmit a second station, then they might
7 also retransmit Station B?

8 A. That's correct.

9 Q. But everybody will retransmit
10 Station C?

11 A. That's correct.

12 Q. And only if Station A -- only if the
13 marginal costs of retransmitting a third
14 station are less than the value of Station A
15 will anybody retransmit Station A?

16 A. Well, would the systems in this market
17 retransmit Station A.

18 Q. So your regression takes no account
19 of the content of the stations that are not
20 retransmitted; correct?

21 A. So my regression accounts for the
22 stations that are transmitted; not those that
23 are not transmitted; right.

24 Q. Now -- can we put up on the -- I want
25 to just find a line from your rebuttal

1 testimony -- 2005, Exhibit 2005, page 22, and
2 I'm looking at paragraph 7. And I'm looking
3 particularly, everybody can read the whole
4 paragraph, but I'm particularly interested
5 where it starts with, "What Dr. Erdem calls..."
6 You see that?

7 A. I see.

8 Q. "What Dr. Erdem calls Waldfogel-type
9 regressions reveal relative CSO value. They do
10 so because they account for the decisions of
11 the CSOs themselves about whether or not to
12 carry distant broadcast signals and pay the
13 required royalty." Right?

14 A. I see that.

15 Q. But your regression takes no account
16 of those signals that they choose not to carry;
17 right?

18 A. So -- it's true my regression does not
19 account for those signals they choose not to
20 carry.

21 Q. As far as you know, and as far as your
22 data would tell you, it might be the signals
23 with all the news minutes that are not being
24 distantly retransmitted; right?

25 A. My regression relates the royalties to

1 the minutes of carried signals.

2 Q. But if it were the case that the
3 signals not being retransmitted have more news
4 minutes than even those signals that are
5 retransmitted, your regression wouldn't pick
6 that up at all, would it?

7 A. No, it would not.

8 Q. Let's take a look at Exhibit 1091.
9 This is a cross-examination exhibit that JSC
10 put in. And I'll start by trying to
11 authenticate it. This is the first page of
12 1091.

13 Do you recognize this article?

14 A. I do.

15 Q. Are you are the lead author of this
16 article entitled, The Welfare Effects of
17 Vertical Integration in Multichannel Television
18 Markets?

19 A. I am the alphabetically first author.

20 Q. Oh, it was all alphabetical? Did you
21 actually participate in the writing of this
22 article?

23 A. I did.

24 MR. MacLEAN: Your Honor, I move to
25 admit hearing Exhibit 1091?

1 JUDGE BARNETT: Hearing no objection,
2 1091 is admitted.

3 (Exhibit Number 1091 was marked and
4 received into.)

5 BY MR. MacLEAN:

6 Q. Let's go to page 25. Another trigger
7 warning for anybody who wants to leave. Let's
8 pull up that Formula 15 at the very bottom.
9 Pull that up. Okay. What's this mean?

10 A. Let me just briefly make sure I know
11 what part of the paper it is.

12 MR. STEWART: Your Honor, may we ask
13 that Mr. McLean provide Dr. Crawford with a
14 copy of the exhibit?

15 JUDGE BARNETT: I assume this paper is
16 not in the binder.

17 MR. MacLEAN: That's correct.

18 JUDGE BARNETT: I assume the
19 proponents of the exhibit have a paper copy
20 they could give to the witness.

21 MR. MacLEAN: Absolutely. Here. I
22 want to make sure I don't have any supersecret
23 notes here.

24 THE WITNESS: Thank you.

25 JUDGE BARNETT: Thank you. What page

1 are we on?

2 MR. MacLEAN: We are on page 25 at the
3 very bottom of the page.

4 (Example examining document).

5 THE WITNESS: Okay. I'm prepared to
6 give a translation.

7 BY MR. MacLEAN:

8 Q. And, you know, try to put it into
9 terms that we can all -- I know the science of
10 economics is taking something everybody knows
11 and putting it into language that nobody can
12 understand. But let's try to put it in
13 layman's terms?

14 A. This paper was evaluating several
15 aspects of cable system behavior. And this
16 equation is describing the decision of which
17 channels to carry. And it says that the -- a
18 cable system, it's a probabilistic statement,
19 so one tries to estimate the probability that a
20 cable system carries a particular channel. And
21 that probability is a function of basically the
22 different profits from carrying the channel or
23 not carrying the channel.

24 Q. That's great. So basically you are
25 saying that this is actually a distributor

1 including a channel in a bundle. A distributor
2 is more likely to include a channel in a bundle
3 if they are going to profit by doing so?

4 A. Exactly right.

5 Q. And less likely if they are not going
6 to profit by doing so?

7 A. That's correct.

8 Q. Now, this is actually a little bit
9 more similar to what you were -- this idea that
10 the probability of carriage is related to the
11 profits, is actually a little bit more similar
12 to what you said in your rebuttal testimony;
13 right? They do so because they account for the
14 decisions of the CSOs themselves about whether
15 or not to carry a distant broadcast signal.
16 You could have done this in a way where you are
17 looking at the probability of carriage --
18 right -- and relating that to the profits?

19 A. So there were many questions in there.
20 Maybe you could re -- split it up?

21 Q. Let's go to the next page. I just
22 want to flow this all the way through.

23 A. Okay.

24 Q. Let's go to the next page. I thought
25 it was the next page -- let's -- here it is,

1 yeah, page after this. Page after there.

2 There we go. That formula at the very top of
3 the page.

4 A. Uh-huh.

5 Q. You're basically -- here you are
6 basically flowing through the probability of
7 being carried in a bundle through the log
8 likelihood of carriage by a cable or satellite
9 system; correct?

10 A. That's correct.

11 Q. Again, you are looking at the -- what
12 is, in this context, the difference between
13 probability and likelihood?

14 A. Effectively, you can think of them as
15 the same thing.

16 Q. You just liked the alliteration of law
17 of likelihood; right?

18 A. This was not my choice. That has been
19 around for a while.

20 Q. I liked your choice. You are relating
21 here the law of likelihood of carriage to the
22 probability of it being in a bundle, which is
23 then related to the profits that are being
24 made?

25 A. That's true.

1 Q. You could have perhaps done something
2 like this in reverse and related the
3 probability of carriage to the profits; right?

4 A. To the profits? So -- you mean in
5 this paper.

6 Q. No, I mean --

7 A. Or in this proceeding?

8 Q. Yeah, you don't take into any account
9 whatsoever in your regression in this
10 proceeding the probability that a station is
11 being carried or not?

12 A. That's correct.

13 Q. Let's go back to the ELMO. All right.
14 So here are my -- or your, these of your three
15 stations in your hypothetical business. And
16 just to remind everybody, we are talking about
17 stations with comparatively more minutes of
18 news programming and fewer minutes of sitcom
19 programming, versus stations with comparatively
20 more minutes of news programming -- I'm sorry,
21 fewer minutes of news programming and more
22 minutes of sitcom programming; right?

23 A. That's correct.

24 Q. I want to understand what you expect
25 through your regression to happen here. Let's

1 say we have System 1 and we'll say our System 1
2 on average -- and this is controlling for
3 everything else. We are going to assume that
4 all of your control variables are working as
5 intended -- we're going to say System 1 has
6 more receipts. System 2 has comparatively
7 fewer receipts. Okay?

8 A. Uh-huh.

9 Q. What's your expectation going in as to
10 which of these stations, System 1 and System 2,
11 are going to choose to retransmit?

12 A. I mean, within the current context? I
13 mean, it depends on the incremental --
14 actually, they will both retransmit Station C
15 first. That's the most valuable station.

16 Q. And if every system out there
17 retransmitted the same station, your regression
18 wouldn't work at all. The coefficients
19 couldn't be calculated; right?

20 A. If every station -- there would be no
21 variability in the minutes. Yes, that is
22 correct.

23 Q. And therefore, you could calculate no
24 coefficients?

25 A. That is correct.

1 Q. So if every system carried the same
2 station, you're regression just would have
3 failed out of the box? You wouldn't have been
4 able to get a results?

5 A. That's correct. If there is no
6 variability in minutes, one cannot identify a
7 regression coefficient from the minutes.

8 Q. But in this hypothetical that you
9 presented, that is what happened; right?
10 Everybody would choose to retransmit Station C?

11 A. Well, we have to be careful though,
12 because this assumes -- this example assumes
13 that every system has the same value for the
14 different minutes of the news programs -- or of
15 the different kinds of programming. So if
16 there is a systems -- especially if different
17 subgroups within a system have different
18 values, then of course that would change the
19 calculus across the example.

20 Q. Okay, that's fair enough. All right.
21 So if it turned out that System 1 decided to
22 carry Station B, and System 2 decided to carry
23 Station C, what would that tell you about the
24 relative value of the programs that they're
25 retransmitting?

1 A. Well, this would suggest to me that
2 Station 1 had different relative values of the
3 different kinds of program minutes relative to
4 Station 2.

5 Q. You mean System 1?

6 A. I said -- yeah. So, in this example,
7 since System 1 only chose Station B, that would
8 suggest that the values in the figure are not
9 appropriate for System 1. Because if System 1
10 had the values in the figure, they would have
11 chosen Station C.

12 Q. And how would this play out in your
13 regression? How would your regression detect
14 that different valuation?

15 A. Well, I mean, basically the regression
16 infers -- as there variation in the different
17 minutes of programming, it looks the distant
18 signals that the system carries. And after
19 controlling for everything else that might be
20 influencing receipts -- which as an
21 econometrician I am legally obligated to say,
22 so maybe we could keep that implicit from now
23 on, so I don't have to repeat it -- that it
24 will infer the value of the programming of the
25 different types of programming would be

1 different.

2 Q. For each system?

3 A. Right, I mean -- look, every CSO can
4 have a different value. What I'm recovering
5 from the regression is the average value across
6 CSOs of the different minutes of programming.

7 Q. Let's change this to be more similar
8 to what your regression actually found. Let's
9 say System 1 were the one that chose Station B,
10 System 2 chose -- I'm sorry, Station C,
11 System 2 chose Station B. What do you conclude
12 from this, if this is what you're regression
13 shows that on average this is what is
14 happening, systems with more receipts are
15 retransmitting Station C, systems with fewer
16 receipts are retransmitting Station B, what
17 conclusion would you draw from such a result?

18 A. I mean in this -- again, in this
19 example, station -- the fact that System 1
20 chose Station C is consistent with the relative
21 values in the figure. But the fact that
22 System 2 chose Station B is inconsistent with
23 the relative values in the figure. So there
24 would have to presumably be some -- there would
25 be different values -- System 2 would have

1 different relative values per minute of the
2 relevant programming than System 1.

3 Q. But again, if they had both chosen
4 Station C, then you couldn't do a regression at
5 all; right?

6 A. Yes, but that's not the environment in
7 the data. In the data there is lots of
8 variations in the stations choses.

9 Q. In the data you see something more
10 like this where a system paying higher fees are
11 choosing to transmit stations more like C,
12 systems paying lower fees are choosing to
13 retransmit stations more like B; right?

14 A. No, not necessarily. What we see in
15 the data is that systems that pay relatively
16 more in terms of royalties tend to carry the
17 relatively more high-value programming.

18 JUDGE STRICKLER: In your Figure 3,
19 are the values that we see there market values
20 or the subjective value to the individual
21 system?

22 THE WITNESS: The idea here is that
23 these are relative CSO values.

24 JUDGE STRICKLER: It is idiosyncratic
25 to the particular city?

1 THE WITNESS: Exactly. And the
2 different system could have different values.

3 JUDGE STRICKLER: Thank you.

4 BY MR. MacLEAN:

5 Q. A different system could have
6 different values and on average the systems
7 with lower receipts and therefore lower fees
8 are retransmitting stations with higher amounts
9 of Devotional and Program Suppliers and other
10 such programming; correct?

11 A. So you keep turning it to lower
12 receipts. The only thing I am willing to agree
13 to is lower royalties. So -- I mean, don't get
14 me wrong. In the data there is still a
15 positive relationship between minutes of
16 Devotional programming and receipts. I don't
17 estimate a negative relationship between
18 minutes of Devotional programming and receipts.

19 Q. Fair enough. You are finding, we will
20 say, a higher coefficient, for example, for CTV
21 programming?

22 A. Yes.

23 Q. Your client's programming?

24 A. For all other categories of
25 programming.

1 JUDGE BARNETT: Are we changing gears
2 here, Mr. MacLEAN?

3 MR. MacLEAN: Well, we can stop any
4 time you want, your Honor. I was about to do
5 that same hypothetical, but using Subscriber
6 Groups instead.

7 JUDGE BARNETT: I think that is enough
8 of a switch for us to take our noon break.

9 (Laughter.)

10 JUDGE BARNETT: We will be at recess
11 until 1:15.

12 (A recess was taken at 12:13 p.m.,
13 after which the trial resumed at 1:19 p.m.)

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1 AFTERNOON SESSION

2 (1:19 p.m.)

3 JUDGE BARNETT: Please be seated. Mr.
4 MacLean, more public map?

5 MR. MacLEAN: We have barely gotten
6 started.

7 JUDGE BARNETT: Oh, goody.

8 (Laughter.)

9 CROSS EXAMINATION -- Resuming

10 BY MR. MacLEAN:

11 Q. Before we get to my next hypothetical,
12 I wanted to come back to something, and I
13 should have done this earlier, but I wanted to
14 address something you said in your -- in your
15 written, I mean, I'm sorry, in your oral direct
16 testimony just now.

17 And so I am putting back up here the
18 control vector for your regression
19 specification.

20 In your oral direct testimony you were
21 asked some questions about an analysis that
22 Dr. Gray performed in which Dr. Gray said he
23 removed the minimum fee-paying systems and then
24 recalculated the results on that basis.
25 Correct?

1 A. That's correct.

2 Q. Okay. And I believe your testimony
3 was, to summarize, basically, when he did that
4 he also removed the fixed effects?

5 A. Well --

6 Q. Is that right?

7 A. No, that's -- I mean, that's partially
8 right. He made a number of changes. And the
9 most significant of them probably was that he
10 changed the analysis from a sub-group level
11 analysis to a system level analysis. So he
12 aggregated the data.

13 And as a consequence of that, he could
14 not include fixed effects, and he included some
15 other variables in it as well.

16 Q. Got it. Okay.

17 So you redid the analysis that you
18 thought he was sort of trying to do by going
19 back to your original specification, simply
20 removing the -- those subscriber groups that
21 were part of systems that paid the minimum fee,
22 and recalculated and came up with, I believe
23 you said, almost exactly the same results as
24 your original specification. Is that right?

25 A. That's correct. I mean, the -- yes.

1 Q. Okay. And your results were very,
2 very close, I bet, right?

3 A. They were very close.

4 Q. Yeah. And that, of course -- so let's
5 talk for a second about why a system would have
6 subscriber groups. Okay?

7 If you've got -- if you are paying the
8 minimum fee, it means you're retransmitting
9 less than one -- one DSE or less as to all
10 subscriber groups, right?

11 A. It means that the total of the royalty
12 payments across all your subscriber groups is
13 less than 1 percent of the total system gross
14 receipts.

15 Q. So if you had -- let's say you have
16 got a system with two subscriber groups. One
17 subscriber group retransmitting, say, two DSEs,
18 the other subscriber group retransmitting,
19 let's say, no DSEs. Okay?

20 A. Um-hum.

21 Q. And let's say that your, you know,
22 your two subscriber groups are of approximately
23 equal size. Okay?

24 How is the fee calculated for that
25 system?

1 A. My understanding is that in the
2 subscriber group where there is no -- where
3 there are no DSEs carried, no distant signals
4 carried, there is no royalty, no calculation of
5 the -- so from what I understand for systems
6 with subscriber groups, the system calculates
7 the base rate royalty at a subscriber group
8 level. I have in mind an example of a system
9 that did this.

10 And if they have no carriage then the
11 -- the contributing royalty in that subscriber
12 group would be zero. And then, of course, in
13 your example there is another subscriber group
14 that carries two DSE, and then they calculate
15 the royalty -- the base rate royalty that would
16 arise from the two DSEs that they carry in that
17 subscriber group.

18 And then they would add together the
19 total royalty -- putting aside 3.75 issues, and
20 they would add together the two total royalties
21 and compare that to the minimum fee that was
22 required for the system, based on the system
23 gross receipts as a whole. That's my
24 understanding.

25 Q. If I could have just one minute.

1 So that's your understanding, that
2 basically there is no fee for the -- for the
3 first subscriber group that has -- that has no
4 distant signal, and then you calculate just the
5 fee for the second subscriber group, and if it
6 is higher than the minimum fee you pay that, if
7 it is lower than the minimum fee you pay the
8 minimum fee?

9 A. I think I have only an example from a
10 single sample statement of account in my head,
11 and that's what's generating the -- my answer
12 here. So that's my understanding based on that
13 single example statement of account.

14 Q. Okay. But that is the assumption that
15 you were applying throughout your analysis
16 here?

17 A. No, I mean, the -- the CDC data
18 reports royalties at a subscriber group level.
19 So my analysis uses the royalties that they
20 report at the subscriber group level.

21 Q. And you're saying that subscriber
22 groups with no DSE pay no royalties?

23 A. I mean, I'm -- again, from this
24 example in my head, that's my understanding.
25 But, of course, if my example is wrong and in

1 the data they did, then it would show up in the
2 data.

3 Q. Do you happen to know what system you
4 are referring to?

5 A. I don't, yeah.

6 Q. Okay. Well, let me -- you have kind
7 of thrown me for a loop here.

8 Can we put up Exhibit 1003, which is
9 Dr. Israel's direct examination. I didn't find
10 a description in your -- do you happen to know
11 if you have a description of the royalty fee
12 calculation in your direct testimony?

13 A. I don't believe I do.

14 Q. Okay. Dr. Israel included one, so we
15 will put that up --

16 A. Okay.

17 Q. -- and see. I mean, this is kind of
18 important to know, right, how the royalty fees
19 are actually calculated?

20 A. I would agree.

21 Q. Because otherwise you don't really
22 know what affects your control variables are
23 having?

24 A. Well, no, I mean, I think the -- the
25 important thing is to understand what -- the

1 royalty that the cable operators are paying
2 within the subscriber group. And, of course,
3 that's in the data.

4 Q. All right. Blow up paragraph 11
5 there. Okay. So this is a description of what
6 I understand the royalty fee formula to be.
7 And it is in the evidence. So let's see if
8 this is consistent with what you are saying.

9 So it says, "the royalty rate for the
10 first DSE is 1.064 percent of gross receipts;
11 this is sometimes referred to as the minimum
12 fee, as Form 3 CSOs carrying any DSE level from
13 zero up to and including 1 must pay at least
14 this amount."

15 And then, "the rate for each of the
16 second through fourth DSEs is 0.701 percent of
17 gross receipts," and then it continues via
18 graduated scale up from there. Right?

19 A. Yes.

20 Q. So in the example that I have just
21 gave, where you have got two subscriber groups,
22 one with no DSE and one with two DSEs, then the
23 formula that you just described would mean
24 there are no -- there are no fees paid for the
25 first subscriber group, and the second

1 subscriber group, there would be a fee up, you
2 know, that would -- that would be calculated as
3 1.064 percent of its gross receipts, plus 0.701
4 percent of gross receipts for that subscriber
5 group, and then you would check to see if that
6 was higher or lower than the -- than the --
7 than 1.064 of receipts for both subscriber
8 groups combined?

9 A. That's my understanding.

10 Q. Okay. And, of course, an alternative
11 -- well, if there were an alternative, where
12 each subscriber group basically had its own
13 minimum fee with it, where the first subscriber
14 group is zero DSEs, had to pay 1.064 percent of
15 gross royalties, and the second subscriber
16 group had to pay 1.064 percent of royalties
17 plus .701 percent of royalties, that would be a
18 different calculation, that system would have
19 to pay more fees under that calculation, right?

20 A. I agree. I agree.

21 Q. Right. And so are you saying that it
22 is, in fact, the first formula and not the
23 second formula?

24 A. That's my understanding from a single
25 example. And the -- and it is also my

1 understanding that the minimum fee applies at
2 the system level. So it -- it is my
3 understanding the minimum fee doesn't
4 necessarily apply at the subgroup level.

5 Q. So you are saying a subgroup could --
6 I mean, as long as it is a small subgroup,
7 retransmitting, you know, as many signals as it
8 wants without exceeding the minimum fee, as
9 long as their subgroups aren't -- don't
10 collectively retransmit enough signals to come
11 up above the minimum fee?

12 A. Could you repeat that? I lost you in
13 the middle.

14 Q. I lost myself there, actually.

15 A. Okay.

16 Q. Well, I mean, we will -- we will move
17 on from here, but, I mean, your -- your
18 assumption is and was that a subscriber group
19 that pays, you know, that retransmits no
20 distant signal or retransmits fewer than one
21 DSE -- well, how would you do that for a
22 subscriber group that -- that retransmits fewer
23 than one DSE?

24 A. My understanding is, again -- and,
25 again, motivated by this example, if it --

1 suppose it transmits a network station with
2 a .25 DSE.

3 Q. Okay.

4 A. The incremental royalty calculated in
5 that subscriber group is .25 percent -- well, I
6 guess perhaps -- I mean, I remember checking
7 roughly the math because it lists, again, in
8 the sample SOA I have in my head, they list the
9 gross receipts in the subscriber group, you
10 know, there is a form on the SOA Form 3
11 systems, and then they list the DSEs, and I
12 remember seeing there are some subscriber
13 groups with .25 DSE or .5 DSE.

14 And then I did the rough math of the
15 -- of the calculation of the gross -- the
16 receipts in that subscriber group times the DSE
17 share. And it seemed to be proportional.

18 So if it was .25 DSE, it seemed to be
19 about a little more than .25 percent. But the
20 important thing is it is not an assumption. I
21 mean, ultimately the data that comes to me is
22 the data that comes from the CDC that reports
23 the royalties that the CSOs pay at the
24 subscriber group level.

25 Q. Well, you earlier agreed with me it is

1 important to understand how the royalty is
2 calculated?

3 A. Oh, I agree. I agree. But it's not
4 -- I just want to say it is not an assumption
5 on my part. It is -- it is -- I'm describing
6 to you my understanding.

7 Q. So your understanding is that there is
8 a subscriber group that is retransmitting
9 0.25 percent of a DSE, that subscriber group's
10 fee is what?

11 A. It's -- again, this is -- it's -- its
12 contribution to the overall fee, and I never
13 actually checked whether the -- but the
14 subscriber group I had in mind had -- the
15 system I had in mind had something like 40
16 subscriber groups or something.

17 And I never checked that if I added up
18 the reported royalty in each box, whether that
19 actually matched up to the -- because there is
20 sort of a summary page where they report the
21 total royalty across all the subscriber groups
22 and then they report 1 percent of the -- of the
23 gross receipts for the system as a whole and
24 then they compare it and then say this is the
25 royalty paid. I mean, that's, as I recall, the

1 sample SOA.

2 Q. I mean, that's -- it is very important
3 to know in your regression how much the system
4 is actually -- the cable system operator is
5 actually paying, right?

6 A. I agree, yes.

7 Q. Okay. So if you were using some
8 formula that incorrectly calculated the -- the
9 amount that the system is actually paying, that
10 could influence your results, right?

11 A. So I don't have control over the
12 formula over the -- of the royalties that the
13 system pays. This information is provided to
14 the Copyright Office and then digitized by the
15 CDC. And that's the data that we used.

16 I didn't do any manipulations of that
17 data.

18 Q. Okay. All right. Well, let me ask
19 this then. Okay?

20 If it were the case that systems with
21 -- that pay the minimum fees are less likely to
22 use subscriber groups. Okay?

23 A. Okay.

24 Q. And can you imagine why that might be
25 the case, because if you are paying the minimum

1 fee anyway, why break your -- why go through
2 the administrative trouble of breaking out your
3 subscriber groups?

4 A. That -- I don't have knowledge of
5 that, but that seems a reasonable presumption.

6 Q. Okay. And if that were the case, then
7 that would mean on the whole systems that have
8 their own -- that pay the minimum fee would
9 tend to have only one subscriber group,
10 correct?

11 A. I mean, this is a question of the
12 data. So we could -- we could, you know, one
13 could just see in the data whether that was
14 true.

15 Q. Okay. And if you were then to take --
16 remove those systems; that is to say, those
17 systems with only one subscriber group from
18 your regression, it would have no influence on
19 the result because each of those system time
20 periods has its own -- has its own indicator
21 variables, correct?

22 A. No. So partially correct. So for
23 systems that pay the minimum fee that have a
24 single subscriber group, correct, removing
25 those systems would not have an influence on

1 the, you know, the coefficients on the minutes
2 variables. But there are some systems that do
3 have more than one subscriber group that do pay
4 the minimum fee.

5 And so when I drop all minimum fee
6 systems -- and those -- those systems do
7 contribute information about the relative CSO
8 value for distant minutes.

9 And so when I dropped the minimum fee
10 systems, I also reduced those systems as well,
11 which is why the results are not identical.

12 Q. Okay. Let's go back to our favorite
13 hypothetical again.

14 So we have been -- we have been
15 working on this hypothetical as if we are
16 talking about systems, choosing between A, B,
17 and C, but your, as you have said, your
18 regression actually works at the subscriber
19 group level, correct?

20 A. That's correct.

21 Q. And, in fact, because of your use of
22 fixed effects, your regression is actually only
23 working on variation within -- among subscriber
24 groups within a particular system, right?

25 A. That's correct.

1 Q. So let's take a fresh page here. And
2 let's do subscriber group 1, subscriber group
3 2. Okay?

4 A. Okay.

5 Q. Let's say that subscriber group 1 has
6 -- pays lower fees. Okay?

7 A. Okay.

8 Q. Subscriber group 2 pays higher fees.

9 A. Okay.

10 Q. And let's assume that within this
11 cable system the cable system operator does, in
12 fact, value minutes of programming the way that
13 you've hypothesized. Okay?

14 A. I'm not -- I mean, that's a very
15 strong assumption. So they very well may not.

16 Q. I'm assuming your regression is
17 correct.

18 A. No, no, because the -- I mean, the
19 same cable operator could have different
20 relative values across different subscriber
21 groups.

22 Q. Okay.

23 A. So -- and I think that's actually
24 quite reasonable. You know, you can imagine a
25 cable system serving the whole of Missouri, and

1 it might have a subscriber group near Arkansas
2 where they value highly distant signals from
3 Arkansas, and they could have another
4 subscriber group far away from Arkansas where
5 they don't value programming from Arkansas.

6 Q. Okay. Well, but we're talking -- I
7 mean, your regression doesn't work on
8 programming from Arkansas versus programming
9 from somewhere else. It works on programs of
10 one category -- programming of one category
11 versus programming of other categories. Right?

12 A. Of course. Of course. But I was just
13 highlighting the point that even within a
14 single CSO, the value within the -- the
15 relative value within the subscriber group of
16 different categories of programming could be
17 different.

18 Q. You might have subscriber groups where
19 the CSO thinks that these people will value
20 devotional programming and other subscriber
21 groups where this cable system operator thinks
22 these subscribers might value news?

23 A. I mean, even take sports programming,
24 suppose the key thing -- or it's news
25 programming, for subscribers in southeast

1 Missouri is that they want to learn about the
2 Arkansas news. Right?

3 So then subscribers in -- even though
4 it is the same system, the CSO value for news
5 programming in that subscriber group could be
6 higher than in some other subscriber group that
7 doesn't have any nearby states, for example.

8 Q. Okay.

9 A. It is right in the middle of Missouri.

10 Q. So let's say that over many, many
11 samples, because your regression works over
12 many, many samples, you are finding as a
13 general matter that in subscriber groups with
14 lower fees being paid, there tend to be --
15 well, you used sitcoms here so, you know, we
16 tend to have more sitcoms, okay, more minutes
17 of sitcoms than in -- than on distant signals
18 retransmitted by those subscriber groups that
19 are paying higher fees. Okay?

20 A. Okay.

21 Q. And let's say that, you know, we will
22 say the opposite with regard to news. Okay?

23 A. Um-hum.

24 Q. All right. Which is what your -- what
25 your regression would predict, correct? I

1 mean, your regression has predicted this,
2 right?

3 A. Yeah, I mean, the results of my
4 regression -- I mean, if -- yeah. My -- my
5 regressions results predict higher per minute
6 values for news than -- per minute values for
7 news than for sitcoms.

8 Q. Okay. So assuming that this is what
9 you observe and what your regression observes
10 over the course of many, many data points,
11 okay, where these low -- lower fee-paying
12 subscriber groups are more likely to get
13 sitcoms; higher fee paying subscriber groups
14 are more likely to get, say, sports, okay, what
15 does that tell you about value?

16 A. I mean, to me it says, you know, just
17 going back to this Missouri example, if -- and
18 we can keep it news and sitcoms if we like, but
19 maybe I will put sports in there, too.

20 Q. Oh, I'm sorry. I said sports. News.

21 A. That's okay. You know, it exploits
22 the variability -- I mean, it may be that in
23 southeast Arkansas -- southeast Missouri, if
24 you have Arkansas-specific programming and
25 there are people in that area that really value

1 Arkansas's specific programming, then they are
2 going to subscribe to the cable system, and the
3 gross receipts will be higher and the royalties
4 would be higher and, therefore, you will get a
5 higher royalty, appropriately so, relative to
6 some other system where there is less of an
7 interest in such programming.

8 Q. Okay, yeah. You're presuming, and
9 maybe rightly so, that in each subscriber group
10 they are going to retransmit the programming
11 that is most valuable to that subscriber group?

12 A. Yeah, absolutely.

13 Q. But the fact that the subscriber group
14 wanted this example, and in all, you know,
15 assuming that this is over the course of much,
16 much data, you know, many, many data points,
17 assuming if those lower fee-paying subscriber
18 groups are the ones getting the sitcom, why is
19 it that you associate those lower fees with
20 lower value? What makes you think that the
21 correlation with the lower fee-paying
22 subscriber group is a matter of value and not
23 something else?

24 A. Because the system is paying -- in
25 order to carry a distant signal, they have to

1 pay an incremental royalty.

2 And so I imagine the cable operator
3 making a choice among sitcoms -- excuse me,
4 among distant signals, and looking at the mix
5 of programming, and if there is valuable
6 programming, then -- relatively more valuable
7 programming, they are willing to pay a higher
8 royalty. And if there is relatively less
9 valuable programming, they are not as willing
10 to pay a higher royalty. And then so they are
11 more likely to carry than -- the programming
12 that has the higher value to them.

13 Q. But both subscriber groups are
14 carrying the programming that has the highest
15 value to that subscriber group, right?

16 A. Right, but the value can be different
17 in the two subscriber groups.

18 Q. It absolutely could be different in
19 the two subscriber groups, but this subscriber
20 group is paying a lower fee no matter what
21 signal it decides to retransmit, right?

22 A. Well, but, I mean, the lower fee -- I
23 mean, the lower royalty is a function of, as it
24 -- you know, maybe that the, you know, the
25 service isn't as attractive to the subscribers

1 in its area and, therefore, they don't get as
2 many subscribers and, therefore, they have
3 lower gross receipts.

4 Q. So then why don't they carry the news
5 channel and get more subscribers?

6 A. Because, this is important, the value
7 of content on distant signals is
8 location-specific, so even within a system, so
9 it may be that the exact same content that is
10 particularly valuable in one subscriber group
11 could be differentially valuable in another
12 subscriber group.

13 Q. I understand, but why do you draw from
14 that point, okay, that observation, which I
15 agree with, that different subscriber groups
16 might, might very well have different
17 valuations of content? How do you draw from
18 there that the fee that is paid for that
19 subscriber group, whether higher or lower, is
20 related to that -- to that difference in
21 content?

22 A. Because, I mean, the fee represents
23 the incremental cost to the -- to the cable
24 operator of carrying a distant signal.

25 Q. The incremental cost after the --

1 after the first DSE?

2 A. Yes. So just to simplify things,
3 let's suppose we're talking about the third DSE
4 or, you know, the third distant signal, and --
5 because I think, as I articulated in my direct
6 testimony, I don't think the minimum fee, the
7 fact that some systems pay a minimum fee is
8 consequential, because what I really value is
9 -- what I really use to identify relative CSO
10 values is the -- is the relative value that
11 they place on different types of programming.

12 So even if their absolute value is
13 below the minimum fee, that's fine for me.
14 They are still making a choice of do they want
15 to carry channel A or channel B. And when they
16 choose between channel A and channel B, they
17 are looking at the programming on channel A
18 versus channel B.

19 Q. Let's say we have got these two
20 subscriber groups, okay, and I am just going to
21 take out the fees for a minute. Okay? We will
22 just make this pristine. All right? Maybe I
23 should start over. I came ready to do a lot of
24 these hypotheticals.

25 MR. STEWART: How many?

1 A. I was going to ask that question.

2 Q. I've got another 12 pages or so. All
3 right. You have got subscriber group 1 and
4 subscriber group 2. Okay?

5 Let's say subscriber group 1, we're
6 going to retransmit station B. Subscriber
7 group 2, we're going to retransmit station C.
8 All right?

9 What, if anything, does this tell you
10 about the relative valuations as between
11 subscriber group 1 and subscriber group 2 of
12 station B and station C?

13 A. Well, I mean, here it is clear the
14 subscriber group 2 appears to be making a
15 decision in line with the relative values in
16 the figure. But the -- in its subscriber group
17 1, it presumably has different relative
18 valuations of programming that make station B
19 the more attractive choice over station C.

20 Q. What if subscriber group 1 is
21 retransmitting station C, but not on a distant
22 basis. What if station C is local to
23 subscriber group 1. What then would you --
24 could you say about how subscriber group 1 and
25 subscriber group 2 value, the relative values

1 that they place on station B and station C?

2 A. So in -- so I agree the programming on
3 local stations is an important feature of what
4 could influence gross receipts. And so I
5 include that in my analysis by including the
6 number of local stations carried on the system.

7 So that -- that effect would pick up
8 the influence on -- that covariant would pick
9 up the effect of the inclusion of station C in
10 subscriber group 1.

11 Q. Well, I'm actually suggesting not just
12 that there is a local station. I'm suggesting
13 this is the same station. Okay?

14 A. I understand.

15 Q. That's the -- I mean, there might be
16 -- there might be, you know, eight other local
17 stations here. Okay? All right.

18 Your --

19 A. I agree.

20 Q. Your regression doesn't take into
21 account whether, you know, whether station --
22 your regression takes into account the number
23 of local stations. It is not taking into
24 account whether station C is local or not?

25 A. That's correct. It does not take into

1 account whether station C specifically would be
2 local.

3 Q. Or actually more accurately, you're
4 assuming that if you don't see station C listed
5 on the -- on the list of distant signals, that
6 subscriber group 1 isn't retransmitting station
7 C?

8 A. No, I don't -- I mean, what I -- I
9 disagree with that. What I would say is that
10 I'm not disaggregating the minutes of station C
11 in the same way I do the distant signals. It
12 enters the model, just it enters through a
13 different channel. It enters through the
14 covariate measuring the number of local
15 signals.

16 Q. Because that covariate is one higher?

17 A. Exactly. Or, I mean, it's -- if you
18 said there is eight there, then it is eight.

19 Q. Well, it is eight, nine instead of
20 eight or, you know, whatever. Okay?

21 A. Yes.

22 Q. Okay. Given this particular fact
23 pattern I've laid out here, okay --

24 A. Yes.

25 Q. -- you couldn't say whether subscriber

1 -- whether either subscriber group 1 or
2 subscriber group 2 values station C more,
3 correct?

4 A. That's correct.

5 Q. Now, am I correct in understanding
6 that distant signals are almost always placed
7 in the lowest tier of service of a cable
8 system?

9 A. That is my understanding, yes.

10 Q. So when we're talking about different
11 subscriber groups, we are generally not talking
12 about subscriber groups for, say, a premium
13 channel package, correct?

14 A. I mean, that's my understanding, just
15 from my experience in the industry, not from
16 specific facts in the case.

17 Q. But it is a fact, though, right?

18 A. That's my understanding.

19 Q. It would be unusual for a cable system
20 to operate a -- to offer a distant signal only
21 on a premium package?

22 A. That would be unusual.

23 Q. Okay. So you are not expecting that
24 subscriber group -- subscribers are going to
25 come and say: Oh, gee, you know, I really

1 would like to know the, you know, the weather
2 in Albuquerque, and so I will take that -- I
3 will take the super premium channel so I can
4 get that signal, right?

5 A. I think that's right. I think the --
6 I think for the -- overwhelmingly, I would even
7 say, I would expect that distant signals are
8 carried on the lowest tier of cable service.

9 Q. And the lowest tier of cable service
10 in terms of the channel line-up generally
11 within a cable system, a single cable system,
12 is not going to vary much among subscriber
13 groups, is it?

14 A. Well, from my look at the data, it
15 varies a fair bit.

16 Q. The distant -- the distant signals
17 vary a fair bit, but does the channel lineup
18 vary?

19 A. So, again, from my recollection
20 looking at individual SOA, the -- it is not
21 only the distant channel line-ups that can vary
22 but also the local channel line-ups can vary.

23 Q. They can.

24 A. Yes.

25 Q. I agree with you they can. But in

1 your data today, in your data are you seeing a
2 lot of subscriber groups that are offering,
3 okay, I am going to offer this channel line-up
4 to this subscriber group, this completely
5 different channel line-up to this subscriber
6 group, a different channel line-up for every
7 subscriber group?

8 A. I mean, yes, we see that, where I
9 define channel line-ups being --

10 Q. Distant?

11 A. -- distant and local signals, but not
12 necessarily what one would normally call cable
13 channels or, I mean, in the CDC data they only
14 list the local signals and the distant signals.

15 Q. Right. If you have got a system where
16 a signal is local to some subscribers, distant
17 to others, is your expectation that they are
18 going to segregate out, say, okay, I am only
19 going to put this signal, this distant signal
20 in my distant subscriber line-up and not in my
21 local subscriber line-up?

22 A. This I don't know. I didn't look at
23 it. I didn't look for that specifically in the
24 data.

25 Q. Okay. Isn't it true that an important

1 difference between subscriber groups within a
2 system tends to be who is local and who is
3 distant with respect to the signals offered?

4 A. I don't know that to be true, but I
5 could imagine that that is true.

6 Q. If that is true, then what your
7 regression is showing is that -- strike that.

8 Let me -- I want to talk for a minute
9 about -- or for a little bit about differences
10 between your regression analysis, and I believe
11 you sort of used, and I am not saying that you
12 didn't do your independent work, but you sort
13 of used Dr. Waldfogel's regression as a
14 starting point?

15 A. No.

16 Q. No? All right. Well, let's talk
17 about the differences between yours and we will
18 say Dr. Israel's, because I know you have read
19 the testimony, and I understand you haven't
20 analyzed it closely, but we will --

21 A. That's great.

22 Q. -- we will work through it anyway.
23 All right.

24 A big difference is you used the log
25 of fees paid as your dependent variable;

1 whereas Dr. Israel uses the level fees paid?

2 A. That's correct.

3 Q. Why in your view would the -- would a
4 level increase, because you do use a -- you use
5 a log level specification, correct?

6 A. We call it log-linear, but I know --

7 Q. Log-linear, okay, that's fine.

8 A. But I think actually log level is
9 probably the better name, even though it is
10 called log-linear.

11 Q. Thank you. I came up with it myself.
12 Log-linear specification, okay, which
13 would imply that a level increase in number of
14 minutes contributes to a -- or is associated
15 with an increase in the logarithm amount of
16 fees paid?

17 A. That's correct.

18 Q. Okay. And you -- and you chose this
19 specification, such a specification, because
20 you expect to see that, you know, if there is a
21 correlation, if there is an effect of minutes
22 offered on fees paid, that effect is going to
23 be essentially bigger, it is going to be a
24 bigger effect for bigger, you know, for higher
25 fee-paying systems than for lower fee-paying

1 systems. Right?

2 A. As I describe in my testimony, when
3 one has -- this log can seem a little
4 mysterious, but when used as a dependent
5 variable, it captures the idea that a level
6 increase in -- any explanatory valuable, but,
7 for example, a minutes variable, is associated
8 with a common percentage effect on royalty.

9 And because systems can vary
10 significantly in size, that seemed more
11 reasonable to me than to assume that both large
12 and small systems would pay the same increment
13 in royalties despite having very different
14 gross receipts.

15 Q. And basically -- so basically you are
16 saying a level increase, an increase in, you
17 know, a given, say, 30-minute increase in some
18 program category amount is going to be
19 associated with essentially a percentage
20 increase in the amount of fees that that system
21 is going to pay?

22 A. Well, I mean, the way you said that
23 was a little bit causal, and I would just say
24 that in the data, distant signals that have 30
25 more minutes of, whatever, say Program Supplier

1 programming, are associated with royalties that
2 are, according to the parameter, the relevant
3 percentage higher on the part of cable systems.

4 Q. Okay. And that's the effect of using
5 a logarithm?

6 A. Yes, a log-linear specification.

7 Q. Yeah. Log-linear because a linear
8 effect on one has a logarithmic effect on the
9 other?

10 A. Exactly, yes.

11 Q. So let's put up your specification
12 here. Again, this is your control vector.
13 Okay? Oh, I'm sorry. That's your main
14 stratification.

15 Can you put up page A-2? I will have
16 to find it. Okay. All right. This is your
17 control vector. As we have said, this is just
18 like your variables of interest, you are
19 controlling for variables times a coefficient.

20 A. That's correct.

21 Q. So it is just a sum of each of these
22 variables. We can ignore the first tau prime,
23 sub ST gamma, right, okay, but it is after that
24 you have got these control variables, each with
25 its -- each variable with its own parameter.

1 One of your control variables here is
2 the number of subscribers, right? That's
3 basically the last control variable before you
4 get into your MSOs. Right?

5 A. That's correct.

6 Q. Okay. All right. And that's
7 associated, you have just got number of
8 subscribers for that particular group, system,
9 and here you have got time period minus 1,
10 because you are using lagged subscribers, but
11 --

12 A. That's correct.

13 Q. It just means you are using the
14 subscribers, the number of subscribers from the
15 last prior -- the prior accounting period?

16 A. That's correct, from a previous
17 accounting period.

18 Q. And then you have got, again, a gamma
19 here?

20 A. Yes.

21 Q. Okay. This is, again, this is a level
22 log relationship that you are expecting here, a
23 level number of subscribers that is going to
24 contribute a percentage to the amount of fees
25 paid. That's your expectation?

1 A. So the -- the interpretation of this
2 variable is a little bit different -- or not so
3 much the interpretation, but the role it plays
4 in the regression is a little bit different
5 than the minutes variables.

6 Q. Well, I am just asking what your
7 regression does here is it associates a level
8 increase in subscribers with a log increase in
9 the amount of fees paid, right?

10 A. That's true.

11 Q. Okay. Can we pull up Exhibit 2004,
12 Appendix A-1, which is the summary statistics
13 page. I got that wrong, obviously.

14 I apologize, everyone. Give me a
15 second. Oh, I'm sorry, I meant A.2.C, which is
16 on page A-6.

17 All right. This is your summary
18 statistics page, right?

19 A. That's correct.

20 Q. All right. Let's take a look at the
21 number of distant subscribers variable.

22 A. I think you mean to say number of
23 subscribers.

24 Q. I'm sorry, thank you. An important
25 difference. Okay.

1 Number of subscribers variable. Okay.

2 Let's pull that up. All right. You have got
3 -- and then you have to look up to the top of
4 the columns to see what these things mean, but
5 basically you have got a mean number, an
6 average number of distant -- of total
7 subscribers, and this is at the group level,
8 right?

9 A. Yes, the subgroup level.

10 Q. Of about 15,000, right?

11 A. That's correct.

12 Q. On average about 15,000. Okay? You
13 have got a standard deviation of almost 53,000.
14 Right?

15 A. That's correct.

16 Q. Okay. So you can -- you can have
17 very, very wide range of numbers of distant
18 subscribers -- of subscribers. I'm going to
19 stop that. That's the last time. Let me start
20 over again.

21 You have got a very wide range of --
22 in terms of numbers of subscribers per
23 subscriber group, right?

24 A. That's correct.

25 Q. This could go from the low thousands

1 up to certainly, necessarily, at least the tens
2 of thousands, it could go up to the hundreds of
3 thousands, right?

4 A. Yes. I don't know the exact ranges,
5 but the data in front of me suggest that it has
6 a very wide range.

7 Q. I think we had one witness earlier
8 here who said there was one distant signal that
9 only went to four subscribers. So that's a
10 really small subscriber group, right?

11 A. I wasn't aware of that, but that's
12 possible.

13 Q. Yeah, okay. So, anyway, we have got a
14 big range of different numbers of subscribers.
15 And, of course, the fees, as we have discussed,
16 that are paid are actually -- are calculated
17 based on the receipts of the, in large part,
18 based on the receipts of the subscriber group,
19 correct?

20 A. Receipts and the rate, which depends
21 on the number of DSEs, correct.

22 Q. Right. I mean, it is always a
23 percentage of the receipts and it is just a
24 matter of whether it is between 1 and
25 3 percent, or maybe a little bit more,

1 depending on the number of DSEs?

2 A. That's true.

3 Q. Okay. I think you said that for these
4 cable systems over 93 percent of revenues come
5 from subscription fees, right?

6 A. For -- for cable systems in general,
7 and 100 percent for distant signal carriage.

8 Q. Okay. All right. So not to put too
9 fine a point on it, but the more subscribers
10 you are going to have, the more receipts you
11 are going to have. Right?

12 A. I agree.

13 Q. All right. So I have got a
14 hypothetical for you. All right?

15 A. Okay.

16 Q. I am a cable system operator in this
17 hypothetical. I come to you, Dr. Crawford, we
18 are in desperate need of an economist. Okay?
19 Because I have got this small system out here,
20 all right, just only a thousand subscribers.
21 Okay? I need to figure out that -- we have got
22 some serious cash flow problems. I need to
23 boost my receipts by 10 percent. Okay?

24 A. Okay.

25 Q. All right. I have got a thousand

1 subscribers. I need to boost my receipts by
2 10 percent. I don't want to change anything
3 else.

4 Holding everything else equal, okay,
5 how many subscribers do I need to go out and
6 get for that subscriber group to boost my
7 receipts by 10 percent? And I don't want to
8 change anything else.

9 A. I mean, 10 percent, you want
10 10 percent of a thousand would be a hundred.

11 Q. 100.

12 A. Yeah.

13 Q. 100. Great. Okay. Dr. Crawford, you
14 are a genius. It worked. Okay? I got my
15 hundred subscribers. All right? And it did,
16 in fact, boost my revenues by 10 percent in
17 that -- in that subscriber group, in that
18 system or subscriber group. Okay?

19 So now, okay, I want to move you up to
20 the big time. All right? I have got a big
21 subscriber group over here, 100,000
22 subscribers. Okay? And I want to do the same
23 thing, exactly the same thing. I am going to
24 boost it by 10 percent. I just have to find
25 100 subscribers, right? I can add 100

1 subscribers there, boost my revenues by
2 10 percent, right?

3 A. Clearly not.

4 Q. Okay. Well, what do you mean "clearly
5 not"? I mean, I -- I saw your written
6 testimony. Okay? I saw you said that the
7 number of subscribers associated with the log
8 of fees paid. You just boosted my log of fees
9 paid by .95, .095, right, almost .1. When I --
10 when I added 100 subscribers, that's all I want
11 to do. I just want to boost my log of fees
12 paid, my log of revenues, my log of receipts,
13 by less than .1. I can do that by adding 100
14 subscribers to my 100,000 subscriber system.
15 Right?

16 A. No. No.

17 Q. You can't? So a level subscriber -- a
18 level increase in the number of subscribers is
19 not associated with a log increase in fees
20 paid. Correct? Am I right?

21 A. In your, yeah, in your examples, yes.

22 Q. Is it different in the real world?

23 A. No. So --

24 Q. Okay. Okay. So whether -- I mean,
25 this -- whether I'm in the regulatory

1 environment, whether I'm in a free market
2 environment, I'm not going to increase my
3 receipts through a level increase in
4 subscribers, am I?

5 A. No.

6 Q. Let's turn to -- let's take a look at
7 Exhibit 5007. This is Dr. Erdem's rebuttal
8 statement.

9 Did you conduct any test as to whether
10 taking the log of number of subscribers would
11 change your results?

12 A. I did not, no.

13 Q. You saw that Dr. Erdem did?

14 A. I did. And I spoke to that issue in
15 my direct testimony.

16 Q. Okay. So let's pull this up, model --
17 model 1. Okay? We can blow it up. Model 1 is
18 Dr. Crawford's non-duplicated analysis. He did
19 a similar one with both of your analyses.
20 Right?

21 A. I believe that's right, yes.

22 Q. So this is -- this is one example but
23 there was another similar example with your --
24 with your -- where you are not including your
25 non-duplicated analysis. Correct?

1 A. I believe that's correct.

2 Q. Okay. All right. So taking a looking
3 at these results here, all right -- actually,
4 Jessica, can you lower that a little bit so we
5 can also see Model 0? Because Model 0 is your
6 actual results, right?

7 A. I'd have to compare it but assuming --

8 Q. It is just Dr. Crawford's
9 non-duplicated analysis.

10 A. Yeah, it looks a little bit different.
11 But, I mean, a bit different. As I recall, for
12 example, the joint sports I thought was at 35.2
13 and I see 32.9. I am not sure what is driving
14 that.

15 Q. Remember, this is the non-duplicated
16 one.

17 A. All right. Non-duplicated. No,
18 that's -- but I --

19 Q. That's what you remember?

20 A. That's what I think I remember from
21 earlier today.

22 Q. Okay.

23 A. But it's inessential, I think. The
24 qualitative pattern is --

25 Q. You would agree that when that -- that

1 when your number of subscribers variable is log
2 transformed, CTV's share goes down from
3 17.46 percent down to on average 6.35 percent?

4 A. That's correct.

5 Q. Of course it is still over-fitted,
6 right?

7 A. No.

8 Q. You didn't test -- you didn't -- you
9 didn't test a transformation like this to see
10 what effect it would have?

11 A. No, because I strongly feel that
12 including log subscribers is not an appropriate
13 specification as an explanatory variable.

14 Q. So in what hypothetical, we're trying
15 to value a hypothetical market here, okay, in
16 what hypothetical universe is the log of fees
17 paid going to vary with the level number of
18 subscribers?

19 A. So -- and this is -- so I think this
20 is an important distinction in an effects
21 regression. So if the subscribers variable was
22 my key variable of interest, then I would be
23 sensitive to some of the criticisms that you're
24 raising, that one really would want to be
25 careful to make the specification such that it

1 really was measuring the effect of interest.

2 But here subscribers is playing a
3 different role. It is playing the role of sort
4 of a control variable to account for the fact
5 that some systems just different size. I even
6 considered not including it at all.

7 But I worried that if I didn't include
8 some measure of subscribers -- I clearly felt
9 that including log subscribers would be a
10 mistake because it would approximate the
11 royalty formula. And so I thought maybe I
12 should just drop it, but if you drop it, then I
13 might be missing important elements in market
14 size that could possibly be correlated with my
15 key effects of interest, and, therefore, I
16 included it.

17 But it was -- it was a variable I
18 thought quite a bit about and -- and ultimately
19 I agree there is a superficial mismatch but
20 since it is a control variable and it is not
21 the core focus of my analysis, I was happy to
22 include it.

23 Q. Well, what it essentially means is
24 that lower level -- at lower levels of fees, of
25 fees paid, you are essentially under-counting

1 for the influence of subscribers, right?

2 A. I don't think that's right.

3 Q. And at higher levels of fees paid, you
4 are essentially over-counting for the influence
5 of subscribers, right?

6 A. So the -- the --

7 Q. May I have the ELMO again?

8 JUDGE STRICKLER: Were you in the
9 middle of an answer?

10 THE WITNESS: Yeah, I don't know if --

11 MR. MacLEAN: I apologize.

12 THE WITNESS: I mean, as I mentioned,
13 it was -- including subscribers wasn't meant to
14 be a core effect of interest. It was just
15 meant to control broadly for the different size
16 of the systems across it.

17 BY MR. MacLEAN:

18 Q. But how is it controlling for anything
19 if you are -- if you are associating it with an
20 effect that isn't -- that doesn't reflect
21 reality?

22 A. I mean, the number of subscribers is a
23 measure of the different size of subscriber
24 groups. So it is, rather than taking a strict
25 interpretation of I increased this many

1 subscribers and my royalties go up by this, it
2 is, rather, instead just roughly capturing the
3 fact that different systems of different size
4 are going to have different royalties.

5 It is not going to be the perfect
6 match, but if we -- if I did do the log
7 transformation, then I can't do my analysis at
8 all. The log transformation just replicates
9 the royalty formula. I even considered
10 dropping subscribers. And qualitatively my
11 results are the same.

12 Q. Qualitatively they are?

13 A. Yes.

14 Q. Did you drop subscribers?

15 A. I mean, after the -- after reading the
16 Erdem rebuttal, then I explored what happens if
17 I dropped subscribers. And the point estimates
18 are within the standard errors of my -- my
19 final analysis.

20 Q. You conducted an analysis in which you
21 dropped the number of subscribers?

22 A. Yes.

23 Q. Have you produced that to us?

24 MR. STEWART: Objection. Dr. Crawford
25 isn't responsible for producing documents, nor

1 is this analysis underlying any of the case
2 evidence that we filed.

3 JUDGE BARNETT: Dr. Crawford, you
4 conducted this test or this analysis after
5 reading Dr. Erdem's direct testimony or
6 rebuttal testimony?

7 THE WITNESS: After his rebuttal
8 testimony.

9 JUDGE BARNETT: Okay. Did you produce
10 a report after you did this test?

11 THE WITNESS: Produce a report? No.

12 JUDGE BARNETT: Did you write anything
13 up? Did you provide it to your counsel?

14 THE WITNESS: No, no. I just -- I was
15 curious.

16 JUDGE BARNETT: Okay. Objection
17 sustained.

18 BY MR. MacLEAN:

19 Q. Of course even if it didn't, if you
20 are dropping the number of subscribers, you are
21 just dropping it as a control variable, right?

22 A. Yes.

23 Q. Okay. If you are, for example,
24 undercounting or under -- if your control
25 variable undercounts, basically, the influence

1 of the number of subscribers, then you wouldn't
2 necessarily expect it to have much of an
3 influence to drop the number of subscribers,
4 would you?

5 A. I don't necessarily agree with that
6 line of logic.

7 Q. Let's try to graph this, because I
8 think it is helpful to, you know, for people to
9 be able to visualize.

10 JUDGE FEDER: Mr. MacLean, can you
11 slide that to the right a little bit? We can't
12 read the legend.

13 MR. MacLEAN: Oh, I'm sorry.

14 JUDGE FEDER: And also, just for the
15 record, describe what you have on the axes.

16 MR. MacLEAN: Absolutely.

17 JUDGE FEDER: Thank you.

18 BY MR. MacLEAN:

19 Q. Okay. So I have drawn up axes here
20 relating log, okay, of receipts. Now, imagine
21 this is not a logarithmic scale, okay, I am
22 just putting log receipts as my axis. Okay?

23 A. I understand.

24 Q. All right. So there will be a curve.
25 Okay? Be ready. All right. And then against

1 the number of -- the level number of
2 subscribers. Okay?

3 A. Okay. I understand.

4 Q. So what I'm going to expect, along the
5 lines of the hypothetical we did earlier,
6 right, is that at low numbers of subscribers,
7 the slope is going to be pretty steep because
8 as I add subscribers, as I add a level number
9 of subscribers, I'm adding a lot to the log.
10 Right?

11 A. I think that's right.

12 Q. Okay. As the number of subscribers
13 gets higher, it is going to curve, right?

14 A. I agree with that, yes.

15 Q. Okay. Because at high levels of
16 receipts, I add a few more subscribers, and it
17 is not -- it is -- it is contributing maybe a
18 level amount to my receipts, but it is not
19 contributing a level amount to the logarithm of
20 my receipts.

21 A. I agree.

22 Q. Now, if you were to do a regression,
23 if you had these data points, you know, along
24 the lines, right, okay, if you were to do a
25 regression with these data points and if you

1 were to do it as a linear regression, by
2 definition it means you're going to find one
3 slope. Right? It is going to be -- you are
4 basically going to be taking the average?

5 A. Yes, that's correct.

6 Q. Okay. Now, in the regression, for the
7 purpose of the coefficients, what's important
8 here at any given -- what is important here is
9 the slope. Right? The slope is basically the
10 coefficient. Right?

11 A. That's correct.

12 Q. Okay. So at these low levels of
13 subscribers down here (indicating), low levels
14 of subscribers, low levels of receipts, the
15 actual slope in reality, you might say, is
16 fairly steep. It is a fairly high -- if you
17 had a coefficient like this, it would be a
18 fairly high coefficient. Right?

19 A. That's correct.

20 Q. The level -- the linear coefficient,
21 though, is less steep?

22 A. I agree with this, yes.

23 Q. Right? So at low levels of
24 subscribers, the coefficient that you are
25 getting for that gamma is going to be lower

1 than what the number of subscribers are
2 actually contributing to the log of fees paid.
3 Right?

4 A. I think this is correct, yes.

5 Q. Okay. Somewhere in the middle it
6 averages out. Your linear coefficient is going
7 to be approximately the same as your -- as your
8 -- I mean, there is a point, there is
9 necessarily a point at which they are exactly
10 the same as the -- as the actual contribution
11 of number of subscribers to the log of fees
12 paid. Correct?

13 A. That's correct.

14 Q. Okay. And then at high levels, your
15 linear coefficient is going to be steeper,
16 meaning higher, than what the actual
17 relationship between fees -- between the number
18 of subscribers is to log of fees paid.
19 Correct?

20 A. That's correct.

21 Q. I mean, this is, in fact, an example
22 of a regression specification, or a
23 coefficient, okay, that is introducing bias at
24 the ends. Right?

25 A. No. I mean, we have to be careful to

1 remember, in an effects regression, we care
2 about the key explanatory variables of
3 interest. So the bias I worry about would be
4 whether this would have an effect on the
5 parameters on the minutes that are feeding into
6 my royalty calculation.

7 So this, I would say, I wouldn't call
8 it biased. I would say it is an approximation.
9 It is a linear approximation to a potentially
10 non-linear relationship.

11 Q. Well, the reason you are controlling
12 for subscribers in the first place is because
13 of your expectation that bigger systems are
14 going to pay more fees. Right?

15 A. Yes, yes.

16 Q. Okay. And you want to control for
17 that so we're trying to narrow down, narrow
18 down what you are looking at to just those --
19 those variables that you are interested in,
20 right?

21 A. Well, no. I mean, the reason I
22 control for, I want to control for system size
23 is to make sure that it is not somehow biasing
24 the key effects that I am interested in.

25 Because, I think, plausibly because

1 royalties vary with system size, you would want
2 to include some measure of it. And the log
3 measure was unsuitable for the reasons I raised
4 earlier, and so I went with the linear
5 measurement.

6 Q. If you had gone with the logarithmic
7 measure, if you had controlled for the log
8 number of subscribers instead of the linear
9 number -- the level number of subscribers, you
10 would have gotten very different results,
11 right?

12 A. Yes, but, as discussed, that's
13 inappropriate in my opinion.

14 Q. All right. Another -- another
15 difference between your specification and
16 Dr. Israel's is you control for the number of,
17 in one version, the number of distant signals,
18 and then in another version you control for
19 both the number of distant signals and the
20 total number of what you call non-duplicated
21 minutes. Correct?

22 A. That's correct.

23 Q. Okay. And I think you discuss in your
24 oral testimony, Dr. Israel does not control for
25 the number of signals, the number of distant

1 signals, but he does have a variable for other
2 prorated minutes. Correct?

3 A. That's correct.

4 Q. Okay. And so, in essence, I mean,
5 when you do a regression, you do want to have
6 -- you do want to have accounted for all the
7 different factors that can have an influence,
8 right?

9 A. That's correct.

10 Q. Okay. And so one way or the other, I
11 mean, you either need to control for total
12 minutes or you need to control for other
13 minutes?

14 A. That's correct, yes.

15 Q. At least that's the best way to do it?

16 A. I mean, either way works. So -- but
17 you want to do one or the other.

18 Q. Right. Not both?

19 A. Not both.

20 Q. Right. Because if you did both, then
21 you have a multicollinearity problem?

22 A. If -- if literally you do both, you
23 have what he calls the multicollinearity
24 problem, which means that one of the variables
25 would sort of just drop out of the regression.

1 But if you do both in a way that is a
2 little bit different, so, for example, if you
3 multiply one of the -- the total by another
4 variable, as I discussed Dr. Erdem did, then
5 qualitatively you are adding both. And that
6 can cause the problems in correctly measuring
7 the relative effects of that.

8 Q. Just to make clear, the
9 multicollinearity that you are talking about,
10 that's why, for example, your indicator
11 variables that worked at a system level were
12 dropped out, right, because they were
13 multicollinear? They were collinear with the
14 -- with the indicator variables that you --
15 that were in the fixed effects?

16 A. That's correct. Just for the record,
17 any -- variables that are multicollinear means
18 you can derive the value of one variable from
19 the others. And so, for example, a minimum fee
20 indicator, a minimum fee dummy variable can be
21 derived from the sum of the dummy variables for
22 all the systems that have minimum -- that have
23 the -- that pay the minimum fee. And so that's
24 why it drops out. And this is called
25 multicollinearity.

1 Q. Okay. I am going to write up two
2 simple sort of form specifications, okay, so we
3 can demonstrate the similarities and
4 differences between, I will say, controlling
5 for other and controlling for all. Okay?

6 A. Okay.

7 Q. And you understand -- you understand
8 what I mean, right?

9 A. I do.

10 Q. All right. So we will have one
11 specification here, I am going to use all
12 betas, but you can use gammas if you want.

13 Okay. So here I have written out Y,
14 that's the dependent variable, equals beta
15 zero, that's the constant, plus beta 1 alpha,
16 this is my coefficient with the variable alpha,
17 right?

18 A. I see beta 1x alpha.

19 Q. Times.

20 A. Oh, times, I see.

21 Q. Okay. I am making this -- I'm trying
22 to make it easy for everybody.

23 A. That's fine. I understand.

24 Q. Beta 1 times A, variable A. Okay?

25 A. Okay.

1 Q. Plus beta 2 times variable B.

2 A. Yes.

3 Q. Okay. So I am looking at two
4 different, a couple of different variables
5 here.

6 A. Yes.

7 Q. And then I know that there are other
8 things that are in my set, that aren't really A
9 or B, but I want to try to catch everything so
10 I will include a beta 3 times other.

11 A. That's correct.

12 Q. Okay? So this is one -- this one is
13 more like Dr. Israel's specification.

14 A. That's correct, yes.

15 Q. Okay. And then more like yours would
16 be -- again, I am using betas instead of
17 gammas, but it doesn't matter, right?

18 A. Right, it does not matter to me.

19 (Laughter.)

20 Q. Okay. Similar specification, but
21 instead of controlling for other minutes, we're
22 controlling for -- I mean, well, whatever it is
23 we're measuring by the specification, we're
24 controlling for everything instead of just what
25 we have left out.

1 A. I think it is important to clarify
2 that, at least as you write it here, I'm
3 interpreting all to be the sum of A plus B plus
4 other.

5 Q. Right. I mean, it could be, or all
6 could be like some factor of the sum of A plus
7 B with other?

8 A. Yes, agreed. Something that is
9 perfectly correlated with the sum of A plus B
10 plus other.

11 Q. Okay. Good. So we have got -- and
12 now let's try to understand the difference.
13 Because, I mean, these are -- there are two
14 different ways of kind of getting to the same
15 place.

16 A. Yes.

17 Q. But, but there is an important
18 difference between them. Right?

19 A. Yes, there is.

20 Q. With respect to the first, the more
21 Israelite coefficient, specification, the one
22 where we're controlling for other, what are --
23 our coefficient for, say, A, for example, is
24 going to be, if I add an A, how much value, how
25 much is the adding of that A holding all else

1 equal going to change Y. Right?

2 A. That's correct.

3 Q. Okay. And when you are controlling
4 for all, more like your specification, holding
5 all else equal, if we add an A and take
6 something else away, how much have we changed
7 Y. Right?

8 A. If we take other away.

9 Q. Right. Good point. Okay. Yeah, if
10 we take something other than A or B away.

11 A. Yes.

12 Q. So I wanted to do a little -- Your
13 Honor, may I walk out in front of the podium
14 for just a little bit?

15 JUDGE BARNETT: Certainly.

16 MR. MacLEAN: Thank you.

17 BY MR. MacLEAN:

18 Q. Okay. I have got my box here of
19 stuff. Okay? And let's say that I paid a
20 certain price for all the very valuable stuff
21 in this box. Okay? I have got binder clips.
22 I have got a pink calculator. Okay?

23 I said -- I said, hey, I have got to
24 examine Dr. Crawford. I might need to do
25 logarithms. Can you get me a calculator? This

1 is what they brought me. All right.

2 So I have got a bunch of stuff in the
3 box. Okay? It all has some value. Presumably
4 somebody bought it. Okay? Let's say I paid a
5 certain amount for this box. Okay?

6 A. Okay.

7 Q. And -- and let's say that you had
8 data, you know, about what was in a bunch of
9 boxes, a whole bunch of different boxes, and
10 how much was paid for that box. Okay?

11 A. Okay.

12 Q. Let's say over all this data you find
13 that if I -- and let's say we're using the
14 doctor -- more like Dr. Israel's specification
15 here. Okay?

16 A. Okay.

17 Q. You find that when I add a marker, on
18 average the price of the box goes up 50 cents.
19 Okay?

20 A. Okay.

21 Q. Okay. Let's say the markers are A.
22 All right?

23 A. Okay.

24 Q. I have got markers. I have got
25 calculators. I have got other things. Okay?

1 If that's what you find overall, what would you
2 say is the value of the parameter for A, the
3 beta 1 for A is?

4 A. So, I mean, if exploiting variation in
5 boxes and number of pens, if every pen was
6 always worth 50 cents, you would expect that
7 beta 1 should be 50 cents.

8 Q. And it, of course, doesn't have to be
9 every pen; just on average?

10 A. Exactly. That's correct. Thank you.
11 On average the pen should be worth 50 cents.

12 Q. Now let's do it more like your
13 specification, where we're controlling for all.
14 Now, I have got a bunch of items in this box.
15 Okay? And I am going to throw -- put in my
16 pen. Okay? And I am going to take out my
17 Purell, all right, flu season.

18 I am going to take out my Purell. Now
19 I find that on average, over many, many
20 observations, I find that when I -- when I do
21 this, the value of the box goes down by \$2.
22 Okay?

23 A. Okay.

24 Q. What's my -- what's my coefficient for
25 A now, my pen?

1 A. So A would -- the beta 1 would measure
2 the value of the pen relative to the value of
3 other, which in this case let's assume other is
4 always Purell, so it would measure the value of
5 the pen relative to the value of the Purell, so
6 to suggest maybe the Purell is worth maybe
7 \$2.50.

8 Q. Well, you only know that because we
9 did our -- our -- our -- we did the Israelite
10 valuation where I already told you the pen is
11 worth 50 cents. Right?

12 A. Right. So that you know that the
13 value of A is roughly \$2 less than the value of
14 other.

15 Q. Okay. So if I wanted to know the
16 marginal value of a pen in that hypothetical, I
17 would actually need to add the marginal value
18 of a bottle of Purell?

19 A. Well, there is -- in your example?

20 Q. Yes.

21 A. Yes.

22 Q. The coefficient that you would get
23 isn't actually marginal value. It's marginal
24 value minus the value of -- the marginal value
25 of an other item. Right?

1 A. The coefficient here, yes.

2 Q. And that's, in fact, what your
3 coefficient does. When you come up with a
4 coefficient for, say, devotional minutes, your
5 coefficient, as Dr. Israel says, my coefficient
6 says the value of a devotional minute is X.
7 Your coefficient, if you just look at the
8 coefficient, says the value of a devotional
9 minute is either X more or X less than the
10 value of an other minute, an uncategorized
11 minute?

12 A. No, not an uncategorized -- well,
13 either a big -- uncategorized has its own
14 variable. So it is relative to either a Big 3
15 network minute or an off-air minute.

16 Q. Okay. So when you get a -- when you
17 get a positive coefficient for devotional
18 programming, as you did, right, you said in
19 your direct statement, as you did, you are
20 actually concluding that a minute of devotional
21 programming is worth more than a minute of Big
22 3 network programming?

23 A. Remember, this is Big 3 network
24 programming in distant markets.

25 Q. In distant markets.

1 A. So Big 3 network programming carried
2 on distant signals in distant markets, which
3 are non-compensable.

4 Q. Well, but hang on now. Your
5 coefficients include non-compensable minutes?

6 A. Yes. Oh, yeah.

7 Q. So when you get a positive
8 coefficient, I'm not talking about -- I mean,
9 after you get your coefficient, you then
10 multiply basically, I mean, you do sort of a
11 conversion to -- to take into account that you
12 have done this in logarithms, and so you
13 basically multiply by the fees of the system
14 times the -- times the number of minutes that
15 the system is carrying. Right?

16 I mean, that's all just algebra.
17 We're talking about your regression here,
18 right?

19 A. Actually, let me restate my previous
20 answer, because my previous answer was correct
21 but it was for my initial analysis. I think it
22 is a little cleaner if we talk about the
23 non-duplicate minute analysis because those
24 duplicate network minutes that I just mentioned
25 are dropped in the non-duplicate analysis.

1 So in the non-duplicate analysis I
2 measure the value of a devotional minute
3 relative to an off-air minute where there is no
4 programming at all.

5 Q. Relative to the value of an off-air
6 minute. You mean relative to the value of a
7 duplicated network minute?

8 A. No. Duplicated network minutes are
9 dropped from the analysis, in the
10 non-duplication analysis.

11 Q. Oh, okay. I understand what you are
12 saying now. All right.

13 A. It's okay. In my initial analysis,
14 there were -- the other category was Big 3
15 network programming and off-air programming.

16 But then in -- when I got rid of
17 duplicate network minutes, of course the Big 3
18 network minutes were no longer included, and so
19 then the other category in my non-duplicate
20 analysis is just off-air minutes.

21 Q. Wait a minute here. Wait a minute
22 here. Your non-duplicated minutes in your
23 non-duplicated analysis still included
24 non-duplicated network minutes, didn't they?

25 A. No, it -- I dropped duplicated network

1 -- no, it included non-duplicated network
2 minutes.

3 Q. Non-duplicated network minutes?

4 A. Yes.

5 Q. So if you have got an NBC station that
6 is being distantly retransmitted, that
7 non-duplicated minutes number includes the
8 minutes on that, you know, the NBC network
9 minutes on that station, as long as there is
10 not a local NBC affiliate in that market.
11 Right?

12 A. That's the key part. As long as there
13 is not a local NBC affiliate in that market,
14 that's correct.

15 Q. Right. Right. And so you did get a
16 positive -- a positive coefficient for
17 devotional in your non-duplicated minutes
18 analysis, right?

19 A. That's correct.

20 Q. Okay. Which would imply that
21 devotional minutes are actually worth more than
22 network minutes that aren't duplicated by a
23 local station?

24 A. I think that's right.

25 Q. But you didn't add back in, when you

1 are calculating marginal values, you didn't add
2 back in the value of those network -- those
3 non-duplicated network minutes that this
4 devotional programming in your model is
5 supposedly replacing. Right?

6 A. So I did not. I am trying to think if
7 it -- I am trying to think if it would matter.

8 Q. You should have, should you?

9 A. Well, that's what I am trying to think
10 about now.

11 Q. I mean, it is important whether you
12 should or shouldn't, right?

13 A. I feel very much --

14 Q. Because the minute of a network -- of
15 network programming, that could be substantial,
16 right?

17 A. Yeah, but so the -- when one does this
18 relative calculation, it basically would shift
19 up or down all the coefficient minutes and
20 there would be a common level shift.

21 Q. Right, a level shift. That's exactly
22 right.

23 A. Yeah.

24 Q. And for a -- and where your
25 coefficient is fairly low, as like for a

1 devotional, you know, minute, for example,
2 compared to where your coefficient is fairly
3 high, like a commercial television minute,
4 right, that level shift as a logarithm is going
5 to affect the devotional minute a lot more than
6 the commercial television minute, isn't it?

7 A. No, because the -- the -- this is all
8 happening after -- the coefficient -- ah, so
9 it's not so easy to figure out as I sit here.

10 Q. Well, we're about to do some
11 algebra --

12 A. Okay.

13 Q. -- to demonstrate it. But you see
14 what I am saying, right?

15 A. I see where you are going. All right.

16 Q. And isn't it correct that if your --
17 you are talking about a level shift, not in the
18 variable, a level shift in the coefficient,
19 right?

20 A. Yes, that's correct.

21 Q. So let's say just hypothetically that
22 your regression comes to the conclusion that,
23 you know, the coefficient for devotional is,
24 say, 10 cents a minute. Okay? I know that's
25 not what you come to. I am just making the

1 math easier.

2 A. Sure.

3 Q. 10 cents a minute. Okay? Your
4 coefficient for news, say, okay, a dollar a
5 minute. Okay? Again, just trying to make the
6 math easy. All right? If I found out that
7 network programming is worth 5 cents a minute,
8 okay, then how is that going to influence --
9 how would that influence the devotional
10 coefficient?

11 A. So the -- the problem with your
12 example is that the coefficients that are --
13 that would be shifted would be the parameters.
14 And those are not the same thing as the average
15 value per minute.

16 There is a -- there is a --

17 Q. True.

18 A. So that's the part of the math that
19 I'm considering.

20 Q. True. But to get to your marginal
21 value, you simply multiply -- I mean, you do
22 this because I understand you have got your
23 dependent variable is a logarithm.

24 A. That's exactly right, yes.

25 Q. You have an estimated approach for

1 converting your beta, which is supposed to
2 influence your logarithm, to an average of
3 something that is supposed to influence a level
4 amount of fees paid, right?

5 A. Yeah.

6 Q. And your conversion is simply -- you
7 just multiply that coefficient times the --

8 A. The royalty.

9 Q. -- the royalty for each system and
10 then multiply it by the number of minutes on
11 that system?

12 A. The number of compensable minutes.

13 Q. Compensable minutes. Thank you.

14 A. Yes.

15 Q. The number of compensable minutes.

16 A. That's right.

17 Q. So that's sort of your rough
18 estimation of how you can convert what -- what
19 started as a logarithm into a level number?

20 A. Exactly, yes.

21 Q. So let's put that aside. Okay? I
22 mean, we're looking at just the coefficients.
23 Okay? So this is the coefficient of how a
24 variable is going to influence the -- the log
25 amount of fees paid. Okay?

1 A. Yes.

2 Q. So let's say -- okay. Now I
3 understand why you got a little confused.
4 Okay.

5 Let's just say, to make math easy, the
6 coefficient that you get for devotional minutes
7 is .001. Okay?

8 A. Okay.

9 Q. And let's say that the coefficient
10 that you get from commercial television minutes
11 is .01. Okay?

12 A. Okay.

13 Q. And let's say that you were -- you
14 were able to determine that your coefficient
15 for non-duplicated network minutes was,
16 say, .0005. Okay? Half of -- half of the
17 coefficient that I gave you for devotional.
18 All right?

19 A. I understand.

20 Q. How would that influence the
21 coefficient for devotional programming versus
22 how it would influence the coefficient for CTV
23 programming?

24 A. I mean, it would move both
25 coefficients up by this -- this .005.

1 Q. By .005. So the devotional
2 coefficient in the hypothetical I just gave you
3 would go up to .015?

4 A. Yes.

5 Q. Right?

6 A. That's correct.

7 Q. From .01 to .015?

8 A. That's right.

9 Q. And the CTV coefficient would go
10 from .1 to .105. Right?

11 A. That's correct. But I am not sure
12 that it has an effect on the shares that come
13 out of the calculation.

14 Q. Well, the shares, the shares that you
15 are getting basically just come from
16 multiplying the coefficient times the amount of
17 fees paid times the number of minutes on each
18 signal -- on each station?

19 A. Right, but if all shares move up by
20 the same proportional amount, then there would
21 be no impact on the relative shares.

22 Q. Well, I mean, we can try that if you
23 want.

24 So let's say we have got -- we will
25 just use the examples I just gave. All right?

1 So you have got CTV minutes and times, okay,
2 the coefficient that you got.

3 A. Yes.

4 Q. Times the fees paid by a system, and
5 then you have summed this up over all the
6 systems, right?

7 A. That's correct.

8 Q. Okay. And I said system. I really
9 meant subscriber group.

10 A. Subscriber group.

11 Q. You have summed this up over all the
12 subscriber groups. Okay?

13 So, I mean, I am not, by adding
14 the .05 -- the .005, I am not changing the fees
15 paid, right?

16 A. The royalty doesn't change.

17 Q. Right, the royalty doesn't change.
18 The number of minutes doesn't change.

19 A. That's correct. So it is just --

20 Q. The only change is this (indicating),
21 this goes to 0.105. So it goes up by -- it
22 goes up by 5 percent, right?

23 A. That would appear to be true.

24 Q. Okay. And so now let's do the same
25 thing, okay, with devotional minutes times, we

1 said .01, times fees paid, okay, and then so
2 this is the -- and you summed this up over all
3 the systems, okay? Right?

4 A. Um-hum.

5 Q. Is that right?

6 A. Yeah, correct, yes.

7 Q. Now, so if I am going to substitute
8 this with now .015, right, I haven't changed
9 fees paid, right?

10 A. That's correct.

11 Q. I haven't changed the number of
12 minutes, right?

13 A. Right.

14 Q. So I have -- I have just put -- I have
15 just raised my devotional share by 50 percent,
16 given these -- given this hypothetical, right?

17 A. No, not necessarily, because remember
18 everything else is going up as well.

19 Q. Okay. I see what you are saying.

20 A. Do you see what I'm saying?

21 Q. Well, my devotional share relative to
22 CTV, I have -- I have -- devotional has gone up
23 as a percentage a lot more than CTV goes up?

24 A. Yes, that's true.

25 Q. Okay. You agree that in both cases it

1 would be a level increase in the -- in the
2 coefficient?

3 A. That's correct.

4 Q. Okay. I know you are still thinking
5 about it. Are you ready to agree with me that
6 you should have taken into account the value of
7 the -- of the coefficient that would be implied
8 for the non-duplicated network programming?

9 A. So I am not sure that I do. I am not
10 sure that I do.

11 Q. And you are not sure that you don't?

12 A. And I am not sure that I don't.

13 Q. Okay. Was Dr. Israel wrong to control
14 for other instead of all?

15 A. I think they are -- I consider them
16 both reasonable specifications. I don't think
17 he was wrong in particular or that I was wrong
18 in particular.

19 Q. Actually you don't know if you were
20 wrong, right?

21 A. Yeah.

22 Q. Okay. Another difference between your
23 specification and Dr. Israel's, you used
24 subscriber group level data and you include
25 fixed effect by system, correct?

1 A. That's correct.

2 Q. As we said before, that really means,
3 whereas Dr. Israel is looking at variation
4 among systems, your regression looks solely at
5 variation among subscriber groups within
6 systems, correct?

7 A. That's correct.

8 Q. So what you are really saying is that
9 among subscriber groups of a system, and the
10 interpretation of your -- of your regression
11 would be that, among the subscriber groups of a
12 system, okay, averaged out over all the
13 different systems, you are going to expect that
14 the higher-paying, higher fee-paying subscriber
15 groups are retransmitting comparatively more
16 minutes of, say, CTV programming than the lower
17 paid -- paying subscriber groups?

18 A. I mean, that's what the data tells me.

19 Q. I understand, yeah, that's what I am
20 saying.

21 A. Yes.

22 Q. Okay. That's after controlling for
23 the total number of distant minutes or the
24 total number of distant signals, right?

25 A. That's correct.

1 Q. And also controlling for the number of
2 subscribers for each of those subscriber
3 groups?

4 A. That's correct.

5 Q. Okay. Now, as we said before, about
6 half of all the systems only have one
7 subscriber group, so they are not contributing
8 at all to your -- to your coefficients?

9 A. That's correct, although it is a
10 smaller share of subscriber groups.

11 Q. Now, earlier we were talking about,
12 about those systems that have subscriber
13 groups, you know, maybe some subscriber groups
14 receiving a station on a local basis and
15 another subscriber group receiving a station on
16 a distant basis. Right?

17 A. That's correct.

18 Q. Okay. Where -- where is something
19 like that likely to happen?

20 A. Oh, I imagine for systems that overlap
21 multiple DMAs, where a DMA is a Designated
22 Market Area, television market.

23 Q. All right. One thing, one place I
24 want to key up. Let's take a look at page 12,
25 paragraph 41, of your written direct statement.

1 Okay. Is it up? Okay. Here it is. Good.

2 All right. Let's take a look at
3 paragraph 41. All right. Let's start this on
4 page 12 here, second line, the sentence that
5 begins "for example." Okay?

6 A. Um-hum.

7 Q. "For example, if households in
8 adjacent markets are more likely to have
9 similar interests than households in widely
10 separated markets, this can help explain why
11 more than 90 percent of all non-super-station
12 distant signals are imported from within 150
13 miles of the community receiving the signal."

14 Right?

15 A. That's correct.

16 Q. And your -- and your -- this
17 particular factoid that 90 percent of
18 non-super-station distant signals that are
19 imported are imported from within 150 miles of
20 the -- of the -- basically of the station,
21 correct?

22 A. Yes, that's my understanding.

23 Q. You say that -- you are basically
24 saying, well, because adjacent markets are
25 likely to have similar interests, this can help

1 explain why that would be the case. And you
2 say help explain.

3 Are there other factors you can think
4 of as to why this might be the case, that
5 stations tend to be retransmitted,
6 non-super-stations tend to be retransmitted
7 within about 150 miles of their -- of their --
8 of the station?

9 A. I mean, the thing I have in mind here
10 is that there is this idea of regional
11 interests. So, you know, so even if you are
12 not within the same television market, you
13 might be interested in the -- in the activities
14 nearby.

15 Q. That could help explain it. Right?

16 A. Yes.

17 Q. Can you think of other reasons why
18 this might be the case?

19 A. That was the dominant reason. But if
20 you have a particular reason in mind, I am
21 happy to evaluate it.

22 Q. Well, if a system wants to import a
23 distant signal, and let's say it is a
24 non-super-station, which means it doesn't have
25 a satellite linked up. Right? If a system

1 wants to import a distant signal to its market,
2 how does it get that signal in order to
3 distribute it to its subscribers?

4 A. I don't know that -- I am not certain
5 of the technology that they use.

6 Q. You agree that the signal does have to
7 be delivered, correct?

8 A. Yes.

9 Q. Okay. Do you happen to know what a
10 fiberoptic cable is?

11 A. I am familiar with what a fiberoptic
12 cable is.

13 Q. As an economist, would you expect
14 there to be a cost associated with -- with
15 laying a fiberoptic cable?

16 A. Yes, but I would imagine that the cost
17 would be -- for laying a fiberoptic cable?

18 Q. For putting one in place, yeah.

19 A. So is the question is there a cost
20 associated with laying a fiberoptic cable? I
21 imagine, yes, there is a cost.

22 Q. As an economist, you would expect
23 there to be?

24 A. I would expect there to be.

25 Q. And you would expect that cost to

1 increase the longer that cable has to go,
2 wouldn't you?

3 A. For, for laying a cable? Yes.

4 Q. Yeah. How about a microwave relay, do
5 you happen to know if microwaves can go over
6 the horizon?

7 A. So my understanding is that they
8 cannot.

9 Q. Okay. And so if you -- if you needed
10 to relay a microwave past the horizon, you are
11 going to need more microwave transmissions,
12 right?

13 A. Yes.

14 Q. Would you, as an economist, would you
15 expect there to be a cost associated with
16 relaying those microwave transmissions?

17 A. Yes, but I don't think either of these
18 costs are the material costs for transmitting a
19 distant signal.

20 Q. What's your basis for saying that?

21 A. I would -- I mean, I wouldn't expect
22 that, just in the sense that there is -- just
23 distributing the distant signal is a digital
24 object and there is, in general, the costs, the
25 costs industry-wide for distributing digital

1 goods has been falling for a long period of
2 time.

3 Q. Do you think they distribute signals
4 over the Internet?

5 A. I mean, the -- the underlying trunk
6 technology, you know, or the technology to
7 deliver digital programming is the same that is
8 used for the -- for -- so I don't know this.
9 So I don't know exactly how --

10 Q. Let's stick to what you know. Okay?
11 I think that's a good, you know, good
12 proposition. Okay?

13 Do you know if there is a cost
14 associated with delivering a signal a longer
15 distance?

16 A. For distant signals, I do not know.

17 Q. Okay. So let's take a look at how we
18 might expect this to play, a signal delivery to
19 play out in real life. Okay. You talked about
20 a system that maybe straddles the border,
21 right?

22 A. Um-hum.

23 Q. Okay? So this is my border. This
24 straight line is my border.

25 A. I see.

1 Q. This -- you can think of this if you
2 want to sort of like a Venn diagram, where this
3 -- these are the area, the geographical area
4 covered by the system. I have got subscribers
5 on both sides of the border line. Okay?

6 A. Um-hum.

7 Q. The border is the border of the DMA?

8 A. I understood that to be true, yes.

9 Q. Okay. Let's say we have got a couple
10 of stations, all right, these are my antennas,
11 all right, within this DMA, okay?

12 A. Okay.

13 Q. Right? These stations are local to
14 this subscriber group.

15 A. To both --

16 Q. To this -- to this --

17 A. The left half of this? Okay. I
18 understand.

19 Q. These signals are local to subscriber
20 group 1.

21 A. I understand.

22 Q. They're distant as to subscriber group
23 2.

24 A. I understand.

25 Q. Okay. So subscriber group -- so if

1 the system transmits these signals, gives these
2 signals to all its subscribers, they are --
3 they basically go into systems 2 -- subscriber
4 group 2's fees; they don't go into subscriber
5 group 1's fees, right?

6 A. Yes. Correct.

7 Q. Now, just as a matter of, you know,
8 the universe we live in, pretty good chance
9 both of these subscriber groups are getting
10 WGNA, because probably more than half the
11 systems out there carry WGNA, right?

12 A. I mean, many systems carry WGNA.

13 Q. I am actually trying to give you a
14 benefit here by saying, okay, this is -- we're
15 not just talking about minimum fees, because
16 we're going to just say that these systems,
17 these subscriber groups are both getting WGNA
18 on a distant basis. Okay?

19 A. Okay.

20 Q. All right. So subscriber group 1 in
21 this hypothetical would be paying the minimum,
22 the minimum fee. Subscriber group 2 is going
23 to be paying a little bit more than the minimum
24 fee. Right?

25 A. Okay. In this example, yes.

1 Q. In this example, right.

2 Now, in this example subscriber group
3 2, since most -- the bulk of the cable system
4 is on the local side of the border, so to
5 speak, subscriber group 2 is going to have a
6 lot fewer subscribers in this example?

7 A. In this example, yes.

8 Q. Okay. So where these signals are
9 retransmitted on a distant basis, they are
10 going to a subscriber group that has fewer
11 subscribers and, therefore, lower receipts than
12 are, we'll say, main subscriber group, right?

13 A. Okay.

14 Q. If this were a situation that you were
15 found across, you know, averaged across all of
16 your data on average, where a lot -- aside from
17 super-stations like WGNA and maybe a few others
18 that get a lot of coverage, you would expect on
19 the whole to find that -- scratch that.
20 Scratch that. I need to develop this a little
21 bit more before I am ready.

22 Are you familiar with or aware of the
23 practice of WGNA to substitute out some of its
24 news for other types of programming?

25 A. I understand that to be true.

1 Q. And in that circumstance you
2 understand that the type of programming it
3 tends to substitute in place of news is
4 devotional and Program Suppliers categories?

5 A. That is my understanding, yes.

6 Q. Okay. So if both of these subscriber
7 groups are getting WGNA on a distant basis,
8 okay, because that's our hypothetical, you
9 would actually expect both of them to be
10 receiving, on average, a bit -- I'm talking
11 about both non-compensable and compensable
12 minutes because your regression doesn't
13 distinguish that at this level, right?

14 A. That's correct.

15 Q. Okay. So you are going to expect a
16 little bit more Devotional, a little bit more
17 Program Suppliers on, you know, on WGNA, right?

18 A. Yes.

19 Q. And on average you would expect that
20 these local signals are going to have, you
21 know, as compared to WGNA, a little bit more
22 news because WGNA is substituting out its news
23 and putting in Program Suppliers instead,
24 right, and Devotional?

25 A. I mean, the -- are you talking about

1 news on the local station?

2 Q. Yeah. Well, let's put it this way:
3 These local stations might have news programs,
4 right? They might, right?

5 A. They might, yeah.

6 Q. And if they do, they are not
7 substituting them out, right?

8 A. I assume not, but I didn't analyze the
9 news programs on local stations.

10 Q. Okay. So if these two signals, okay,
11 have more sports and more news than WGNA does,
12 then that -- then ultimately what that means is
13 system 2 is getting more sports and more news
14 in terms of minutes, distant minutes than
15 system 1 would be getting, correct?

16 A. Oh, I see. Can you repeat that,
17 please?

18 Q. Assuming that these two local stations
19 have more sports and more news than WGNA, the
20 nationally-available signal --

21 A. Right, yes.

22 Q. -- that would imply that subscriber
23 group 2 is retransmitting on a distant basis
24 more minutes of sports and news than subscriber
25 group 1, right?

1 A. It is hard to say because we haven't
2 talked about what are the local signals
3 available in subscriber group 2.

4 Q. I just said, though, they have more
5 sports and more news than WGNA.

6 A. No, but the local stations in
7 subscriber group 2. So subscriber group 2 can
8 also have local stations.

9 Q. Well --

10 A. Yeah, but that's not part of our
11 hypothetical.

12 Q. That's not part of the hypothetical.

13 A. Excuse me. Excuse me.

14 (Laughter.)

15 BY MR. MacLEAN:

16 Q. If something like this, okay, where
17 the local stations have on average more sports
18 and more news, right, than a
19 nationally-available signal like WGNA --

20 A. Yes.

21 Q. -- then you would expect to see a
22 certain correlation in your regression as a
23 result of that?

24 A. But the -- I mean, the -- but the
25 number of minutes of sports and news on local

1 stations doesn't enter into the regression. It
2 is only the -- the minutes of distant
3 programming.

4 Q. Right. Exactly. So group 2 in this
5 hypothetical has more minutes of sports and
6 news on a distant basis, right?

7 A. Oh, I see. Yes. Okay. Yes, yes, I
8 see. I'm sorry, somehow I was missing this.
9 Yes.

10 Q. Okay. Now, you are controlling for
11 the number of subscribers as between group 1
12 and group 2, right?

13 A. That's true.

14 Q. So you might expect that group 2 is
15 paying less in fees than group 1, if group 1
16 has more subscribers, right?

17 A. I mean, if group 1 has more
18 subscribers, but by the same token it could be
19 switched. I mean, group 1 could have fewer
20 subscribers and group 2 could have more
21 subscribers.

22 Q. Could be, yeah. Okay. But, I mean,
23 you are controlling for the number of
24 subscribers?

25 A. Yes.

1 Q. You are not controlling for the log
2 number of subscribers?

3 A. That's correct.

4 Q. But in this hypothetical group 2 is
5 retransmitting more signals, right?

6 A. That's correct.

7 Q. And, therefore, pays a higher fee as a
8 result of retransmitting more signals?

9 A. Pays a higher rate, yeah.

10 Q. Okay. Fair enough.

11 A. Yeah, it depends on the size of the
12 gross receipts and the subscriber group.

13 Q. Right. If you were to average this
14 out over all -- lots of different -- if you
15 found a trend that says basically something
16 like this, okay, that subscriber groups are,
17 you know, often retransmitting WGNA with
18 comparatively fewer minutes of news, but those
19 subscriber groups that are retransmitting more
20 than just WGNA tend to retransmit more minutes
21 of news and more minutes of sports, you would
22 expect that to show up as a more positive
23 coefficient for news and sports in your
24 regression, right?

25 A. This one I have to think through for a

1 moment. I mean, it -- it -- given your
2 premise, that there is relatively more news and
3 sports, then that would follow from your
4 premise.

5 Q. In your -- in your experience in
6 looking at the data and so forth, do you find
7 that, setting aside WGNA for a moment --

8 A. Sure.

9 Q. -- do you find that signals tend to be
10 retransmitted from larger markets into smaller
11 markets or are you finding that signals tend to
12 be retransmitted from smaller markets into
13 larger markets?

14 A. They tend to be, from my
15 understanding, they tend to be transmitted from
16 larger markets, carried -- the smaller markets
17 carry larger markets' signals, as a rule.

18 Q. Okay. All right.

19 And in your experience, do major
20 sports teams, okay, Boston Red Sox or something
21 like this -- where are the Boston Red Sox?

22 A. Where are they?

23 Q. Yes.

24 A. They are in Boston.

25 Q. Okay. Major sports teams, do they

1 tend to be associated with big cities?

2 A. They do.

3 Q. Who is more likely to have a major
4 sports team on its -- on its signal, a station
5 that's in a major city or a station that's away
6 from a major city?

7 A. Who is more likely to have it on their
8 local signal?

9 Q. Yeah, where is the station going to
10 be? If somebody is going to carry the Boston
11 Red Sox, where is that station going to be?

12 A. Of course it would be in Boston.

13 Q. You are not going to have the Boston
14 Red Sox probably on some rural station, right?

15 A. I mean --

16 Q. I mean, not as likely, not as likely.
17 How about we will just say it like that.

18 A. Yeah, not as likely, yes.

19 Q. So when you have a situation like
20 this, okay, where you have got a system that
21 straddles the border, all right, it is more
22 likely going to be in the case where the
23 signals are being retransmitted from, say, the
24 city side of the border into, say, the maybe
25 suburban side of the border, you might say,

1 right?

2 A. Sure.

3 Q. So the signals that are more likely to
4 retransmit things that are of sort of, you
5 might say, big market interest, like big sports
6 teams, major sports teams, maybe major local
7 news programs --

8 A. Sure.

9 Q. -- and so forth, they are more likely
10 to be retransmitted from the city center area
11 out to the either more suburban or more rural
12 areas?

13 A. I think that's right, yes.

14 Q. And you don't know -- you don't
15 control for geography anywhere in your
16 specification, do you?

17 A. No, I don't believe so.

18 Q. You don't have any control variable,
19 for example, distanced from the station or
20 something?

21 A. No, I do not.

22 Q. Even though distance from the station
23 could be an important consideration?

24 A. I mean, it will, of course, show up in
25 the set of distant signals that a station --

1 that a CSO chooses to carry, as described in
2 the pattern that you -- that we covered from my
3 testimony.

4 Q. But if we find that, you know, that,
5 say, smaller systems or systems in smaller
6 markets are retransmitting, say, more sports,
7 more news, or something on a distant basis,
8 that could be in part a result of a geographic
9 effect?

10 A. Sure.

11 Q. And let's take a look at your
12 regression results, because there are a number
13 of places where you can see this in a way.
14 Page B-1 of Exhibit 2004. I am going to look
15 at a number of these. Can we zoom in a little
16 bit just so we can see the table a little bit
17 better, the whole table? Okay.

18 Let's look at your initial analysis.
19 We will start there. Okay?

20 A. All right.

21 Q. Take a look at number of permitted
22 stations rebroadcast to the subscriber group.

23 A. Yes.

24 Q. Okay? Your regressions here, your
25 coefficients are actually pretty small, but

1 importantly, for our purposes, statistically
2 insignificant?

3 A. That's correct.

4 Q. You wouldn't calculate share based on
5 a statistically insignificant -- I mean, I know
6 you don't use this to calculate a share, but
7 you wouldn't calculate a share based on a
8 statistically-insignificant result, would you?

9 A. Well, I didn't have to confront that
10 problem. So --

11 Q. Okay.

12 A. So I didn't. I didn't calculate a
13 share based on statistically insignificant.

14 Q. Statistically insignificant means you
15 can't falsify the null hypothesis, correct?

16 A. You can't falsify the null hypothesis
17 that the coefficient is zero, yes.

18 Q. The first step of that -- I mean, I
19 just want to, since I am on this track, the
20 first step a statistician is going to look at
21 is can I falsify the null hypothesis?

22 A. Well, or we say reject the null
23 hypothesis. But often that is the first thing
24 you would do if you cared about zero. I mean,
25 sometimes you might care about some other

1 number. But here I think we care about zero.

2 Q. Okay. Fair enough. All right.

3 So very little, very little effect,
4 statistically-insignificant effect of the
5 number of permitted systems retransmitted to
6 the -- to the subscriber group, correct?

7 A. That's correct.

8 Q. Number of subscribers to the
9 subscriber group in the previous accounting
10 period, all right, strongly correlated with the
11 log of fees paid, as we would expect, right?

12 A. As we would expect, yes.

13 Q. It probably would have been more
14 strongly correlated if you had used log distant
15 drivers?

16 A. Yes, but then it would just be
17 replicating the royalty formula.

18 Q. But now let's take a look at number --
19 first of all, permitted stations rebroadcast to
20 the subscriber group, that's just -- that's all
21 stations, right, that's local and distant
22 stations?

23 A. This -- permitted stations has a
24 special meaning related to the 3.75 fee.

25 Q. It is not local versus distant, right?

1 A. No, not to my --

2 Q. You have got another control variable
3 for number of distant signals rebroadcast to
4 the subscriber group?

5 A. Exactly, yeah. Yes.

6 Q. Okay. Can we highlight that one? All
7 right. Now we're looking at your initial
8 analysis here and a negative coefficient.

9 A. Yes.

10 Q. For number of distant signals.

11 A. Yes.

12 Q. So by your -- by your analysis, your
13 regression is anticipating that when I add
14 distant signals, I am actually going to pay
15 less in fees?

16 A. Yes.

17 Q. For that subscriber group?

18 A. Yes, but that's a little bit of a
19 quirk of the -- of the DSE calculations.

20 Q. I understand it is a quirk. We're
21 about to get, you know, into that.

22 A. Okay.

23 Q. The main component on distant signals
24 that is not otherwise categorized, isn't put
25 into these categories, you know, sports,

1 program suppliers, so forth, the main component
2 of what else is on that distant signal is
3 network programming, right?

4 A. Yeah, Big 3 network programming and
5 off-air programming in the initial analysis.

6 Q. So your -- your regression
7 specification here actually says that network
8 programming is of negative value?

9 A. No, that's not how I would interpret
10 that coefficient.

11 Q. Okay. All right. Go ahead.

12 A. So I think -- so the -- this -- the
13 number of distant signals carried on a station,
14 the way that -- to understand that coefficient
15 is to imagine two environments, one where there
16 is an independent station with a particular
17 portfolio of the minutes of the -- of the six
18 programming categories, and suppose that they
19 have -- all the minutes were of the six program
20 categories.

21 And then imagine another equivalent
22 subscriber group that had two network stations
23 with half of its -- each network station had
24 half of the total minutes of the six
25 categories, so that the total across the two

1 stations would be equal to the total minutes of
2 the independent station.

3 And then, of course, the other half
4 would be network programming, non-compensable
5 network programming. But because network
6 stations are -- only pay royalties of .25 DSE,
7 the royalty would be only at the .5 DSE level
8 compared to the full DSE for the -- for the --
9 for the -- for the independent station.

10 And so basically this says that this
11 number of distant signals is capturing the fact
12 that the DSE payment is lower for the -- for
13 these network stations.

14 Q. Well, if that were the case, if that's
15 what it was picking up, why wouldn't you have a
16 negative coefficient for Public Television,
17 which also is at .25?

18 A. Yeah, but Public Television, you can't
19 isolate the effects of the -- of controlling
20 for the other number of minutes of the other
21 program categories constant with the Public
22 Television, with the Public Television example.

23 Q. You would agree that what this
24 basically says for the number of distant
25 signals rebroadcast to the subscriber group is

1 that there would be a negative coefficient for
2 minutes of network programming, if you had a --
3 if you had a coefficient for minutes of network
4 programming?

5 A. No, it just says -- I mean, it
6 reflects -- remember, the dependent variable is
7 royalties, so it reflects that if you have --
8 if you have distant signals that have more
9 network programming and they pay less in
10 royalties, of course that's going to show up as
11 a negative coefficient there.

12 Q. That's what I just said. It's a
13 negative coefficient.

14 A. No, but it is not -- I think it's more
15 an artifact of the DSE structure than of the
16 value of the number of programming.

17 Q. Okay. But it is a negative
18 coefficient for log of fees paid, right?

19 A. Yes.

20 Q. And network minutes have a negative
21 coefficient in your regression?

22 A. So somehow I am struggling to think
23 through -- so I don't think that's right, but I
24 can't articulate it at the moment.

25 Q. I can help you.

1 A. All right.

2 Q. Let's take a look at your
3 non-duplicate minute analysis.

4 A. Sure.

5 Q. Okay? Let's keep -- let's -- and
6 let's highlight, you have added one coefficient
7 here towards the bottom, total number of
8 non-duplicated minutes. Okay?

9 A. Um-hum.

10 Q. You have got a negative coefficient
11 there, right?

12 A. Yes.

13 Q. Now, that negative coefficient would
14 be reflective of the coefficient that would go
15 with non-duplicated network programming,
16 correct?

17 A. That's correct.

18 Q. Okay. So this is network programming
19 that doesn't have a -- a local station's
20 transmitting the same thing, right?

21 A. Yes, so yes.

22 Q. Now, this is important, and you do
23 describe why you would do analysis like this.
24 Part of the reason is, I mean, you said on oral
25 examination, you said: Well, as an economist,

1 you don't expect subscribers to value something
2 that they are already getting somewhere else,
3 basically.

4 A. Yes.

5 Q. To me that makes some sense. You also
6 -- another reason you give in your written
7 testimony is that where you are distantly
8 importing a network signal, if there is already
9 a local network signal in that, in that area,
10 you would expect in many cases -- it depends on
11 the miles and so forth -- but there is, you
12 know, there is a regulatory regime that would
13 require the duplicated network minutes to be
14 blacked out?

15 A. That's my understanding.

16 Q. And your assumption is that
17 subscribers and, therefore, cable systems don't
18 value blacked-out programming?

19 A. That's correct.

20 Q. Would you -- I mean, do you feel
21 confident in that assumption?

22 A. Yes. I mean, there is nothing to
23 watch.

24 Q. Okay. So here, though, you have got
25 -- you have got a negative coefficient for

1 total number of non-duplicated minutes, which
2 would imply a negative coefficient for
3 non-duplicated network minutes. Right?

4 If I could help you with an
5 illustration.

6 A. Yes.

7 Q. If I am going to hold the total number
8 of non-duplicated minutes equal, okay, hold
9 that the same, and I am going to add, you know,
10 a minute of CTV programming, for example.

11 A. Sure.

12 Q. Holding everything else the same.
13 Okay? I am adding a minute of CTV programming,
14 so what am I replacing?

15 A. You have to be replacing some network
16 programming.

17 Q. Non --

18 A. Non-duplicated network programming.

19 Q. Not duplicated network programming?

20 A. Yes.

21 Q. So it is the non-duplicated network
22 programming --

23 A. Yes.

24 Q. -- that has a negative coefficient,
25 right?

1 A. Yes, but -- yes, but I think it is an
2 artifact of the royalty structure.

3 Q. I know it is an artifact. Okay?
4 We're in agreement.

5 A. Okay.

6 Q. Okay. So now look up, still staying
7 with this non-duplicated analysis, look up to
8 your number of distant signals rebroadcast.

9 A. Yes.

10 Q. Okay? You have got a positive, not
11 statistically significant, but positive
12 coefficient there, right?

13 A. Yes, that's correct.

14 Q. Okay. And if I am increasing, say,
15 okay, the total number of non-duplicated
16 minutes, holding all else the same, okay, what
17 am I replacing on the -- what am I replacing
18 when you have got a control for distant
19 signals?

20 A. I mean, the number of distant signals
21 rebroadcast in the non-duplicate analysis is
22 controlling for something very similar to the
23 number of non-duplicated minutes. So it is --
24 these are fairly highly correlated.

25 So --

1 Q. Well, wait a minute here. The number
2 of distant signals, that still includes -- I
3 mean, a distant signal is all the minutes,
4 right, I mean, whether it is duplicated or not,
5 right?

6 A. Right, but the -- the number of
7 distant signals is proportional to the total
8 number of minutes.

9 And if you add up the distant minutes
10 of these claim categories plus the number of
11 total non-duplicated minutes, that's going to
12 be pretty close to proportional to --

13 Q. It's very close, right?

14 A. Right. Exactly.

15 Q. But there is a difference between
16 them. Right? What's the difference between
17 the total number of minutes on the distant
18 signal and the total number of minutes of --
19 total number of non-duplicated minutes?

20 A. It would be the duplicated minutes.

21 Q. Duplicated minutes.

22 A. Yeah.

23 Q. Some of which is likely blacked out,
24 right?

25 A. Exactly, yes.

1 Q. Now, we can actually, with a little
2 bit of algebra, we can actually convert,
3 without changing anything else, these
4 coefficients to show a coefficient for the
5 duplicated minutes, couldn't we?

6 A. I mean, the number of distant signals
7 is statistically -- it's not statistically --
8 significancy you might be a little wary about
9 doing that, but I'm curious to see your
10 calculation.

11 Q. Okay. I am so glad you asked.

12 A. I think you were going to go there
13 anyway.

14 (Laughter.)

15 Q. Okay. So the hypothesis that I'm
16 proposing is, all right, my -- your coefficient
17 for non-duplicated minutes, total
18 non-duplicated minutes, is simply the negative
19 of a coefficient for duplicated minutes. Okay?

20 So you help me walk through this.

21 A. The negative for the coefficient for
22 duplicated minutes?

23 Q. Yes.

24 A. Okay.

25 Q. Okay? So with an adjustment to the --

1 to the coefficient for signals, okay, I'm going
2 to use gammas here. Okay? I have got gamma
3 with your number of unduplicated minutes.

4 A. Um-hum.

5 Q. Okay? Plus you have got a gamma for
6 your number of distant signals, okay?

7 A. Um-hum.

8 Q. All right? So these are two of your,
9 well, you know, 7,000 something terms, right?

10 A. Um-hum.

11 Q. Okay. So let's just assume that I'm
12 just focused on these two. I am going to
13 assume that everything else remains exactly
14 identical. Okay?

15 A. Okay.

16 Q. And I'm going to see whether I can get
17 out of this a coefficient for duplicated
18 minutes. Okay?

19 A. Okay.

20 Q. This term is equal to the number of
21 signals, okay, this is my unduplicated minutes
22 term, it is the number of signals times how
23 many minutes on a signal?

24 A. About 500,000.

25 Q. About 500,000. But you are forgetting

1 you used accounting periods, right?

2 A. Oh, yeah, okay, so half that.

3 Q. Okay. Half of about -- it is 262,800.

4 I mean, it might change on leap years or
5 something.

6 A. Okay.

7 Q. So number of signals times that number
8 of -- total number of minutes, okay, minus the
9 duplicated minutes, right?

10 A. I mean --

11 Q. Your unduplicated minutes are the
12 total --

13 A. Oh, yeah, total, yeah.

14 Q. -- total number of minutes minus the
15 duplicated minutes, right?

16 A. Agreed, yes.

17 Q. Okay. So that's that term. Plus
18 gamma 2 my number of signals, okay?

19 A. Um-hum.

20 Q. All right?

21 A. Yes.

22 Q. Now I have got duplicated minutes and
23 signals in both of my terms here.

24 A. I agree.

25 Q. Okay? Now it's just a matter of

1 algebra.

2 A. I agree.

3 Q. So this is equivalent to gamma 1 times
4 signals, times 262,800, minus gamma 1 of my
5 duplicated minutes plus gamma 2 for my signals,
6 right?

7 A. Um-hum.

8 Q. Okay? This is equivalent to negative
9 gamma 1 of my duplicated minutes, right?

10 A. Um-hum.

11 Q. Plus, we will say 262,800 gamma 1 Sigs
12 plus gamma 2 Sigs, right?

13 A. Um-hum.

14 Q. Which is equal to negative gamma 1
15 duplicated minutes plus 262,800 gamma 1 plus
16 gamma 2 number of signals, right?

17 A. Um-hum.

18 Q. Yes?

19 A. Yes. I agree with your algebra.

20 Q. Okay. So after I do this conversion,
21 I can see that, with this adjustment, this
22 adjustment here, to the coefficient for my
23 number of distant signals, I can make my -- I
24 can show that my coefficient for the number of
25 duplicated minutes is the negative of the

1 coefficient for unduplicated minutes, right?

2 A. But of course gamma 1 enters both in
3 two places. So --

4 Q. Well, right. I have to adjust this
5 coefficient. So let's see. Bring -- could you
6 bring up the regression results again? You
7 know what, leave it on the ELMO. I can do
8 this. This will be -- this will work better
9 this way.

10 Okay. So my gamma 1 here is your --
11 is your duplicated minutes gamma, right?

12 A. Yes.

13 Q. Which in your regression, in your
14 regression results is negative .00000265,
15 right?

16 A. That's correct, yeah.

17 Q. Okay. So if I wanted to take the --
18 if I wanted to figure out after doing this
19 algebra the coefficient for duplicated minutes,
20 I would take the negative of that, so the
21 duplicated minute coefficient will now be
22 positive 0.00000265, right?

23 A. I mean, I agree with your math. I
24 don't necessarily agree with the interpretation
25 of it.

1 Q. Okay. Okay. And then for gamma 2,
2 the equivalent to gamma 2 here is the number of
3 distant -- where is it here -- distant signals,
4 okay, that's the positive .11837, right?

5 A. Um-hum.

6 Q. Now I could -- I could multiply gamma
7 1 times 262,800, add it to -- add it to 0.11837
8 and I come up with -- I will just represent
9 that it is negative 0.57805, okay?

10 A. Okay.

11 Q. So what I have just done there is to
12 show how, using your regression results, we can
13 -- we can show that a positive coefficient for
14 unduplicated, I'm sorry, a negative coefficient
15 for unduplicated minutes is equivalent to a
16 positive coefficient for duplicated minutes,
17 right?

18 A. I mean, I agree with your algebra. I
19 am not yet agreeing with your interpretation.

20 Q. Well, I mean, I haven't interpreted it
21 yet. I am just saying that's -- the
22 coefficients are equivalent.

23 Now I will interpret it.

24 A. Okay.

25 Q. Because this would imply, if this --

1 if this is accurate, okay, that not only do
2 your unduplicated minutes have a negative
3 coefficient, your duplicated minutes, those
4 minutes of blacked-out programming, largely
5 blacked-out programming, have a positive
6 coefficient.

7 And that if we're willing to interpret
8 these coefficients as inputs into marginal
9 value, cable systems, if we're to put that
10 interpretation on, cable systems actually do
11 value that blacked-out programming more than
12 they value unduplicated network programming?

13 A. Yeah, I mean, the -- the -- so part of
14 this whole calculation, of course, relies on
15 this -- on the inclusion of the
16 statistically-insignificant distant signals,
17 you know, parameter.

18 So I think that throws off the
19 analysis somewhat.

20 Q. Well, I mean, either way, these
21 unduplicated minutes -- I mean, the distant
22 signals is just the sum of duplicated minutes,
23 unduplicated minutes, divided by the sum of the
24 total minutes, 262,800, right?

25 A. I agree.

1 Q. And the distant signal, you already
2 had a statistically-significant coefficient for
3 unduplicated minutes. You already had a
4 statistically-insignificant coefficient for
5 your number of signals.

6 Your number of signals already, in
7 essence, included the unduplicated minutes for
8 which you have a statistically-significant
9 coefficient, right?

10 A. I'm sorry, I was thinking elsewhere
11 when you were speaking. Could you -- do you
12 mind repeating the question?

13 Q. Your variable for signals already
14 implicitly included the -- the unduplicated
15 minutes, right?

16 A. Yes, it included all minutes.

17 Q. And it also included the duplicated
18 minutes, right?

19 A. Yes.

20 Q. Okay. And you did get a
21 statistically-significant result for your
22 unduplicated minutes, right?

23 A. Yes.

24 Q. So all we really did was just take out
25 those -- the unduplicated minutes out of the

1 signals, put in the duplicated minutes?

2 A. I mean, the -- I would not overly
3 interpret the total number of non-duplicated
4 minutes in the sense that the role it plays in
5 the non-duplicate analysis is very similar to
6 the roles -- the role that the number of
7 distant signals plays in the -- in the --

8 Q. Well, let's be precise. Okay? I
9 mean, you are saying the role it plays. You
10 are talking about the role that you intended
11 for it to play. Right?

12 The role it plays in your regression
13 specification is, when you multiply the
14 variable by the coefficient, you add it to all
15 the other variables, multiply it by their
16 coefficients, you come up with a -- with a --
17 with a number that you predict is going to be
18 close to the amount of fees paid.

19 That's the role it plays, just like
20 every other coefficient in your -- in your
21 specification. Right?

22 A. I mean, I missed the last half of
23 that, the -- the -- just the part before.

24 Q. You add up all the variables with the
25 respective coefficients, you add them all up,

1 you come up with an expected amount of fees
2 paid. That's what the regression specification
3 did?

4 A. Yes, for the claim categories.

5 Q. The role that this coefficient plays
6 for unduplicated minutes, I mean, you may have
7 a different intention, but in terms of what it
8 does to your regression specification, it is
9 just like every other, every other coefficient
10 you have. You are multiplying it by a
11 variable, adding it to the sum, right?

12 A. I mean, except this one doesn't add in
13 -- enter into the sum for the --

14 Q. Well, you don't use it to calculate
15 shares?

16 A. Exactly.

17 Q. There are no --

18 A. Oh, you mean enter into the sum of the
19 -- of the regression equation?

20 Q. Right.

21 A. Yes, yes.

22 Q. Okay.

23 JUDGE BARNETT: Mr. MacLean, we have
24 to have a break. We will be at recess for 15
25 minutes.

1 (A recess was taken at 3:27 p.m.,
2 after which the hearing resumed at 3:47 p.m.)

3 JUDGE BARNETT: Good afternoon.
4 Please be seated. Between blueberries, my
5 antioxidants are up. I'm ready.

6 BY MR. MacLEAN:

7 Q. Okay. Dr. Crawford, I just have a
8 couple more questions on this and then we'll
9 move on to another topic.

10 A. Very good.

11 Q. All right. So we have here -- you've
12 -- you've said you agree with my algebra.

13 A. I agree with your algebra.

14 Q. We have here a positive coefficient
15 for duplicated minutes of programming, correct?

16 A. According to your algebra, that's
17 correct.

18 Q. Okay. And positive coefficient
19 being .00000265 positive, right?

20 A. That's correct.

21 Q. Okay. So taking a looking at your
22 regression results, if we were to interpret
23 your coefficient as an input into marginal
24 value, which is what you do, right?

25 A. That's correct.

1 Q. Not only does duplicated, which means
2 often blacked out network programming, have a
3 positive coefficient, it is, in fact, more
4 positive than three of the six program
5 categories in your -- in your regression; is
6 that right?

7 A. So that -- so I -- I disagree with the
8 interpretation of the -- even though I agree
9 with your algebra, I disagree with the
10 interpretation of the coefficient as measuring
11 the value of duplicated minutes, duplicated
12 network minutes.

13 Q. Because your coefficient doesn't
14 measure value, does it?

15 A. No, not for that reason. But because
16 -- I mean, in essence, this is a non-duplicate
17 minute analysis. So it -- it doesn't have
18 duplicate minutes in it.

19 And so it -- by virtue of that, by
20 virtue of that feature, it's not able to reveal
21 the value of duplicate minutes.

22 Q. It does have duplicate minutes in it
23 in -- in the distant signals --

24 A. Right.

25 Q. -- Variable, right? That's where I

1 got the duplicated minutes, from the distant
2 signals variable, right?

3 A. The statistical insignificance of the
4 duplicated signals variable indicates that --
5 and, in fact, I'm -- we actually ran this
6 analysis without the duplicate -- without the
7 number of distant signals variable, and you get
8 qualitatively the same result.

9 So the -- because that's -- because
10 that's so highly correlated with the number of
11 non-duplicate minutes, essentially you could
12 leave that out of the analysis and -- and then
13 the interpretation of the non-duplicated
14 coefficient as a measure of duplicated minutes
15 would not be appropriate.

16 Q. Well, if you didn't include a distant
17 signals variable, then it would be a different
18 interpretation, right?

19 A. No, but I mean -- I think the --

20 Q. I wouldn't be able to do my algebra if
21 you hadn't included a distant signals variable?

22 A. Right, but -- I understand that, but
23 from an econometrics perspective, the number of
24 -- there aren't so many duplicate minutes. And
25 so the number of distant signals, which is a

1 measure of total minutes, is very, very highly
2 correlated with the total number of
3 non-duplicated minutes.

4 And so in some sense, the regression
5 is trying to tease out the very -- very nuanced
6 difference between these two variables. And in
7 retrospect, the -- the role of the number of
8 distant signals variable in the initial
9 analysis was critical, and then once I moved to
10 the number of non-duplicate minutes analysis,
11 then the role of that number of distant signals
12 variable fell to the total number of
13 non-duplicate minutes, and I could and perhaps
14 should have dropped the number of distant
15 signals variable and none of the -- the
16 qualitative conclusions from the non-duplicate
17 analysis change.

18 Q. Well, the -- I'll get to that in a
19 second, but your total number of non-duplicated
20 minutes, all that is, is the total number of
21 minutes minus the total number of duplicated
22 minutes, right?

23 A. I mean, the total number of
24 non-duplicated minutes is -- yes, but it's also
25 the sum -- yes, but it's also and more

1 importantly the sum of the six minutes of the
2 program categories and the excluded category,
3 which in this non-duplicate analysis is
4 non-duplicated Big 3 network programming -- not
5 Big 3 -- but non-duplicated network programming
6 and off-air programming.

7 And it's important to not lose sight
8 of this off-air programming as well because
9 that -- that's exactly where this negative
10 coefficient comes from, is that, as I was
11 trying to articulate in the context of the
12 initial analysis, the -- the -- what that total
13 non-duplicated minutes is trying to capture is
14 the thought experiment of two -- two subscriber
15 groups, one with a certain portfolio of minutes
16 of the six categories, another one with that
17 same portfolio of minutes divided across two
18 network stations for which royalties are lower,
19 and all this coefficient, this negative
20 coefficient, says is that cable systems value
21 less the same portfolio of minutes if it comes
22 with a bunch of, in this case, non-duplicate
23 network programming and especially off-air
24 programming.

25 And so that negative coefficient says

1 cable systems just don't value this -- this --
2 distant signals with this portfolio of -- of
3 especially off-air programming.

4 Q. Well, you say especially off-air
5 programming. You haven't done a regression in
6 which you calculate separate coefficients for
7 network programming and off-air programming,
8 have you?

9 A. I have not -- I think you mean to say
10 non-duplicate network programming.

11 Q. Non-duplicate network programming.

12 A. And off-air programming. No, I did
13 not -- I did not separate those out?

14 Q. You lumped them both in the same
15 category, right? Basically. I mean, that's
16 the effect of what you've done here, is to lump
17 them in the same category?

18 A. That's true. And I -- and I'm not
19 sure how empirically relevant non-network -- I
20 don't know, actually, how common it is to have
21 non-network -- non-duplicate network
22 programming carried on distant signals as a
23 share of minutes of -- of the other category.

24 Q. Why else would you carry network
25 programming -- why else would a subscriber

1 group import network programming?

2 A. Well, because there's -- I mean,
3 there's other -- quite -- there's syndicated
4 programs -- I mean, there's all sorts of other
5 programming on network stations, besides
6 network programming.

7 Q. So you don't think distant signals --
8 you don't think cable systems value the ability
9 to import a non-duplicate network station into
10 their market?

11 A. Oh, I'm sure they do.

12 Q. For the network programming?

13 A. I'm sure they do, but at the moment,
14 this coefficient lumps that together with
15 off-air.

16 Q. Right. It treats them the same,
17 right?

18 A. Well, so then what it's going to
19 report is the average effect of the off-air
20 minutes and the non-duplicate network program
21 minutes, and that --

22 Q. There is no way to tell, from your
23 regression results, which is having the
24 influence on your -- on your coefficients,
25 right?

1 A. Well, I -- there's no way to tell from
2 the regression results which is having the
3 influence on those coefficients.

4 Q. Right.

5 A. Excuse me, on that coefficient.

6 Q. Well, on any coefficient? Your -- you
7 -- because you always lump off-air programming
8 with network programming, none of your -- none
9 of your coefficients tell you which one, which
10 one is having the influence on the
11 coefficients, the off-air programming or the
12 non-duplicated network programming, right?

13 A. Well, I mean, which is having an
14 influence on that coefficient?

15 Q. On any coefficient, right? You have
16 no control variable for off-air programming,
17 right?

18 A. Off-air and -- I have no separate
19 control from off-air programming other than
20 other. I mean, it's lumped together with the
21 non-duplicate network programming.

22 Q. Right. And you actually don't have a
23 control variable for other; as we've discussed,
24 you have a control variable for essentially
25 total?

1 A. Exactly. But I was following your
2 lead and interpreting using the total for the
3 implications of what it meant for the other.

4 Q. Well, you say following my lead. I
5 mean, I'm -- did I lead you astray? Is that --

6 A. No, no, I meant to say to follow your
7 lead in the discussion, not to -- not that you
8 were leading me.

9 Q. Okay. I don't want to mislead you.

10 A. No, no. You have not.

11 Q. Okay. Can we pull up -- well, let me
12 just ask, if we were to interpret your
13 coefficients as an input into marginal value,
14 that would -- this would essentially falsify
15 your hypothesis that cable systems do not value
16 duplicate network programming, correct?

17 A. No, I -- no, I mean, I think you
18 should follow my lead in -- in using the minute
19 categories, especially for the six claimant
20 categories as inputs into marginal value. And
21 I don't think that this -- because I don't
22 think in principle that number of distant
23 signals should be in the second regression, I
24 don't agree with the -- the logic of the -- and
25 as I say, the results are qualitatively

1 identical when one drops that.

2 Q. But it is in the second regression,
3 right?

4 A. But you're forcing an interpretation
5 on it that it doesn't merit. I mean, you also
6 can't -- essentially you can't reject the
7 hypothesis that it should not be in the
8 regression.

9 Q. Well, I -- I --

10 A. Because it -- one cannot. Not just
11 you, but one cannot.

12 Q. I mean, certain -- that's certainly
13 true because you've got a statistically
14 insignificant coefficient, okay.

15 So one more thing on this. You said
16 you ran a regression that -- in which you did
17 not include a distant signals variable --

18 A. Yes.

19 Q. -- but did include the unduplicated
20 minutes variable; is that right?

21 A. Yes. So, basically I -- just as a
22 robustness, you know, in preparation for
23 testifying here, I reran the -- well, the team
24 and I reran the non-duplicate analysis just
25 dropping that -- that one variable because I

1 realized it was -- somehow I had two variables
2 putting in -- you know, measuring qualitatively
3 the same thing, and I just wanted to see what
4 happened if we got rid of one of them.

5 Q. When did you -- when did you run that
6 regression?

7 A. Just in the last weeks before the --
8 preparing for testimony.

9 Q. Okay. Can we pull up -- new topic.

10 A. Okay. New topic.

11 Q. Can we pull up Dr. Erdem's rebuttal
12 testimony, Exhibit 5007, Table R3. Okay. So
13 these are Dr. Erdem's sensitivity tests on your
14 regressions, correct?

15 A. Yes, that's my understanding, yes.

16 Q. As we've already seen -- we've already
17 taken a look at model 1, in which he transforms
18 the -- the number of distant subscribers and
19 found that, under this sensitivity, CTV would
20 get a 6.35 share, right?

21 A. I'm so pleased to correct you. It's
22 number of subscribers.

23 Q. What did I say?

24 A. Number of distant subscribers.

25 Q. Ahh. Thank you. All right.

1 A. With a smile.

2 Q. I appreciate that. You know, I told
3 you at the beginning, this was all friendly.
4 Okay.

5 All right. I understand you don't
6 like the rest of his -- actually, I don't think
7 you like any of his sensitivities, do you?

8 A. Like or dislike has nothing to do with
9 it. I just don't think that they're meaningful
10 criticisms of my -- of, in this case, my
11 analysis.

12 Q. A sensitivity is making a change to a
13 variable, see what effect it has, right?

14 A. Oh, a properly run sensitivity, yes.
15 But as I mentioned in these effects regression,
16 you really have to be careful that any variable
17 that you add doesn't materially influence the
18 interpretation of the key effects of interest.

19 Q. Okay. But, I mean, you would agree
20 with me if there is a -- an econometric
21 justification for testing the effect of a
22 variable, that would be an appropriate
23 sensitivity, right?

24 A. I mean, I would look for both an
25 economic justification, but then once one had

1 an economic justification that I would -- that
2 I was certain would not change the
3 interpretation of a key variable, then I would
4 evaluate the statistical or econometric
5 consequence of it, yes.

6 Q. And did you -- did you conduct any
7 sensitivities on your regression?

8 A. I mean, I've mentioned some that I've
9 conducted.

10 Q. Well, you mentioned a couple that you
11 conducted, apparently just before this
12 testimony?

13 A. Yes.

14 Q. When you were actually preparing your
15 report and, you know, thinking about, okay,
16 what's the -- what's the model that I'm going
17 to propose here, did you -- did you run any
18 sensitivities?

19 A. I mean, the -- in the sense of I
20 considered -- you know, of the variables that
21 are included in the model, so, for example, at
22 first, I didn't have the interaction of
23 subscribers with the different -- you know, in
24 one of my early specifications, I didn't have
25 the interaction of subscribers with the

1 different dummies for the cable system
2 operators.

3 And then I -- in producing the report,
4 we noticed that there was very different
5 average receipts per cable system operator and
6 we thought, okay, well, you know, I think we
7 might want to control for that, and so these
8 are the kind of -- so the sensitivities I did
9 built up to the final model.

10 Q. Well, okay. You just named one. And
11 that is in some earlier version of your
12 specification, you didn't control for the
13 interaction between subscribers and the MSO,
14 correct?

15 A. That's correct.

16 Q. Okay. Which is in your final model,
17 right?

18 A. Yes.

19 Q. Okay. So you would regard that as a
20 sensitivity because you ran a regression to see
21 what the results would be without that
22 variable?

23 A. Well --

24 Q. Or without that interaction?

25 A. I mean, I started it -- I went the

1 other way. I started without it and then added
2 it in. And I also -- then I also did the
3 sensitivity of the parameters over time that I
4 report in my report.

5 Q. Okay. Let's go back to the MSO one.

6 A. Okay.

7 Q. Aside from the MSO one, I mean, you
8 did describe your parameters over time, which
9 really just shows that things don't change a
10 lot over time, right?

11 A. Yeah, but that's reassuring. That's
12 good. That's an important sensitivity, I would
13 argue.

14 Q. I mean, it's not clear what it's
15 sensitive to. If things don't change over
16 time, what's -- what would it -- what would it
17 be sensitive or not sensitive to?

18 A. Well, it suggests whether -- I mean,
19 it suggests -- it evaluates whether the
20 precision one gets in the full model is only
21 because you're forcing the data to have the
22 same effect in every year, and that was a
23 concern in the regressions in previous
24 proceedings.

25 And so I wanted to say, okay, well,

1 you know, does it have an effect -- you know,
2 different effects in different years?

3 Q. If it were -- if it were an effect, if
4 it were the case that from year to year systems
5 don't change their channel line-ups a lot, if
6 it were the case that from year to year
7 systems, you know, might marginally but not
8 hugely change, for example, the number of
9 subscribers, your other control variables, you
10 wouldn't really expect to see a change in your
11 results from year to year, right?

12 A. Well, you might, because while the
13 true relationship, I agree, I totally agree
14 with you, is likely to be stable, relatively
15 stable over time, there's a question of whether
16 your data are rich enough to recover the true
17 relationship, right?

18 And so if the data aren't rich enough
19 and you sort of force it to -- to use all the
20 -- all the years of data when, in fact, it's
21 saying, well, it seems like maybe this is a
22 little bit different from another year, then
23 that's something you want to check.

24 Q. You did attest -- show that things are
25 fairly stable over time?

1 A. Exactly, yes.

2 Q. Of course, you do have a -- an
3 indicator variable for every accounting period
4 for every system, right?

5 A. I agree.

6 Q. So you're already, basically,
7 controlling for accounting period? I mean,
8 correct?

9 A. Yeah, but the -- yes, but, in fact,
10 doing that is more likely -- I mean, to be
11 clear, doing that makes it more likely that the
12 coefficient estimates I get on my key effects
13 of interest are imprecise. So if I -- if in a
14 regression you add 7,000 variables, that's
15 7,000 parameters it has to estimate. And that
16 will generally make the other coefficients less
17 precise.

18 So the argument that this somehow is
19 favoring me in getting precision, actually it
20 isn't as a general rule, and so I was quite
21 pleased that the coefficient estimates on the
22 key effects of interest were a little more
23 precise -- were still precise, even with all
24 these fixed effects.

25 Q. Okay. So you tried a sensitivity with

1 -- without basically the MSO interactive with
2 the number of subscribers --

3 A. That's correct.

4 Q. -- right? What other -- what other
5 changes to the -- to your variables did you
6 attempt in coming up with your model?

7 A. I mean, the -- the -- once we -- once
8 I settled on the model, I was content with it.
9 Then, of course, when the reports came in,
10 especially the rebuttal reports, then I, as I
11 mentioned already, looked at a few of the
12 regression specifications that other opposing
13 experts had proposed, and I evaluated those
14 sensitivities and found them also -- you know,
15 I mentioned the minimum fee and dropping the
16 subscribers and dropping the -- this variable
17 in the non-duplicate --

18 Q. I'm mainly, though, interested in your
19 report, okay, because this is what -- I mean,
20 you've got 7400 -- close to 7400 variables in
21 your model, and sensitivity really could be an
22 issue, right? So --

23 A. I think that's right. And that's why
24 I was sensitive to the -- I mean, I tried to be
25 responsive to the criticisms raised by the

1 other experts and tried to evaluate them
2 myself.

3 Q. But I want to know what sensitivity
4 tests you did, okay? So you've -- you've
5 mentioned MSOs interactive with subscribers.
6 Any others? You mentioned over time.

7 A. No, I mean, I think -- I think that
8 was it. I mean, we settled pretty quickly on
9 -- I mean, A, we settled pretty quickly on --
10 so that's not true. I also considered the
11 log-linear versus the linear model, which I
12 discuss in my direct report, and the data
13 supported the log-linear model. I mean --

14 Q. You did a Cox-Box test?

15 A. Exactly. I mean -- but, economically,
16 it made more sense to me also, but then I also
17 did a Box-Cox test.

18 Q. Okay. You did a Box-Cox test, which
19 is not a sensitivity test?

20 A. Well, I mean, it's a -- I would call
21 it a sensitivity test, sensitivity to the
22 functional form of the regression equation.

23 Q. Did you do -- did you conduct a
24 regression that took the log -- I'm sorry, took
25 the linear fees paid versus the log-linear fees

1 paid?

2 A. I don't know if I did that. I
3 think --

4 Q. Because that -- you wouldn't have to
5 do that to do a Box-Cox test?

6 A. That's right. I think we just did the
7 Box-Cox test.

8 Q. I mean, I saw you did the Box-Cox
9 test.

10 A. Exactly, yes.

11 Q. Did you actually do a regression in
12 which you -- in which you used the level fees
13 paid as the dependent variable?

14 A. I honestly don't recall, but -- so I
15 don't remember, but because I think,
16 conceptually, we thought the log percent -- you
17 know, because of the economic foundations, the
18 log approach was sensible, so we said, okay,
19 you know, let's try Box-Cox, you know, see what
20 it says and then -- you know, as you know,
21 there's this parameter in a Box-Cox -- maybe
22 not everyone knows, but there's a parameter in
23 a Box-Cox model which varies between zero and
24 one. And if the parameter is closer to zero,
25 that suggests it should be a log model. And

1 that's what we found, and so that's why we
2 stuck with it.

3 Q. Okay. So that's not a sensitivity
4 test, because you didn't do a regression to see
5 what the results would be?

6 A. Well, I mean, a Box-Cox is a
7 regression.

8 Q. Okay. Fair enough. You didn't change
9 a variable in your regression?

10 A. Yeah, I mean, you seem to be narrowly
11 defining -- no offense, but narrowly defining
12 sensitivity to did I add different variables on
13 the right-hand side? But there's other
14 dimensions of sensitivity, like what is the
15 right functional form for the variables that
16 you have.

17 Q. Okay. Aside from the MSOs interactive
18 with number of subscribers, did you do any --
19 did you change any variables?

20 A. I don't believe so.

21 Q. Did you produce your regression
22 results when you conducted a regression without
23 interacting MSOs with number of subscribers?

24 A. I mean, I don't know that we did. I
25 mean, this was just something we did in the

1 course of -- of doing the analysis.

2 Q. So you tried it, you saw the results,
3 you didn't produce them to us?

4 A. It was -- I mean, so -- correct.

5 Q. So this was -- this was a regression
6 you considered, you tried it, you decided not
7 to use it, you didn't produce the results?

8 A. Well, yeah, because, I mean -- and the
9 reason is if you look at the statistical
10 significance of the coefficients on those
11 variables, the data set, I want those in there.
12 And so one wouldn't -- you know, if -- when
13 there's good economic reasons and good
14 statistical reasons and you're not going to
15 distort the interpretation of the coefficient
16 estimate, then it was clear that I should --
17 that they should be there and that's why
18 they're there.

19 Q. I'm not quibbling with your choice to
20 use --

21 A. Okay.

22 Q. -- to interact MSOs with subscribers,
23 but you tried a regression in which you didn't
24 do that, and you found what? It wasn't
25 sensitive or was sensitive?

1 A. I mean, I don't remember, to be
2 honest.

3 Q. But you considered doing it. You ran
4 the regression. You didn't give us the
5 results, right?

6 A. That's correct.

7 Q. And sitting here today, you actually
8 don't remember whether it was sensitive to this
9 change or not?

10 A. That's correct.

11 Q. Could have been sensitive to the
12 change? Your coefficients for these
13 interactions are statistically significant,
14 which would suggest that they have some
15 influence on the results, right?

16 A. Yeah, but even -- I mean, I would even
17 stipulate, even if the royalty share
18 calculations were sensitive to the change --
19 and I don't know if they were -- that would
20 just be evidence to me that it was appropriate
21 to include these variables as control variables
22 because the whole point of control variables is
23 to include them in the model so that they don't
24 bias the coefficients of interest.

25 Q. Dr. Erdem's model 1 here, Dr. Erdem's

1 inclusion of a log transformed number of
2 distant subscribers, that was a statistically
3 significant inclusion of a variable, wasn't it?

4 A. Yes, but in my answer, it was --
5 you'll notice I was very careful to say I
6 included variables that did not change the
7 interpretation of the key parameters of
8 interest. And Dr. Erdem's inclusion of the log
9 subscribers basically approximates the formula
10 and doesn't let the data reveal the
11 relationships of interest.

12 So that, in my opinion, in my
13 strongly-held opinion, is an inappropriate
14 sensitivity analysis.

15 Q. So what you're really saying, though,
16 is you did some sensitivity analysis; you
17 didn't give us the results?

18 A. I did that one analysis and did not
19 give you the results.

20 Q. And, in fact, that was more than just
21 a sensitivity. You actually did the
22 regression. You decided that it could be
23 improved, you improved it, and you did another
24 regression, right?

25 A. That's correct.

1 Q. And, actually, on the subject of
2 over-fitting, that actually can be a form of
3 over-fitting, can't it, to try a regression, to
4 reject some variables or to reject a form, and
5 then try another regression and find you get a
6 statistically improved result? Those variables
7 count against your -- against your degrees of
8 freedom, don't they?

9 A. Yes, but, I mean, over-fitting is
10 really an issue when you have a large number of
11 variables relative to the number of
12 observations. I don't think the --
13 especially -- I mean, we have 7,000 fixed
14 effects, but, of course, we have 26,000 data
15 points.

16 Q. You've got --

17 A. And so there's --

18 Q. -- you've bot about 3.5 data points
19 per variable?

20 A. No, no --

21 Q. 3.55 data points per variable. Okay.

22 And, in addition, you've got some, now
23 it turns out, some phantom variables of some --
24 left over, basically, from some specifications
25 you tried and rejected?

1 A. What phantom variables are you
2 referring to?

3 Q. Well, when I say phantom variables,
4 I'm talking about those variables that you
5 tried and that are not included or -- or are
6 included. You've tried some things that you
7 then rejected, okay.

8 A. Right.

9 Q. That's also creating a fit to the
10 model, isn't it?

11 A. I don't know what you -- I mean, I --

12 Q. All right. I'll -- I'll leave it
13 alone.

14 Now, Dr. Israel actually presented us
15 with his sensitivity results, right?

16 A. I mean, to be honest, I didn't review
17 Dr. Israel's testimony to that detail so I'm
18 not -- I'm not intimately aware of his
19 sensitivity results.

20 Q. Okay. You're not familiar with
21 Dr. Israel's sensitivity tests?

22 A. No.

23 Q. Okay. All right.

24 MR. MacLEAN: I thank everybody for
25 bearing with me. I hope I was able to make it

1 interesting. That concludes my questioning.

2 JUDGE BARNETT: Thank you,

3 Mr. MacLean. Mr. Garrett? Sorry. Mr. Laane.

4 Any questions for this witness?

5 MR. LAANE: Nothing at this time, Your
6 Honor.

7 JUDGE BARNETT: Okay. Any redirect?

8 MR. COSENTINO: Your Honor, I have --

9 JUDGE BARNETT: I'm sorry,
10 Mr. Cosentino.

11 CROSS-EXAMINATION

12 BY MR. COSENTINO:

13 Q. Good afternoon, Dr. Crawford.

14 A. Good afternoon.

15 Q. My name is Victor Cosentino. I am an
16 attorney for the Canadian Claimants group.

17 A. Hello. Nice to meet you.

18 Q. Okay. So you spent a lot of time on a
19 deep dive into your regression. I want you to
20 come back out to the top.

21 (Laughter.)

22 BY MR. COSENTINO:

23 Q. I have a very simple question for you.

24 Okay?

25 A. Wonderful.

1 Q. I'm putting in front of you figure 20.

2 A. Yes.

3 Q. Let me see here. And my --

4 JUDGE BARNETT: Which document is this
5 in?

6 MR. COSENTINO: I'm sorry, Your Honor.

7 BY MR. COSENTINO:

8 Q. This is Exhibit 2004, your direct
9 testimony.

10 A. I believe that to be correct.

11 JUDGE BARNETT: Direct. Okay, thank
12 you.

13 BY MR. COSENTINO:

14 Q. When you are doing your regression,
15 you categorized -- you categorized the
16 programming into claimant group programming
17 categories; is that correct?

18 A. Well, Dr. Bennett at Bates White
19 Economic Consulting did the categorization and
20 presented it to me. So I myself did not do the
21 categorization.

22 Q. Okay. My question, though, for you is
23 on -- in your table -- various tables, and
24 figure 20 is an example, you write for the
25 Canadian -- you write in the last column

1 Canadian, and what I want to clarify is simply
2 this: Is this a relative value for Canadian
3 Claimant Group programming or for all the
4 programming on the Canadian signal?

5 A. So I'm afraid I'm not sufficiently
6 cognizant of the distinction between the two to
7 be able to answer correctly.

8 Q. Okay. Let me explain and then maybe
9 you can answer.

10 A. Please.

11 Q. So Canadian signal consists of a
12 majority of Canadian Claimant Group
13 programming, programming coming from Canadian
14 providers. It also has some Joint Sports
15 programming on it.

16 A. Okay.

17 Q. And some programming -- Program
18 Suppliers content.

19 A. Okay.

20 Q. And a very small amount of Settling
21 Devotional Claimant programming.

22 A. Okay.

23 Q. So in some of the studies that have
24 been presented, for example, the surveys, they
25 attempt to value the entire signal. And what I

1 want to understand is are you trying to value
2 the entire signal or just the programming
3 category?

4 A. So my understanding that the
5 categorization Dr. Bennett did would be that it
6 would -- it categorized the programming on the
7 Canadian signal into the relevant categories,
8 so if there was joint sport content or program
9 supplier content or devotional content on
10 Canadian signals, it would have been allocated
11 to those claimant categories, and then the
12 results I'm presenting to you here represents
13 the average value per minute coming out of the
14 regression results for Canadian Claimant
15 category programming.

16 Q. Okay. Thank you. And I won't ask you
17 about gamma or tau. That's all I have, thank
18 you.

19 A. You're welcome.

20 JUDGE BARNETT: Now, other
21 cross-examination of this witness?

22 MR. OLANIRAN: I think we have at
23 least two more, so --

24 JUDGE BARNETT: Okay.

25 //

1 CROSS-EXAMINATION

2 BY MR. OLANIRAN:

3 Q. Good afternoon, Dr. Crawford. My name
4 is Greg Olaniran and I represent Program
5 Suppliers.

6 A. Hello.

7 Q. I think we may have had discussions
8 before in the '04/'05 proceeding.

9 A. I believe -- I believe that's correct.

10 Q. Yeah. I hate to disappoint you. I'm
11 also not going to be talking about regression.
12 And I'm not going to be in the weeds of tau and
13 sigma and beta and so on and so forth.

14 But I do want to talk about something
15 which I think we spoke of before in the last
16 proceeding and I want to talk about the market.
17 And so let's talk first about the current
18 regulatory environment.

19 And so -- and I'll focus my discussion
20 on just all non-network programming, right?

21 A. Okay.

22 Q. On distant signals.

23 A. Okay, non-network programming.

24 Q. And the process begins with the -- in
25 the prior market, where a copyright owner

1 licenses a program to the broadcaster, correct?

2 A. That's correct.

3 Q. And then the broadcaster negotiates
4 with several copyright owners and fills up its
5 daily line-up of programming, and then the
6 cable system retransmits the broadcaster signal
7 out of market. Is that fair?

8 A. That's my understanding as well.

9 Q. And assuming the cable system is in
10 compliance with Section 109, correct.

11 A. That's correct.

12 Q. All right. Now let's look at the
13 manner in which the copyright owner receives
14 compensation under the regulatory scheme.

15 A. Okay.

16 Q. There are two -- two income streams.
17 The first one is the direct compensation from
18 the transaction between the broadcaster and the
19 copyright owner and their primary market,
20 right?

21 A. Yes, that's the first income stream,
22 yes.

23 Q. Okay. And then the second one is the
24 compulsory licensing scheme, where, because of
25 the regulatory scheme, the cable system pays

1 the money to the government and then we end up
2 where we are today, to determine compensation
3 to the copyright owner for that second stream,
4 correct?

5 A. That's -- yes, that's correct.

6 Q. You agree, do you not, that this
7 proceeding is to determine the allocation of
8 royalties to copyright owner as those copyright
9 owners are grouped in the program categories
10 used in this proceeding, correct?

11 A. Yes, subject to their compulsory
12 programming, yes.

13 Q. Okay. And so I want -- this
14 proceeding is not for the purpose of
15 compensating distant signals, correct?

16 A. That's my understanding. The payments
17 go to the content owners.

18 Q. Because distant signals, by
19 definition, are not protected works, right?

20 A. I don't specifically know that, but
21 that would not surprise me.

22 Q. Okay. Now let's talk about your
23 theory of the hypothetical market where a
24 compulsory license no longer exists.

25 A. Okay.

1 Q. And I think you said that -- and this
2 is a follow-up to the discussion I think you
3 had many moons ago this morning with the Judge.
4 And you say in your written testimony that in
5 absence of compulsory license, that the market
6 will continue to involve retransmission of
7 entire broadcast television stations. Do you
8 recall that?

9 A. I do.

10 Q. Okay. And so in your hypothetical
11 market, the cable operator would still not
12 negotiate directly with copyright owners,
13 correct?

14 A. That's correct.

15 Q. And broadcasters will continue to
16 negotiate with copyright owners -- would
17 continue to negotiate with copyright owners,
18 correct?

19 A. Yes, that's right.

20 Q. And the copyright owners would
21 continue to license to broadcasters who would
22 continue to create their daily programming
23 lineup and the cable system would continue to
24 retransmit broadcast signals, correct?

25 A. As long as it could reach a negotiated

1 agreement with the local station that it wanted
2 to bring into the distant market.

3 Q. Okay. And so there would be no
4 allocation or distribution proceeding as we're
5 having now, correct?

6 A. That's correct.

7 Q. And there would be no phase 1 or phase
8 2 proceeding, correct?

9 A. Correct.

10 Q. In fact, there would be no Copyright
11 Royalty Judges?

12 (Laughter.)

13 MR. OLANIRAN: Sorry, Your Honor.

14 THE WITNESS: I believe they have
15 other jobs within the copyright framework,
16 within the copyright space, than just this
17 proceeding.

18 BY MR. OLANIRAN:

19 Q. The whole -- the regulatory schemes
20 surrounding retransmission of distant signals
21 would -- in this context, would not exist,
22 correct?

23 A. Well, I mean, I think we're talking
24 about a hypothetical market where it doesn't
25 exist. So that's -- where the compulsory

1 license does not exist. And, therefore, I
2 think, given this premise, then it would not
3 exist.

4 Q. And also gone would be the royalty
5 payments that you've relied on for calculating
6 your marginal -- your marginal values of each
7 additional minute, correct?

8 A. That is correct.

9 Q. There would be no such payments?

10 A. That's correct.

11 Q. Okay. And so now -- but still in the
12 hypothetical market, the copyright owners would
13 still require to be compensated -- would still
14 require to be compensated for exploitation of
15 their works or their primary market transaction
16 for retransmission of distant signals, correct?

17 A. I mean, "required" is too strong. I
18 would say they would probably seek to be
19 compensated.

20 Q. Fair enough. Now, thinking back to
21 the two income streams that we talked about
22 under the current regulatory regime, for the
23 copyright owner, you would still have -- as I
24 said, you have two income streams potentially,
25 right?

1 A. That's correct.

2 Q. And under your theory of the
3 hypothetical market, the buyer is the cable
4 system; is that right?

5 A. So, I mean, I think I had in mind a
6 sort of two-stage hypothetical market. I think
7 the buyer -- clearly the buyer would be the
8 cable system --

9 Q. Okay.

10 A. -- of distant signals and then, of
11 course -- or local broadcast stations carried
12 in distant markets. And then, of course, the
13 local stations themselves would be buyers of
14 content from the content owners.

15 Q. Okay. Now, the buyer is buying
16 channels at that point, is it not?

17 A. That's correct.

18 Q. Okay. And that channel is a bundle of
19 different programs embedded in the broadcast
20 signals that the buyer is buying, the CSO is
21 buying?

22 A. That's correct.

23 Q. Okay. And the seller is the
24 broadcaster in that transaction as between --
25 the retransmission transaction, if you will?

1 A. Yes, the seller is the -- the local
2 broadcast station acting, if you like, as an
3 agent on behalf of the content owners.

4 Q. And I think in your -- in your vision
5 of the market, the CSO and the broadcaster will
6 negotiate a fee for carriage of the distant
7 signals; is that right?

8 A. That's correct.

9 Q. Okay. Let's now talk about
10 compensation for the copyright owner, still in
11 the hypothetical market, okay?

12 A. Yes.

13 Q. Now, with regard to compensation of
14 the copyright owner, would you expect there to
15 be a trans- -- you would expect there to be a
16 transaction between the copyright owner and the
17 broadcaster, right?

18 A. That's correct.

19 Q. And in that transaction, there are two
20 rights issues to be determined, correct?

21 A. Exactly, that's correct.

22 Q. One has to do with the local -- the
23 rights to -- to -- a license to air -- for the
24 broadcaster to air the particular work within
25 the local area, correct?

1 A. That would be one of the rights, yes.

2 Q. Okay. And the second right would have
3 to address the issue of additional exploitation
4 of that work via the acquisition of the signal
5 by a CSO, correct?

6 A. That's correct.

7 Q. Okay. So I think it's fair to say
8 that your basic theory is that the broadcaster
9 would obtain from the owner the right to grant
10 transmission rights to another entity; in this
11 case, the cable system, correct?

12 A. That's correct.

13 Q. So if I as a copyright owner were to
14 license both American Idol and Watching Paint
15 Dry, the movie, I would expect to be
16 compensated by the copyright owner -- I'm
17 sorry, by the broadcaster, right?

18 A. Yes, I think the -- yes. But perhaps
19 differently for the two different rights.

20 Q. Okay. What do you mean, "perhaps
21 differently"?

22 A. I mean in the sense that the right to
23 -- in the local market, the economic value of
24 the right in the local market could differ from
25 the economic value for the right in the distant

1 market.

2 Q. Okay, fair enough. Thank you.

3 Let's also talk just briefly about the
4 calculation of royalty payments under Section
5 111. The royalty payments that you use are
6 actually royalty payments that are made by the
7 cable systems as they are required to do under
8 Section 111; is that correct?

9 A. That's my understanding.

10 Q. Okay. And I think, in this case, you
11 actually used the royalty payment for
12 subgroups, not the entire system?

13 A. That's right. That's correct. I used
14 the royalty payment at the -- reported at the
15 subgroup level.

16 Q. Okay. In general, under the
17 regulatory -- under Section 111 -- let's give
18 you a hypothetical which involves absolutely
19 very little or no math.

20 So assume that a cable system carries
21 no distant signal, okay?

22 A. Okay.

23 Q. And what would be the system's
24 royalty?

25 A. It would have to pay them -- if it's a

1 Form 3 system --

2 Q. Right.

3 A. -- it would have to pay the minimum
4 fee, which is a little over 1 percent of its
5 gross receipts.

6 Q. And -- okay. And let's assume the
7 cable system then decides to carry one
8 independent signal, and let's assume further
9 that this new independent signal carries
10 100 percent Program Supplier minutes.

11 How would the payment be different
12 from the one that carried no additional -- no
13 signals at all?

14 A. Well, when they carry no signals, it
15 would not enter my regression because the
16 systems or subscriber groups that had no
17 distant signals don't -- they have no minutes
18 of programming so they don't enter.

19 Q. I'm not asking how it would enter your
20 regression.

21 A. Okay. I'm sorry.

22 Q. I'm asking how it works currently. If
23 the system, if the system now carries one
24 independent signal, 100 percent of Program
25 Supplier minutes, how would that change what

1 this -- the system's royalty obligation under
2 Section 111?

3 A. No, it would not change royalty
4 obligation because it's still one distant
5 signal.

6 Q. And what if the same system, one
7 independent signal, and that independent signal
8 is 50 percent Program Supplier minutes,
9 50 percent JSC minutes, any difference in the
10 royalty obligation?

11 A. No. No, as long as it's one DSE, it
12 pays the same royalty.

13 Q. Okay. And let's assume the same cable
14 system decides to add another independent
15 signal so we now have two different signals,
16 two independent signals, correct?

17 A. That's correct.

18 Q. Okay. And then let's assume further
19 that the new signal carries 100 percent JSC, so
20 we would have one independent signal with
21 100 percent JSC and then we have another
22 independent signal -- strike that.

23 Let's assume that we have a -- the
24 cable system, we have two independent signals,
25 and let's assume that the new signal, the one

1 signal carries 100 percent JSC programming, so
2 we have one independent signal with 100 percent
3 Program Suppliers and then another independent
4 signal with -- another independent signal with
5 100 percent JSC only. So 100, 100 apiece.

6 A. I understand.

7 Q. Are you with me?

8 A. Yes.

9 Q. Okay. And how much would that cable
10 system pay in royalties? What would be the
11 royalty obligation calculations, just roughly?

12 A. Roughly, I think it's a little over
13 1 percent for the first -- for -- if you carry
14 one DSE and it's .7 percent; for the second DSE
15 so it would pay roughly 1.7 percent with maybe
16 a little higher overall of its gross receipts
17 for the carriage of both signals.

18 Q. And now this is my last scenario. You
19 have the same system, and rather than the
20 second DSE being sports programming, you have
21 50 percent Commercial Television programming
22 and 50 percent Joint Sports programming.

23 How would the payment be different
24 from the last scenario we had?

25 A. As long as it's the same DSE, there

1 would be no difference in payment.

2 Q. Okay. So as you said a few minutes
3 ago, that your regression analyzed royalty
4 payments by subgroups, not at system level, is
5 that right?

6 A. That's correct.

7 Q. Okay. Just curious, in your data, how
8 many times did it happen that the minimum fee
9 relative -- the minimum fee royalty payments
10 exceeded the sum of the subgroup total royalty
11 payments?

12 A. Exceeded, like strictly exceeded or --

13 Q. Yeah.

14 A. Oh.

15 JUDGE BARNETT: I'm sorry,
16 Mr. Olaniran. Could you repeat that question?

17 MR. OLANIRAN: Like how many times did
18 the minimum fee royalty obligation exceeded the
19 total subgroup payments that he calculated?

20 BY MR. OLANIRAN:

21 Q. Is that clear?

22 A. That is clear, and -- but I'm afraid I
23 don't know the answer.

24 Q. Okay. And I want to talk about the
25 marginal view -- the marginal value that you

1 calculated. And I want to make sure I
2 understand this.

3 You calculated coefficients on a
4 subgroup-by-subgroup basis; is that correct?

5 A. I mean, the regression coefficients
6 are an outcome of the entire regression
7 analysis. So the -- and there are common -- so
8 I exploit variation in royalties and program
9 minutes across subgroups, but there's only a
10 single parameter for the -- for each of the
11 different key explanatory variables, for the
12 entire regression.

13 So there's not a different parameter
14 for each -- on the -- on the key explanatory
15 variables for each of the subgroups. There's
16 only one parameter.

17 Q. So you don't have individual
18 coefficients on a subgroup-by-subgroup basis,
19 based on the minutes?

20 A. Not for the minutes variables. And I
21 -- no.

22 Q. Okay. Now, the marginal value of the
23 -- of the -- each additional minute for each
24 category that you calculate, that applies only
25 to the bundles, correct?

1 A. I don't know what you mean by -- I
2 mean, it applies -- I don't know what you mean
3 by "applies only to the bundles."

4 Q. That -- the -- the margin value
5 applies to each type of programming bundle; is
6 that right?

7 A. I mean, programming category.

8 Q. Category, I'm sorry. Yes.

9 A. Yeah. "Bundle" can mean something
10 else in cable markets.

11 Q. And you've assumed that in the
12 hypothetical market that these programming
13 category labels will continue to be the same;
14 is that right?

15 A. No. I mean, I think the -- in the
16 hypothetical market, I think the -- the
17 negotiations between content owners and local
18 stations would be at the program-by-program
19 level, but I think the categories are still
20 useful for this proceeding because, of course,
21 the purpose of the proceeding is to allocate
22 royalties for the -- the -- excuse me, to
23 allocate royalties that CSOs actually paid for
24 the -- the carriage of programming in the
25 existing categories.

1 So my -- my regression analysis
2 reveals the relative value of the categories
3 that are at issue in this proceeding.

4 Q. And are these the same categories that
5 you assume -- the categories that are used in
6 the market in acquiring programs?

7 A. I mean --

8 Q. I'm sorry, strike that.

9 Are these the same program categories
10 that are used in a market for acquisition --
11 when you're acquiring bundles of programming?

12 A. I mean, of course, in the hypothetical
13 market, I envision the CSO negotiating with the
14 distant signal for the entire distant signal.
15 And then, of course, the -- the local station
16 negotiating with the individual content owners.

17 But the key thing is that what I
18 recover, I think it's the relative CSO value
19 that would reveal the relative marketplace
20 value in this hypothetical market. And that, I
21 can recover from the existing market.

22 Q. Okay. Let me try to make my question
23 a little bit clearer.

24 Recall my two works as a copyright
25 owner, the American Idol and Watching Paint

1 Dry, the movie. And recall the transaction
2 that would occur between the broadcaster and me
3 without a compulsory license --

4 A. Okay.

5 Q. -- in that primary market.

6 A. Okay.

7 Q. The local market license is taken care
8 of, right?

9 A. Okay. So you're presuming that the
10 negotiation has been resolved for distribution
11 in the local market?

12 Q. Yes.

13 A. Okay.

14 Q. And so my question for you is how
15 would the marginal value that you've now
16 calculated apply to that transaction?

17 A. Well, I think the -- I mean, the key
18 thing is that the value of programming in the
19 distant market is driven by relative CSO value
20 because that's the only -- that's the -- the
21 value that -- that CSOs receive -- the value
22 that programming has in a distant market is by
23 virtue of CSOs ability to, by carrying that
24 program, attract and retain subscribers.

25 And so that's why relative CSO value

1 would then drive the relative marketplace value
2 in the hypothetical market.

3 Q. So my question, though, is so you're
4 now in that -- in the -- right now in the
5 transaction between the broadcaster and the
6 copyright owner, who has two works. And what
7 is the -- what is the basis for the exchange
8 value-wise in that market?

9 A. I think -- basically, I think that the
10 broadcaster would understand that -- the
11 relative -- the relative value of the type of
12 programming or even the specific program might
13 have in the distant market and use that as a
14 basis for negotiations with the ultimate
15 content owner.

16 Q. So the value that you've calculated,
17 is not a value -- is not a value for --
18 directly for that market; it's a value in terms
19 of how the cable system views an entire signal;
20 is that fair?

21 A. I didn't understand the question.

22 Q. I'm trying to get -- I'm trying to get
23 at the purpose for -- the meaning of the margin
24 value you've calculated.

25 A. Okay.

1 Q. And how that's relevant to the
2 transaction in that primary market when they're
3 dealing with the two rights issues --

4 A. I understand.

5 Q. -- or perhaps one. So my question is,
6 if I understand your testimony correctly, the
7 value that you've calculated is the cable
8 operator's view of an entire signal, broadcast
9 signal; is that correct?

10 A. Well, it's -- it's -- not quite. It's
11 the cable operator's relative value for the
12 different types of programming carried on
13 distant signals.

14 Q. Based on the cable operator's
15 perspective?

16 A. That's correct.

17 Q. Okay. And your testimony is that
18 somehow the broadcast signal when there is a --
19 when the transaction occurs to grant rights to
20 retransmission, the broadcaster would somehow
21 be aware of what the cable -- how the cable
22 operator has determined the value of the
23 different program categories?

24 A. Exactly, yes.

25 Q. And -- and what evidence do you have

1 of that?

2 A. Well, I mean --

3 Q. That the broadcaster would be aware of
4 that?

5 A. Well, I mean, so they -- I mean, I
6 think they could do the same logic that we're
7 doing in this proceeding and understand that
8 the value of different types of content will
9 have, in distant markets, based on the value to
10 CSOs, and you could read my regression results
11 and get a sense of what are the relative values
12 of different types of programming.

13 Now, of course, that would only give
14 them the sense of the average value of
15 different types of programming in the
16 hypothetical market. So any particular
17 program, even within each of the categories,
18 could have relatively more value or less value
19 like in your example. American Idol is
20 probably a more valuable property than Watching
21 Paint Dry, the movie, and so then they could
22 factor in --

23 Q. Some may disagree, by the way, but go
24 ahead.

25 (Laughter.)

1 A. But then they could -- you know, from
2 -- once they had a sense of the relative values
3 in general in the sort of average relative
4 values of the different programming categories,
5 then in their negotiations they could move off
6 of those averages for specific individual
7 programs.

8 Q. And what's your basis for -- for
9 assuming that American Idol has more value than
10 Watching Paint Dry?

11 A. I would imagine that consumers in
12 distant cable markets would be more interested
13 in -- I mean, it depends. It depends if
14 American Idol is already on the bundle of
15 programming carried on the -- on the cable
16 operator's existing local stations. But if it
17 weren't, then I could imagine that that might
18 have some attraction in terms of getting
19 someone to subscribe to the cable bundle.

20 Q. What would be the basis for the
21 attraction, is my question? Why would it be
22 more attractive than Watching Paint Dry?

23 A. Well, I think -- I mean, it sounds
24 like more attractive programming that consumers
25 would want to see and therefore to -- to sign

1 up for a cable bundle.

2 Q. It would be -- people would be more
3 interested in watching American Idol than
4 Watching Paint Dry?

5 A. And I think within every category, so
6 I'm not -- if we can stipulate that these are
7 both Program Supplier categories --

8 Q. Yes.

9 A. -- or both programs within the Program
10 Supplier category, I think within every program
11 category, there's going to be relatively more
12 valuable programming and relatively less
13 valuable programming. And so I'm just saying
14 that -- that to the cable operator, and so I
15 was attributing to American Idol the relatively
16 higher value rather than the Paint Drying, but
17 the cable operator would know better than I.

18 Q. So let me ask you this question:
19 Suppose there were two different copyright
20 owners in that primary market. How is the
21 broadcaster -- and they're both -- assuming
22 that Watching Paint Dry and American Idol are
23 in the same -- in the syndicated category.

24 A. Okay.

25 Q. How is -- how are the parties

1 negotiating, distinguishing between one price
2 point and another?

3 A. I mean, I -- I don't have intimate
4 knowledge of the details of negotiations over
5 individual programs, but I can -- I would
6 imagine that it relates to the value it would
7 have to the cable operator in the distant
8 market. They would form beliefs about this.
9 Both sides of the party would form beliefs
10 about that.

11 Q. But your regression results does not
12 address that specific issue, does it?

13 A. My regression result does not address
14 how the specific royalty or fee that would be
15 negotiated between a local broadcaster and an
16 individual content owner would be determined,
17 no, but I -- but it recovers the average
18 relative value with -- across programming
19 within content categories.

20 Q. And also with regard to the minutes of
21 programming that you use, you treat all of the
22 minutes equally, if I'm understanding your
23 regression correctly. You don't make a
24 distinction about the value of the program
25 minutes in any way, do you?

1 A. I treat all the minutes equally.

2 Q. And so there are no -- there's no
3 differentiation between the day parts during
4 which the different programs air, correct?

5 A. That's correct.

6 Q. And there's no consideration for
7 expected audience, is there?

8 A. That's correct.

9 Q. It doesn't consider the type of
10 programming other than as bundles, correct?

11 A. I mean, it -- so within a program
12 category, it measures the average value of all
13 the programming in that category across day
14 parts, across everything. But, of course, I
15 estimate different average values across
16 different categories, across the six different
17 claimant categories in this proceeding.

18 Q. Now let me just talk briefly about
19 your rebuttal testimony. And I think you said
20 that -- you said that -- in criticizing
21 Dr. Gray's relative viewing approach to market
22 value, you said the CSOs would only earn --
23 would earn only a relatively small amount of
24 revenue from sale of advertising.

25 Do you recall that?

1 A. Would? I mean, in -- are we talking
2 in the hypothetical market or in the current
3 market?

4 Q. You were criticizing Dr. Gray's
5 testimony.

6 A. Okay.

7 Q. And I suppose in the hypothetical
8 market, if you're criticizing it, is relatively
9 -- is a relative universe, relative to market
10 value approach using viewing. And you said
11 CSOs would only -- would earn a relatively
12 small amount of ad revenue from the sale of
13 advertising. Is that right?

14 A. I mean, let me just -- I don't fully
15 understand the question, but if we're talking
16 about the hypothetical market --

17 Q. Right.

18 A. -- in my view there would be
19 inconsequential -- in the absence of a
20 compulsory license, and so therefore in the
21 absence -- so even if local stations -- local
22 signals could substitute advertising in the
23 distant market, which is of course not
24 permitted under the current compulsory
25 license --

1 Q. No, it's not prohibited either. It
2 would not necessarily be prohibited?

3 A. It would not -- exactly, it would not
4 be prohibited, but even were it possible, the
5 viewing of distant signals is so miniscule as a
6 share of total viewing in a market, in my
7 rebuttal testimony I estimated it something on
8 the order of .4 percent of total viewing, that
9 -- and, furthermore, Nielsen generally doesn't
10 report ratings for program stations that have
11 such low viewing.

12 And even if they did have ratings for
13 stations with such low viewing, these stations
14 would have to compete with the much larger
15 audiences that are in the local market of the
16 distant cable system as to lead me to conclude
17 that there would be inconsequential advertising
18 revenue in the distant -- in the hypothetical
19 distant market.

20 Q. In that analysis, do you preclude the
21 possibility of -- and I'm going to say this
22 very carefully, so --

23 A. Okay.

24 Q. Do you preclude the possibility of
25 insertion of local ads in the distant market of

1 the -- of the distant signal? In other words,
2 if the signal has been imported into a local
3 market, your analysis precludes the possibility
4 that when the distant signal is in a new
5 market, that there could be ad insertions of
6 the market within which it's competing with the
7 local signals?

8 A. I'm afraid -- I'm sorry, I don't mean
9 to be dense, but I'm confused about whether
10 we're talking about ads in the distant market
11 or ads in the local market.

12 Q. Okay. So let me make it a little bit
13 easier. You have market A, is the local
14 market. And you have WABC --

15 A. Okay.

16 Q. -- that has been imported to market B.

17 A. Okay.

18 Q. Under the current regulatory regime,
19 you are going to have -- WABC cannot be -- the
20 signal cannot be altered.

21 A. Correct.

22 Q. When it lands in market B.

23 A. That's my understanding.

24 Q. Now, let's move to a hypothetical
25 market.

1 A. Okay.

2 Q. Same transaction where you have WABC
3 now, still in market B, without the
4 restrictions of the regulatory scheme. Are you
5 ruling out the possibility that in market B,
6 there could be ad insertions under WABC that
7 are relevant to that local market?

8 A. So I'm certainly not ruling it out,
9 but I would just repeat the answer I gave
10 previously. I think that because the viewing
11 on distant signals is so small, that I conclude
12 -- and, furthermore, there would likely not be
13 Nielsen ratings and there would likely not be
14 -- they wouldn't be able to compete effectively
15 with other local stations in market B, that I
16 conclude from that that there would be no
17 meaningful advertising revenue in market B in
18 the hypothetical market.

19 Q. In your rebuttal testimony, you also
20 -- you state that there is data available to
21 model CSOs' buying decision, and you base that
22 on your review of Mr. Trautman's report?

23 A. No, I don't understand.

24 Q. This is -- I'm almost quoting
25 directly. You said that there's data available

1 to model CSOs' buying decision and you
2 reference Mr. Trautman's testimony. Do you
3 recall that?

4 A. No. Could you point me to that
5 passage in the --

6 Q. You can look at your rebuttal
7 testimony, page 7, paragraph 22.

8 A. Okay.

9 Q. Are you at your rebuttal testimony?

10 A. Yeah, but it's also here, which is
11 fine.

12 Q. Exhibit 2005, I think.

13 A. Yes, thank you. Ah, I see. Yes.
14 Okay. So I now understand the passage you're
15 referring to. Could you repeat your question?

16 Q. My question, you reference in that
17 paragraph that there's data available to model
18 CSOs' buying decision, and I think you
19 reference the testimony of Mr. Trautman. Is
20 that right?

21 A. I do.

22 Q. Okay. And my question simply was what
23 -- what specifically in Mr. Trautman's
24 testimony were you referring to?

25 A. So I think -- I think the -- the

1 language there is a little bit imprecise.

2 Q. Okay.

3 A. So I think I had in mind that there's
4 data available to model CSOs' buying decisions.
5 That was meant to reflect regression analyses
6 of the type I run, that Dr. Israel ran, and
7 then Drs. Waldfogel and Ralston ran previously.

8 But there is also -- so this model
9 word should really have only applied to the
10 regression analyses, but there is -- that being
11 said, there is potentially, in my opinion, I
12 think, a cable operator's survey is
13 potentially -- can potentially reveal relative
14 CSO values, although it's not modeled.

15 Q. So did you review Mr. Trautman's
16 report?

17 A. I just -- basically I looked just at
18 his results to see how they compared with my
19 results, but I didn't do a detailed review of
20 his report.

21 Q. Okay. You didn't read the report; you
22 just looked at the results?

23 A. Yeah, I looked at the results and I
24 think I looked briefly at the survey, just to
25 see what it looked like.

1 Q. And so you have no idea -- you don't
2 know very in detail what the methodological
3 approach to the survey is?

4 A. That's correct.

5 Q. Okay.

6 JUDGE BARNETT: I just want to
7 interrupt here for a moment. Professor
8 Crawford, are you returning to Zurich tonight
9 or --

10 THE WITNESS: No, no.

11 JUDGE BARNETT: Okay. So if we don't
12 complete your testimony today --

13 THE WITNESS: That's fine.

14 JUDGE BARNETT: -- you're not going to
15 miss a flight?

16 THE WITNESS: No. But I do return
17 tomorrow night.

18 (Laughter.)

19 JUDGE BARNETT: Okay. I think we'll
20 all go with you.

21 (Laughter.)

22 JUDGE BARNETT: How much more,
23 Mr. Olaniran?

24 MR. OLANIRAN: As you ask me that
25 question, I think I am done. I have no further

1 questions. Thank you, Dr. Crawford.

2 THE WITNESS: Thank you.

3 JUDGE BARNETT: Thank you. Questions,
4 Mr. Dove?

5 MR. DOVE: Yes, but we're going to
6 have about an hour and a half.

7 JUDGE BARNETT: Okay. Let's see. Did
8 I tick all the boxes, Mr. MacLean?

9 MR. MacLEAN: Your Honor, I'm sensing
10 that you're about to break for the day, and I
11 don't want to -- I thank you for going a little
12 bit over our time, but I don't to put too much
13 on it, but before we break, could I be
14 permitted to make an oral motion outside the
15 hearing of the witness?

16 JUDGE BARNETT: Yes.

17 THE WITNESS: Shall I step down?

18 JUDGE BARNETT: Thank you, Professor
19 Crawford. If you don't mind just --

20 THE WITNESS: Not at all.

21 (Witness exits the hearing room.)

22 MR. MacLEAN: Your Honor --

23 JUDGE BARNETT: Would you mind coming
24 up to the lectern?

25 MR. MacLEAN: Sure. The SDC move to

1 strike Dr. Crawford's testimony on the grounds
2 that he testified he conducted analyses,
3 alternative analyses, that were not produced,
4 not made part of his written statement or
5 produced to the SDC.

6 Section 351.1 of the Judges' rules,
7 351.1(e), with regard to introduction of
8 studies and analyses -- and I'll say there was
9 an equivalent provision in both the current
10 version of the rules and the prior version of
11 the rules -- provide that the facts and
12 judgments upon which conclusions are based
13 shall be stated clearly, together with any
14 alternative courses of action considered.

15 Dr. Crawford admitted he considered
16 other courses of action, tried them, decided to
17 modify his regression specification as a result
18 of those, and then produced and included in his
19 written direct statement only those courses of
20 action that he -- or did not include those
21 alternative course of actions.

22 I will -- I have this on a computer.
23 I can bring in copies tomorrow, but the SDC did
24 serve follow-up document production requests on
25 CTV. Our Document Request Number 12 sought all

1 documents supporting Dr. Crawford's conclusion
2 that "an econometric analysis relating existing
3 distant signal royalty payments to the minutes
4 of programming of different types carried on
5 distant signals under the compulsory license is
6 most suited" -- I'm sorry -- "is most suitable
7 for determining the relative marketplace value
8 of the programs actually retransmitted between
9 2010 and 2013, including documents relating to
10 Dr. Crawford's consideration of alternative
11 approaches to determining the relative
12 marketplace value of the different programming
13 categories represented on distant broadcast
14 signals."

15 The response to that request was:
16 "See general objections Numbers 2, 5, and 8.
17 This statement is based on the professional
18 knowledge and experience of Dr. Crawford,
19 including that reflected in his academic
20 research and prior testimony. Subject to and
21 without waiving this objection" -- "its
22 objections, CTV is producing a copy of the
23 rebuttal testimony of Gregory S. Crawford in
24 the 2004/2005 cable royalty distribution
25 proceeding." And then gives the numbers there.

1 Nothing was produced with regard to
2 any alternative regression that included
3 anything -- any other proposed specifications.

4 We also had -- we also included a
5 request, in our Document Request Number 14, all
6 documents relating to Dr. Crawford's selection
7 of variables used in his regression analysis,
8 including the bases for selecting such
9 variables, other variables considered, and the
10 bases for rejecting use of any variables.

11 And we got in response: "See General
12 Objections Numbers 1, 2, 3, 4, 5, 8 and 10.
13 Subject to and without waiving its objections,
14 CTV refers SDC to paragraphs 94 through 107 of
15 Dr. Crawford's testimony." Those were simply
16 the paragraphs that describe the variables that
17 were used in his final regression.

18 So on these bases, we don't believe
19 there has been compliance with the Judges'
20 rules. We should have received both a
21 description in his testimony and certainly, in
22 discovery, alternative regressions considered,
23 including those in which he excluded variables
24 that were not included in his final regression.
25 So we move to strike on that basis.

1 JUDGE BARNETT: Thank you. We're
2 going to hear response tomorrow. Not today.
3 This is a complex motion, albeit delivered
4 orally.

5 In fact, we might decide to ask for it
6 on paper, but be prepared, Mr. Stewart, just in
7 case we make you think fast.

8 MR. STEWART: Thank you, Your Honor.

9 JUDGE BARNETT: Before we break for
10 today, let's discuss our available Fridays.
11 Looking at the calendar, as Ms. Whittle urged
12 us to do, since we aren't available on the 2nd,
13 which is this Friday, or the 9th, which is next
14 Friday, that only leaves us a single Friday,
15 which will be the 16th. And we can make
16 ourselves available for that day.

17 In addition, this hearing was
18 scheduled to end on a Tuesday, the 20th. That
19 means we could move all the dominos around and
20 figure out a way to keep our court reporter and
21 the room and go over into the 21st or 22nd,
22 which will be the Wednesday or Thursday of that
23 week.

24 I know that working all the moving
25 pieces among yourselves is, as our law firm

1 administrator once said to me about office
2 assignments, much too delicate for a computer
3 program; it requires a yellow legal pad and a
4 pencil. So if you would, if not tonight or
5 tomorrow, certainly on Friday, put your heads
6 together, come up with a schedule that will
7 work for all of your witnesses and for all of
8 us, and rest assured that we will make
9 ourselves available on Friday, the 16th, if
10 that works for everyone, or on the -- Wednesday
11 and Thursday, the 21st and 22nd, if those days
12 work better for everyone or a combination. You
13 know, we'll do what works.

14 So we look forward to hearing from you
15 on that calculus or the results of that
16 calculation, and we will continue with
17 Dr. Crawford, Professor Crawford, tomorrow
18 morning at 9:00 o'clock. Okay? We're at
19 recess until that time.

20 (Whereupon, at 5:01 p.m., the hearing
21 recessed, to reconvene at 9:00 a.m., on
22 March 1, 2018.)

23

24

25

1 C O N T E N T S

2 WITNESS: DIRECT CROSS REDIRECT VOIR DIRE

3 GREGORY CRAWFORD

4 By Mr. Stewart 1367

5 By Mr. MacLean 1432

6 By Mr. Cosentino 1648

7 By Mr. Olaniran 1652

8

9 AFTERNOON SESSION: 1508

10

11 CONFIDENTIAL SESSIONS: NONE

12

13 E X H I B I T S

14 EXHIBIT NO: MARKED/RECEIVED REJECTED

15 2007 1367

16 2009 1367

17 1091 1496

18 2008 1367

19 2010 1367

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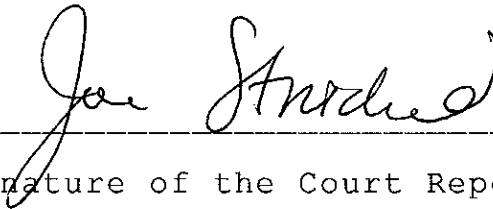
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1 CERTIFICATE

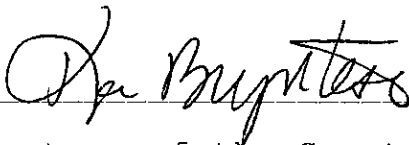
2
3 I certify that the foregoing is a true and
4 accurate transcript, to the best of my skill and
5 ability, from my stenographic notes of this
6 proceeding.

7
8
9 2-28-18

10 Date


Signature of the Court Reporter11
12 2-28-18

13 Date


Signature of the Court Reporter

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) Docket No.

DETERMINATION OF CABLE) 14-CRB-0010-CD

ROYALTY FUNDS) (2010-2013)

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4 IN THE MATTER OF:)

5) Docket No.

6 DETERMINATION OF CABLE) 14-CRB-0010-CD

7 ROYALTY FUNDS) (2010-2013)

8 -----X

9 BEFORE: THE HONORABLE SUZANNE BARNETT

10 THE HONORABLE JESSE M. FEDER

11 THE HONORABLE DAVID R. STRICKLER

12

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19 9:06 a.m.

20 VOLUME VIII

21

22

23 Reported by: Joe W. Strickland, RPR, CRR, CRC
24 Karen Brynteson, RMR, CRR, FAPR

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

2 (9:06 a.m.)

3 JUDGE BARNETT: Shall we march on?

4 Get it?

5 Mr. Cho.

6 Whereupon--

7 GREGORY CRAWFORD,

8 a witness, called for examination, having previously
9 been duly sworn, was examined and testified further
10 as follows:

11 CROSS-EXAMINATION

12 BY MR. CHO:

13 Q. Good morning, Dr. Crawford.

14 A. Good morning.

15 Q. My name is Dustin Cho, and I represent
16 the Public Television Claimants.

17 A. Nice to meet you.

18 Q. The last time I was up here with a
19 witness that spilled over from the day before,
20 she wanted to start by elaborating or
21 clarifying some of her testimony. So I thought
22 I should give you the same opportunity first.
23 Is there anything you want to elaborate or
24 clarify from the day before? Of course, it is
25 perfectly fine if you don't wish to.

1 JUDGE BARNETT: I'm sorry; before we
2 even ask the question. With regard to
3 Mr. MacLean's oral motion yesterday, this is
4 not something we can handle unless we have it
5 in writing.

6 MR. MacLEAN: You Honor, we filed our
7 motion in writing this morning, taking your
8 hint from yesterday. And so it's -- it's been
9 filed.

10 JUDGE BARNETT: Thank you very much.

11 MR. STEWART: Your Honor, we are
12 responding in writing, as well.

13 JUDGE BARNETT: I appreciate that.
14 And that having been said, of course, we are
15 going to complete Dr. Crawford's testimony and
16 make the decision after the fact, as we have
17 done at times in the past.

18 Now, I'm sorry, Mr. Cho -- oh,
19 Mr. MacLean, you have an objection to the
20 question?

21 MR. MacLEAN: Yes, your Honor. The
22 question is broad and vague and basically
23 allows the witness to question himself. I'd
24 ask that the question be something that we can
25 understand and respond to, without simply

1 opening the floor to the witness.

2 MR. CHO: Your Honor, I am just asking
3 the witness to clarify his remarks, if he
4 wishes to do so.

5 JUDGE BARNETT: Overruled.

6 THE WITNESS: So I have nothing to say
7 at this time -- I have nothing to say at this
8 time.

9 BY MR. CHO:

10 Q. Well, one thing I do want to clear up
11 at the outset -- I don't know if we can pull up
12 Slide 1. Yesterday, you agreed with
13 Mr. MacLean that this issue was very important,
14 and so I want to touch on this right away.

15 Mr. McLean repeatedly suggested that
16 the minimum fee might be calculated on a
17 subscriber group basis rather than on a
18 systemwide basis, as you had testified. And on
19 the screen is an excerpt from Exhibit 4009,
20 which is the testimony of Jonda Martin, the
21 President of Cable Data Corporation. And she
22 states, "Only the minimum fee should be
23 calculated on a systemwide basis without
24 reference to subscriber group." Is that
25 consistent with your testimony yesterday?

1 A. Yes, it is.

2 Q. And in fact, if we view the next
3 slide, if you look at the Statement of Account
4 form, Form 3, that is attached to Exhibit 4009
5 at page 39, it is clear from Form 3 that the
6 minimum fee is calculated on a systemwide
7 basis, as you testified; right?

8 A. That's correct. And this is the form
9 I was familiar with in my memory.

10 Q. Thank you, Dr. Crawford.

11 JUDGE FEDER: Dr. Crawford, is your
12 mic on?

13 THE WITNESS: I don't know. I will
14 move it a little closer.

15 BY MR. CHO:

16 Q. So I want to start out by looking at
17 Figures 11 and 12 of your Direct Testimony on
18 page 25. Do you have that in front of you?

19 A. I see the image on the screen, yes.

20 Q. So Figure 11, which is at the top of
21 the slide, shows each Claimant group's share of
22 the minutes of their programming that were
23 broadcast multiplied by the number of distant
24 subscribers who receive that programming;
25 right?

1 A. Weighted by the total subscribers at
2 the system level -- or at the subscriber group
3 level. Excuse me.

4 Q. Right. So I guess that is sort of
5 what my question is trying to get at. It is
6 the minutes of the programming that were
7 broadcast multiplied by -- and that is the
8 weighting -- multiplied by the number of
9 distant subscribers receiving that program. Is
10 that how the weighting is done?

11 A. Yes, that's correct.

12 Q. So, for example, if there is a station
13 that carried only 1,000 subscribers on a
14 distant basis and one minute of that station
15 programming is transmitted to those 1,000
16 subscribers, that counts as 1,000 distant
17 minutes for this table?

18 A. For this table, yes.

19 Q. Whereas, if it is a widely carried
20 station like WGN that goes to 40 million
21 distant subscribers, then 1 minute of WGN would
22 actually count as 40 million distant minutes on
23 this table?

24 A. That's correct.

25 Q. Figure 11, the one on the top, does

1 not account for the fact that most of the
2 programming minutes on WGN are non-compensable;
3 right?

4 A. That's correct. It reports the share
5 of total minutes.

6 Q. So then Figure 12, which is below
7 that, that shows the shares of only the
8 compensable distant minutes?

9 A. That's correct.

10 Q. And Program Suppliers and Devotional
11 shares of the minutes fall by nearly half?

12 A. Yes, I see that, yes.

13 Q. And everyone else's share actually
14 more than doubles?

15 A. That looks to be -- yes; correct.

16 Q. And is it your testimony that the
17 Public Television category accounted for
18 36.3 percent of the compensable distantly
19 retransmitted programming minutes that CSOs
20 chose to carry in 2010 through 2013?

21 A. When weighted by subscribers, yes.

22 Q. Did Public Television account for the
23 largest share of compensable distantly
24 retransmitted minutes during this period?

25 A. Yes.

1 Q. And from 2010 to 2013, there is a
2 marked increase in Public Television's share of
3 compensable minutes; is that right?

4 A. There is a modest increase. I mean,
5 it's maybe 10 percent over -- well, no -- yeah,
6 10 to 15 percent over the three-year --
7 four-year period.

8 Q. It goes from approximately 32 percent
9 in 2010 up to nearly 40 percent?

10 A. That's right. It's closer to
11 20 percent, excuse me.

12 Q. And you previously testified that --
13 if we could put up the next slide -- I think
14 you previously testified that Public
15 Television's type of programming is more likely
16 to be considered niche programming, therefore
17 is more profitable to cable systems than other
18 types of programming; right?

19 A. Could I see the full context?

20 Q. I believe -- oh, has this been moved
21 -- this is a Program Suppliers exhibit. Has
22 this been moved into evidence? 6047?

23 JUDGE STRICKLER: What is this
24 exhibit?

25 MR. CHO: This is his prior testimony

1 from 2004 to 2005 -- Dr. Crawford's prior
2 testimony from 2004 to 2005.

3 MS. PLOVNICK: I believe this
4 particular exhibit number hasn't been admitted
5 into evidence; however, I think it may have
6 been previously designated by somebody else.
7 So it may already be in the record with another
8 number, 40-something.

9 JUDGE BARNETT: Okay. Somebody in the
10 room designated Dr. Crawford's prior testimony.
11 Who are you and what number is it?

12 (Laughter.)

13 MR. COSENTINO: I think it is us, your
14 Honor. Let me find it.

15 JUDGE BARNETT: Thank you.

16 MR. CHO: I apologize.

17 JUDGE BARNETT: It's okay. It's just
18 we want to de-duplicate to the extent that we
19 can.

20 MR. COSENTINO: This is the 2004-2005?

21 MR. CHO: Yes, rebuttal.

22 MR. COSENTINO: Rebuttal of
23 Dr. Crawford? This is Tab A to Exhibit 4005,
24 which is the Direct Statement of Dr. George.

25 JUDGE BARNETT: And is 4005 previously

1 admitted?

2 MR. COSENTINO: Yes, it is, your
3 Honor.

4 JUDGE BARNETT: So it is already in
5 the record. So, Mr. Cho, if you could --

6 MR. CHO: We will try to find that
7 copy.

8 JUDGE BARNETT: -- mentally highlight
9 the Exhibit 6047 and refer to it, rather, as an
10 exhibit to -- rather, an appendage to
11 Exhibit 4005, the record will be clear, we
12 hope.

13 MR. CHO: Thank you very much, your
14 Honor. May I approach the witness?

15 JUDGE BARNETT: You may.

16 THE WITNESS: I'm sorry; I'm doing
17 damage to the binder here. Appendix A. Okay.
18 Yeah.

19 BY MR. CHO:

20 Q. It's also up on the screen.

21 A. If you don't mind, I'll look at the
22 full page.

23 Q. Of course.

24 A. Okay. I see the passage. Go ahead
25 with your question.

1 Q. My question is that you previously
2 testified that Public Television's type of
3 programming is more likely to be considered
4 niche programming and is, therefore, more
5 profitable to cable systems than other types of
6 programming; is that right?

7 A. Yes, that's what I testified
8 previously.

9 JUDGE STRICKLER: You say in your
10 testimony that we are looking at that that is a
11 result of your research. The sentence begins,
12 "My research" closed quote. Then there is a
13 footnote. Do you then reference the research
14 in Exhibit --

15 THE WITNESS: The research I believe
16 is cited in the paragraph above, where it says,
17 "The second condition, negative correlation,
18 can in a recent article published in
19 Quantitative Marketing and Economics."

20 JUDGE STRICKLER: Can we blow that up?
21 I'm just trying to find that.

22 MR. CHO: Oh, I don't have a paper
23 copy.

24 JUDGE STRICKLER: We will get up to
25 speed and get it easier to read.

1 MR. CHO: This is the downside of
2 using electronic versions.

3 JUDGE BARNETT: Well, if there is an
4 earthquake, we won't be buried.

5 (Laughter.)

6 MS. PLOVNICK: You could use 6047 in
7 paper and put it on the ELMO and we'll just
8 pretend it's the other exhibit.

9 JUDGE BARNETT: Just like bankruptcy
10 courts have jurisdiction. You learn to
11 pretend.

12 (Laughter.)

13 BY MR. CHO:

14 Q. So I have up page 10 of what I believe
15 is somewhere in this Exhibit 4005, and the
16 footnote -- is that Footnote 24?

17 JUDGE STRICKLER: I think the witness
18 did not agree with me that it was in the
19 footnote. I thought he said it was in the
20 sentence.

21 THE WITNESS: The footnote is
22 referring to the same paper in the previous
23 paragraph. So The same reference.

24 JUDGE STRICKLER: Okay. Why don't we
25 start from the top and go back to your

1 testimony. Let's go to the sentence you were
2 talking about. Where is that?

3 THE WITNESS: Sure. I think it was
4 the previous paragraph. A little bit higher.

5 JUDGE STRICKLER: "The second
6 condition..."?

7 THE WITNESS: That one.

8 JUDGE STRICKLER: And that first
9 sentence suggests that we should be going back
10 even further, doesn't it? "The second
11 condition, negative correlation, can..."

12 THE WITNESS: If you like, I can
13 summarize. Or we could go back.

14 JUDGE STRICKLER: Please.

15 THE WITNESS: So this is research that
16 was looking to explore the economic incentives
17 of cable systems to bundle cable networks. And
18 one of the theories -- the ideas of the theory
19 of bundling is that it makes tastes more
20 homogenous and this can be profitable to cable
21 systems, and it is widely believed to be one of
22 the reasons that cable systems bundle.

23 This homogenizing account effect is
24 stronger if there is negative correlation
25 between the case for a given cable network and

1 the other elements in the cable bundle. So,
2 therefore, the profitability effect is stronger
3 if there is this negative correlation. So that
4 is what this second condition says.

5 And in both my direct and rebuttal
6 testimonies in this proceeding, I mentioned
7 that there is a bundling premium associated
8 with programming that can appeal to niche
9 cases.

10 JUDGE BARNETT: Thank you.

11 DR. CRAWFORD: Of course.

12 BY MR. CHO:

13 Q. And, in fact, you give examples in
14 that paper of particular channels or types of
15 programming that are represented -- or are
16 similar types of programming to Commercial
17 Television Claimant programming, Joint Sports
18 Claimant programming, and Public Television
19 programming; is that right?

20 A. Let me see the example. Yes, I do.

21 Q. Thank you. If we could go back to the
22 slides. Let's look at Figure 13 on page 26 of
23 your Direct Testimony, Exhibit 2004. In this
24 table, are you showing the average number of
25 distant Public Television stations in each

1 subscriber group broken down to show the
2 differences between different cable operator
3 MSOs?

4 A. Yes, that's what the table shows.

5 Q. And if you look at the bottom right
6 cell where it says .44, does that mean that
7 across all the cable operators in 2010 to 2013
8 the average distant subscriber group carried
9 .44 distant Public Television stations?

10 A. That's correct.

11 Q. And the 22 percent number below that,
12 does that mean that the Public Television
13 stations accounted for 22 percent of the
14 distant signals per subscriber group on
15 average?

16 A. That's correct.

17 Q. Now, in your testimony you observe
18 that there is an upward trend in both the
19 number and the share of distant stations that
20 are Public Television stations during 2010
21 through 2013; right?

22 A. Yes.

23 Q. Is that upward trend for Public
24 Television reflected in this far-right column?

25 A. I mean, the far-right column is the

1 average over the four-year period, so it would
2 not reflect a trend within the period.

3 Q. Well, the first row shows .41.

4 A. Oh, I see, I'm sorry. I thought you
5 meant -- yes, the final column reflects the
6 upward trend.

7 Q. Thank you. So in your testimony, you
8 also observe that since 2004-2005 -- the
9 2004-2005 decision -- there have been two new
10 entrants to the cable television industry;
11 right?

12 A. That's right.

13 Q. And those two new entrants were AT&T
14 and Verizon?

15 A. That's correct.

16 Q. And those two entrants quickly grew to
17 be among the largest pay TV providers in the
18 United States by 2013?

19 A. According to -- yeah.

20 Q. I don't have a slide for it, but I
21 believe it's Figure 7 on page 19 of your
22 testimony.

23 A. Maybe we just look at that before I --

24 Q. Okay.

25 A. -- before I confirm without seeing the

1 numbers.

2 Q. I believe on Figure 7, page 19, you're
3 showing the top MVPDs by share of the total
4 MVPD subscribers. We will try to bring it up.
5 Page 19.

6 A. So, can you repeat?

7 Q. My question is, those two entrants,
8 the AT&T and Verizon entrants, grew to be among
9 the largest pay TV providers in the U.S. by
10 2013?

11 A. That's correct.

12 Q. And, in fact, if we look at the right
13 column of this Table 2013, Comcast -- that's a
14 cable provider; right?

15 A. Yes, that's a cable priority.

16 Q. And then the next two, DirecTV and
17 Dish, those are satellite providers?

18 A. Yes.

19 Q. And then after that is Time Warner,
20 AT&T, and Verizon?

21 A. That's correct.

22 Q. So if we go back to my slide --
23 sorry -- Verizon alone actually accounted for
24 more than 17 percent of the royalties paid in
25 2013, according to the next -- yes -- sorry.

1 If we could go to Figure 5 on page 17. Thank
2 you. So Verizon alone actually accounted for
3 more than 17 percent of the royalties paid in
4 2013, just Verizon?

5 A. That looks -- if I do the math of 108
6 divided by 744, that looks to be approximately
7 right.

8 Q. And, in fact, if you look on the
9 bottom line, Verizon alone accounted for about
10 14 percent of the total royalties paid for the
11 full four-year period?

12 A. That's correct.

13 Q. So did Verizon carry significantly
14 more Public Television stations than the other
15 MSOs during this period?

16 A. That's my understanding.

17 Q. Yeah. And on average, did Verizon
18 carry 1.38 distant Public Television stations
19 to each of its subscriber groups?

20 A. As reported in my Figure 13, yes.

21 Q. I got it from your Figure 13. So
22 Public Television stations actually accounted
23 for more than half, that's that 53 percent
24 number, of the average number of total distant
25 stations that Verizon carried to its subscriber

1 groups?

2 A. I'm just reading the footnote to make
3 sure I say the right thing. Yes, that appears
4 to be correct, 52 percent of the distant
5 stations choose -- Verizon subscriber groups
6 were PTV stations.

7 Q. Now, you mentioned yesterday that you
8 were familiar with the Bortz survey; right?

9 A. I am familiar in the sense that I read
10 the results, but I did not do a detailed
11 analysis of the entire study.

12 Q. Are you aware that in all four years,
13 the Bortz surveys never surveyed a single
14 Verizon system that carried any distant Public
15 Television signal?

16 A. I'm not aware of the Bortz survey to
17 that level of detail.

18 Q. Is it possible in your opinion that
19 that omission -- just assuming that that
20 omission is true -- is it possible that that
21 could have biased the Bortz survey against
22 Public Television?

23 A. I'm sorry; I don't feel confident to
24 comment on whether the Bortz survey would be
25 biased. I haven't analyzed it carefully.

1 Q. Well, okay. Now, the Bortz surveys
2 focused their analysis on sampling and
3 surveying entire cable systems. But even just
4 among the largest MSOs, there can be
5 substantial differences in the size and
6 complexity of cable systems; right?

7 A. Yes, that's true.

8 Q. Let's first talk about size. For
9 example, in Figure 8, which is up on the
10 screen, you show that the size of the average
11 Charter system is about 35,000 subscribers,
12 whereas the average size of the Verizon system
13 is more than 270,000 subscribers.

14 A. That's correct.

15 Q. But at the same time, Charter and
16 Verizon actually had similar numbers of total
17 subscribers during the 2010 through 2013
18 period?

19 A. Okay. That seems consistent with the
20 figure you presented there.

21 Q. On average, Verizon had about 15 cable
22 systems during this period, doing the math.

23 A. Verizon is known for having very large
24 cable systems.

25 Q. And on average, Charter had more than

1 100 systems during this period, just dividing
2 3.9 million by 35,000?

3 A. That's correct.

4 Q. So Charter systems were much smaller,
5 on average, than the Verizon systems?

6 A. Yes, that seems to be true.

7 Q. And according to your Figure 8, the
8 average size of the Comcast, Time Warner, Cox,
9 and AT&T cable systems were somewhere between
10 the Charter and Verizon systems on average?

11 A. Yes, that's correct.

12 Q. And the other MSOs, the other column
13 toward the right, on average had cable systems
14 with fewer subscribers than the six that you
15 just set out?

16 A. That's correct.

17 Q. All right. Well, that covers the
18 size, but I want to talk about the complexity
19 of the cable systems distant signals. And for
20 the most part, the largest systems did not
21 carry the same set of distant signals to all of
22 its subscribers in their system; is that right?

23 A. Well, I don't know if that's right,
24 actually. I mean, I didn't -- I didn't break
25 down the -- this Figure 10 which shows the

1 number of subgroups by system size. So I don't
2 know if that's true.

3 Q. Okay. Well, different subscriber
4 groups within the same system received
5 different sets of distant signals; right?

6 A. Yes.

7 Q. And -- well the Bortz survey and the
8 Horowitz survey and the Israel regression, they
9 stop at the level of the cable system as a
10 whole and they don't go deeper; is that right?

11 MR. STEWART: Your Honor, I object
12 again to further questions of this witness
13 about the Bortz survey. He said that he hasn't
14 studied it.

15 MR. CHO: Your Honor, he's said that he
16 is generally familiar. I don't know exactly
17 how familiar he is. But my question is -- this
18 is a pretty high-level question.

19 JUDGE BARNETT: This is not a specific
20 question about the Bortz survey, but I agree
21 with you, Mr. Stewart, that we don't need
22 further questions on the specifics of the Bortz
23 survey, since the witness has said he is not
24 familiar with the details of it. But that
25 question is acceptable. You may answer.

1 THE WITNESS: Thank you. Although I
2 think I will divide up my answer. I am
3 familiar that the Israel regression was at the
4 system level; I think I knew that the Bortz
5 survey was at the system level; but I'm not at
6 all familiar with the Horowitz survey.

7 BY MR. CHO:

8 Q. Well, let's talk about what you did.
9 You actually dug deeper and analyzed these
10 subscriber groups within each system; is that
11 right?

12 A. That's correct.

13 Q. And that detailed subscriber group
14 data has actually never been available before
15 or used in any prior proceeding -- or any prior
16 regression previous to this proceeding; is that
17 right?

18 A. There were two questions in there. So
19 my understanding is that subscriber groups were
20 available in previous proceedings. But I don't
21 believe that they were used in previous
22 regressions in previous proceedings.

23 Q. And the richness of your dataset
24 allowed you to control for system level fixed
25 effects, even within the same accounting

1 period; right?

2 A. That's correct.

3 Q. And because of your rich data, at the
4 same time you were also able to provide more
5 precise estimates with tighter confidence
6 intervals than any previous regression in these
7 proceedings; right?

8 A. Well, I mean, any previous regressions
9 in these proceedings is fairly broad. So I'm
10 familiar with the Waldfogel regression and my
11 confidence intervals were tighter than the
12 Waldfogel regression.

13 Q. Did you review the Ralston regression?

14 A. I reviewed it for the previous
15 proceeding, but I did not review it for this
16 proceeding.

17 Q. I see. So you didn't re-review it in
18 preparing your testimony here?

19 A. Yes.

20 Q. Understood. But your regression has
21 tighter confidence intervals than that
22 regression, as well; is that right?

23 A. Yes -- oh, than that regression? I'm
24 not sure. I reviewed it so long ago, I don't
25 really remember.

1 Q. So according to the bottom of your
2 Figure 10, there were some cable systems that
3 had more than 20 different subscriber groups?

4 A. That's correct.

5 Q. Do you know whether larger cable
6 systems, which accounted for more of the
7 royalty payments -- that's what I mean by
8 larger -- on average had more subscriber groups
9 than smaller cable systems?

10 A. I don't know.

11 Q. Well, a different question;
12 Mr. MacLean asked about the first row on this
13 table. And is it true that on average the
14 smaller systems that paid the least royalties
15 fall into this category of having only one
16 subscriber group?

17 A. So again, I don't know how this table
18 correlated with the size of the system.

19 Q. Okay. Well, by my calculation, the
20 largest 50 systems by royalty payments in the
21 last accounting period of your study averaged
22 more than 15 subscriber groups per period. Is
23 that consistent with what you observed?

24 A. Well, I mean, I haven't observed it,
25 but -- so I can't comment one way or the other

1 whether that is true.

2 Q. Well, one thing I do want to clear up
3 from yesterday. Mr. MacLean yesterday
4 suggested that a system paying a minimum fee
5 would not have any reason to have multiple
6 subscriber groups. But now that we clarified
7 earlier this morning that the minimum fee
8 actually only applies on a systemwide basis, as
9 you consistently testified, isn't it actually
10 the case that cable operators would have an
11 incentive to use subscriber groups to pack all
12 the communities that have the highest demand
13 for distant signals into one subscriber group
14 that receives maybe more than one DSE, and then
15 put the rest in a subscriber group that gets
16 fewer than one DSE in order to pay the minimum
17 fee for the system as a whole?

18 A. So that's not my -- that's not how I
19 usually think of how the cable operator would
20 select the distant signals to carry in
21 subscriber groups.

22 Q. I guess I'm just asking at a
23 theoretical level, if a cable operator that is
24 trying to reduce its cable fees might use
25 subscriber groups to actually fall within the

1 minimum fee while importing distant signals?

2 Is that possible?

3 A. Could you maybe elaborate a little bit
4 more on the scenario you see?

5 Q. Sure. For example, a cable system
6 might want to gerrymander its borders or create
7 different subscriber groups within a system, so
8 that maybe there is a section that's a major
9 city that doesn't need to import a lot of
10 distant signals and a more suburban or rural
11 community all connected, and they have
12 discretion to draw the borders of their cable
13 system. And then they could have a subscriber
14 group out there that gets two DSEs and the
15 large subscriber group in the city that gets
16 zero DSEs, and they end up paying the minimum
17 fee?

18 A. I mean, that's possible. But I have
19 no evidence for it.

20 Q. Mr. MacLean also asked you yesterday
21 about -- about an implied coefficient for Big
22 Three network nonduplicated network
23 programming. Do you recall that?

24 A. I do.

25 Q. And I think you gave him three reasons

1 why -- why his interpretation of that, what he
2 felt was an implied coefficient, is not really
3 valid. And I'll restate, and you can correct
4 me if I am wrong --

5 A. Do, please.

6 Q. I believe, one, you said that that
7 variable actually wasn't significant. Two, it
8 combined multiple things that were off-air
9 minutes plus Big Three nonduplicated network
10 minutes. So all those minutes were just
11 combined in one variable. And third, it was an
12 effects regression, and so you can't really
13 interpret a variable that the effects
14 regression wasn't designed to actually have an
15 interpretable coefficient for; is that right?

16 A. So that sounds -- without looking at
17 the specific transcript, that sounds broadly
18 consistent with my testimony from yesterday.

19 Q. I just want to follow up on that last
20 part about the effects regression being -- I
21 think that there may be a reason why stations
22 -- and I think you touched on this yesterday --
23 there is maybe a reason why stations that are
24 importing nonduplicated Big Three network
25 programming might be different from other

1 stations in the population; is that right?

2 A. You mean systems importing?

3 Q. Oh, I'm sorry, systems, yes.

4 A. Might be different from other systems
5 in the population?

6 Q. Exactly. Or subscriber groups, I
7 guess is the more relevant.

8 A. Yes, I could imagine that there are
9 probably much smaller systems. If it is a
10 system that is importing nonduplicated Big
11 Three network programming, then presumably it
12 doesn't have its own Big Three network
13 programming locally. And to me, this suggests
14 that they are probably small systems.

15 Q. In fact, there might be all sorts of
16 what you would call unobserved heterogeneity or
17 differences between subscriber groups that need
18 to import a Big Three network station versus
19 all of the other systems. And that, in fact,
20 that omitted variable bias might be captured
21 within this variable that Mr. MacLean was
22 trying to interpret as just reflecting the
23 value of Big Three nonduplicated network
24 minutes?

25 A. So I disagree strongly with that

1 characterization. Shall I elaborate?

2 Q. Yes, please.

3 A. So I think if different systems or
4 subscriber groups are importing different
5 distant signals, they're doing so to reflect
6 the value they have for the programming.
7 That's not an omitted variable; that's an
8 included variable. So they are selecting the
9 distant stations to carry and the regression
10 measures the value of the different minutes of
11 programming. So it's not omitted.

12 Q. I didn't mean to say -- I was not
13 saying this would bias the coefficients of
14 interest for the minutes that you actually
15 designed your regression to interpret. I'm
16 sorry if I was unclear.

17 I was just saying if Mr. MacLean is
18 trying to interpret the coefficient for -- you
19 know, the implied coefficient that he created
20 for a Big Three nonduplicated network minute,
21 that variable is actually capturing potentially
22 any differences that a system might have that
23 decides that it needs to import a Big Three
24 network; isn't that right?

25 A. Well, I dispute the value of the

1 premise for the reasons I gave Mr. MacLean
2 yesterday --

3 Q. Right.

4 A. -- of investigating the consequences
5 of this coefficient. So -- but putting that
6 aside, if you could repeat again -- I wanted to
7 get that out first -- and if you can repeat
8 again your question, I am happy to consider,
9 sort of pursue it even absent -- because of the
10 first two considerations, to pursue
11 investigations on the third.

12 Q. I guess what I'm really getting at is
13 since you didn't design your regression to try
14 and have an interpretable coefficient to
15 measure the value of nonduplicated Big Three
16 network programming, you didn't try and account
17 for all of the control variables that would be
18 needed to actually have an interpretable
19 coefficient for that. And you wouldn't need
20 to, because what you are trying to do is
21 interpret the effects of these minutes of the
22 six categories of programming, which do not
23 include Big Three network programming.

24 A. So -- so I disagree with this. So, I
25 mean, the purpose of the proceeding is to

1 measure the relative value of the Claimant
2 categories. But it does show in my regression,
3 as I described to Mr. MacLean yesterday, by
4 including the total minutes that measures these
5 relative to the value of -- in the nonduplicate
6 analysis -- the pool of nonduplicated network
7 programming and off-air programming.

8 And so, in fact, the regression does
9 measure also the -- implicitly, the value of
10 this pool of off-air and nonduplicated network
11 programming.

12 Q. Exactly. That's what I was trying to
13 get. Thank you. And I guess my point is,
14 then, you don't need to worry about trying to
15 have the regression as an interpretable Big
16 Three network coefficient, because the purpose
17 of that variable would be entirely different?

18 A. Well, I mean, the -- I mean, we don't
19 use that coefficient in the actual royalty
20 shares. But it's part of the calculation that
21 goes into the calculation of the royalty shares
22 for the other -- for the Claimant categories.

23 Q. Let's talk about another feature, the
24 quality of your data. So some other studies in
25 this proceedings, which will go unnamed, don't

1 try to survey every single cable system in
2 every year. Those surveys rely on samples or
3 the other studies rely on samples; is that
4 right? The Bortz survey, you probably know,
5 does rely on samples; right?

6 A. I am familiar enough with the Bortz
7 survey to understand that it relies on samples.

8 Q. And each of those surveys actually
9 involve fewer than 100 unique respondents; do
10 you know?

11 A. I did not know that.

12 MR. MacLEAN: Objection. Outside the
13 scope of Direct.

14 JUDGE BARNETT: Sustained. Although I
15 think that objection belongs to the party
16 presenting the witness.

17 (Laughter.)

18 MR. STEWART: I agree with Mr. McLean.
19 That's the last time I'm going to say that.

20 (Laughter.)

21 MR. CHO: Your Honor, one of the key
22 issues in this proceeding will be, you know,
23 the extent to which Dr. Crawford's survey -- I
24 mean Dr. Crawford's study corroborates or does
25 not corroborate the Bortz survey. So I am

1 going to ask some questions, if I may, about
2 the Bortz survey. But I can ask in a
3 hypothetical, if he is not familiar with the
4 details of the Bortz survey.

5 JUDGE BARNETT: You can ask about the
6 results of the Bortz survey and, if he knows,
7 he can answer. Otherwise, it would have to be
8 a hypothetical question.

9 MR. CHO: Understood. Thank you.

10 BY MR. CHO:

11 Q. In the past, the regression analyses
12 in these proceedings have relied on samples as
13 well; is that right?

14 A. Samples is a broad term. So in some
15 data in some settings, they relied on the
16 population of the systems, but perhaps samples
17 of the programming. So -- the answer varies
18 depending on the variable that we are talking
19 about.

20 Q. Well Dr. Waldfogel's regression we've
21 seen relied on a sample of only three weeks of
22 programming data from each accounting period;
23 right?

24 A. That's my understanding for the
25 programming data, yes.

1 Q. And unlike that study, your study did
2 not rely on sampling; correct?

3 A. That's correct.

4 Q. In fact, you used the entire
5 population of programming on all the distant
6 signals for all four years?

7 A. That's correct.

8 Q. And unlike the sample-based survey,
9 your regression is able to systematically
10 account for all the programming that was
11 transmitted to all the subscriber groups in the
12 four-year period?

13 A. That's correct.

14 Q. So it's actually impossible for your
15 study to suffer from a bias like nonresponse
16 bias?

17 A. The word "nonresponse bias" would not
18 be relevant for the environment that my study
19 applies.

20 Q. Right. Because your study actually
21 captures all of that data. You are not
22 surveying anyone. There is no respondent.

23 A. Exactly. There is no respondent.

24 Q. And another feature of your study is
25 that you actually are able to take into account

1 non-compensable programming; right?

2 A. Yes.

3 Q. In fact, your regression is able to
4 fully control for non-compensable programming
5 and doesn't attribute any value to that
6 non-compensable programming for any Claimant
7 group; right?

8 A. You misstated a little bit. So in the
9 regression, if the non-compensable programming
10 has a value to the cable operator, then it
11 informs the regression coefficient. But then,
12 once I have the regression coefficients, of
13 course. I only apply them to the compensable
14 programming.

15 Q. My question, I believe I said, was you
16 don't attribute any value to the
17 non-compensable programming for any Claimant
18 group?

19 A. That I agree with. I didn't know that
20 the previous question said exactly that.

21 Q. In your report you offer two different
22 versions of your regression analysis; right?

23 A. That's correct.

24 Q. Your initial analysis and then what
25 you called the nonduplicate analysis?

1 A. That's right.

2 Q. In your nonduplicate minutes analysis
3 you removed all of the value for all duplicated
4 programming; right?

5 A. I mean, I reviewed -- I removed from
6 the data duplicated network programming.

7 Q. When you say "duplicated network
8 programming," you're not restricting that to
9 the Big Three networks though. You actually
10 included all types of programming from --

11 A. From networks. That's correct. It
12 wasn't just the Big Three networks. As I
13 mentioned in my Direct Testimony, Fox was
14 included, PBS, Univision, et cetera.

15 Q. And the only basis for your decision
16 to remove 100 percent of the value for
17 duplicated minutes is your intuition that
18 duplicated programming had zero value for cable
19 system operators?

20 A. So let me -- I'm going to contest the
21 premise and then ask you to ask the question
22 again, because I think you mischaracterized.
23 When I remove the duplicated minutes -- so the
24 minutes of duplicated programming, so the way I
25 think about it is that the minutes of that

1 duplicated programming has no value to cable
2 operators.

3 When I include it in the initial
4 analysis, then I'm basically measuring an
5 average value of programming which includes the
6 value of nonduplicated programming, the
7 positive value for nonduplicated programming
8 and a zero value for the duplicated
9 programming.

10 When I then remove the duplicated
11 programming, of course you are only left over
12 with the nonduplicated programming that has
13 positive value. So, of course, the value per
14 minute of that programming comes higher because
15 we are no longer averaging in a bunch of zeros.

16 So I don't take away any of the value
17 of the programming, because I take away -- so
18 the programming that remains has higher value
19 because it's not being averaged with a bunch of
20 zeros. So there is no removal of the value of
21 the programming from any Claimant category.

22 Q. Well, let me ask my question again --

23 A. Please.

24 Q. -- and see if you are able to respond.

25 The only basis for your decision to remove

1 100 percent of the value from the duplicated
2 minutes is your intuition that the duplicated
3 programming has zero value to cable operators?

4 A. I don't remove 100 percent of the
5 value from duplicated minutes. So -- oh -- I
6 -- I -- the premise behind the analysis is that
7 the duplicated minutes have no value. So --
8 but putting aside that disagreement with the
9 beginning of your question, I am happy to
10 answer the second half of your question, which
11 is that because of this idea that duplicated
12 programming is a perfect substitute for
13 existing programming and it, therefore, would
14 have no value to the cable operator, and so I
15 guess my justification for this is that it's a
16 bit of an extension of the network
17 nonduplication rules to networks outside the
18 Big Three. So it basically captures this idea
19 that programming on networks that duplicates
20 programming that is already in the local market
21 has no value to the cable operator.

22 Q. Well, does the network non-duplication
23 rule imply that the cable operators do not
24 value duplicated network programming?

25 A. My understanding of the rules is that

1 the local station that has exclusive rights to
2 the programming can ask the cable operator to
3 blackout that programming. And if it's blacked
4 out programming, I assume it has no value. In
5 fact, it may even have negative value.

6 Q. But the rule, actually, doesn't --
7 isn't derived from cable operators' preferences
8 or their valuation. It's a rule; right?

9 A. It's a rule. And I'm not even deeply
10 familiar with the specific rationale for the
11 rule. But from an economist perspective, when
12 I see the rule and say why does that rule make
13 sense, I think it is meant to protect local
14 broadcasters that have an exclusive right to
15 programming to have the identical programming
16 present on another signal and, since it is a
17 perfect substitute, some consumers might
18 otherwise go to that signal. And so they --
19 because they are perfect substitutes and so
20 then it is blacked out.

21 Q. But is it your opinion that that rule
22 is, in fact, a reflection that that cable
23 operators do not value the distant duplicated
24 network programming?

25 A. From a cable operator's perspective,

1 they want to have a program for the consumers;
2 right? And so once they have it on one signal,
3 what is the point of having it on another
4 signal?

5 Q. And the rule, in fact, doesn't apply
6 to any networks other than the Big Three
7 networks?

8 A. That's my understanding.

9 Q. Have you ever discussed with any cable
10 operator whether or not duplicates have any
11 value?

12 A. I have not.

13 Q. And you don't cite any literature or
14 evidence beyond that intuition?

15 A. No, I don't.

16 Q. In fact, is it possible that cable
17 subscribers develop brand loyalty to a
18 particular station and like to continue to
19 watch the same channel, both for its unique
20 programming as well as its network programming?

21 A. I mean, I do believe stations
22 potentially develop brand loyalty in general,
23 yes.

24 Q. And do you think it's possible that
25 some viewers might want to continue to watch

1 the same channel that they consistently watch?

2 A. But I think the viewing of distant
3 signals is so tiny, relative to the viewing of
4 local stations, that I think -- I can imagine
5 the idea of brand loyalty for a local station,
6 but I think the concept, while relevant for
7 what might be large stations within a market,
8 is probably less relevant for these smaller
9 distant signals.

10 Q. And the only basis for that is your
11 intuition?

12 A. My analysis of the likely forces
13 within the market.

14 Q. But there's no -- you can't point to
15 any evidence?

16 A. That's correct.

17 Q. So to the extent that there may be
18 some value to network programming brand
19 loyalty, whatever it might be, would you agree
20 that if you were imposing that all Public
21 Television programming has -- duplicated Public
22 Television programming has zero value, that the
23 implied share for Public Television in your
24 nonduplicate minutes analysis is conservative
25 as to Public Television?

1 A. No -- no, because if you recall, by
2 taking out those minutes -- suppose for the
3 minute -- suppose I agreed with your premise
4 that those minutes didn't have zero value, but
5 some slight nonzero value. In the -- by virtue
6 of taking them out, I measure a higher value --
7 so and let's continue the premise that the
8 value to cable operators of nonduplicate PTV
9 programming is higher than whatever this slight
10 value.

11 Then by virtue of taking out the
12 duplicate programming, what I am estimating is
13 this higher value of the other minutes. And so
14 it would be absolutely inappropriate to apply
15 that higher value, which was estimated on data
16 associated with nonduplicate programming, and
17 then applying it to the programming minutes I
18 dropped in the duplicate analysis. That would
19 be a mistake.

20 Q. I very much agree with you. But my
21 question is really that if you -- if there were
22 some value, as you were saying in this
23 hypothetical, if there was some value to Public
24 Television duplicated minutes that is slightly
25 above zero, at least, then the shares that you

1 compute in your duplicate analysis would be
2 conservative as to Public Television. We can
3 see that between your initial analysis and the
4 Public Television analysis there is a gap.

5 A. There is a gap in -- so let me say the
6 initial analysis didn't drop the duplicate
7 minutes. And so the initial analysis would
8 capture whatever is this value of both the
9 duplicate and nonduplicate minutes. But it did
10 not need to -- none of the coefficients needed
11 to go any particular direction once one takes
12 away the duplicate minutes.

13 So it just -- it happened -- because
14 what is happening when you take away the
15 duplicate minutes you get a higher average
16 value per minutes. And then for some program
17 categories, fewer minutes. So one number goes
18 up and one number goes down, and it could have
19 been higher or lower than the share estimate
20 from the initial analysis.

21 Q. But isn't it true that if there were
22 some value to those duplicated minutes, then
23 the shares would fall somewhere in between the
24 initial analysis and the nonduplicated minutes
25 analysis?

1 A. No, if there was some value, then the
2 results of the initial analysis would be the
3 germane results, because the initial analysis
4 includes those minutes.

5 Q. Now, I want to turn to looking at the
6 shares that you actually propose in your
7 nonduplicate minutes analysis which are on
8 Figure 20 of page 45.

9 A. Okay.

10 Q. What are the numbers in the
11 parentheses?

12 A. The numbers in the parentheses are an
13 estimate of the standard error for the
14 estimates.

15 Q. So to calculate a 95 percent
16 confidence interval for each of these point
17 estimates, you can multiply the standard error
18 by roughly two, and then add or subtract them
19 to each point estimate to get a confidence
20 interval?

21 A. That's true. That is how one gets
22 confidence intervals, in general.

23 Q. And you note that in Footnote 60. All
24 right.

25 A. Good.

1 Q. Now, I imagine that this may be fairly
2 sample arithmetic, but I will hand you a
3 calculator, if you would like, so you can use
4 it.

5 MR. CHO: May I approach the witness?

6 JUDGE BARNETT: Yes.

7 BY MR. CHO:

8 Q. Just to take an example, if you wanted
9 to calculate the confidence interval for 2010,
10 that first row, for Public Television, your
11 point estimate is 14 percent and the standard
12 error is 1 percentage point. So double it, it
13 is 2. So 2 is the 95 percent confidence
14 interval, plus or minus 2 percentage points; is
15 that right?

16 A. That's correct.

17 Q. So if you subtract 2 from 14 you get
18 12; you add 2 to 14, you get 16. So the low
19 end of the 95 percent confidence interval for
20 Public Television would be 12 percent and the
21 high end would be 16 percent?

22 A. That's correct.

23 Q. So if we go to the next slide, I have
24 done that arithmetic in the table. And I'm not
25 going to ask you to verify all of that right

1 now, but this slide is demonstrative. But is
2 this approach I described consistent with how
3 you would calculate 95 percent confidence
4 intervals?

5 A. It is, yes.

6 Q. In your rebuttal testimony,
7 Exhibit 2005, on page 19, you point out that
8 Dr. Gray's study must not actually reveal
9 relative values to CSOs because his estimated
10 shares were different from yours; right?

11 A. Well, that was -- I had many
12 objections to Dr. Gray's study. But one of the
13 objections was that if his did reveal relative
14 value, they should broadly corroborate my
15 study, which I do believe reveals relative
16 value.

17 Q. All right. On the next slide, I've
18 added the Bortz survey shares from page 3 of
19 Exhibit 1001.

20 MR. CHO: May I approach the witness?

21 JUDGE BARNETT: You may.

22 THE WITNESS: Thank you.

23 BY MR. CHO:

24 Q. And on this demonstrative, if the
25 Bortz survey share was outside of the

1 95 percent confidence intervals, I've marked it
2 in red. And just looking at -- and if you want
3 to look at the Bortz estimates, it's on page 3
4 of 1001.

5 And just looking at the Public
6 Television column, in every year the Bortz
7 estimates for Public Television are outside of
8 the 95 percent confidence intervals produced by
9 your regression; right?

10 A. There are a lot of numbers here, but I
11 think, yes, that's right.

12 Q. And, in fact, for the entire 2010 to
13 2013 period, the Bortz estimate for Public
14 Television is 5.1 percent. And how many
15 standard errors is that below your regression's
16 estimate for Public Television? We can do the
17 math together, if you like. So your point
18 estimate, I believe, was 17.02.

19 A. Okay.

20 Q. And the Bortz survey share for the
21 entire four-year period is 5.1 for Public
22 Television. So that is a difference of 11.92,
23 if my subtraction is correct.

24 A. Okay.

25 Q. And you would just divide 11.92 by

1 your standard error, 1.23, and according to my
2 math, that is 9.69 standard errors.

3 A. That sounds correct. Although I would
4 point out that, of course, both my estimates,
5 and I presume the Bortz estimates, are
6 estimates. And so I presume Bortz also has
7 standard errors.

8 Q. Yes, it has confidence intervals. I
9 think his Public Television confidence interval
10 is purportedly half a percentage point,
11 according to Mr. Trautman.

12 But if you were to adjust the Bortz
13 estimate to include systems that carry only
14 Public Television, per another witness'
15 testimony, Public Television's share would go
16 to about 8 percent. So in a hypothetical world
17 where Public Television's share is about
18 8 percent in a different study, would that
19 still be more than 7 standard errors below your
20 regression's estimate for Public Television?

21 A. Yes, a share of 8 percent would be
22 something on the order of 7 standard errors
23 below my estimate for Public Television.

24 Q. Now, when you are interpreting
25 standard errors -- 7 standard errors, that

1 would be on the lower bound on what I believe
2 would be a 99.999999997 percent confidence
3 interval. Does that sound roughly right?

4 A. That sounds approximately right.

5 Q. Would you also agree with me that in
6 every year the Bortz estimate for Program
7 Suppliers are outside of the 95 percent
8 confidence interval produced by your regression
9 analysis?

10 A. Yes, it looks like it.

11 Q. So, for example, in 2011 the Bortz
12 estimate for Program Suppliers is more than
13 6 standard errors higher than the estimate
14 produced by your regression?

15 A. I mean, we could do the math, but I
16 trust that you have done the math correctly.

17 Q. Thank you. Incidentally, are you
18 aware of any reason why the Bortz survey would
19 have estimated Program Suppliers' value in 2011
20 to be so much higher than 2010 or '12 or '13?

21 A. As I said earlier --

22 MR. STEWART: Objection.

23 JUDGE BARNETT: Sustained.

24 BY MR. CHO:

25 Q. Are you aware -- setting aside the

1 Bortz survey, are you aware of any reason
2 Program Suppliers' value might be, in 2011, so
3 much higher than 2010, '12 or '13?

4 A. I'm sorry; I missed that question.
5 Say that again, please.

6 Q. Are you aware of any reason why
7 Program Suppliers' share, relative market value
8 share, in 2011 should be so much higher than in
9 2010 or '12 or '13?

10 A. I mean, I can only report what my
11 study shows. And, I mean, I don't have the
12 point estimates in front of me, but -- I mean,
13 they go down a little bit over time. I mean, I
14 could look at my --

15 Q. Feel free.

16 A. Okay. I think I will. So I show sort
17 of a general decline in the Program Suppliers'
18 share over time in my recommended royalty
19 shares.

20 Q. In fact, it's a consistent decline.

21 A. A continuous decline.

22 Q. Now, the Bortz estimates for
23 Devotional programming are also significantly
24 above your regression's 95 percent confidence
25 interval in every year; is that right?

1 A. That's true.

2 Q. And the Bortz estimates for Canadian
3 programming are significantly below your
4 regression's 95 percent confidence interval in
5 every year?

6 A. That's true.

7 Q. That leaves Commercial Television and
8 Joint Sports. In two of the four years, the
9 Commercial Television's Bortz estimates are
10 within your regression's 95 percent confidence
11 interval; is that right?

12 A. Yes, that's correct.

13 Q. But in the other two years, the
14 Commercial Television's Bortz estimates are
15 outside your regression's 95 percent confidence
16 interval?

17 A. Outside, but fairly close.

18 Q. Fairly close. And for the Joint
19 Sports Claimants, their Bortz estimates are
20 within your 95 percent confidence interval in
21 every year?

22 A. That's true.

23 Q. Is it fair to say that there are
24 statistically significant differences between
25 the Bortz survey shares and the shares

1 estimated by your regression analysis?

2 MR. STEWART: Objection. Your Honor,
3 the witness has already indicated that he
4 believes that there must be standard errors
5 around the Bortz results and any questions
6 about the statistical difference would be
7 difficult.

8 JUDGE BARNETT: Sustained.

9 MR. CHO: You Honor, may I direct him
10 to the confidence intervals in the Bortz
11 surveys so that he may look at those?

12 JUDGE BARNETT: You may do that.

13 BY MR. CHO:

14 Q. I believe they are in the appendix --
15 one of appendices to 1001. Yes, it's toward
16 the very back on the last five pages. On page
17 D8 through D11 of Exhibit 1001, Mr. Trautman
18 reports confidence intervals.

19 A. So it's just the first table on each
20 of the pages?

21 Q. Yes, that is correct.

22 A. Okay. So repeat your question.

23 Q. So with that additional data, are you
24 able to answer whether it is fair to say that
25 there are statistically significant differences

1 between the Bortz survey shares and the shares
2 estimated by your regression analysis?

3 A. Can we come back to your table?

4 Q. Yes.

5 A. So it's -- so -- so I'm able to
6 make -- with my own analysis, I'm able to do
7 any hypothesis tests with respect to any single
8 number within my data. So if you ask me is a
9 particular number 9 standard errors below my
10 point estimate, I can say that.

11 When it involves comparing results
12 across studies using different datasets and
13 different techniques, it's not as comparable.
14 So I'm completely comfortable answering any
15 question, does any number lie within or outside
16 or relative to my confidence intervals. But in
17 terms of assessing whether -- that's the limit
18 of my comfort of what I am able to answer.

19 Q. Are you able to answer, just taking
20 this set of Bortz point estimates as a, you
21 know, hypothetical, are you able to answer
22 whether or not that set of numbers is
23 statistically significantly different from your
24 regression analysis?

25 A. So the midpoint of the Bortz

1 estimates, as you report on your table in front
2 of me, is, depending on year-end category,
3 outside the confidence intervals that I have
4 for my study.

5 Q. Setting aside the statistically
6 significant issue for a second, is it fair to
7 say that there are economically meaningful
8 differences between the Bortz survey shares and
9 the shares estimated by your regression
10 analysis, just assuming that these numbers are
11 the Bortz survey shares?

12 MR. STEWART: Objection as to the use
13 of the term "economically meaningful."

14 MR. CHO: The question is in within
15 the witness' experience, if he believes they
16 are, in his opinion, economically meaningful.

17 JUDGE BARNETT: That is sustained.
18 That's very fuzzy. If you can break it down
19 and ask it another way, Mr. Cho, have at it.

20 BY MR. CHO:

21 Q. Sure. So if you have an incredibly
22 large dataset -- for example I have done
23 analyses on voter registration datasets -- you
24 can get pretty much any variable that is
25 statistically significant, even if you wouldn't

1 think there was any theoretical reason to have
2 that data to be meaningfully different under a
3 particular variable. If you have a big enough
4 dataset, you can find statistical significance.
5 But that doesn't mean that it is important in
6 an economical or theoretical sense.

7 But the number could be -- it could be
8 because the coefficient could be very tiny or
9 very small. But when you have a big number
10 difference, that could be economically
11 meaningful, even if it is not statistically
12 significant; right?

13 So what I'm trying to get at is there
14 could be a difference between statistical
15 significance and economic significance; is that
16 right?

17 MR. MacLEAN: Objection.

18 MR. STEWART: I also have an
19 objection, your Honor.

20 JUDGE BARNETT: Mr. MacLean?

21 MR. MacLEAN: Objection. He
22 incorporated the same term as in the last
23 objection to the question. But my objection is
24 that counsel is testifying.

25 JUDGE BARNETT: Mr. Stewart?

1 MR. STEWART: And my objection is that
2 this purports to be a question about the
3 potential economic significance of the Bortz
4 survey results, as to which Dr. Crawford has
5 testified he hasn't studied the study itself.

6 MR. CHO: Your Honor, I'm not asking
7 him to assess the Bortz survey. I'm just
8 asking whether these numbers, taken
9 hypothetically, are economically different or
10 different in a meaningful way. And I'm going
11 to try and develop that idea so that he can
12 answer in whatever way he thinks is appropriate
13 in his opinion.

14 JUDGE BARNETT: I think he answered
15 the question with regard to statistical
16 significance.

17 MR. CHO: Yes. And I'm trying to ask
18 him about a different concept.

19 JUDGE BARNETT: Well, that's the
20 concept we're all having trouble with. I'm
21 going to defer to our Judge with the
22 significant economic knowledge and see if he is
23 familiar with the term and comfortable with the
24 question and the answer.

25 JUDGE STRICKLER: Well, are you asking

1 about the economic significance as
2 distinguished from the statistical
3 significance?

4 MR. CHO: Exactly.

5 JUDGE STRICKLER: Why don't you ask
6 the witness if he understands what you mean by
7 economic significance in this context, as
8 contrasted from statistical significance?

9 BY MR. CHO:

10 Q. Do you understand the difference
11 between economic significance in this context
12 as opposed to statistical significance?

13 A. To be honest, I don't.

14 (Laughter.)

15 JUDGE BARNETT: Sustained.

16 (Laughter.)

17 BY MR. CHO:

18 Q. In your testimony, you concluded that
19 the best method for estimating relative
20 marketplace value is regression analysis; is
21 that right?

22 A. I mean, in my testimony I said that
23 there are several appropriate methods and
24 regression is the one I used.

25 MR. CHO: If you could put up the

1 slide.

2 THE WITNESS: Okay.

3 BY MR. CHO:

4 Q. I believe this is page 3 of your
5 testimony. I think you concluded that the best
6 method for recovering relative marketplace
7 values is to apply a regression approach using
8 outcomes from the existing market; is that
9 right?

10 A. Yes, that's right.

11 Q. Thank you. I pass the witness.

12 JUDGE BARNETT: When I asked about
13 cross-examination yesterday, there was very
14 little response, although everyone did have an
15 opportunity, I think. Is there anyone else who
16 has questions for the witness, before
17 Mr. Stewart has redirect? Okay.

18 Mr. Stewart.

19 REDIRECT EXAMINATION

20 BY MR. STEWART:

21 Q. Good morning, Dr. Crawford.

22 A. Good morning.

23 Q. It's been a long time. I just had a
24 few questions for you.

25 First, with respect to the questions

1 that Mr. Cho just asked you with regard to
2 niche -- your testimony in a prior proceeding
3 about niche networks. Do you recall that?

4 A. I do.

5 Q. And I'm sorry that I don't remember
6 the number of the exhibit that we're
7 discussing, but he referred you to your prior
8 rebuttal testimony; correct?

9 A. That's correct.

10 Q. Do you have that in front of you?

11 A. I can pull it out again. I have it.

12 Q. And you cite in Footnote 24 on page 10
13 of that the examples from which you drew the
14 characterization of Public Television as a
15 niche network; is that correct?

16 A. That's correct.

17 Q. What was the comparable cable network
18 that you referred to?

19 A. C-SPAN.

20 Q. All right. And in this proceeding,
21 your testimony does not identify -- has not
22 identified PTV as a niche program service; is
23 that correct?

24 A. That's correct.

25 Q. Is that consistent with the results of

1 your regression? That is, does it have
2 different coefficients?

3 A. Yes.

4 Q. And describe -- I'm sorry --

5 A. I should be -- different coefficients
6 relative to?

7 Q. To other -- to other program
8 categories that you've identified as niche
9 programming.

10 A. Clearly, yes.

11 Q. Now, yesterday Mr. MacLean showed you,
12 among other drawings -- and I'm sorry I'm not
13 going to be able to do the same -- one that
14 appears to be an X with royalties on the left
15 axis and apparently some minutes of
16 programming, or some similar thing, with
17 respect to CTV programming and Devotional
18 programming. Do you recall that?

19 A. I do.

20 Q. And for CTV, he had a black line that
21 started in the lower left and increased to the
22 right?

23 A. That's right.

24 Q. And for Devotional programming, he had
25 a line that started in the upper left as red

1 and went down to the lower right; is that
2 correct?

3 A. I do remember.

4 Q. And that slope would indicate a
5 negative coefficient; correct?

6 A. That's correct.

7 Q. But your study did not provide a
8 negative coefficient for Devotional
9 programming, did it?

10 A. It did not.

11 Q. So what is the meaning of a positive
12 coefficient in this context?

13 A. A positive coefficient in this context
14 means that the relative CSO value for
15 programming, in this case Devotional
16 programming, would be positive.

17 Q. So that more minutes of Devotional
18 programming is associated with increased
19 royalties; is that right?

20 A. I'm sorry; yes, that would be a
21 clearer way to say the same thing.

22 JUDGE STRICKLER: Are you referring to
23 the drawing that Mr. MacLean did where he had
24 cost as a percent of income?

25 THE WITNESS: It was -- it was one

1 after this, I believe. That one was with beef
2 and lettuce and this one that Mr. Stewart is
3 referring to was with CTV and Devotional.

4 JUDGE STRICKLER: Okay.

5 BY MR. STEWART:

6 Q. Now, he also talked to you about your
7 use of log royalties as the dependent variable;
8 is that correct?

9 A. That's correct.

10 Q. He talked about how two different
11 cable systems, one with a thousand subscribers
12 and one with 100,000 subscribers -- do you
13 recall that?

14 A. I do.

15 Q. And a 10 percent increase in the
16 royalties would be associated in the two cases
17 with a thousand subscribers in the large system
18 but only ten in the small system -- no?

19 A. One hundred.

20 Q. One hundred in the small system. So
21 if you had used a linear royalty measure, that
22 10 percent increase in both systems, would it
23 have produced the same effective relationship
24 for your regression purposes?

25 A. I don't -- so if my dependent variable

1 had just been royalties?

2 Q. Yes.

3 A. Would it have produced the --

4 Q. Would it have produced a different
5 result in effect, or a different effect
6 measured for the two different systems, each of
7 which had a 10 percent increase?

8 A. No, it would have been the same thing.

9 Q. Would it not have produced an increase
10 of a thousand in the 100,000 subscriber
11 network?

12 A. Oh, I'm sorry; if that same parameter
13 had been with a linear regression, yes, it
14 would have produced the same linear effect for
15 both.

16 Q. So the impact would have been measured
17 at 100 times more for the large system than the
18 small system?

19 A. That's correct.

20 Q. So why did you include -- is that
21 related to why you include the log form of the
22 royalties?

23 A. Yes.

24 Q. How so?

25 A. Because as I mentioned, especially

1 when it came to the minutes of programming, I
2 thought it important to capture this idea that
3 there is more likely to be a proportional
4 effect on royalties of linear changes in
5 variables than a linear effect.

6 Q. And Mr. MacLean also talked to you
7 about the level shift issue. Do you recall
8 that?

9 A. I do.

10 Q. And the numbers that he picked for his
11 hypothetical showed a 50 percent increase in
12 the Devotional coefficient and a 5 percent
13 increase in the CTV coefficient; is that
14 correct?

15 A. Something like this, yes.

16 Q. Now, if the actual numbers turned out
17 to be substantially smaller, orders of
18 magnitude smaller, would there be any
19 disproportionate any significant
20 disproportionate impact across the coefficient
21 of these different categories.

22 MR. MacLEAN: I object to
23 "significant" in this context.

24 MR. STEWART: I will reword it.

25 JUDGE BARNETT: Thank you.

1 BY MR. STEWART:

2 Q. So, for example, if instead of a .05,
3 if I recall his hypothetical correctly, or
4 .00005 level shift, would there be large
5 differences in the relative sizes of the
6 coefficient?

7 A. No.

8 Q. And could we look at Figures 19 and 20
9 of your Direct Testimony. Let's look at
10 Figure 19. Can you blow that up for me?

11 Your response to Mr. MacLean included
12 a reference to the fact that other things are
13 changing as you would add a level shift across
14 the categories; is that right?

15 A. That's correct.

16 Q. So if you look at the bottom line
17 here, the Devotional -- the average marginal
18 value of Devotional minutes is .032. Do you
19 see that?

20 A. I do.

21 Q. Now, comparable orders of magnitude,
22 although the numbers are slightly larger, are
23 Program Suppliers at .69 and Public Television
24 at .054. Do you see that?

25 A. Yes, that's correct.

1 Q. So a level shift would have a similar
2 order of magnitude of effect on those average
3 marginal values as it would for the
4 Devotionals; is that correct?

5 A. Broadly, yes.

6 Q. Now let's look at Figure 20. You see
7 in the bottom line comparing the implied share
8 for Devotional programming against the implied
9 shares for Program Suppliers and Public
10 Television, there is quite a large difference;
11 is that right?

12 A. That's correct.

13 Q. And that's attributable to the amount
14 of programming in those other categories that
15 is in the mix; is that right?

16 A. That's correct.

17 Q. So if you had this level of shift that
18 had even the kind of disproportionate impact
19 that Mr. MacLean's hypothetical showed, would
20 you necessarily expect to see a significant
21 increase in the relative increase in the
22 Devotional implied share?

23 A. No.

24 Q. Mr. MacLean talked to you at some
25 length about implying a variable for

1 nonduplicated network minutes. Do you recall
2 that?

3 A. I do.

4 Q. There was some Greek and some algebra
5 involved, as I recall. So first, your study
6 defines nonduplicated Big Three network minutes
7 as those minutes that are not -- as including
8 programs that were not aired simultaneously
9 with local versions or other distant signal
10 versions of the same programming; is that
11 correct?

12 A. That's correct.

13 Q. Now, I'm not going to test you on the
14 law, but if the law were -- if the FCC's
15 network non-duplication rule were that all
16 programming from Big 3 networks was to be
17 blacked out at the request of a local authority
18 of the same network by cable systems,
19 regardless of whether they aired at exactly the
20 same time, would that lead you to expect a
21 large or small -- or what would that lead you
22 to expect about the likely value of this,
23 quote-unquote, network nonduplicated
24 programming?

25 A. I would think it would not be very

1 important.

2 Q. I'm not entirely clear on this, but I
3 want to make sure that the record is clear. In
4 discussing something with Mr. MacLean, I
5 believe he referred to your definition of the
6 hypothetical market, or your description of
7 your view of the hypothetical market, and he
8 suggested, if my memory is correct, that such a
9 hypothetical market would include a minimum
10 fee. Do you remember that testimony or do you
11 remember that question?

12 A. I don't remember that specific
13 question.

14 Q. Just to be clear, in your view of what
15 the hypothetical market would be, would there
16 be a minimum fee?

17 A. No.

18 MR. STEWART: I have no further
19 questions.

20 JUDGE BARNETT: Okay. Thank you.
21 Professor Crawford, you may be excused.

22 THE WITNESS: Thank you.

23 MR. STEWART: Your Honor, our next
24 witness is on her way here from her hotel. So
25 if we could have the morning break, that would

1 focused more directly than any other evidence
2 to the issue presented, relative market value?

3 A. That's what it says, yes.

4 MR. LAANE: Nothing further.

5 JUDGE BARNETT: Is Mr. Hartman
6 available?

7 MR. LAANE: He is, Your Honor.

8 JUDGE BARNETT: Then let's get
9 started.

10 (The witness stood down.)

11 JUDGE BARNETT: Thank you, Dr. Israel.
12 Sorry.

13 THE WITNESS: Thank you.

14 JUDGE BARNETT: Thank you.

15 Please be careful finding your way to
16 the chair.

17 MR. HARTMAN: Yes, I will not trip on
18 anything.

19 JUDGE BARNETT: If you would, please,
20 raise your right hand.

21 THE WITNESS: Sure.

22 Whereupon--

23 DANIEL HARTMAN,
24 having been first duly sworn, was examined and
25 testified as follows:

1 JUDGE BARNETT: Please be seated.

2 MR. CANTOR: Good afternoon, Your
3 Honors. Dan Cantor of Arnold & Porter for the
4 JSC.

5 DIRECT EXAMINATION

6 BY MR. CANTOR:

7 Q. Good afternoon, Mr. Hartman.

8 A. Good afternoon.

9 Q. Would you please introduce yourself
10 for the Court.

11 A. Yes. My name is Dan Hartman.

12 Q. Would you please just give us a brief
13 background, overview, of your professional
14 background?

15 A. Sure. I have been in the television
16 and media business for 20 plus years,
17 negotiating for content, kind of
18 valuing/acquiring that content.

19 I currently serve as president of
20 Hartman Media Services, a consulting company.

21 So I provide consulting services to
22 various media clients, including content owners
23 like cable channels, content distributors like
24 satellite cable, new entrants to the market,
25 and I do a -- I do a lot of work with financial

1 institutions kind of giving advice, strategy,
2 background on just the -- this is in general,
3 whether it is the cable distributors or the
4 networks themselves, content companies.

5 Q. Now, where did you work before Hartman
6 Media?

7 A. Prior to that I was at DirecTV for 15
8 years. I spent the last seven of that as
9 Senior Vice President of Programming
10 Acquisitions.

11 So in that role I was basically
12 responsible for acquiring all the content that
13 you see on the -- on your channel guide, so
14 general entertainment networks, sports
15 networks, ESPN, kind of out-of-market sports
16 packages like your NBA League Pass, pay TV
17 channels like HBO, and also during that period
18 the group that negotiated the local station
19 carriage and the distant signals reported into
20 me as well.

21 JUDGE BARNETT: Could you put the
22 microphone closer?

23 THE WITNESS: Oh, sure.

24 BY MR. CANTOR:

25 Q. And I believe you said you negotiated

1 terms of carriage when you were at DirecTV. Is
2 that correct?

3 A. Yes.

4 Q. Do you have just a rough estimate of
5 about how many terms of carriage you may have
6 negotiated while you were at DirecTV?

7 A. Yeah. It would have been in the
8 hundreds, I'm sure.

9 Q. And where did you work before DirecTV?

10 A. Prior to that I was at Fox
11 Broadcasting Company. So I -- and there I
12 basically just served as in-house legal counsel
13 for the broadcast network. Mostly I was the
14 attorney for the Fox Sports Group.

15 Q. Do cable and satellite distributors
16 compete for the same customers?

17 A. Yeah, they do. The business model is
18 basically, I would say, the same. You are
19 getting revenue from the customers coming in.
20 And that's kind of the lifeblood of your
21 business.

22 The -- you know, we compete, I would
23 say, on programming, pricing, packaging. When
24 I was at DirecTV certainly cable was the -- by
25 far the biggest competitor we had.

1 MR. CANTOR: Your Honors, the JSC
2 offer Mr. Hartman as an expert in the valuation
3 of television programming by multi-channel
4 video program distributors.

5 MS. PLOVNICK: Voir dire, Your Honor?

6 JUDGE BARNETT: Yes.

7 VOIR DIRE EXAMINATION

8 BY MS. PLOVNICK:

9 Q. Good afternoon, Mr. Hartman.

10 A. Good afternoon.

11 Q. My name is Lucy Plovnick. I represent
12 the Program Suppliers.

13 Have you ever worked for a cable
14 operator?

15 A. I have not worked for a cable
16 operator. Like I said, I think the business
17 models are the same.

18 Q. And your experience is at DirecTV,
19 which is a satellite carrier; is that correct?

20 A. It is a satellite carrier, correct.

21 MS. PLOVNICK: Your Honor, we would
22 object to the proffer as overly broad. I guess
23 I can ask one more question.

24 BY MS. PLOVNICK:

25 Q. Would you define MVPD as including

1 both cable and satellite carriers?

2 A. Yes.

3 MS. PLOVNICK: Your Honor, JSC has
4 offered him as an expert in this MVPD
5 decision-making, but that includes cable
6 operators, not just satellite carriers. And
7 his experience is limited to satellite.

8 So we would object as an overly broad
9 offer of his experience.

10 JUDGE BARNETT: Mr. Cantor, would you
11 like to inquire further or respond?

12 MR. CANTOR: If I may, Your Honor, I
13 will both inquire further and then respond.

14 JUDGE BARNETT: Okay.

15 DIRECT EXAMINATION - Resumed

16 BY MR. CANTOR:

17 Q. Mr. Hartman, when you were at DirectTV,
18 did the programming that you were negotiating
19 for, was that the same type of programming that
20 cable operators negotiated for?

21 A. Yes, it was the same. And, in fact,
22 the contract terms would be pretty much the
23 same and, you know, rates, all the -- all the
24 terms, I guess, we would negotiate for I think
25 would be the same as a cable company would

1 negotiate for.

2 Q. And when you were at DirecTV, did
3 DirecTV carry WG -- distantly carry WGNA?

4 A. Yes, it did.

5 MR. CANTOR: Your Honor, if I may
6 respond to Ms. Plovnick?

7 JUDGE BARNETT: Yes.

8 MR. CANTOR: Mr. Hartman is a highly
9 qualified expert in the field of -- in the
10 industry of multi-platform -- multi-channel
11 video distributors.

12 He is someone who has negotiated
13 hundreds of agreements for content, and it is
14 an industry that is not just limited to cable,
15 but includes both satellite distributors as
16 well as telecom distributors as well.

17 So this is someone square right in the
18 middle of the very industry that we're talking
19 about in this proceeding.

20 MS. PLOVNICK: Your Honor, we don't
21 have an objection to Mr. Hartman testifying
22 based on his experience as a satellite carrier,
23 but he is not a cable operator.

24 So we think the proffer should be
25 limited to qualify him as a satellite carrier

1 expert.

2 MR. CANTOR: And if I may respond to
3 that as well. I think this is just an area
4 that is proper for cross-examination, that if
5 others disagree with his qualifications to
6 comment about the main competitors in the cable
7 industry, that that's something that can be
8 brought out on cross.

9 But this is someone who is, again,
10 square right in the middle of this industry,
11 and been involved with cable and satellite.

12 JUDGE BARNETT: Mr. MacLean?

13 MR. MacLEAN: Your Honor, the SDC also
14 has an objection to the qualifications of this
15 expert.

16 And we, although we do believe that a
17 foundation has been laid for an expert in
18 something, we would object to his qualification
19 as an expert in valuation absent any foundation
20 for any experience in appraisal or other
21 valuation techniques.

22 We put an objection on that basis to
23 his expertise as -- in that way.

24 JUDGE BARNETT: Thank you. Do you
25 want to respond to Mr. MacLean, Mr. Cantor?

1 MR. CANTOR: Sure. As you have heard
2 from Mr. Hartman, Your Honor, this is an expert
3 who has negotiated for all types of content
4 that are at issue in this proceeding, for
5 sports, for general entertainment, for
6 Devotional.

7 And as he has already said and as you
8 will also hear further in his testimony, he is
9 someone who had to decide whether to carry it
10 and what to pay for it, which goes to the very
11 heart of valuation of the programming.

12 JUDGE BARNETT: Now, would you state,
13 again, the areas in which you are asking that
14 he be qualified?

15 MR. CANTOR: Sure. We are asking that
16 he be qualified as an expert in the valuation
17 of television programming by multi-channel
18 video program distributors, and, if it's
19 helpful, I can ask him to define that for you.

20 JUDGE BARNETT: I'm going to consult
21 with my colleagues on this. It will just be a
22 few minutes.

23 (Judges confer outside the hearing room.)

24 JUDGE BARNETT: Please be seated.

25 MR. CANTOR: Your Honor, if I may, I

1 was hoping I could make just one more point on
2 this issue.

3 JUDGE BARNETT: You may.

4 MR. CANTOR: What we're talking about
5 here is in -- satellite and cable are two
6 different just technologies competing for the
7 same customers with the same product. It is
8 just the only difference that we're dealing
9 with is a difference in the transmission
10 technology.

11 So it is just one more reason why this
12 witness is fully qualified to be an expert
13 here.

14 JUDGE BARNETT: Ms. Plovnick?

15 MS. PLOVNICK: Your Honor, we have a
16 separate satellite proceeding here. We
17 actually moved to consolidate cable and
18 satellite and the Judges did not grant our
19 motion as to Phase 1.

20 So this is not -- cable and satellite
21 are not consolidated and so we would object.

22 JUDGE BARNETT: Okay. An expert --
23 I'm sorry I don't have the rule in front of me
24 and I can't quote the language precisely, but
25 the Judges may qualify an expert based on

1 either education, training, or experience.

2 Clearly Mr. Hartman has experience in
3 this industry and has direct experience in
4 negotiating programming carriage, station
5 programming, or station carriage, I believe is
6 his actual words.

7 And as to the difference between
8 satellite and cable, we believe that goes to
9 the weight of his testimony rather than to the
10 admissibility.

11 And for that reason Mr. Hartman is
12 qualified as an expert in valuation of
13 television programming in multi-channel video
14 distribution. Did I say all those words right?

15 MR. CANTOR: Correct.

16 JUDGE BARNETT: Okay. You may
17 proceed, Mr. Cantor.

18 MR. CANTOR: Thank you, Your Honor.

19 BY MR. CANTOR:

20 Q. Mr. Hartman, have you been retained as
21 an expert in this proceeding by the JSC?

22 A. Yes, I have.

23 Q. What was your assignment?

24 A. It was basically to provide, I guess,
25 use my experience as an MVPD executive to offer

1 my opinion as to the valuation of different
2 types of television programming.

3 Q. So you should have on the witness
4 stand there a binder with exhibits marked 1010
5 and 1011. Let's start with 1010 first, please.
6 Would you please tell us what 1010 is?

7 A. Yes. That's a copy of my written
8 direct testimony submitted in this proceeding.

9 Q. And what is Exhibit 1011?

10 A. That is a copy of my written rebuttal
11 testimony submitted in this proceeding.

12 Q. And did you prepare both Exhibits 1010
13 and 1011?

14 A. Yes, I did.

15 Q. Do you declare that Exhibit 1010, your
16 written direct testimony, is true and correct
17 and of your personal knowledge?

18 A. Yes, I do.

19 Q. Do you have any corrections that you
20 would like to offer regarding Exhibit 1011,
21 your written rebuttal testimony?

22 A. Yes. There is one correction on page
23 6, I believe, which is Table -- Table III.1, so
24 there it's just a listing of the -- of the
25 Major League Baseball telecasts on WGNA.

1 So for the year 2010, the White Sox
2 number should read 32 versus 33. So the total
3 there would reflect a 116 number versus a 117
4 number.

5 Q. I was going to ask, Geoff, if you
6 could please put Table III-1 up on the screen.

7 And if you could just repeat what you
8 were just saying, now that it is up on the
9 screen, if you could repeat what you were
10 saying for the Judges.

11 A. Oh, sure. Sure. So the only change
12 to this table is the number of White Sox games
13 in 2010 should be 32 versus 33. And so the
14 total at the bottom there should be 116 versus
15 117.

16 Q. And with this correction, do you
17 declare that Exhibit 1011, your written
18 rebuttal testimony, is true and correct and of
19 your personal knowledge?

20 A. Yes, I do.

21 Q. Thank you.

22 We have already talked about this a
23 little bit, but are you familiar with the
24 acronym MVPD?

25 A. Yes, it stands for Multi-channel Video

1 Programming Distributor.

2 Q. And would you please share with us
3 your understanding of that term?

4 A. Sure. I think of it as just more
5 traditional forms of distributing programming,
6 cable, satellite, telcos.

7 Q. Would you please provide us with an
8 overview of the competitive landscape of the
9 MVPD industry in the period 2010 to 2013?

10 A. Yeah, sure. I guess it would probably
11 be helpful to give a little bit of history on
12 the satellite business, which launched in the
13 mid 1990s.

14 And it was -- it started as more of a
15 rural play, kind of going after customers that
16 cable couldn't reach because they were the --
17 cable was the entrenched distributor. And so
18 both cable and the satellite grew for a long
19 period of time, 10, 15 years or so.

20 And so at some point in, I would say,
21 mid 2000s or maybe a little later, there, you
22 know, again, both companies were able to grow,
23 so both companies could bring on new
24 subscribers and be profitable.

25 And -- but as kind of the 2000s closed

1 out, the marketplace just became more
2 saturated.

3 So there were fewer customers to fill
4 the bucket with, meaning that instead of
5 growing the rates that cable or satellite had
6 been growing the last 15 years or so, that
7 growth had slowed because there were just no
8 customers, you know, from this bucket to fill.

9 So, in other words, cable and
10 satellite were kind of starting to take each
11 others' customers. And so at that point the
12 focus, I think, has been more on growth and
13 acquisition of customers.

14 And I think it kind of, when that
15 saturation point hit, it became more of a
16 retention play for both companies, kind of
17 making sure your customers stayed on the
18 platform. That -- that was the revenue source.

19 Q. And during this period did management
20 or containment of costs play a role in your
21 considerations?

22 A. Yeah, it did. I think, you know, it
23 is always a factor, but when you're not growing
24 at the rate that you had been growing, then
25 costs become an issue. And at a cable or

1 satellite company, programming costs were the
2 -- by far the biggest cost line item. So, yes,
3 there was more of a focus for sure.

4 Q. And so given this goal of customer
5 retention that you were just telling us about,
6 and the overlay of cost considerations as well,
7 were there particular characteristics of
8 programming that you were particularly looking
9 for as someone charged with making program
10 decisions at DirecTV?

11 A. Yeah. I think that, you know, as
12 this, again, focusing more on costs and then
13 what was important to the customer, I think
14 that you looked at really marquee or must-have
15 type programming, that -- basically programming
16 that I would say that if you lost or didn't
17 have that you were at high risk of losing your
18 customer because of it.

19 Q. Would you please give us an example of
20 what you're calling must-have or marquee
21 programming?

22 A. Yeah, I think live sports is really
23 honestly the best example. I think that there
24 are certain factors that, you know, if you had
25 a checklist of I think what was important to

1 keeping a customer on the platform, I think
2 live sports is really a great example of that.

3 I think there is, you know, multiple
4 factors. There is -- folks are really
5 passionate about sports. They are really
6 passionate about not just sports in general,
7 but their particular team.

8 So if you are a sports fan, you have
9 particular teams you follow and, you know,
10 you're just, I guess, yeah, you're just really
11 passionate about following that team or those
12 teams. And there is no other substitute for
13 that.

14 So -- and, you know, just not really
15 -- sports isn't really available many other
16 places. So you take the Cubs, for instance.
17 And if you want to catch your Cubs game and you
18 obviously are going to catch it live, it is
19 really only going to be on one channel.

20 So unlike some other types of
21 programming, you can't just kind of flip
22 through the dial and find it somewhere else.
23 It's -- it's -- you know, there is other sports
24 out there and there is other networks out
25 there, obviously, that carry sports, but if you

1 want to catch that game, it's pretty much going
2 to be on just one channel.

3 And so I think that -- and as I
4 mentioned, the fact that it is live is
5 important because I think that, you know,
6 people are just much more engaged in that kind
7 of programming, that they have to sit down and
8 watch kind of day and date for when it's on.

9 I think sports is fairly unique in its
10 content. There is nothing else like it out
11 there.

12 And I guess, kind of my prior point,
13 too, there is really no substitution for a
14 particular game. If you are, again, if you are
15 a Cubs fan and we weren't carrying WGNA, for
16 instance, or I didn't have the Yankees, I can't
17 go tell you to watch another team or another
18 sport because I just don't think -- you know,
19 again, there are many general sports fans, but
20 if you are a true fan of a team or teams, I
21 can't tell you to watch another -- a different
22 game. It is just not going to work.

23 Q. Are there examples of what you're
24 calling must-have programming other than team
25 sports?

1 A. Yeah. I think there are certain types
2 of content, like I think Game of Thrones is a
3 good example of, if you kind of ran back the
4 factors, I think it's certainly a very
5 passionate fan base, as you can see from social
6 media.

7 I think it is the type of programming
8 that people watch live or near live. I think
9 that it is not -- it is similar to sports in
10 that, you know, you don't want a spoiler, so
11 you want to catch it when it's on.

12 I think that a network like Fox News
13 is really kind of -- would fit into that
14 category. I think it is another -- it's a type
15 of network or content that has a really
16 passionate fan base. Obviously, again, people
17 watch that live.

18 It's a type of network or programming
19 that, if I didn't have, I think I would suffer
20 because of it.

21 Q. How about sitcoms, reruns of sitcoms
22 or old movies, do they have these must-have
23 qualities that you are speaking of?

24 A. No. I would say no, I think, because,
25 you know, again, if you kind of run through the

1 checklist, I don't think that it -- there is
2 certainly other avenues that you can find this
3 content on. I think there is other -- you can
4 find it on other channels a lot of times. You
5 can find it on other platforms.

6 I think if -- I know I use 30 Rock as
7 my example in my testimony, that it was carried
8 on WGNA at the time, the period we're talking
9 about here, 2010 through 2013, and the fact
10 that -- it was broadcast on WGNA but it was
11 also on, I believe, Comedy Central at the same
12 time. NBC was broadcasting their initial
13 broadcast premiers there. And it was on
14 Netflix at the time as well.

15 So I think that, you know, this type
16 of content, just because it is parsed in so
17 many places, I think it just -- it carries less
18 of a value. There is just more, more places
19 you can see it and there is more substitutes
20 for it.

21 Q. Let's talk for a minute about the
22 licensing fees that you paid for programming
23 outside of the compulsory license context when
24 you were at DirecTV.

25 A. Um-hum.

1 Q. How did the licensing fees that you
2 paid for team sports programming compare to
3 licensing fees for other types of programming?

4 A. Well, it was multiples. I think it's
5 no secret that ESPN is, I guess, I would call
6 it a poster child for high sports rights fees,
7 and everybody kind of reads in their local
8 paper, when there is a dispute, how much ESPN
9 costs.

10 So if I use that as an example, I
11 think that, you know, I can say that if I
12 looked at ESPN and its license fees in any
13 given year, and then I guess compared it
14 against some, you know, networks that don't
15 carry sports, that would be, you know, in the
16 higher range of content like a USA Network or a
17 Disney, you would, you know, if you did the
18 comparison, you could see that ESPN would be
19 multiples, probably four-five-six-seven times
20 of what those other networks would be.

21 Q. Have you reviewed the written
22 testimony of Program Suppliers' witness Sue Ann
23 Hamilton?

24 A. Yes, I have.

25 Q. Ms. Hamilton testifies that audience

1 viewing is the best measure of the relative
2 value of programming.

3 In your experience in the industry, is
4 there a one-to-one correlation between audience
5 viewing and value?

6 A. No, not to my prior point. I think
7 that -- I think if you could -- you could look
8 at it one of two ways.

9 I think in the example that I gave
10 you, if you are kind of comparing ESPN to, say,
11 a Disney or a USA Network, those networks, I
12 put an example in my testimony, we looked at a
13 certain year and it had certain viewer --
14 similar viewership, all three of those
15 networks, and then you could just see how
16 wildly different the license fees were.

17 And, conversely, I think you could
18 look at networks that have similar license
19 fees. So they could be all bunched together
20 and within a small range, but they could have
21 greatly different viewership numbers.

22 Q. Have you reviewed the written
23 testimony of Dr. Mark Israel?

24 A. Yes, I have.

25 Q. I will ask Geoff to place on the

1 screen Table 9 from Dr. Israel's written
2 rebuttal testimony.

3 Would you please tell us what this is?

4 A. Yes. So this is Dr. Israel's -- I
5 think he called it his cable content analysis.

6 And basically what he performed here
7 was he looked at -- basically he kind of took
8 the top 25 networks in terms of distribution
9 and then he basically kind of broke out the
10 expenditures that all of these top 25 networks
11 spent for JSC and non-JSC programming.

12 So you can see the line item from JSC
13 programming, the expenditures line, and kind of
14 as a percentage of overall budget you can see
15 that number of 22, almost 23 percent.

16 And so then, for comparison purposes,
17 he did this so that you could kind of see how
18 there really is no -- that correlation really
19 isn't there because, if you look at the
20 household viewing hours, it represents less
21 than 3 percent of the Joint Sports Claimant
22 programming, less than 3 percent of the
23 overall, you know, viewing hours of all those
24 top 25 networks, programming hours, again,
25 another small number.

1 But I think it just really goes to
2 show you that the viewership and the value or
3 expenditures that people are spending on -- or
4 that networks are spending on this programming
5 just doesn't -- that doesn't correlate.

6 Q. And we're now going to place on the
7 screen Table 10 from Dr. Israel's written
8 rebuttal testimony.

9 Would you please tell us about this
10 table?

11 A. Sure. So this is a similar analysis
12 although he just -- he broke it down for two
13 specific networks. And I think these are
14 illustrative, because I think that both of
15 these networks carry JSC and non-JSC
16 programming. So you can see, you know, CBS
17 carries Major League Baseball, among other
18 things, and TNT carries NBA games.

19 And so, again, you can kind of just
20 see he took the overall programming budget for
21 both of these channels and then broke out the
22 JSC programming, you know, and the non-JSC
23 programming.

24 So you can just kind of see the
25 expenditures item list there in column C,

1 again, near 50 percent for these channels is
2 what they are spending on the JSC programming.
3 And then if you look at the household viewing
4 hours or the programming hours, the percentages
5 are just much, much less.

6 Q. Are the results that you're talking
7 about in Dr. Israel's analysis in Tables 9 and
8 10 from his rebuttal testimony, are these
9 consistent with your experience in the
10 distribution industry?

11 A. Yes, they are.

12 Q. What role does audience viewing data
13 play in the video distribution industry?

14 A. I mean, certainly we looked at it. It
15 is one of a number of factors that we would
16 look at when we were kind of commencing
17 negotiation.

18 Personally I would look at it. I
19 would do basically an analysis of the last
20 several years. If the channel is coming up for
21 renewal, it was just kind of more of a
22 benchmark to see how it had performed, whether
23 ratings had kind of been generally going up or
24 generally going down.

25 But it was definitely not a

1 determinative factor in -- in negotiations.
2 And certainly when it came to the 11th hour,
3 the focus was much more on how important was
4 that particular type of programming that
5 channel had versus what its ratings were.

6 And, you know, it is clearly they are
7 used for ad sales purposes. You could look at
8 a TBS or a TNT and they certainly bring in a
9 decent amount of their revenue from advertising
10 sales.

11 And so ratings are important to the
12 networks themselves. But MVPDs don't really --
13 the amount of advertising time we get and the
14 amount we sell is just not a big revenue item
15 for us. So that doesn't really factor in.

16 It's not -- really in normal
17 experience, I never remember it being part of a
18 contract, so it was never -- ratings were never
19 kind of part of a rate sheet that said, well,
20 if your ratings go up on this network, then
21 your rate goes up and, vice versa, if your
22 ratings go down, your rate goes down.

23 It was not ever in the representations
24 and warranties or breaches, so just, again, it
25 was a factor we looked at, but, again, when

1 push came to shove in making a decision or, you
2 know, negotiating the contract, it didn't fit
3 in there.

4 And we did not, certainly when I was
5 -- when the station group was reporting it to
6 me, we did not use ratings for evaluating
7 distant networks.

8 Q. Thank you.

9 I'd like to now discuss for a few
10 minutes DirecTV's carriage of distant signals.

11 Did DirecTV carry WGNA during the
12 period 2010 to 2013?

13 A. Yes, it did.

14 Q. Do you know how much of DirecTV's
15 spending for Section 119 royalties were paid
16 for retransmitting WGNA?

17 A. Yeah, on average it was about
18 75 percent of the amount that we paid into the
19 copyright tribunal was for carriage of WGNA.

20 Q. Why did DirecTV carry WGNA?

21 A. It was definitely because of the live
22 sports. It was -- we saw real value in, you
23 know, there was, I think, 100 or so games. We
24 saw real value in the Cubs, the Bulls, and the
25 White Sox.

1 And I think that they not only serve,
2 you know, certainly look at a team like the
3 Cubs, which has a national following, they
4 certainly, you know, have a following
5 nationwide.

6 And so it serves a particular fan base
7 in that respect. But also just having national
8 games is important. You know, a lot of -- you
9 have a lot of networks out there, MLB or ESPN,
10 that carry nationally-televised games and
11 sports fans, you know, it's -- it's -- when
12 sports fans are looking for something, even if
13 you are not a particular fan of that maybe
14 team, you're going to want to watch sports. So
15 it was valuable to us.

16 Q. Did you place value on the syndicated
17 sitcoms and movie reruns on WGNA?

18 A. Not really. I don't think that at the
19 time I probably, when I was negotiating our
20 deal, I think I may have known what, you know,
21 had a general idea of what else was on other
22 than the Cubs games, but -- and then the White
23 Sox and Bulls, but I think that it wasn't -- it
24 wasn't a -- I wouldn't have really put a lot of
25 value on that, I guess.

1 I think that, you know -- and just
2 getting back to the ratings, I think you could
3 say that, you know, a show like 30 Rock or a
4 Saturday night movie may have decent ratings,
5 and they may have done, you know, fairly well
6 on a network like WGNA.

7 But I think that, again, you go back
8 to what's really important, what I consider
9 important to the customer.

10 And so even though a show may have
11 decent ratings, I think in the examples of a 30
12 Rock -- a sitcom or a movie, people aren't
13 sitting down to watch, I don't think, that
14 particular show day and day. I don't think
15 someone is sitting down every night to watch
16 Seinfeld or 30 Rock at a certain time.

17 So I think that, you know, again, it's
18 kind of fungible, that if I were to have to
19 drop WGNA, I would have a much harder time
20 telling the subscriber to find their sports
21 content elsewhere, where I wouldn't have as
22 difficult a time telling that subscriber where
23 to find the more general entertainment sitcom
24 and movie-type programming. There are lots of
25 other places for them.

1 Q. Did you negotiate a carriage agreement
2 with WGNA during the period 2010 to 2013?

3 A. Yes, I did.

4 JUDGE BARNETT: Before we go there, it
5 is time to stop for the day. So we will be at
6 recess until 9:00 o'clock in the morning.

7 (Whereupon, at 4:40 p.m., the hearing
8 recessed, to reconvene at 9:00 a.m. on Tuesday, March
9 13, 2018.)

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1 C O N T E N T S

2 WITNESS: DIRECT CROSS REDIRECT VOIR DIRE

3 MARK ISRAEL

4 By Mr. Laane 2813

5 By Mr. Cho 2876

6 By Mr. MacLean 2946

7 By Mr. Cosentino 3019

8 By Mr. Olaniran 3040

9 By Mr. Laane 3130

10 DANIEL HARTMAN

11 By Mr. Cantor 3132

12 By Ms. Plovnick 3135

13 By Mr. Cantor 3136

14

15 CONFIDENTIAL SESSIONS: 2916-2933

16 AFTERNOON SESSION: 2985

17 E X H I B I T S

18 EXHIBIT NO: MARKED/RECEIVED REJECTED

19 1112 2896

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21 1114 2896

22 1115 2896

23 1118 2896

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CERTIFICATE

I certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

3-12-18


Signature of the Court Reporter

1 UNITED STATES COPYRIGHT ROYALTY JUDGES

2 The Library of Congress

3 -----X

4 IN THE MATTER OF:)

5) Docket No.

6 DETERMINATION OF CABLE) 14-CRB-0010-CD

7 ROYALTY FUNDS) (2010-2013)

8 -----X

9 BEFORE: THE HONORABLE SUZANNE BARNETT

10 THE HONORABLE JESSE M. FEDER

11 THE HONORABLE DAVID R. STRICKLER

12

13 Library of Congress

14 Madison Building

15 101 Independence Avenue, S.E.

16 Washington, D.C.

17 March 13, 2018

18

19 9:06 a.m.

20 VOLUME XIV

21

22

23 Reported by: Karen Brynteson, RMR, CRR, FAPR

24

25

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

2 (9:06 a.m.)

3 JUDGE BARNETT: Good morning. Please
4 be seated.

5 We brought over a book truck for these
6 binders. It narrows that passageway even
7 further. But it appears we are not -- we don't
8 have a witness.

9 Mr. Cantor?

10 MR. CANTOR: Yes, we do. Mr. Hartman
11 is in the back of the room.

12 JUDGE BARNETT: Oh, there he is,
13 hiding. Okay.

14 MR. CANTOR: Shall he take the stand?

15 JUDGE BARNETT: Mr. Garrett looked
16 like he might have something, some preliminary?

17 MR. GARRETT: No, Your Honor, but I
18 can make one up if you would like.

19 (Laughter.)

20 JUDGE BARNETT: Let's just go ahead
21 with Mr. Hartman.

22 (Laughter.)

23 MR. GARRETT: I'll catch you later,
24 Your Honor.

25

1 JUDGE BARNETT: Off the record.

2 (Discussion off the record.)

3 Whereupon--

4 DANIEL HARTMAN,
5 a witness, called for examination, having previously
6 been duly sworn, was examined and testified further as
7 follows:

8 JUDGE BARNETT: Mr. Hartman, you
9 remain under oath.

10 THE WITNESS: Yes. Okay.

11 JUDGE BARNETT: Mr. Cantor?

12 MR. CANTOR: Good morning, Your
13 Honors.

14 DIRECT EXAMINATION -- RESUMED

15 BY MR. CANTOR:

16 Q. Mr. Hartman, when we were breaking for
17 the day yesterday, you were just finishing
18 summarizing for us why DirectTV carried WGNA
19 during the period of 2010 to 2013.

20 Just for -- to kind of reset the
21 context, would you please just briefly
22 summarize these reasons for us now.

23 A. Oh, sure. So I think I walked through
24 the fact that we -- you know, in our decision
25 to launch it and continue carrying it, we -- we

1 put a high value on the live team sports. So
2 it had 100 games, which is comparable to what
3 you might find on a regional sports network,
4 and served a national audience. You know, we
5 just didn't find as much value on clearly
6 something like infomercials, which took a big
7 part of the day, overnights or the, you know,
8 the more syndicated movie-type content, the
9 kind of stuff you find other places.

10 Q. Have you reviewed the written
11 testimony of Mr. Mansell, one of the Program
12 Suppliers' witnesses?

13 A. Yes, I have.

14 Q. Mr. Mansell asserts that during this
15 period, 2010 to 2013, that there was a
16 proliferation of regional sports networks, and
17 he asserts that this proliferation devalued or
18 reduced the volume of the team sports on
19 distantly transmitted signals.

20 Do you have an opinion about
21 Mr. Mansell's statement?

22 A. Yeah, I do. I think there are -- I
23 have a couple of opinions. One, I think he's
24 right when he talks about, you know, the high
25 value of sports. We talked about it a little

1 bit yesterday. And the fact that, you know,
2 these sports costs really are going through the
3 roof and, you know, doubling what non-sports
4 costs are.

5 So I think it -- it's true that there
6 are -- you know, these sports costs are
7 increasing, but I think that it just goes to
8 show you that people are paying these rights
9 fees because sports are so important.

10 But I also think that it shows when he
11 does talk about the -- you know, the fact that
12 these new RSNs are popping up over the last 15
13 or 20 years, and that's also true, that, again,
14 I think it just goes to show you the power of
15 live team sports.

16 I think that there's no other content
17 I'm aware of, you know, in all my years at
18 DirecTV, that you could take and form a new
19 network and get carriage, get, you know, good
20 distribution, if not full distribution, at a
21 high license fee, other than just live sports.

22 I think, you know, operators weren't
23 thrilled when these new networks, these RSNs
24 came along, but we knew we had to have them.

25 Q. Do you know how the amount of team

1 sports on WGNA in the period -- in the period
2 2004 to 2005 as compared to 2010 to 2013, how
3 the volume of sports compared between those
4 periods?

5 A. It didn't decline.

6 Q. And if I can, let's put up on the
7 screen Table Roman numeral III-1 from your
8 written rebuttal testimony, please. Would you
9 please tell us what this is?

10 A. Sure. This is a table that sets forth
11 the -- basically the JSC telecasts that
12 appeared on WGNA for those two periods that you
13 just referenced. So if you look at the table,
14 it walks you through the number of Cubs games,
15 White Sox games, and Bulls games for 2004 and
16 2005, and you can see the totals at the bottom
17 there.

18 And then you jump to 2010 through
19 2013, again, you can see the totals at the
20 bottom, and there's no -- there's no decrease.
21 In fact, there's probably a slight increase in
22 number of games.

23 Q. And is this the table that you offered
24 a correction on at the beginning of your
25 testimony yesterday?

1 A. Yes. This is the table where the
2 White Sox -- the number of White Sox games in
3 2010 should read 32, so that total in 2010
4 should read 117 -- 116, excuse me.

5 Q. And does that correction at all change
6 your opinion?

7 A. No, no.

8 Q. And we're going to put on the screen
9 now Table Roman numeral III-2 from your written
10 rebuttal testimony.

11 Would you please tell us what this is?

12 A. Sure. So this is a similar table. It
13 shows the Major League Baseball telecasts on
14 Fox for those two periods that we were talking
15 about. So it just -- if you go down the left
16 side there, it just details the type of game,
17 regular season, all star, league division,
18 league championship, world series, and then
19 totals at the bottom, the total number of
20 telecasts. So, again, for 2004 and 2005, you
21 can see the totals there at the bottom.

22 Jump to 2010 through 2013, and, again,
23 you can see the totals, and there's really --
24 really no difference, maybe a game or two, but
25 nothing at all that I would deem material.

1 Q. And now we're going to put on Table
2 Roman numeral III-3 from your rebuttal
3 testimony. And would you likewise explain to
4 us what this chart shows.

5 A. Sure. So this is a similar telecast,
6 which just lays out the NFL telecasts that
7 appeared on the Fox network for those two
8 periods. And, again, on the left side -- on
9 the left side, you can see it's preseason
10 games, regular season, playoffs, Superbowl, and
11 Pro Bowl. So it lists the type of games. And
12 then for the totals 2004-2005 there at the
13 bottom, you can see the numbers.

14 And again if you jump to 2010 through
15 2013, it's virtually identical. So, again, no
16 decline there.

17 Q. In Mr. Mansell's written testimony,
18 did he address changes in the media programming
19 landscape outside of team sports programming?

20 A. No, he didn't. I think that if he
21 had, I think he would have -- if you would have
22 looked at -- because I know he brings up the
23 fact that all these new technologies have
24 created these new opportunities, and I think
25 that's also correct in his testimony, but I

1 think what that has led to as well is the
2 proliferation of the more non-sports type
3 content, sitcoms and movies, just going to more
4 sources. So not only is it, you know,
5 increasing across the number of networks it's
6 on but then there's all these new platforms
7 like Netflix and Hulu and Amazon and YouTube
8 that you'll find this content as well.

9 Q. Thank you. Let's turn back to the
10 Bortz survey for a minute.

11 Did you reach any opinion about the
12 results of the Bortz survey?

13 A. Yeah, I guess based on my experience,
14 his findings were consistent with how I think a
15 multi-channel executive would basically value
16 the categories of programming.

17 Q. So we yesterday were talking a bit
18 about the written testimony of Program
19 Suppliers witness Ms. Sue Ann Hamilton.

20 A. Um-hum.

21 Q. Ms. Sue Ann Hamilton suggests that the
22 program categories adopted for this proceeding
23 and that were used in the Bortz survey would be
24 -- would be, I think her words were, confusing
25 to distributors.

1 Do you agree with her on that?

2 A. No, because I think that they're -- it
3 seems pretty -- they seem pretty self-evident
4 and clear to me. I think that if you look at,
5 you know, live professional college team
6 sports, I think that's fairly -- I think if you
7 asked a -- an executive in our business, what
8 that meant they would say that it really speaks
9 to the major -- the marquee leagues, NFL, MLB,
10 et cetera, and kind of the premier or marquee
11 college team sports like basketball and
12 football.

13 Q. Did you also review the testimony of
14 Program Supplier witness Dr. Joel Steckel?

15 A. Yes, I did.

16 Q. Dr. Steckel asserts, among other
17 things, that the task of asking distributors to
18 value different types of programming would be
19 what he calls unfamiliar.

20 And he says that's so because
21 distributors typically purchase whole channels
22 of programming, rather than, you know,
23 individual pieces of programming.

24 Do you have a view about his
25 assertion?

1 A. Yeah. I mean, it's true that we do
2 mostly negotiate for linear channels, but I
3 think when you look at the types of linear
4 channels that we negotiate for, they really do
5 fall into categories such as news or movies or
6 sports.

7 So I think that just, you know, kind
8 of by default, we negotiate for different types
9 of programming, even though it may be a channel
10 of programming, but I think that it's --
11 basically, it's our day-to-day job to kind of
12 know those, that type of programming.

13 Q. Thank you, Mr. Hartman. I have no
14 further questions.

15 CROSS-EXAMINATION

16 BY MS. PLOVNICK:

17 Q. Good morning, Mr. Hartman.

18 A. Good morning.

19 Q. I'm Lucy Plovnick. I represent
20 Program Suppliers. How are you?

21 A. Good, thank you.

22 Q. All right. So, Mr. Hartman, I want to
23 start with your direct testimony, which was
24 Exhibit 10-10, or 1010. And if you flip to
25 Appendix A, which is your resume at the back.

1 A. Oh, okay.

2 Q. So just to confirm, you worked at
3 DirecTV from 1998 to 2013; is that correct?

4 A. That's correct.

5 Q. And before that, you worked at Fox
6 Broadcasting and Fox Sports?

7 A. That's correct.

8 Q. But you have never been a cable
9 operator; is that correct?

10 A. I have never been a cable operator,
11 but I've worked in the MVPD industry.

12 Q. In the MVPD industry. And you would
13 define that as cable and satellite industry
14 combined, when you define -- or just define
15 MVPD.

16 A. Well, I think it is the more
17 traditional technologies of satellite and
18 cable.

19 Q. Right. But just to be --

20 A. Just that these bubbles are the same.

21 Q. Just to be clear, though, you have
22 never worked in the cable side of this
23 industry; your experience is in the satellite
24 side of this industry?

25 A. I have never worked for a cable

1 company.

2 Q. All right. Now, you mentioned some
3 boards that you worked on at the bottom and you
4 mentioned The Tennis Channel?

5 A. Um-hum.

6 Q. And you also mentioned the Southern
7 California Committee for the Olympic Games.

8 A. Um-hum.

9 Q. Do you consider tennis and the
10 Olympics to be sports?

11 A. Do I consider them to be -- sports as
12 a very general category?

13 Q. Well --

14 A. I mean, if you're talking about a
15 broad category of sports, yes, there's --

16 Q. Is it sports or is it not sports?

17 A. -- there's 50 different sports, so --

18 Q. Is it sports or not sports?

19 A. It's not live team sports, but it's --

20 Q. But it's --

21 A. -- tennis is a sport.

22 Q. Tennis is a sport, but you wouldn't
23 consider it live team sports?

24 A. That's correct.

25 Q. All right. Would you consider the

1 Olympics live team sports?

2 A. No.

3 Q. All right. Now, let's move to
4 paragraph 3 of your direct testimony. And
5 that's on page 1.

6 A. Okay.

7 Q. So about two-thirds of the way down,
8 you're talking about your experience at
9 DirecTV, and you say that you were "responsible
10 for DirecTV's program acquisition activities
11 with respect to all general entertainment and
12 premium cable networks, as well as initiatives
13 such as video-on-demand programming and the
14 development of DirecTV's TV Everywhere
15 platform."

16 Is that correct?

17 A. Yes.

18 Q. So did you also -- were you also
19 responsible for programming selections with
20 regard to distant signals while at DirecTV?

21 A. Yes, so that, when I was senior vice
22 president during that period of 2007 through
23 2013, the group that I -- there was an entire
24 group of -- of folks that negotiated our local
25 station and distant carriage. And they all

1 reported in to me.

2 Q. They reported to you?

3 A. Yes.

4 Q. And were you involved in those
5 decisions?

6 A. I was -- yes, for the -- yes, I was
7 involved in -- in the bigger local station
8 deals, and I was definitely involved in the
9 distant signal carriage deals.

10 Q. Involved as in you participated or you
11 just approved what the team under you --

12 A. Both. I mean, if it was a -- there
13 wasn't a lot of distant signal carriage, other
14 than WGNA, and unless you're talking about the
15 big four broadcast networks, so by the time I
16 came in and took over the group, there wasn't
17 really, to my knowledge, a lot of new distant
18 networks being launched.

19 Q. So did that analysis that you would do
20 in deciding to carry -- well, really everything
21 you did but also, in particular, distant
22 broadcast stations, did that include an
23 analysis or review of Nielsen viewing
24 information?

25 A. No, it didn't.

1 Q. Nielsen ratings information?

2 A. No. I mean, again, there -- there --
3 the -- well, when I was -- when the group was
4 reporting in to me, there was, again, very few
5 -- if you look at the statement of accounts
6 that DirecTV filed with the Copyright Office,
7 you have WGNA, which is this huge chunk, and
8 then you have the big four broadcast networks,
9 affiliates of the big four broadcast networks,
10 for instance, maybe New York and L.A. stations,
11 which is another decent size chunk, and kind of
12 independent distants are -- were just a very
13 small part of that.

14 So I don't -- but to answer your
15 question, no, I don't recall that we ever
16 looked at, you know, ratings would have made a
17 difference. It was really about getting big
18 four broadcast networks into a market.

19 Q. So -- and you mentioned statements of
20 account. Did you prepare the statements of
21 account for DirecTV?

22 A. I did not. We had an accounting group
23 that would have prepared those.

24 Q. Did you review them as a part of your
25 work at DirecTV?

1 A. Yes.

2 Q. So you would review them before they
3 went out or just in the course of -- you said
4 the Accounting Department.

5 A. The Accounting Department would bring
6 to me and we would just run through them and I
7 would sign them.

8 Q. You would sign them, but you would
9 review them first or you would just accept that
10 --

11 A. They would basically do a quick
12 walk-through with me, but I did not review them
13 station by station or, you know, subscriber
14 detail or anything like that.

15 Q. Right.

16 A. They had all the records so I trusted
17 them.

18 Q. So, Mr. Hartman, when you were working
19 at DirecTV, did you work with a person named
20 Toby Berlin?

21 A. Yes, I did.

22 Q. Ms. Berlin also worked at DirecTV from
23 1998 to 2013; is that correct?

24 A. She did. And she reported to me for
25 several of those years in the end.

1 Q. Ms. Berlin was a vice president of
2 programming acquisitions?

3 A. Correct.

4 Q. Was she a part of the team that you
5 were describing that worked under your
6 direction?

7 A. She was part of the team -- the local
8 channel team or --

9 Q. Well, you tell me.

10 A. Yeah. Okay. So she was involved in
11 local channel launches, I think back in the
12 early days, you know, around the early 2000s, I
13 think, and then segued into different areas.
14 So when she was reporting to me, she was
15 working on -- she would negotiate our adult
16 programming deals. She negotiated our airborne
17 deals, she negotiated our Pay Per View
18 contracts, boxing and wrestling. She worked on
19 ethnic platform. I think that was about it.

20 Q. And she also was involved with distant
21 signals as well, was she not?

22 A. Not when she was reporting to me, no.

23 Q. Not when she was reporting to you?

24 A. No. That all came through the
25 station -- the local station group, which

1 reported in to me, she was not a part of.

2 Q. But she -- so are you aware that she
3 has testified here in proceedings --

4 A. Yes.

5 Q. -- before the Copyright Royalty
6 Judges?

7 A. Yes.

8 Q. Have you reviewed her testimony?

9 A. I have.

10 Q. All right. Let's take a look at her
11 testimony. So if you --

12 MR. PLOVNICK: Oh, and before we do
13 that, Your Honor, as a housekeeping matter, I
14 understand that all the parties have agreed to
15 stipulate to the admission of MPAA Exhibits
16 6041 through 6044, inclusive. And I would move
17 their admission before we actually start
18 looking at them.

19 JUDGE BARNETT: Hearing no objection,
20 6041 through 60 -- did you say 44?

21 MS. PLOVNICK: 44, yes, Your Honor.

22 JUDGE BARNETT: Inclusive, are
23 admitted.

24 (Exhibit Numbers 6041, 6042, 6043,
25 6044 were marked and received into evidence.)

1 BY MS. PLOVNICK:

2 Q. So take a look at Exhibit 6041, which
3 is which is the written direct testimony of
4 Toby Berlin from the 2004 through 2009 cable
5 and 1999 through 2009 satellite Phase II
6 proceeding.

7 A. Okay.

8 Q. Do you see that?

9 A. Yes, I see that -- yes, the front page
10 here, yes.

11 Q. All right. And so if you turn to page
12 6 of that testimony, and you look under heading
13 D at the bottom of the page, and you see the
14 heading that says "importance of program
15 ratings"?

16 A. Um-hum.

17 Q. So if you just take a look -- and have
18 you had a chance to review this testimony?

19 A. I -- I did. Yes.

20 Q. So what Ms. Berlin says here, at the
21 bottom of page 6 and carrying over to page 7,
22 and I'll just, you know, read it, "In deciding
23 whether or not to carry that station on an out
24 of market basis, we would look at ratings, just
25 like our cable competitors. Our marketing and

1 business analytics departments would supply a
2 list of stations in a DMA with their Nielsen
3 ratings. If a station had high ratings, and
4 cable had it or we believed it would bolster
5 our line-up because it had high ratings, we
6 would carry the station out of market and pay
7 copyright royalties. Ratings were the single
8 most significant factor that the business team
9 considered when evaluating new programming
10 acquisition opportunities. The Nielsen ratings
11 and other audience measurement tools play a
12 pivotal role in determining the true value of a
13 signal and its constituent programs. This is
14 consistent with the very simple paradigm that
15 satellite operators value programs that people
16 watch and do not value programs that people do
17 not watch. Based on my years of experience in
18 the subscription television industry, I would
19 say other satellite service providers and cable
20 operators all viewed ratings as a principal
21 measure of value within a defined genre of
22 programming."

23 So would you agree or disagree with
24 Ms. Berlin's testimony?

25 A. I would disagree with that.

1 Q. You would disagree?

2 A. Yes. I think that you can look at it
3 from two different perspectives, as I was
4 reading through it. And one is just when
5 you're talking about distant signals -- and I
6 can speak to the period, you know, from about
7 2007 or so on when, again, the station group
8 reported in to me and we did not use ratings
9 for distant signals. Again, any market that we
10 were bringing distant signals in, it was
11 basically trying to get the big four networks,
12 which is what were most important to the
13 customers.

14 You know, I can't speak to when she
15 was -- the early, I guess, 2000s, I wasn't part
16 of that group then, but, again -- and I read
17 her example of trying to, I think, bring in
18 signal from San Diego into L.A. or vice versa,
19 and, I mean, I guess just speaking from I was
20 at the company then and I was involved in
21 obviously the -- just in knowing kind of how
22 the company worked, I just think that any
23 distant signals brought in that weren't a big
24 four affiliate were really around the edges.
25 And I don't know that ratings would have

1 mattered.

2 But I can speak more generally too. I
3 would like to speak more generally because I
4 think she's -- she was not involved -- the
5 types of programming she worked on for most of
6 the time she was at DirecTV, most of it didn't
7 even involve seeing ratings. I mean, Pay Per
8 View events, she worked on the music channels,
9 she worked on, again, adult. A lot of the
10 ethnic programming is Pay Per View packages.

11 So she would not have been -- you
12 know, I think I can speak much better to the
13 fact of whether or not we used ratings overall,
14 you know, in the general platform and
15 negotiations and decisions, and I can say that
16 there were -- again, as I said in my testimony
17 yesterday, they were -- you know, they just
18 really not determinative. We definitely looked
19 at them but --

20 Q. Well, so -- so from reviewing
21 Ms. Berlin's testimony, it's clear that ratings
22 were important to her.

23 A. I can't speak for her. I can only
24 speak for the fact that, you know, I was the
25 head -- I ran the programming group and --

1 Q. So is it fair to say that within a
2 single organization like DirecTV, that
3 different individuals have different opinions
4 about what's important in their
5 decision-making?

6 A. Again, I can't speak to her. Maybe
7 she does have a different opinion. I --

8 Q. Well, she clearly does.

9 A. She reported in to me for a long
10 period of the time while I was a senior vice
11 president there. And I -- I don't recall her
12 ever coming to me and bringing ratings and
13 saying this makes a difference or -- I don't
14 know how she would have necessarily used these
15 ratings. So I --

16 Q. You don't --

17 JUDGE FEDER: Excuse me.

18 THE WITNESS: Sure.

19 JUDGE FEDER: Mr. Hartman, a moment
20 ago you said "around the edges." What do you
21 mean by that?

22 THE WITNESS: Oh, I think it's -- I
23 mean, I think maybe -- and I was trying to
24 understand -- like I said, I have to admit I
25 didn't quite really understand her example.

1 She didn't give certain -- she didn't give a
2 specific station to say we launched KQED or
3 something because, you know -- or we brought it
4 in distantly because it was important.

5 I was -- I was thinking that maybe she
6 was talking more about maybe devotional or
7 other types of programming, that, you know, may
8 have been kind of a one-off. Like maybe it's
9 worth it to bring in this one distant signal
10 because maybe it does serve a particular niche.
11 But I don't think -- again, I think that was
12 just around the edges. It wasn't like we were
13 doing that in multiple markets as I understand
14 it.

15 BY MS. PLOVNICK:

16 Q. All right. So -- but you don't know
17 what Ms. Berlin considered or didn't consider
18 in her programming decisions?

19 A. Well, again, I'm trying to think how
20 she would have used ratings for the types of
21 work she worked on when she was reporting to
22 me. It wouldn't have -- it wouldn't have
23 factored in. And she wouldn't have been in --
24 she was never in any negotiations for the
25 general market platform, all the deals I worked

1 on, which is, you know, the vast majority of
2 the programming. So I'm not sure, you know --
3 again, I can't speak for her, but I can only
4 speak for my experience as running the
5 programming group.

6 Q. Right. You speak from your
7 experience, but she clearly has a different
8 view of what's important than you do.

9 A. She -- her testimony says that.

10 Q. All right. If we look in the next
11 paragraph of her testimony, she says, "One
12 reason ratings are crucial is because it is
13 difficult to discontinue a channel after a
14 commitment has been made to include it. Once a
15 decision was made to carry a station out of
16 market, DirecTV rarely, if ever, pulled it from
17 the DMA, unless that DMA became 'served' or if
18 that network's station launched in the DMA.
19 The reason we never pulled a station once
20 launched is that every station had some local
21 constituency, usually" --

22 JUDGE STRICKLER: Loyal, loyal
23 constituency?

24 MS. PLOVNICK: I'm sorry -- loyal
25 constituency -- you're right, Your Honor.

1 BY MS. PLOVNICK:

2 Q. -- "loyal constituency, usually a
3 niche audience. However small it might be, we
4 never wanted to have subscribers retaliate by
5 'churning' off the platform or discontinuing
6 service. So it was a common practice of
7 DirecTV that once a station's carriage
8 commenced, the signal rarely went dark or was
9 pulled off the air."

10 Would you agree with that testimony of
11 Ms. Berlin?

12 A. Well, no. I mean, I don't -- I do --
13 you know, I think you can look at the history
14 of DirecTV, and probably cable as well, and
15 it's not commonplace for cable networks or
16 stations to be pulled. I mean, it is a last
17 resort.

18 It's happening more and more with
19 broadcasts with the station groups, because the
20 fees they are asking for are so high. You
21 know, we did drop networks. I think that, you
22 know, usually when you're coming down to the
23 wire in a negotiation, last week or two, and
24 you see the crawls on screen and you see people
25 messaging about losing channels, it really does

1 bring the parties to the table.

2 But I wouldn't agree -- you know, I
3 worked on our Viacom deal in 2012 where we
4 dropped 14 Viacom channels for about two weeks
5 just because of the deal there. So, you know,
6 I do -- it's not -- you don't relish pulling
7 programming, but I think when you have to look
8 at the decision for pulling programming, you
9 know, the biggest factor is are you going to
10 lose customers?

11 And I think that, you know, in my
12 testimony yesterday, live sports was the most
13 important -- was the category we were most
14 worried about if we had to drop.

15 Q. Dropping a channel -- the reason you
16 would not drop a channel you carry along for a
17 long period of time was because you were afraid
18 that you would lose customers?

19 A. Well, no. I think it's just a matter
20 of degrees. So I think that, yes, every
21 channel, you could -- yes, every channel has
22 somebody, it's somebody's favorite. DirecTV
23 had 20 million customers so you're going to
24 find somebody that -- but I think that when you
25 made the decision -- when we discussed

1 decisions to drop -- again, this is just
2 another point, that ratings never factored into
3 that decision.

4 The last couple of weeks we were
5 polling customers, we were kind of trying to
6 run numbers as to, okay, you know, is this
7 programming so important that we're going to
8 lose customers quickly? Do they have other
9 alternates? So if it's a movie channel, we can
10 just, you know, tell them to go watch -- you
11 know, there's other -- five other movie
12 channels on DirecTV, so you'll find a
13 substitute with -- again, live sports, that was
14 our biggest category that we were most worried
15 about dropping.

16 Q. But you agree with Ms. Berlin that you
17 would rarely, if ever, drop a station if you
18 could help it?

19 A. Yes, we -- the goal was always to
20 reach a deal with every programmer.

21 Q. Would you describe continuing to carry
22 these signals as legacy carriage?

23 A. No, because I think every time a deal
24 came up, you know, whether it be four, five,
25 six years, there was a review of the value of

1 the network and whether or not it made sense to
2 keep on the platform.

3 Q. And you usually decided it made sense
4 to keep the same signals on the platform if you
5 could?

6 A. Well, I mean, I guess if you're asking
7 if we dropped a lot of networks, no, we didn't.
8 But every -- every channel was examined every
9 time it came up for renewal.

10 So if the value equation wasn't there,
11 then we would become much tougher in our
12 negotiation. And then we would usually reach a
13 deal and it was -- then it would be more
14 favorable to us.

15 Q. The goal was to reach a deal to
16 maintain the same carriage because the
17 subscribers would not be happy if they didn't
18 continue to get the signals that they cared
19 about?

20 A. Yes, it's a matter of degrees, like I
21 said. You know, every channel has somebody,
22 it's somebody's favorite. So the goal, of
23 course, was to keep as much programming on the
24 platform as we could because, yes, that is the
25 way to keep customers happy.

1 Q. All right. So let's just switch gears
2 for a little bit.

3 And, Dima, you can take that off.

4 Let's just talk a little bit about
5 programming decisions in general. So -- and I
6 think you testified that when a satellite
7 carrier makes a programming decision, it's
8 usually about whether to carry a whole station
9 or a whole cable network. You're not usually
10 selecting individual programs or categories of
11 programs. Is that correct?

12 A. Yes. Our negotiations for -- if
13 you're asking about, yes, the negotiations at
14 DirecTV are generally for linear channels.

15 Q. And sometimes you would purchase
16 multiple signals or networks in a package or
17 bundle; is that correct as well?

18 A. Yes, from the same content owner?

19 Q. Yes.

20 A. Yes.

21 Q. So --

22 JUDGE STRICKLER: Excuse me, counsel.
23 I don't want to lose the thread, going back.

24 THE WITNESS: Sure.

25 JUDGE STRICKLER: Good morning, sir.

1 THE WITNESS: Good morning.

2 JUDGE STRICKLER: You said that -- in
3 response to counsel's question a moment ago,
4 that every station would come up for renewal
5 over a period of time. And when they would,
6 you would review the station and you'd either
7 decide whether or not you wanted to drop it,
8 whether you wanted to keep it, or maybe be
9 tougher in negotiations because you thought you
10 had a better bargaining position.

11 What would make a station weaker such
12 that you would negotiate for -- you would
13 negotiate and seek lower -- to pay lower rates?

14 THE WITNESS: I think that if -- if
15 they had lost certain product. You know, I
16 could use general entertainment or sports. You
17 know, if they had a couple of big shows that
18 had been fan favorites or something, you know,
19 like a Mad Men or something or Walking Dead,
20 and they lost that programming, I think that
21 would make their leverage weaker. If they had
22 lost a major team, if they were a sports
23 network, that would clearly factor into our
24 evaluation.

25 It really came down to whether or

1 not -- again, we did a lot -- we tried to do a
2 lot of analysis as to how long can we be off
3 with this network and not suffer the
4 consequences of losing customers?

5 JUDGE STRICKLER: When you would
6 decide whether to negotiate to pay a lower rate
7 or to -- whether to drop the station, did you
8 look at whether or not people were actually
9 watching programs on the station?

10 THE WITNESS: I would do an initial
11 analysis. I think, like I said yesterday, I
12 would look back over historicals and just to
13 see -- just as they would come in and tout, you
14 know, they could slice and dice it any way they
15 wanted, their prime time on Tuesdays was up
16 20 percent or something, you know, I could walk
17 in and say: Well, overall, I think your
18 ratings are down a little bit here and there.

19 But in the end, you know, I think it
20 was kind of used as an initial -- you know,
21 initial tactic in kind of starting negotiations
22 and, you know, you kind of -- as we're all
23 gathering 50 pieces of information to go
24 negotiate with. But when push came to shove,
25 again, ratings didn't really -- we would look

1 much more at kind of how important that
2 programming was. And, again, to me it was just
3 how quickly our customers are going to leave
4 the platform.

5 JUDGE STRICKLER: In your answer you
6 mentioned in the beginning of the negotiations
7 you would talk to the station representatives
8 about, well, your prime times, is the
9 expression I think you used --

10 THE WITNESS: Yeah.

11 JUDGE STRICKLER: -- your prime times
12 are up or prime times are down. By "prime
13 times," were you referring to your ratings in
14 prime time?

15 THE WITNESS: Oh, they -- so they
16 would come in and say -- you know, use AMC for
17 instance, they would come in and say, well --
18 they would ignore, obviously, ratings that
19 didn't favor them, but they might come in and
20 say: Well, look, this program has -- it just
21 launched and it's now seeing, you know, 10 or
22 20 percent increases every year. Or --

23 JUDGE STRICKLER: So they would try to
24 push that the station was valuable and the
25 programming was valuable because the ratings

1 were high. And you, in the negotiations, at
2 times would push back and say: Well, maybe
3 that's not really so. And then you'd point to
4 the negative ratings that they were trying to
5 obscure or not emphasize?

6 THE WITNESS: Yeah, I mean, I think
7 that -- again, I think both parties looked at
8 it like -- you know, again, it's much more
9 important to the network because that's where
10 they make a lot of their money, is advertising
11 sales.

12 I think we both -- like I said, it
13 would be, you know, one of 25 things you would
14 use in your arsenal. But, again, when push
15 came to shove, the last X number of weeks or so
16 and these negotiations got very intense, always
17 went down to the 11th hour, it really came down
18 to, you know, the value equation. And we would
19 look at what -- you know, again, what would it
20 cost us in losing subscribers to lose this
21 content and whether we were at a rate that
22 could justify paying them.

23 JUDGE STRICKLER: Can we put
24 Ms. Berlin's testimony back up on the screen
25 for a moment if possible.

1 MS. PLOVNICK: Sure. And, Dima, if
2 you could please put it up.

3 JUDGE STRICKLER: The part that you
4 were -- yeah, that's it. Thank you. I don't
5 know what paragraph we were in or page number
6 we were on there.

7 MS. PLOVNICK: For the record, this is
8 page 7 of Exhibit 6041.

9 JUDGE STRICKLER: I think that's the
10 wrong one. Stop scrolling. You're making me
11 motion sick.

12 (Laughter.)

13 JUDGE STRICKLER: Thank you.

14 In her testimony, she says at the end
15 of a paragraph, I can't tell which one it is,
16 on page 7 I think, she says -- that is
17 Ms. Berlin, right? -- "Based on my years of
18 experience in the subscription television
19 industry, I would say other satellite service
20 providers and cable operators all viewed
21 ratings as principal measure of value within a
22 defined genre of programming."

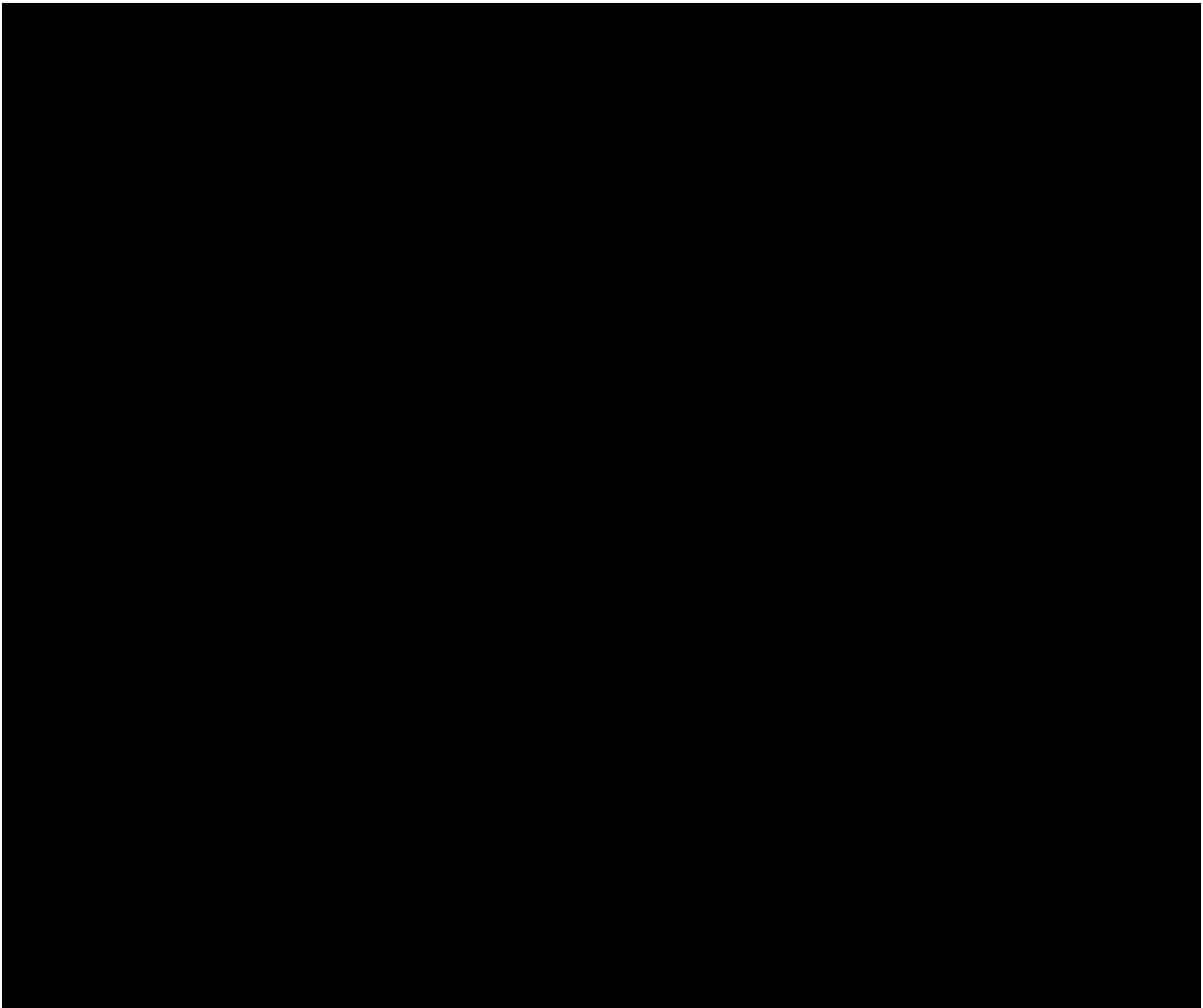
23 I want to focus on that last phrase
24 there, "within a defined genre of programming."
25 Did you understand that once you had identified

1 a particular genre of programming that you
2 thought would round out the package of
3 programming in stations that you had, that you
4 would then be more -- at that point be more
5 interested than you were previously as to
6 ratings because once you know the genre you
7 want, you want a more popular version, a more
8 popular program within that genre?

9 THE WITNESS: Yeah, I'm trying to --
10 so I think that, you know, maybe she's again
11 getting back to the early days of before we had
12 launched most -- you know, the local markets
13 and whether -- again, whether she was looking
14 at bringing in distant signals for maybe even
15 ethnic variety or devotional programming,
16 religious programming.

17 And all things being equal, okay,
18 there are two networks we can bring in, we only
19 have room for one, which one do we think is,
20 you know, you know -- you know, again, I can't
21 speak to kind of what -- the work she did back
22 in the early 2000s. You know, I'll say now
23 that there's not a lot of new channel launches,
24 other than regional sports networks. I think
25 you could look at the DirecTV platform over the

1 last ten years and maybe there has been a
2 handful of non-sports networks launched. So
3 there's not a lot of -- you know, I think now
4 as, you know, the saturation of the market
5 happens not only with -- it has not only
6 happened with customers but with programming, I
7 think people basically are carrying everything
8 that's out there now.



25 BY MS. PLOVNICK:

1 Q. Okay. You and Ms. Berlin both left
2 DirecTV in 2013; is that correct?

3 A. That's correct.

4 Q. Did you both leave for the same
5 reason?

6 A. No, I was burned out on the industry
7 so I took about a year and a half off and
8 traveled. I actually don't know the
9 circumstances behind hers. She left after I
10 did so I don't know the circumstances behind
11 her.

12 Q. She left after you did?

13 A. Yes.

14 Q. But in the same year?

15 A. Yes, I think that's right.

16 Q. So you both were at DirecTV from 1998
17 to 2013, the exact same years?

18 A. Yeah, I guess that's right.

19 Q. Okay. So let's talk a little bit
20 about the Bortz survey. I understand you
21 reviewed the Bortz survey for 2010 to 2013 --

22 A. Yes, I did.

23 Q. -- for your testimony in this
24 proceeding? Have you ever participated in a
25 Bortz survey during your time as a satellite

1 carrier?

2 A. In a Bortz survey, no.

3 Q. And do you know if Bortz surveys
4 satellite carriers?

5 A. I don't know that.

6 Q. All right. But you have never
7 participated -- because you're not a cable
8 operator, you've never participated in the
9 cable operator Bortz survey?

10 A. I have never participated in a Bortz
11 survey.

12 JUDGE STRICKLER: Have you
13 participated in any similar survey?

14 THE WITNESS: I would participate in
15 surveys that were -- not -- I wouldn't say
16 directly related to this survey or very similar
17 to this survey. I would participate in
18 surveys. A lot of time content companies would
19 kind of call around and survey all the
20 distributors anonymously, like a Disney or
21 Viacom, and ask about value of content and what
22 went into decision-making and other things, but
23 I did not participate in particular in a survey
24 that was very similar to this one, no.

25 JUDGE STRICKLER: Thank you.

1 BY MS. PLOVNICK:

2 Q. All right. So let's turn to page 5 of
3 your direct testimony, which is Exhibit 1010.
4 And at the bottom of that page, you report the
5 point estimates from the Bortz report; is that
6 correct?

7 A. That's correct.

8 Q. And those are literally copied and
9 pasted from the Bortz report?

10 A. Yes, that's correct.

11 Q. So now, is it your testimony that
12 these results reflect the market value of the
13 different categories of programs from -- that
14 were retransmitted on distant signals between
15 2010 and 2013?

16 A. Yes, I think they're consistent with
17 -- with how I would value them.

18 Q. You say they're consistent with how
19 you would value them. Is that market --

20 A. I mean, I could -- yes, they're
21 consistent. When I saw these numbers, I said,
22 you know, that just makes sense to me. It
23 seems consistent with how operator -- you know,
24 a MVPD executive would value these categories.

25 Q. So do you think that reflects the

1 market value of the programming categories or
2 your willingness to pay?

3 A. Well, no, I think it's the market --
4 you know, I think the question was relative
5 value. And so I think that's --

6 Q. Is relative value the same as market
7 value?

8 A. Relative value -- when I read the
9 questionnaire, I read it as when you're looking
10 at these categories of programming and you're
11 talking about distant signals, how -- you know,
12 what's the relative value of each category
13 versus the other category?

14 Q. And would you believe that to be
15 relative value within the market that existed
16 in 2010 through 2013?

17 A. Yeah, yes.

18 Q. So -- and that would be the regulated
19 market subject to the statutory licenses?

20 A. Well, I think that -- you're asking --
21 wait, I'm sorry, what are you asking?

22 Q. I'm saying so in -- you're talking
23 here -- you say this is a relative valuation
24 for 2010 through 2013.

25 A. Um-hum.

1 Q. And I said would that be the market
2 that existed that cable operators were in when
3 they made these valuations in 2010 through
4 2013? I believe you said yes.

5 And so I was saying -- asking you to
6 confirm that the market that existed between
7 2010 and 2013 was a regulated market, subject
8 to statutory licensing.

9 A. Well, but I do believe one of the
10 questions asked, you know, if you had to go out
11 and purchase this in the marketplace, what --
12 you know, what are the values you would give.

13 Q. Oh. Well, why don't we take a look.

14 A. Okay.

15 Q. Let's look at the Bortz report, which
16 is Exhibit 1001.

17 A. I mean, they're asking about the
18 specific distant networks that were listed in
19 the questionnaire.

20 Q. Correct. And if you flip to the back,
21 there's a bunch of questionnaires, actually, in
22 the back of the Bortz report. But we can just
23 pick one. Let's see.

24 I'm looking at -- I'm going to just
25 look at Question 4a in one of those

1 questionnaires. So let me find one to point
2 you to. I'm looking at -- well, I think the
3 one they put up on the screen is C-14. We can
4 use the one that's on the screen just to make
5 it fast and easy for everybody here.

6 Actually, this is a WGNA-only one, so
7 we want one that's not WGNA-only, in case the
8 language is different, because most of the --
9 would you agree that there are more WGNA
10 systems that are not just WGNA-only than
11 WGNA-only systems?

12 A. I'm sorry, WGNA carrying --

13 Q. Carrying WGNA as one of multiple
14 signals, rather than being a WGNA-only system.
15 Would you agree that there are more cable
16 systems that carry multiple signals, rather
17 than just WGNA-only?

18 A. Oh, I didn't look at all the --

19 Q. You didn't --

20 A. -- statement of accounts for cable --

21 Q. Okay.

22 A. -- so I can't speak to that.

23 Q. Okay. Well, let's just -- how about
24 -- let's look at B-20.

25 A. Okay.

1 Q. That's the one that's on here. So
2 this is Question 4a from the Bortz survey.

3 MR. CANTOR: Excuse me. Could you
4 just make available for him the full version of
5 the survey that you're talking about?

6 MS. PLOVNICK: Sure. I've got it
7 right here, actually, if I may approach the
8 witness. I think it's probably also in one of
9 the mini-binders over there. May I approach?

10 JUDGE BARNETT: You may.

11 BY MS. PLOVNICK:

12 Q. All right. This is a copy of
13 Exhibit 1001, in case you would like to look at
14 any other page of it. But I'm really simply
15 looking at Question 4a, so that you can
16 understand what the language was because I
17 think that you were trying to remember it off
18 the top of your head.

19 So in Question 4a, it says, "Now, I
20 would like you to estimate the relative value
21 to your cable system of each category of
22 programming actually broadcast by the stations
23 I mentioned during" -- and they say the year --
24 "excluding any national network programming
25 from ABC, CBS, and NBC."

1 A. I'm sorry, let me -- okay, I'll look
2 here. I'm in the WGNA one.

3 Q. I think we're on page B-20. That's in
4 the back in the appendices.

5 A. Okay.

6 Q. It says "relative value to your cable
7 system of each category of programming actually
8 broadcast by the stations I mentioned during"
9 -- and this one it says 2013 -- "excluding any
10 national network programming from ABC, CBS, and
11 NBC."

12 A. Um-hum.

13 Q. So my question is, is this the --
14 asking for a relative valuation based on the
15 market as it existed in 2010 through 2013,
16 which would be the regulated market?

17 A. Well, I think that, yeah, I mean, it's
18 asking you to value the programming on --
19 again, on the stations they were carried, the
20 distant signals, correct? But I think that --

21 Q. The distant signals that were carried?

22 A. Yes. But I think that -- and so I
23 think you're talking about specifically with
24 respect to the program that's on these distant
25 signals, but I think your -- you know, my

1 experience in negotiating for types of content
2 would help me evaluate the types of content
3 that were on these distant signals.

4 Q. So you're saying that you wouldn't be
5 limiting it to distant signals, if you were to
6 be asked this question?

7 A. Well, no. I would look at what
8 programming was on the distant signal and I
9 would say, you know, clearly that if I was
10 bringing the distant signal in, I'm assuming it
11 was because of a certain type of programming on
12 that signal that I was looking for something --
13 there's a reason I'm bringing that distant
14 signal in.

15 And so I would -- you know, so I would
16 look at whatever the signals were and -- you
17 know, and figure out, okay, well, how important
18 was that type of programming for me to bring in
19 on this distant signal.

20 Q. So you would limit it to the signals;
21 you wouldn't be considering other kinds of
22 programming?

23 A. Well, I think you would look, I
24 guess -- you know, I would look at what the
25 content that was on the distant signal. Again,

1 I'm bringing it in for a reason, so -- and
2 then --

3 Q. And is it your testimony you would
4 consider other factors outside of distant
5 signals? Or that you would limit your
6 consideration to the value of the programming
7 on the distant signals?

8 A. Well, I'm looking at the distant
9 signals. So I'm evaluating the content that's
10 on the distant signals.

11 Q. So you would evaluate the content on
12 the distant signals and you would limit your
13 consideration to the value of the content on
14 the distant signals?

15 A. Yes, that's correct, although, like I
16 said, at some point, you know, you do know the
17 value of content because of all the -- you
18 know, you're a professional in the industry.

19 Q. And you would be -- you would, just to
20 bring it -- just to clarify what you were
21 saying, so you would be focused on the content
22 on the distant signals that you were carrying
23 subject to the statutory license in the
24 relevant royalty years as considering Question
25 4a?

1 A. The survey to me was asking what --
2 I'm reading -- I'm looking at the distant
3 signals that I carry. And what is the -- you
4 know, obviously like I said, if I have a fixed
5 dollar amount to spend, a budget to spend, to
6 acquire the non-network programming on those,
7 you know, on that -- on the programming that's
8 on these distant signals -- this, I think, asks
9 for a percentage, right, the percentage of the
10 fixed dollar amount -- so I've got a fixed
11 dollar amount. How much am I going to allocate
12 to sports?

13 So I would look at the stations that
14 I've carried and say, okay, well, you know,
15 given these, I think that, you know, X percent
16 is a fair value. That's what I would value,
17 the relative value of sports versus the other
18 content that would be appearing on these
19 distant signals.

20 JUDGE STRICKLER: When you would make
21 that analysis as you're going through that in
22 your answer, would you consider how much in the
23 way of sports you already have in your line-up
24 on other channels and say, for example -- I'm
25 not saying this is the case, but

1 hypothetically -- well, we've already -- we
2 think we've exhausted the sports enthusiast who
3 is going to subscribe, so sports, while it may
4 be the biggest overall driver of what we have,
5 we've so successfully tapped into that market
6 that we don't need to tap -- you know, getting
7 the Cubs, the White Sox, and the Bulls, three
8 out-of-market teams on a distantly
9 retransmitted station is not that big a deal.

10 So sports on the margin now, now that
11 we're -- that you're looking at a distantly
12 retransmitted station, isn't as big a driver as
13 it otherwise would be when you're first
14 creating your overall line-up of stations and
15 networks?

16 THE WITNESS: I guess, you know, I
17 think that -- I guess if you use WGNA as an
18 example, we saw -- you know, DirecTV clearly
19 saw value in live team sports programming,
20 locally, nationally. You know, ESPN is a
21 national sports network.

22 I don't think -- you know, it's --
23 satellite and cable do work differently as far
24 as how they can import distant signals. And so
25 as I understand it, cable can bring in distant

1 signals without permission into a launched
2 market where satellite can't.

3 And so I think they may have made a
4 determination for bringing, say, a Fox station
5 in that I can get a regional game that's not
6 available in my local Fox or something. So,
7 you know, if you're bringing in a distant
8 station from a neighboring market and it has
9 got the same sports, maybe the value isn't
10 there, because you're seeing the exact same
11 programming, I will say for something like WGN,
12 we really did see -- you know, we launched the
13 WGNA before we launched the Tribune stations.
14 We saw value. We kept that because we saw the
15 value.

16 JUDGE STRICKLER: If you were
17 answering this survey, would you -- given how
18 important sports is in terms of subscribership,
19 would you give 100 percent to sports and zero
20 to the other categories?

21 THE WITNESS: No, because I think that
22 you -- you know, I think, again, when you're
23 looking at the -- and, again, satellite does
24 work differently, but I imagine as a cable
25 operator if you're looking at the six different

1 stations you're carrying or whatever, you're --
2 again, you're bringing those distantly in for a
3 reason. So there's a type of programming on
4 there or whether it's, you know, a newscast or
5 some other type of local programming or sports
6 or something else that you find valuable.

7 But --

8 JUDGE STRICKLER: So there does come,
9 if you will, a saturation point even with
10 regard to the distantly retransmitted stations,
11 where you say enough with the sports already,
12 we can do better by having some other
13 programming type. Sports may be 50, 60,
14 70 percent, whatever number you might choose as
15 the percent in this constant sum survey, but at
16 some point you're going to say that's enough,
17 let's move into some other niche or programming
18 category that will better serve our bottom
19 line?

20 THE WITNESS: I mean, I think you
21 could say that probably with the general market
22 and I assume distant signals as well, that you
23 want to serve as many customers, as many bases,
24 your whole customer base. And that would
25 include trying to provide as much content as

1 you can from all genres.

2 JUDGE STRICKLER: Which goes back to
3 my first question. So if you already had a
4 channel and station network line-up before you
5 started looking at the distantly retransmitted
6 stations, you would on the margin add sports or
7 not add sports in part based on how much you
8 had in the way of sports already; isn't that a
9 fair statement?

10 THE WITNESS: I guess if you're
11 looking at -- I guess I separate out
12 super-stations and local -- and distant, you
13 know, distant stations and bringing in a
14 neighboring signal from another market.

15 And like I said, I guess -- you know,
16 if your question is would I see value in
17 bringing in a distant Fox if I've already got
18 the Fox and it has got all the same programming
19 on it, you know, I'm not getting a different
20 game of sports, yeah, maybe I don't know that I
21 would see the value there, but I think -- I'm
22 sorry if I'm not --

23 JUDGE STRICKLER: No, you're
24 answering.

25 THE WITNESS: Okay.

1 JUDGE STRICKLER: But what if it's --
2 what if it's a different team? I mean, in the
3 local market, if it was the New York market,
4 say you already had the Knicks and the Nets, so
5 you had basketball and you had other basketball
6 on the super-stations.

7 THE WITNESS: Um-hum.

8 JUDGE STRICKLER: Would that -- would
9 you consider whether or not there would be
10 sufficient value added by importing a station
11 because it had the Chicago Bulls?

12 THE WITNESS: Yes, I would --

13 JUDGE STRICKLER: When that market
14 already had a lot of basketball?

15 THE WITNESS: Oh, no, because I don't
16 think -- no, I actually -- I think I understand
17 your question now. I think that I guess, you
18 know, when you talk about -- you know, I know
19 at some point you talk about the passion of the
20 fans.

21 I think you've got, you know, a large
22 base of sports fans that are pretty passionate.
23 And they'll watch, you know, sports when it's
24 on. That's why ESPN has Sports Center. And
25 then you clearly have your local teams that are

1 -- that serve a local audience.

2 But there are a number of teams that I
3 would be interested in bringing nationally, if
4 I could, that just the rights don't allow you
5 to do that. The Cubs, you know, WGNA, because
6 of the super-station, we were allowed to serve
7 an entire national audience and that was
8 important to us. I'm not saying everybody is a
9 Cubs fan, but for the rate they were paying --

10 JUDGE BARNETT: They're not?

11 (Laughter.)

12 THE WITNESS: I grew up in Pittsburgh
13 so --

14 JUDGE STRICKLER: You can be an
15 anti-fan too and hate the team and hope to
16 watch them lose.

17 THE WITNESS: Well, true, true. No,
18 but I do think you also get a -- you know,
19 there's certainly a level of fan that --
20 nationally that want to see all the games.
21 There's also a level of fan that just will
22 watch a national game if it's on. Maybe a more
23 casual sports fan.

24 But, you know, specifically with
25 respect to super-stations, no, I mean, I will

1 tell you I was involved in the decision, we saw
2 the value of every time it came up for renewal.

3 JUDGE STRICKLER: Thank you.

4 BY MS. PLOVNICK:

5 Q. So in the course of your answers to
6 Judge Strickler's questions, you said "I
7 assume," "I imagine." And this is because
8 you're not actually a cable operator, correct,
9 so you're having to make assumptions about what
10 cable operators would do in this context?
11 Because your experience is --

12 A. I mean, I know a lot of folks in the
13 cable industry, so we speak about matters, but
14 I have never worked for a cable company.

15 Q. You never worked for a cable company.
16 You never responded to the Bortz survey?

17 A. That is correct.

18 Q. And so when you were answering some
19 questions on direct about Dr. Steckel and his
20 critique of the categories that are used in the
21 Bortz survey, and you said that you disagreed
22 with him that they would be confusing to cable
23 operators, this is based on your experience in
24 the satellite industry, not based on having
25 ever worked in the cable industry as a cable

1 operator?

2 A. It's my experience as an MVPD
3 executive, which I think covers both. We go
4 through the same analysis with respect to
5 programming and --

6 Q. That's your assumption based on your
7 satellite experience, not based on ever having
8 worked in the cable industry?

9 A. But based on knowing every -- all my
10 competitors and the folks that have my job at
11 all the major competitors, cable companies.
12 I --

13 Q. You're making assumptions about what
14 they would think or how they would answer these
15 questions?

16 A. I -- I -- from having -- obviously
17 from knowing a lot of people in the industry
18 and having conversations over the 15 years, I
19 know the importance of these categories of
20 programming to an executive.

21 Q. Based on --

22 A. But I cannot -- you're right.

23 Q. But you cannot speak for them or what
24 goes on in their minds or how they may or may
25 not have understood this?

1 A. That is -- yes, you are correct.

2 Q. Having never responded yourself. All
3 right.

4 Let's talk just for a minute about the
5 part of your rebuttal testimony that responds
6 to Mr. Mansell. And so now your rebuttal
7 testimony for the record is Allocation Hearing
8 Exhibit 1011. And the part of your rebuttal
9 testimony where you respond to Mr. Mansell I
10 think is pages 5 to 6; is that correct?

11 And now, Mr. Mansell's testimony is
12 Exhibit 6002. And we can pull it up and look
13 at it if you need to, Mr. Hartman, but I'll
14 represent to you -- and you can tell me if I'm
15 characterizing this correctly -- that
16 Mr. Mansell analyzed programming trends for JSC
17 programming over 30 years, and he concludes
18 that the number of professional live college
19 team sports games on local over-the-air
20 stations has significantly declined over that
21 time; while the number of games available
22 through other outlets, such as cable networks,
23 has increased. Oh, it looks like they already
24 put it up here.

25 So that's what Mr. Mansell says in his

1 testimony.

2 A. Okay.

3 Q. So they put up on the screen 6002,
4 which is Mr. Mansell's testimony.

5 A. Okay.

6 Q. That's what he says?

7 A. I've analyzed -- you're talking about
8 the first full paragraph?

9 Q. Yes.

10 A. Yes, that's what he says.

11 Q. All right. And so you testified
12 earlier this morning that you agreed with a lot
13 of what Mr. Mansell says about the emergence of
14 regional sports networks and changes in the
15 industry over the 30 years that he analyzed?

16 A. That's -- I did agree with his
17 testimony that there have been more and more
18 regional sports networks launching over the
19 last 15 or 20 years, yes.

20 Q. Now, in your rebuttal testimony, you
21 did an analysis focused on comparing the time
22 period 2004 to 2005 and 2010 through 2013, and
23 you just looked at changes over that period of
24 time; is that correct?

25 A. Are you talking about the charts with

1 respect to the carriage for --

2 Q. Yes, I'm talking about the charts on
3 page 5, 6, and 7 of your testimony.

4 A. Okay.

5 Q. Well -- and actually, if we look at
6 the first one, Table 1 -- and it's on page 5, I
7 think that's what on the screen right now --
8 this is actually you reporting an analysis that
9 someone else did, right? This is an analysis
10 that Dr. Israel did?

11 A. Yeah, that's correct.

12 Q. And Dr. Israel actually was just
13 reporting some numbers that other folks had
14 actually calculated; Mr. Ducey and
15 Dr. Crawford; is that correct?

16 A. That's correct.

17 Q. So do you know how Dr. Israel put this
18 table together?

19 A. Well, no, I know he reviewed the
20 testimony of Ducey and Crawford, but, no, I
21 took -- I trusted Dr. Israel as in his
22 position.

23 Q. And Dr. Israel said -- in your title
24 you say that this is weighted by subscribers.
25 Do you know if it's subscribers or subscriber

1 instances?

2 A. For which one? I'm sorry.

3 Q. The title to Table 1. It says Share
4 of Compensable Minutes by Claimant Group
5 Weighted by Subscribers.

6 Do you know if the weighting was done
7 by subscribers or subscriber instances? Or do
8 you even know what a subscriber instance --

9 A. Sorry, you're talking about subscriber
10 instances, people watching the number of --

11 Q. Right. Do you believe which it is?

12 A. Yeah, I don't.

13 Q. And did you analyze what Dr. Israel or
14 Mr. Ducey or Dr. Crawford relied on to come up
15 with these numbers?

16 A. No, I did not.

17 Q. All right. You just took them
18 verbatim as reported by Dr. Israel; is that
19 correct?

20 A. I read Dr. Israel's testimony and,
21 yes, I trusted Dr. Israel.

22 Q. And same for moving over here to page
23 6, 7, you have here some tables reporting JSC
24 telecasts on WGNA, Fox, and, carrying on into
25 page 7, these are Major League Baseball

1 telecasts on Fox, NFL telecasts on Fox.

2 These tables say underneath source,
3 Bortz Media compilation. Did you rely on
4 Mr. Trautman at Bortz to prepare these tables?

5 A. Well, he sent me the -- I got backup
6 with respect to these game numbers.

7 Q. So you actually reviewed the backup --

8 A. Yes.

9 Q. -- underlying these tables?

10 A. Yes, I did.

11 Q. And you focused, in those tables,
12 solely on WGNA and Fox, correct?

13 A. Yes, that's correct.

14 Q. You did not look at all other
15 stations?

16 A. I -- no, I think these were the --
17 when you look at, certainly with WGNA, it was,
18 you know, by far, I think, but certainly with
19 satellite and cable, the biggest revenue
20 source, I guess, for -- going into the
21 Copyright Office.

22 But if you're asking whether we looked
23 at 500 stations, not to my knowledge.

24 Q. But Mr. Mansell did not limit his
25 analysis to WGNA and Fox, did he?

1 A. I -- no, it does not appear that he
2 did. But, again, I think when you're looking
3 at -- for purposes of this hearing and what's
4 being compensated on, I think that these were
5 the important numbers to focus on.

6 Q. So you think that the Judges should
7 disregard all of the other distantly broadcast
8 stations out there that aren't Fox or WGNA?

9 A. Well, I don't know that -- you know,
10 without having seen all the -- I'm not sure how
11 many distant signals were carried that were
12 carrying sports at the time amongst --

13 Q. A lot more than Fox and WGNA. Let me
14 represent that to you. Do you trust that
15 representation?

16 A. I would have to look at the numbers.

17 Q. All right. Well, do you know how much
18 compensable programming was aired on WGNA?

19 A. Oh, it's mostly the sports. There
20 were some other programming, programs that were
21 compensable for WGNA.

22 Q. But it's a small number of minutes
23 total that are compensable on WGNA; is that
24 correct?

25 A. For which category? For which --

1 Q. For all categories. The vast majority
2 of the programming on WGNA is not compensable
3 in these proceedings. Is that correct?

4 A. With -- I have not reviewed that
5 material, but I know that a good portion of the
6 programming was not compensable but the sports
7 is what was compensable.

8 Q. But you haven't reviewed that
9 information about what was compensable and what
10 wasn't compensable on WGNA?

11 A. Well, I've seen -- yes, it has been a
12 while since I reviewed it, but I did review it,
13 yes.

14 Q. You reviewed it, but you don't recall?

15 A. I can't cite it to you.

16 Q. But you know it's a small amount?

17 A. I know that -- but I don't think for
18 purposes of this hearing, I guess, I'm not sure
19 what -- you know, the sports was compensable,
20 and I think that's what's the important part.

21 Q. Well, sports is not the only category
22 at issue in this proceeding, is it?

23 A. No, it's not.

24 Q. Yeah. So the other signals and the
25 other categories of programming are also

1 important to the Judges in their consideration,
2 are they not?

3 A. I'm sure they're looking at all the
4 stations, yes. And I guess if I could just say
5 one thing. I'm not sure for the period we're
6 talking about here that -- without seeing your
7 analysis, I'm not sure if the period 2010
8 through 2013 we're talking about here, I don't
9 know how many local stations we were talking
10 about that may have lost sports.

11 Q. May have launched sports?

12 A. Lost, lost.

13 Q. Lost sports?

14 A. Yes, lost. When he's doing his
15 analysis here, you know, I was really focusing
16 on the prior period and then the current period
17 that we're --

18 Q. You were focused on the '04-'05 period
19 versus the 2010 --

20 A. Well, the -- right, and the 2010 being
21 obviously the most important period.

22 Q. You didn't consider the entire period
23 that Mr. Mansell considered or all the stations
24 he considered?

25 A. Well, I considered -- my point was

1 that we're talking about the 2010 through 2013
2 period here for compensable purposes, so I
3 don't know. I don't have an analysis of how
4 many local stations lost sports during that
5 period.

6 Q. During 2010 through 2013?

7 A. Yes, which I think would be relevant.

8 Q. One more follow-up -- actually a
9 couple more follow-up questions.

10 In your testimony just in general, and
11 this is switching gears a bit, you mentioned
12 some -- HBO, ESPN, Disney, USA, different
13 things. These are all cable networks; is that
14 correct?

15 A. Yes, the ones you mentioned?

16 Q. Yes.

17 A. Yes.

18 Q. And the ones that -- I'm trying to
19 remember all the ones you said.

20 A. Yes, yes.

21 Q. Those are cable networks and they are
22 not distant broadcast signals?

23 A. They are not distant broadcast
24 signals.

25 Q. Or local broadcast signals. And one

1 other follow-up question just coming back to
2 the Bortz survey question very quickly.

3 Did you -- when you were asking -- the
4 hypothetical questions that Judge Strickler was
5 asking you about how you would have answered
6 Question 4a, what volume of programming, if
7 any, would you have had in mind in considering
8 those questions? If you were responding to the
9 Bortz survey and you were considering distant
10 signals and the different bundling type issues
11 that Judge Strickler was asking you about?

12 A. I'm sorry, I don't -- what do you mean
13 by volume?

14 Q. Would you have had any particular
15 volume of programming in mind when you were
16 evaluating and assigning value to the different
17 categories of programming?

18 A. Meaning would I -- if there was 100
19 hours of sports versus two hours of --

20 Q. Would you know any particular volume
21 or would you have had any particular volume in
22 mind for any particular category?

23 A. Well, I'm sorry, I was really having
24 trouble. You know, you're looking at the --
25 would I know every program that was on there

1 and what -- every program and what category it
2 fit into for every signal?

3 Q. I guess that's -- that's one way to
4 look at my question. Would you be thinking
5 about every one of the individual programs in
6 all of the signals or how much total those
7 comprise?

8 A. I guess I would look at -- you know,
9 again, you're bringing in a distant signal
10 because there's certain programming on that
11 signal that's important to you. So I would not
12 know every program that was on, I don't think,
13 that was on every distant signal that I
14 carried.

15 But if I'm importing something, I'm
16 probably importing it for a reason, so I would
17 probably know that -- kind of what was
18 important to me on that signal.

19 Q. And so you said you wouldn't know
20 every program. And you probably wouldn't know
21 the minutes of programming that they totalled,
22 how many minutes of each category of
23 programming?

24 A. I don't think anybody would know that
25 but -- yes.

1 Q. All right. Thank you.

2 MS. PLOVNICK: I have no further
3 questions, Your Honor.

4 JUDGE BARNETT: Thank you.

5 Mr. MacLean?

6 MR. MacLEAN: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. MacLEAN:

9 Q. Good morning, Mr. Hartman.

10 A. Good morning.

11 Q. I'm Matthew MacLean. I represent the
12 Settling Devotional Claimants.

13 A. Okay.

14 Q. I first want to ask something about --
15 about something you said about network
16 programming and your decision to retransmit
17 network programming. And I believe you said
18 that, aside from WGNA, this was some of the
19 programming that you retransmitted
20 predominantly?

21 A. On a distant network basis?

22 Q. Yes.

23 A. Yes.

24 Q. Could you explain why you would have
25 retransmitted network programming on a distant

1 network basis?

2 A. Oh, I'm sorry if I was speaking more
3 -- if I was misspeaking. What I meant was when
4 you looked at -- again, when you look through
5 other statement of accounts, the DirecTV
6 statement of accounts for the period we're
7 talking about here, and when it lists the
8 stations that we're paying on, you know, like I
9 said, WGN is obviously this huge tranche of
10 75 percent, and then you have, I guess I should
11 say network affiliated stations.

12 Q. Sure.

13 A. Maybe that's -- you know, so when we
14 were -- at the time when DirecTV was trying to
15 figure out how best to service our customers,
16 before we could launch every market, it was
17 important to have the -- what I would call the
18 big four broadcast networks in market, whether
19 it was an out-of-market signal or not, network
20 affiliates, because it carried the sports
21 programming, the prime time programming that
22 were important to customers.

23 I guess that's what I was getting at.
24 And that's the whole -- you know, that's the
25 vast majority of what we paid on, as I

1 understand it.

2 Q. And when you say prime time
3 programming, you're referring to basically
4 nationwide network programming?

5 A. Network -- the programming that comes
6 from the corporate level network, yes.

7 Q. In what kinds of markets would you be
8 retransmitting network programming on a distant
9 basis?

10 A. So I guess, like I was saying -- and
11 this is more in the early days because DirectTV
12 has launched pretty much every market now and
13 has for -- has been in most markets for at
14 least several years, probably eight or ten.

15 So if there was a market that DirectTV
16 had not launched yet, you know, pick a number,
17 200 markets, Burlingame, Iowa, or something, if
18 it did not have the capacity to launch, you
19 know -- just briefly, I don't know if you know,
20 with satellite it's launch one, launch all. So
21 if we launch a local station in a market, we've
22 got to launch all local stations under either
23 must-carry or retrans. So, obviously, we had
24 to be very careful about which markets we
25 launched because we were a satellite company,

1 we were using spot beam technology, which is
2 just very difficult to figure out and get, you
3 know, the number of stations you need into a
4 local market on a national -- using a national
5 satellite.

6 But, anyway, so the point would be
7 that when we were launching -- we were looking
8 at different markets and we were allowed to
9 bring in a distant signal, again, what was most
10 important to us were affiliates of the -- of
11 the big four broadcast networks.

12 So that initially I think was the New
13 York ABC, NBC, CBS, and Fox, and L.A. NBC, CBS,
14 ABC, and Fox.

15 Q. And that's because in a particular
16 market, if it didn't have its own local network
17 affiliate station, you would want to import a
18 station so that you'd have that network
19 programming?

20 A. No, there were two -- I guess you
21 could look at it -- again, it was so difficult,
22 sorry if it's kind of confusing, but because we
23 had used -- you know, cable is already
24 entrenched. They could launch every market.
25 They have a cable plant that you can just flip

1 a switch and you can launch 20 local channels.
2 Because DirecTV had to take its national
3 satellite capacity and try to figure out how to
4 get -- to launch, you know, 5 different
5 stations in this town, 20 different stations in
6 this town, it was a very slow roll-out process.

7 So there was no decision -- once we
8 launched a market, there was no decision; it
9 was we launched every channel, every local
10 station, excuse me, but until we launched a
11 market, in order to be competitive, it was most
12 important for us to carry -- again, these were
13 markets we hadn't launched any local station
14 yet, to carry affiliates of the big four
15 broadcast networks.

16 Q. Are there local markets that don't
17 have all four big four?

18 A. Yes.

19 Q. And in those markets that don't have
20 all four big four networks, is it important to
21 import a network channel?

22 A. Yes, to distantly import a -- yes.
23 You mean a Fox or an ABC? Yes.

24 Q. And in a DMA or in a market like that,
25 that doesn't have its own local ABC, NBC, CBS

1 station, is it -- is there value in importing
2 the network programming into that market?

3 A. So if there's a market that only has
4 three of the big four?

5 Q. Sure.

6 A. Yes, there is value in bringing in --
7 again, because, you know, for instance, sports,
8 if it's a Fox -- if we don't -- if a station --
9 if a small market did not have a Fox affiliate
10 for some reason, yes, it was very important to
11 bring in a national -- to bring in a Fox so
12 that they could see their football games.

13 Q. What are some characteristics of those
14 markets that don't have all four of the big
15 four network broadcast stations?

16 A. So some markets --

17 Q. Network affiliated?

18 A. So, yeah, so markets that don't have
19 -- that -- they would be -- I can't give you a
20 number. They would be very small markets. You
21 know, some of the major markets have -- L.A.,
22 for instance, has probably 20 or 30 local
23 stations. But a smaller market -- and I don't
24 know that there are that many, but they would
25 -- it would be a much smaller market, very

1 small market.

2 Q. Do markets like that tend to have
3 lower subscription fees on average?

4 A. No.

5 Q. Across the country?

6 A. No. I mean, our pricing, it's pretty
7 much -- except for some of the access fees,
8 it's pretty much national pricing that DirectTV
9 has. So, no --

10 Q. For DirectTV, it's national?

11 A. Yes, yes. So the fee, what you would
12 pay in a smaller market -- and there was
13 another reason too, because you wanted to -- if
14 your customer is paying the same price, you
15 really would like them to have the same
16 programming that everybody across the country
17 has.

18 Q. Shifting gears a little bit here, I'd
19 like to take a look at page 7 of your written
20 direct testimony. Focusing on paragraph 24,
21 you say you've reviewed the written testimony
22 from the 2004-2005 proceedings of Judith Meyka?

23 A. Um-hum.

24 Q. And that she testified as to the
25 importance of live sports programming to a

1 cable operator's programming line-up. So you
2 agreed with the testimony of Ms. Meyka?

3 A. Yes, I did.

4 Q. Do you know Ms. Meyka personally?

5 A. I do.

6 Q. You've never chastised her for
7 dishonesty?

8 A. For dishonesty, oh, no.

9 JUDGE STRICKLER: Try to think up your
10 own question.

11 (Laughter.)

12 THE WITNESS: Sorry. I just got what
13 I think you were saying. No, I'm friendly.
14 I've known her from the business for probably
15 10 or 15 years.

16 BY MR. MacLEAN:

17 Q. Okay. So I'm showing you here
18 Allocation Exhibit -- Hearing Exhibit 1037,
19 which is designated and is in evidence already.
20 And this is the testimony of Judith Meyka. Is
21 this the testimony that you reviewed?

22 A. Yes, it looks like it.

23 Q. Taking a looking at paragraph 27, and
24 I'm focusing here in the middle of the
25 paragraph, "live sports programming, local news

1 and public affairs programming and Public
2 Television programming are particularly
3 important components of the offering because
4 they bring unique content that may not be
5 available on other channels in the line-up."

6 Do you agree with Ms. Meyka on that
7 statement?

8 A. You know, I do think I will say that,
9 again, satellite and cable are different. And
10 so cable is more flexible in what they can
11 bring into a local market.

12 They can bring in -- if they've
13 already launched a market, they can bring in a
14 distant signal, and I don't know the rules
15 exactly, without getting permission of either
16 the stations in the market, if there's a
17 competing station. And satellite is just not
18 -- it doesn't have the same rules, but --
19 again, I would say that I think if you're
20 serving a market and you have capacity, you
21 know, again, I think it's just like the general
22 market platform. I think you do want to serve
23 as many customers with as much different
24 programming as you can.

25 Q. And live sports programming, local

1 news and public affairs programming and Public
2 Television programming are all important
3 components of that offering that you want to
4 give your subscribers?

5 A. They're different levels of value,
6 but, you know, again, every -- I think, most
7 genres of programming are important to the
8 platform. It's just a matter of degrees.

9 Q. And so looking at her footnote here,
10 footnote 3, and I am so glad that we got a
11 footnote here, "to a lesser extent" -- you
12 would agree -- "devotional and Canadian
13 programming also may also add a unique element
14 to the programming mix that might otherwise be
15 unavailable to a cable operator"?

16 A. I think this may have been where Toby
17 was going -- Ms. Berlin was going with her
18 testimony.

19 Q. This is Ms. Meyka's testimony.

20 A. No, but I'm saying -- I'm sorry. I'm
21 just -- I'm trying to make the point that I --
22 you know, again, that there's -- we do try to
23 serve as many -- with 20 million customers, we
24 try to serve as many customers, you know,
25 everybody's needs to the extent we had

1 capacity.

2 So I was only bringing up the
3 Ms. Berlin testimony because I think maybe this
4 is what she was getting at with her example of
5 the L.A. and New York, bringing in a distant
6 signal, that, you know, it was trying to serve
7 a niche.

8 It's -- you know, capacity is just
9 very tight. So, you know, we would try to
10 launch as many stations and cable networks as
11 we could to serve our customers within the
12 bounds of, you know, the value equation and the
13 capacity we had.

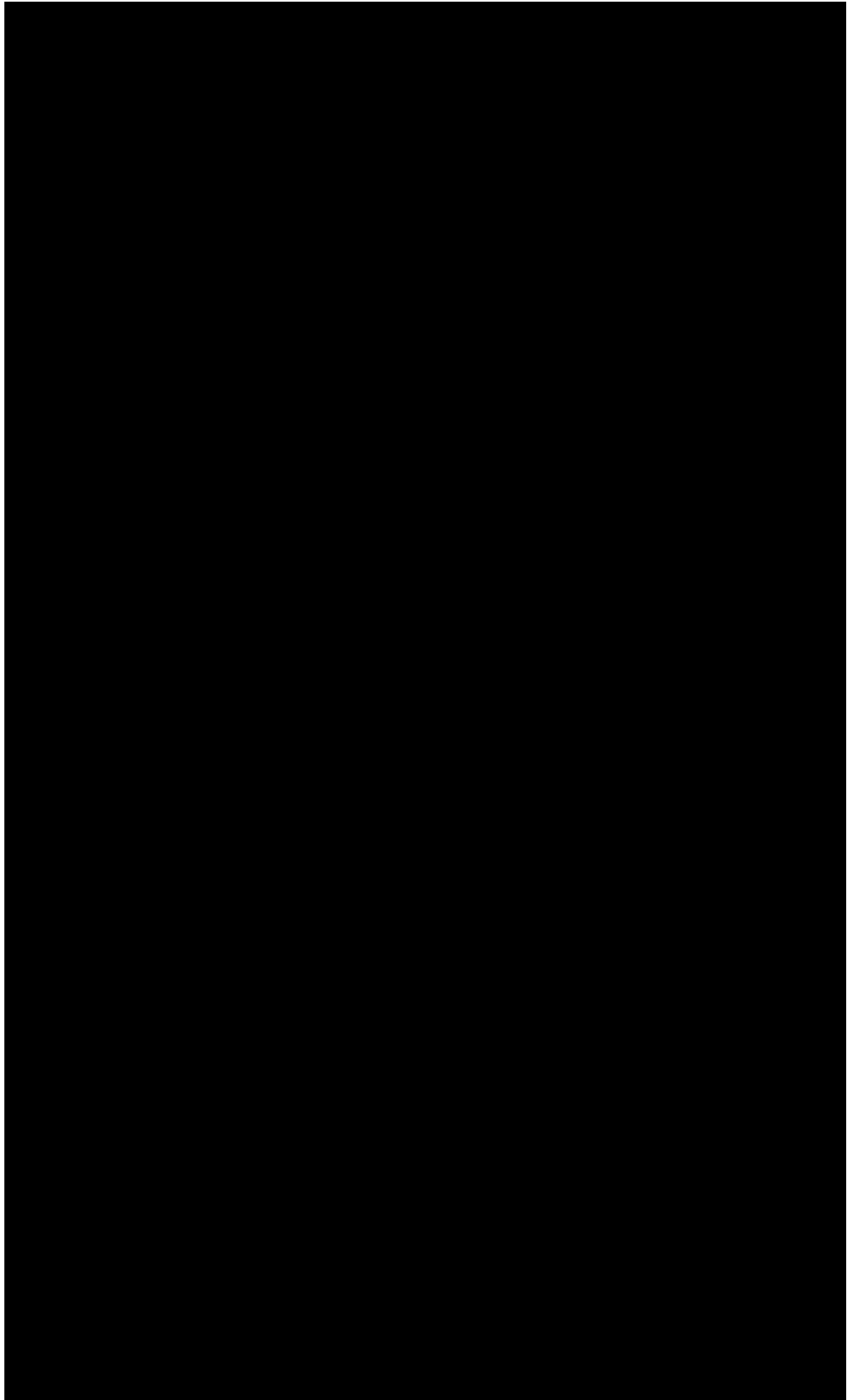
14 Q. And among those were devotional
15 programs to serve devotional customers?

16 A. I'm not aware of any devotional
17 programs that we -- networks, excuse me, that
18 we brought in on a distant basis, but it could
19 be the case. And, again, I can't speak to her
20 from a cable perspective. She might have a
21 different -- you know, slightly different view
22 based on the fact that they have more
23 flexibility in what they bring in.

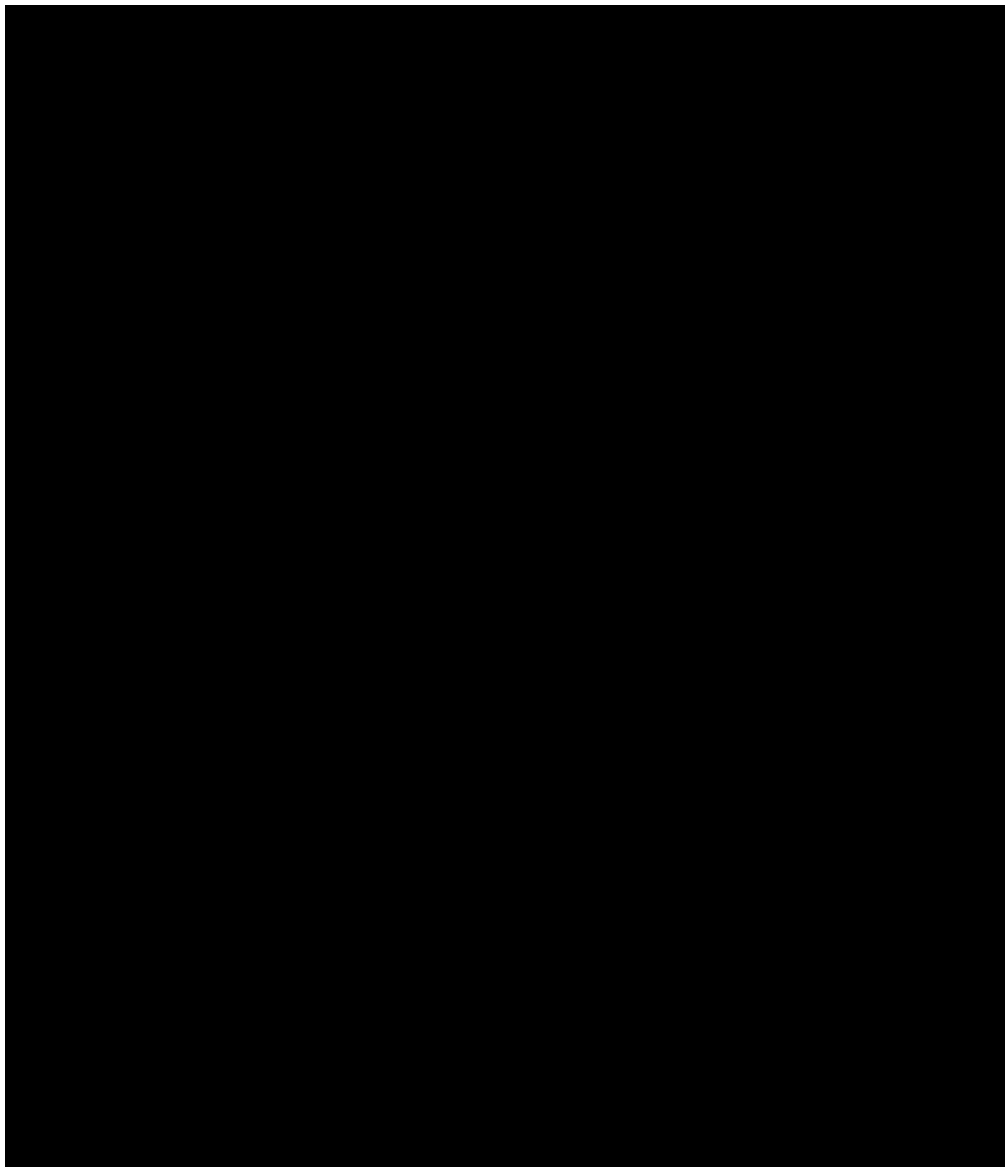
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19 BY MR. MacLEAN:

20 Q. Would you say that DirecTV valued its
21 religious customers?

22 A. I would say DirecTV valued every
23 single customer. So I think we --

24 Q. DirecTV at one point offered Easter
25 and Christmas specials from Crystal Cathedral

1 on a Pay Per View basis; is that right?

2 A. I think that is correct, yes.

3 Q. Would you regard that as devotional
4 programming?

5 A. I suppose so.

6 Q. DirectTV launched its own devotional
7 programming, including church services from
8 University of Notre Dame; is that right?

9 A. I think that's correct, yes.

10 Q. And these programs, DirectTV felt,
11 served an important niche audience; would you
12 agree with that?

13 A. I think that, again, there's -- you
14 could look at a multiple kind of diverse --
15 each audience we served. We, you know, had
16 packages of Italian programming. You know, we
17 served -- again, you could look at -- you could
18 probably slice and dice it numerous ways as to
19 the different types of programming -- customers
20 we served with our programming.

21 So, yes, I mean, devotional would be
22 one of the many kind of niches that we tried to
23 serve.

24 Q. You described sports programming as
25 high-value programming, right?

1 A. Um-hum.

2 Q. Right?

3 A. Um-hum.

4 Q. And you do have to answer yes or no
5 for the reporter.

6 A. Oh, yes. I'm sorry, yes.

7 Q. I'm sorry, that's --

8 A. Yeah.

9 Q. And that -- and I believe this is
10 because, in your words, folks are really
11 passionate about their particular sports teams;
12 would you agree with that?

13 A. I would agree with that.

14 Q. Many of these -- I mean, there are
15 some devoted fans of these sports teams, would
16 you agree?

17 A. Yes.

18 Q. They idolize their heroes?

19 A. That is correct.

20 Q. They -- some of them, I mean, they'll
21 watch these games religiously sometimes, right?

22 (Laughter.)

23 THE WITNESS: They're very passionate
24 about watching their games.

25 BY MR. MacLEAN:

1 Q. I don't -- I don't want to stretch
2 this, you know, analogy too far, but do you
3 know what Tebowing is?

4 A. I do.

5 Q. Could you explain?

6 A. Can I explain? As in taking a knee?

7 Q. In...

8 A. I don't know -- it has been a while.

9 Q. In prayer?

10 A. In prayer, yeah, I know he is -- he
11 was big a few years ago.

12 Q. Would you agree with me that there's
13 some people that are very passionate about
14 their religions?

15 A. Yes, I would say but as a matter of
16 degrees and, you know, I think if you're asking
17 whether or not I could value the types of
18 programming simply, I would not.

19 Q. I understand.

20 A. Yeah.

21 Q. But, I mean, there are people out
22 there who are passionate about their religion?

23 A. There are, and I think it's a matter
24 of if you're looking at kind of the whole, you
25 know, discussion we've had been having around

1 what's important to the customer, and, again,
2 we want to serve every customer. If, you know,
3 we lost certain networks, they would be less
4 detrimental to us than losing sports networks.
5 I consider sports at the top of networks that
6 we just couldn't lose because we would lose
7 customers. I'm not sure on the devotional side
8 if that's the case.

9 Q. Well, DirecTV carried religious
10 programming to serve religious customers,
11 right?

12 A. Yes.

13 Q. Are you aware that religious
14 programming is often similar to sports
15 broadcast live in the form of church services?

16 A. Yeah. Okay. I don't -- I'm sorry, I
17 don't watch a lot of devotional programming,
18 but, yes, I imagine they have services that are
19 broadcast live.

20 Q. And that's an opportunity similar to
21 feeling like you're there for a sports game, to
22 feeling like you're there, part of a religious
23 community in a church service?

24 A. For some small group of customers,
25 yes.

1 Q. So -- and, finally, I just want to
2 take a look at your testimony, page 5, where
3 you --

4 A. Direct or my rebuttal?

5 Q. This is your direct testimony, page 5,
6 where you refer to the Bortz results.

7 A. Um-hum. Yes.

8 Q. And you'll see, I mean, certainly, you
9 know, we're not at the top of the list here,
10 but devotional and religious programming has
11 Bortz results within the 4 to 5 percent range.
12 Do you see that?

13 A. Yes.

14 Q. In your experience as a system
15 operator, do you think that that's a reasonable
16 range for a valuation of religious programming?

17 A. Yes.

18 MR. MacLEAN: Thank you. I have no
19 further questions.

20 JUDGE BARNETT: Let's take our morning
21 recess, 15 minutes.

22 (A recess was taken at 10:27 a.m.,
23 after which the trial resumed at 10:48 a.m.)

24 JUDGE BARNETT: Please be seated.

25 Other cross-examination for Mr. Hartman?

1 No? Any redirect?

2 MR. CANTOR: No redirect, Your Honor.

3 JUDGE BARNETT: Well, thank you, Mr.
4 Hartman. If I had known that, I would have let
5 you go before the break.

6 THE WITNESS: No worries. I have all
7 day.

8 JUDGE BARNETT: Thank you.

9 THE WITNESS: Thank you, Your Honors.

10 JUDGE BARNETT: And our next witnesses
11 are from the Program Suppliers?

12 MR. OLANIRAN: Yes, Your Honor.

13 JUDGE BARNETT: Mr. Steckel? Dr.
14 Steckel?

15 MR. OLANIRAN: Dr. Steckel. Program
16 Suppliers call Dr. Joel Steckel.

17 JUDGE BARNETT: It is not an easy
18 place to get, or an easy place to be for that
19 matter.

20 THE WITNESS: But it is nice and snug
21 I can see.

22 JUDGE BARNETT: Will you please raise
23 your right hand.

24 Whereupon--

25 JOEL H. STECKEL,

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

2 (9:05 a.m.)

3 JUDGE BARNETT: Good morning. Please
4 be seated.

5 Are we beginning with Hartman this
6 morning?

7 MR. LAANE: Dr. Israel, Your Honor.

8 JUDGE BARNETT: Israel, okay. And
9 where is Dr. Israel? There he is.

10 MR. LAANE: He's right here. Joint
11 Sports Claimants call Dr. Mark Israel.

12 JUDGE BARNETT: Good morning.

13 THE WITNESS: Good morning.

14 JUDGE BARNETT: Please raise your
15 right hand.

16 Whereupon--

17 MARK ISRAEL,
18 having been first duly sworn, was examined and
19 testified as follows:

20 JUDGE BARNETT: Please be seated.

21 DIRECT EXAMINATION

22 BY MR. LAANE:

23 Q. Good morning, Dr. Israel.

24 A. Good morning.

25 Q. Please introduce yourself to the

1 Judges.

2 A. I'm Mark Israel. I'm an economist. I
3 -- local in D.C. I work for a firm called
4 Compass Lexecon, where I'm a senior managing
5 director.

6 Q. And could you just give us an overview
7 of your educational background?

8 A. Sure. So I'm -- I have a Bachelor's
9 degree from Illinois Wesleyan University, a
10 school in central Illinois, in math and
11 economics. Then went on and got a Master's
12 degree in economics at the University of
13 Wisconsin, worked for a few years, and then
14 went and got a Ph.D. in economics from Stanford
15 University, which I finished in 2000.

16 Q. And do you have any areas of
17 specialization within the field of economics?

18 A. Yeah, generally, I'm an industrial
19 organization economist. So I work on
20 competition in markets and pricing matters. I
21 also consider myself an applied econometrician.

22 As far as areas of focus, a great deal
23 of my work has been on television, media
24 generally, telecom-type industries, although I
25 work on a wide variety of industries.

1 Q. You mentioned applied econometrics.
2 Do you personally have experience designing and
3 conducting regression analyses?

4 A. Yeah, I do it all the time. It's
5 probably the single best description of what I
6 do for a living.

7 Q. And have you previously served as an
8 expert in litigation matters?

9 A. Several times, yes.

10 Q. And can you just give us a couple
11 examples of those?

12 A. Sure. So I've testified in federal
13 court three times in the last four years on
14 merger trials. One for the government, two for
15 the parties. I've worked on a variety of state
16 court matters, class certification, damages,
17 several arbitration matters.

18 Q. And were you qualified as an expert in
19 those proceedings?

20 A. Yes, I was.

21 Q. How long have you been with Compass
22 Lexecon?

23 A. Just over 12 years.

24 Q. And what did you do professionally
25 before joining Compass Lexecon?

1 A. So after leaving Stanford, I went to
2 Northwestern University, where I taught in the
3 Kellogg School of Management. I taught
4 business strategy and economics to MBA
5 students, Ph.D. students at Northwestern.

6 Q. And do you continue to do some
7 teaching?

8 A. Yeah. I still do some sort of
9 executive education teaching or various
10 programs, kind of on an intermittent basis. I
11 really enjoy teaching, so I try to get back to
12 it when I -- when time permits.

13 Q. And is that also with the Kellogg
14 School?

15 A. Yes.

16 Q. Have you published in the
17 peer-reviewed economics literature?

18 A. Yes, I have. I think I have between
19 10 and 15 published papers in peer-reviewed
20 journals, American Economic Review, the RAND
21 Journal of Economics, the Review of Network
22 Economics, and some others.

23 Q. And then in addition to publishing in
24 the peer-reviewed literature, have any journals
25 asked you to serve as a peer reviewer to

1 determine whether other authors' works are
2 worthy of publication?

3 A. It's usually referred to as being a
4 referee. And I do it a few times a year for
5 similar journals to the ones I mentioned I
6 publish in.

7 Q. Okay.

8 MR. LAANE: Your Honors, Joints Sports
9 Claimants offer Dr. Israel as an expert in
10 economics, industrial organization, and
11 econometrics.

12 JUDGE BARNETT: Hearing no objection,
13 Dr. Israel is so qualified.

14 MR. LAANE: Thank you, Your Honor.

15 BY MR. LAANE:

16 Q. Dr. Israel, what was your assignment
17 in this proceeding?

18 A. Initially, it was to review the
19 results of the Bortz survey and then, in
20 particular, to see if those results were
21 corroborated by marketplace evidence on the
22 prices paid for content and the value on
23 content.

24 Over time, it also included reviewing
25 testimony prepared and presented by other

1 experts and giving my reactions to that
2 testimony.

3 Q. Okay. And, Dr. Israel, in front of
4 you, you should have a binder containing
5 Exhibits 1003 and 1087, which have already been
6 admitted into evidence.

7 Do you have that there in front of
8 you?

9 A. Yes.

10 Q. Okay. And is Exhibit 1003 your
11 written direct testimony?

12 A. Yes.

13 Q. And is 1087 your written rebuttal
14 testimony?

15 A. Yes.

16 Q. Okay. Do you have any corrections to
17 your written testimony?

18 A. There was one very small correction,
19 just discovered in reviewing things for the
20 proceeding. In Table V-5, or Roman V-5, on
21 page 26 of my original testimony, there was a
22 very small error in one cell in the spreadsheet
23 that causes the total household viewing hours
24 for the non-JSC content to go down by a very
25 small amount.

1 But it has no effect on -- changes
2 things in the sort of math in the table at the,
3 you know, second decimal place. It has no
4 effect on anything substantive.

5 Q. Okay. And with that correction, do
6 you declare Exhibits 1003 and 1087 true and
7 correct?

8 A. Yes.

9 Q. All right. So you told us you were
10 asked to evaluate whether marketplace behavior
11 corroborates the results of the Bortz survey.
12 How did you go about exploring that question?

13 A. A couple different ways. The first
14 one was to use regression analysis.
15 Intentionally, I relied on a regression
16 analysis quite similar to what Dr. Waldfogel
17 had used in the last proceeding and Dr. Rosston
18 before him. I wanted to stick closely to that
19 method so that, you know, the Judges could see
20 what that method that has been used and
21 indicated was useful before, what that would
22 apply to the current data.

23 So that's a regression that relates
24 the viewing or the acquisition or the -- the
25 viewing of or the showing of various minutes of

1 different programming by CSOs. It relates to
2 -- those minutes to the dollars paid. So I
3 looked at a regression of that form.

4 And then I also looked at what I call
5 a cable content analysis that looks at cable
6 networks, TBS, TNT, and the top 25 networks,
7 and looks at what they pay for various types of
8 content, sports content and other content, what
9 they pay relative to how many hours of that
10 type of content they show and how many hours
11 are viewed.

12 Q. Okay. And we'll go into some of the
13 details in a minute, but, first, just what were
14 your bottom-line conclusions on whether or not
15 those studies corroborated the Bortz survey
16 results?

17 A. I found they corroborated them very
18 closely, strikingly closely in my experience in
19 doing this kind of work with different methods.
20 The regression analysis found relative
21 valuations that were, you know, quite similar
22 to Bortz.

23 And the cable content analysis found,
24 you know, different types of content had
25 different value relative to how many minutes of

1 it were shown and that the value on sports
2 content, in particular, was quite a bit higher,
3 as the Bortz survey had found.

4 Q. Okay. And let's take a look at Figure
5 V-1 at page 22 of your written testimony.

6 And, Geoff, if you could put up slide
7 2, please.

8 And what is this graph showing us,
9 Dr. Israel?

10 A. So this is summarizing the comparison
11 of my regression results to the Bortz survey
12 results, as I just mentioned. So this is a
13 good summary of my basis for saying that the
14 regression corroborates the Bortz survey.

15 You can see that the ranking -- so the
16 blue bars are my regression results. The red
17 bars are the Bortz results. Each expressed --
18 each expressing the total value, you know, as a
19 percentage out of 100.

20 So you can see the -- you know, for
21 sports in particular, the percentage is very
22 similar. And then the rankings across the
23 various categories are quite similar and
24 certainly similar percentages for the -- for
25 the top categories.

1 JUDGE STRICKLER: Excuse me, counsel.

2 Good morning, Dr. Israel.

3 THE WITNESS: Good morning.

4 JUDGE STRICKLER: How are you?

5 THE WITNESS: Good.

6 JUDGE STRICKLER: When you did your
7 regression, that's the results summarized in
8 this bar chart, were you already aware at the
9 time you began your regression of the results
10 of the Bortz survey or did you do your
11 regression blind and then compare it to the
12 Bortz survey?

13 THE WITNESS: My recollection is that
14 when I did the regression initially, I was not
15 aware of the results of the Bortz survey.
16 Certainly, I became aware of them over time.
17 But I designed the regression similar to what
18 Dr. Waldfogel had done with just a couple
19 changes, all independent of the Bortz survey.
20 And, you know, there has been a main
21 specification throughout that hasn't changed,
22 so I'm pretty sure that specification was
23 designed before I had seen any Bortz results.

24 And the basic specification, with a
25 couple modifications from what Dr. Waldfogel

1 has done, has stayed the same throughout.

2 JUDGE STRICKLER: So you're pretty
3 sure you hadn't seen the Bortz survey first but
4 you're not completely certain?

5 THE WITNESS: I'm certain I had seen
6 it when I designed the initial specification.
7 I just -- as far as when -- I'm pretty -- my
8 recollection of what happened is I'm certain we
9 designed the specification before having seen
10 any results because I got the Waldfogel
11 testimony, figured out a couple very minor
12 changes to make, and I hadn't seen any Bortz
13 results at that point.

14 I don't -- the only thing I don't
15 recall is exactly when in the process the Bortz
16 stuff first came in. But, certainly, the
17 design of the specification was done before I
18 had seen any Bortz results.

19 JUDGE STRICKLER: Were you finished
20 with the results of the regression before you
21 saw the Bortz results?

22 THE WITNESS: Yeah, certainly the
23 first runs of the regression that gave the
24 coefficients were done before I had seen the
25 Bortz results, yes. As we'll go through, there

1 are a couple of sensitivities in the back that
2 I added to check things, and it may be that I
3 had seen the Bortz results and then did those
4 as I went along, but certainly the first
5 specification and the first set of coefficient
6 results in that first regression was all done
7 based on Waldfogel before I had seen the
8 updated Bortz results.

9 JUDGE STRICKLER: Thank you.

10 JUDGE FEDER: Dr. Israel, is it fair
11 to say that there's a reasonably close
12 correlation between your results and the Bortz
13 survey for the top three categories, sports,
14 Program Suppliers, and CTV, but that
15 correlation breaks down somewhat as you get
16 into the smaller categories?

17 THE WITNESS: I think it's fair to say
18 that correlation is closer for the top
19 categories. I mean, I think the way I would
20 describe it is it's very -- it's very close,
21 even quantitatively, for the top three. It's
22 close in ranking overall, but in -- the numeric
23 comparisons, certainly, is less close at the
24 low end.

25 I will say in sort of regression work

1 I've done, I've done a fair amount of
2 regression work where you're valuing the
3 quality of -- of different products or you're
4 valuing different components. I've done some
5 work on automobiles where you're valuing the
6 components of an automobile. And in my
7 experience, when you get sort of toward the
8 lower end, the components with lower value, the
9 regression results can differ a little bit more
10 from what you see from other sources of
11 evidence.

12 If you just see fewer people
13 purchasing a given -- like in a car, fewer
14 people have a different, a certain package they
15 add. Certainly, that package has some value,
16 but pinning it down precisely in a regression,
17 in my experience, it's pretty common that you
18 get a little more variation at the low end.

19 JUDGE FEDER: Thank you.

20 BY MR. LAANE:

21 Q. And we'll come back to a bit more on
22 the regression in a minute.

23 For the moment, Geoff, if you could go
24 to slide 3, please.

25 And, Dr. Israel, this is Figure V-3,

1 of page 29 of your written testimony. And what
2 does this reflect?

3 A. So this is a summary of what I
4 referred to as the cable content analysis. And
5 this is for TBS, in particular. So, obviously,
6 TBS used to be a super-station that was part of
7 these proceedings. It's now a cable network
8 that shows a mixture, you know, mostly shows
9 non-JSC content but has a little sports
10 content.

11 And this is a summary of how much TBS
12 pays per hour of sports programming versus how
13 much it pays per hour of non-sports
14 programming, showing that, obviously, the cost
15 of the sports programming is much higher.

16 Q. Now, what relevance does that have to
17 your assessment of the Bortz survey results?

18 A. I mean, really I take two things from
19 it, both of which are consistent with what the
20 Bortz survey found. One is that an hour is not
21 an hour. I mean, there's differences in values
22 of an hour of different types of programming.

23 And, in particular, obviously, the
24 Bortz survey finds that, you know, a much
25 larger percentage of the value of the content,

1 say, goes to sports content than is reflected
2 in the number of hours. So that it, you know,
3 gets a much higher valuation of sports than the
4 number of hours would reflect.

5 And that's consistent and confirmed by
6 what -- you know, what cable networks like TBS
7 are paying when they put together bundles of
8 content.

9 Q. Thank you.

10 Geoff, you can take that down.

11 Turning back to the regression, are
12 the royalty rates for distant signals set by
13 law?

14 A. Yes.

15 Q. How can the payment of royalties in a
16 regulated market shed light on the issue of
17 relative value that's in front of the Judges?

18 A. It's really the fact that the CSOs
19 choose what content to carry. So that the
20 royalty schedule is set by law. So the price
21 is effectively set by law.

22 But the decision of what to carry,
23 given those prices, is a decision of the CSOs.
24 So you can learn based on the choices people
25 are making. You can see what minutes of

1 different types of content they're -- they're
2 airing and how that -- and how that relates to
3 what they pay.

4 I should note -- you know, this was
5 interesting to me. I've done some work in my
6 own career. I've done a fair bit of work on
7 the insurance industry, some of which was
8 designed -- my dissertation work, in fact,
9 designed to indicate what parts of insurance
10 policies people value.

11 And that was a setting where the
12 prices were set by regulation. And the study
13 was what decisions people make given those
14 prices. So I think it's -- you know, it's
15 reasonably common to try to learn based on the
16 decisions people make when facing regulated
17 pricing.

18 Q. And, Geoff, if you could bring up
19 slide V- -- slide 4, Table V-1.

20 First, just generally, Dr. Israel,
21 what does this table contain?

22 A. So this is the results of my
23 regression analysis.

24 Q. Okay. And we see at the top the
25 minutes of various categories of programming.

1 And then listed below are those control
2 variables?

3 A. Correct. So this is -- discussing a
4 minute ago, the base -- that's the
5 specification of my basic regression, which is
6 quite similar to what -- to what Dr. Waldfoegel
7 and Dr. Rosston had used.

8 So the basic setup is you're
9 explaining the royalty payments. That's what's
10 called the left-hand side or dependent
11 variable. And it's being explained based on
12 how many minutes of the different types of
13 programming people, you know, show.

14 And then control variables, I think of
15 the control variables largely to capture the
16 other part of the formula for how much people
17 pay. It's minutes times -- you know, basically
18 times the size of the system. And so the other
19 control variables capture the size of the
20 system as well as things like the -- the
21 features of the payment schedule, the minimum
22 payment and the 3.75 percent royalty rate.

23 Q. Now, you mentioned the minimum payment
24 and we can see there's an indicator variable
25 listed here for payment of the minimum fee.

1 Did you see that Dr. Gray suggested in
2 his rebuttal that you should have simply
3 discarded minimum fee systems from the data
4 set?

5 A. I did see that, yes.

6 Q. Why did you retain those systems in
7 the data set?

8 A. I mean, they're systems that are
9 making choices about what to carry. They're
10 part of the overall data. So, in general it's,
11 in my opinion, better to use all the data,
12 particularly when the data are informative,
13 when you see even the systems making the
14 minimum payment are choosing what to carry. So
15 we can relate what they choose relative to what
16 they pay.

17 And then maybe even most importantly
18 in a regression, the purpose is to compare what
19 different systems carry and what they pay and
20 so it's important to include all the systems in
21 the regression so that you can compare those
22 choices across the full set of systems.

23 Q. Did Dr. Waldfoegel include minimum fee
24 systems in his regression?

25 A. Yes.

1 Q. Looking back at the regression results
2 in your table, can you just tell us, for
3 example, if we look at the number 4.836 for
4 Sports or 0.469 for Program Suppliers, what
5 those numbers are and what they mean?

6 A. Yeah. So 4.836 -- well, each of them
7 is what's called the coefficient in the
8 regression analysis. And then the way to
9 interpret those two, in particular, is 4.836
10 would say, for every minute of sports
11 programming that we see being carried, the
12 payment that the CSO is making, indicating, you
13 know, the value they must put on the content.
14 That payment is 4.836 dollars for every minute
15 of sports programming.

16 The .469 says, for every minute of
17 Program Suppliers' programming, we see a
18 payment of, you know, just roughly 47 cents.
19 And so you can see that for different minutes
20 of different types of programming listed
21 throughout, there are different sort of average
22 payments. Again, all of this is controlling
23 for the control variables and then looking at
24 the payments given a minute of that type of
25 programming, controlling for the other

1 variables.

2 JUDGE FEDER: Dr. Israel, how do we
3 interpret the negative coefficients for
4 Canadian, Devotional, and network programming?

5 THE WITNESS: So, I mean, the simple
6 regression answer is it says that for a CSO of
7 a particular size, when we see it, you know,
8 carrying Canadian or Devotional or network
9 programming, its total payments are slightly
10 smaller than we would expect for a typical CSO
11 of that size.

12 So it's associating carriage of that
13 program with slightly smaller payments than you
14 would expect for a CSO of that size.

15 I would say, you know, as an
16 economist, my interpretation of those -- of
17 those negative coefficients is slightly
18 different across the categories. For network
19 programming, and maybe we'll talk more about
20 it, but for network programming, it's obviously
21 not compensable here. I'm using it as a
22 control variable.

23 But the network programming is, you
24 know, from a distant signal, is often
25 duplicative of network programming that the

1 system would have from local stations. So it
2 wouldn't surprise me as an economist that if
3 somebody carries a distant network affiliate,
4 they really are carrying it for something other
5 than the network programming. And so the
6 network programming might be something they
7 would rather not have because they have that
8 from another source.

9 For Canadian and Devotional, frankly,
10 this relates to the question you asked me
11 before. I think sometimes when you have lower
12 value, you know, programming that isn't carried
13 quite as often, the regression sees in the data
14 that the people carrying that are paying
15 somewhat less. And so it gives a negative
16 coefficient.

17 My own view is, obviously, those
18 sources of programming have some value here.
19 So I wouldn't take the regression -- I would
20 take the regression to say the value on that
21 programming is relatively smaller, but I
22 wouldn't say it's literally negative or zero,
23 or even necessarily zero.

24 And that's why it's, in my view,
25 useful to use these things to corroborate

1 something like Bortz. So we see smaller
2 numbers there. We see lower payments there.
3 But I think Bortz survey correctly captures
4 that there's some positive value on that
5 programming.

6 BY MR. LAANE:

7 Q. Geoff, could you go to slide 5,
8 please.

9 So, Dr. Israel, after you've computed
10 those coefficients, you know, then how did you
11 go about determining the allocation shares for
12 each program category?

13 A. All right. So for the categories that
14 are included here that are compensable, so
15 leaving out network as we just discussed, the
16 basic methodology is laid out on this table.
17 It's take the value per minute, that's in
18 column B here, which we were just looking at,
19 and then multiply it by compensable minutes.

20 As you see, in column C, it mentions
21 prorated minutes. So that's covered in my
22 written testimony. But the minutes are
23 prorated based on the subscriber groups that
24 actually receive it. So if only half of the
25 subscribers at a given CSO receive the minutes,

1 that minute would count half as much. But it
2 basically takes the value of the minute times
3 the number of minutes to give an overall value
4 of minutes.

5 And as you can see, as we were just
6 discussing, for Devotional and Canadian, I
7 don't give them negative value. I give them
8 zero under the regression. But it -- so it
9 does that multiplication, it comes up with a
10 value per minutes, and it then converts that in
11 column E into the percentage shares.

12 Q. Okay. Now, we've already heard
13 testimony that not all of the programming on
14 WGNA was compensable in this period. How at
15 all did you address that in the regression?

16 A. Well, so the regression itself --
17 similar to what we just said for network
18 programming, the regression itself includes all
19 the minutes because the regression is capturing
20 the decision that a CSO makes. When a CSO
21 takes WGNA, it's taking all of the minutes.
22 That's what it has on its programming.

23 But, obviously, for purposes of this
24 proceeding, only a subset of those minutes are
25 compensable. So it takes those -- the

1 coefficients that come out of the regression
2 and multiplies them only by the compensable
3 minutes. So, basically, it's taking the
4 implied price but multiplying it only times
5 what you have to pay for.

6 My understanding is the other minutes
7 are covered through other negotiations between
8 CSOs and WGNA. So they would be compensated in
9 another way. So here I just include what is
10 relevant in my understanding to this
11 proceeding.

12 JUDGE STRICKLER: Excuse me,
13 Dr. Israel. In the first column of figures,
14 it's called value of an additional minute. Is
15 additional, in fact, the accurate way to
16 describe that, that is to say as a marginal
17 minute as an economist might say it, or is it
18 more in the nature of an average minute?

19 THE WITNESS: Yeah, I think you're
20 probably right. It's probably more an average
21 -- average minute that you've captured from
22 that content, I think. It's -- it's -- because
23 this is really taking the average value across
24 the different CSOs.

25 And the CSOs take the content in a

1 bucket, right? They can't just literally take
2 one more minute. So I think it's the average
3 sort of incremental minute, but that's an
4 average across a bucket of minutes that you get
5 when you take a signal.

6 JUDGE STRICKLER: Because from an
7 economic point of view, if the value of a
8 marginal minute of sports programming was so
9 much higher than everything else, you would
10 never take the other programming; you would
11 take the one that gives you a greater marginal
12 value and -- on the margin. You would continue
13 to use -- to air sports programming until the
14 marginal values were equal, right?

15 THE WITNESS: Right, or in a -- in a
16 marketplace, there would be negotiations over
17 the prices of these things that would cause the
18 price of sports to be higher to reflect that,
19 which is a --

20 JUDGE STRICKLER: Then you would be
21 worried about the ratio of the price to the
22 revenue that you could produce and try to
23 equalize that ratio until -- and when they were
24 equal --

25 THE WITNESS: Correct.

1 JUDGE STRICKLER: -- then you would
2 have your marketplace result?

3 THE WITNESS: I agree with that
4 generally. I mean, the way I think about these
5 results is the way this particular marketplace
6 works, at least for other types of networks, I
7 work on this stuff a lot, is there is a
8 negotiation between the network and the CSO,
9 right? And so if the CSO had ten times as much
10 value for sports than Program Suppliers, then
11 you would expect the negotiated price to be ten
12 times as high. That's how I interpret these
13 numbers and why they can be used to understand
14 what would happen in a free market.

15 JUDGE STRICKLER: Thank you.

16 BY MR. LAANE:

17 Q. Geoff, if you could go to slide 7,
18 please.

19 And, Dr. Israel, I guess this is -- is
20 this a tabular form of the same comparison we
21 were looking at before between the Bortz
22 results and your regression results?

23 A. Yes.

24 Q. And we can see in the table the Bortz
25 survey covers 2010 through 2013 while your

1 regression uses data from 2010 through 2012.

2 Why doesn't your regression include
3 2013 as well?

4 A. It sort of goes back to the earlier
5 conversation about how early I started working
6 on this stuff. So when I first started working
7 on the regression, the proceeding, as I
8 understand it, was covering 2010 through 2012.
9 It was later extended to include 2013.

10 Because the way I approached this
11 problem throughout was ultimately to -- to see
12 if the regression results corroborated the
13 relative values in the Bortz survey, I
14 ultimately decided I could check 2010 to 2012
15 versus 2010 to 2012 or '13 in Bortz and check
16 the corroboration so I didn't add the
17 additional year.

18 Q. Okay. And have you reviewed the
19 regression study that was submitted by
20 Dr. Crawford in this case?

21 A. I mean, yes, I've read his submitted
22 testimony.

23 Q. Okay. And does Dr. Crawford's
24 regression shed any light on whether adding
25 2013 to your regression likely would have made

1 any material difference?

2 A. Well, Dr. Crawford does include 2013.
3 And I note that his 2013 results are consistent
4 with his 2010 through 2012 results. And
5 they're also consistent, you know, generally
6 consistent with the numbers in the Bortz
7 survey. And generally consistent with my
8 numbers. So it doesn't appear that the
9 addition of 2013, you know, had any material
10 effect.

11 Q. Okay. If you could turn for a minute
12 to page C-5 in Appendix C of your written
13 direct testimony.

14 A. C-5. Yes.

15 Q. And this refers to your main model, as
16 well as sensitivities. What does sensitivities
17 mean?

18 A. I mean, sensitivity is a common term
19 in econometrics to say you have a main model
20 that's your main specification. Often you'll
21 run, you know, a few other versions that have
22 relatively small changes to your main
23 specification, just to -- you know, check to
24 make sure the results are not particularly or
25 overly sensitive to small changes.

1 Q. And, Geoff, could you bring up slide
2 9, please.

3 Dr. Israel, this is Table C-I-3 from
4 page C-6. And does this table show us your
5 sensitivities?

6 A. Yes.

7 Q. So column 1 is, I guess, the main
8 model we've been looking at, and 2, 3, and 4
9 are the sensitivities?

10 A. That's correct.

11 Q. Okay. And we can see for your main
12 model and most of these sensitivities, the
13 coefficients for all the program categories are
14 statistically significant, but column 3, DMA
15 fixed effects sensitivity, there most of them
16 are not statistically significant.

17 Does that have any impact one way or
18 another on your conclusions about your
19 regression?

20 A. No. Just to make sure we're all on
21 the same page here, the little stars -- for
22 those who don't read regression tables every
23 day, the little stars next to the coefficients
24 are indicators of statistical significance.

25 Statistical significance is ultimately

1 a measure of -- sort of a precision of the
2 estimate, how certain we are that the estimate
3 is different from zero.

4 So if you go to column 3 with what's
5 called DMA fixed effects, what that means is
6 that regression has added a separate, sometimes
7 called a dummy variable or an indicator
8 variable. It has added a separate variable for
9 every different DMA.

10 So it's entirely controlling for all
11 of the variation across DMAs. That's adding
12 lots and lots and lots of variables to the
13 model. And when you do that, you're going to
14 get less statistical significance on the
15 coefficients. That's common in a sensitivity
16 analysis like this.

17 What I really check for is, you know,
18 for things like sports, you know, which
19 obviously I focused on to some degree, you
20 know, is the number of the coefficient
21 estimates similar to what we see in the base
22 regression? So it's not something -- you know,
23 you're going to see insignificance when you do
24 a check like this. What you're really looking
25 for is does the actual coefficient change but

1 in a way that would change your conclusion?

2 Q. Okay. Now, if you could just flip
3 over in your notebook to the tab for your
4 rebuttal, Exhibit 1087, and I wanted to ask you
5 about Figure 1 at page -- at page 6.

6 And, Geoff, if you could bring up
7 slide 10, please.

8 And what is this graph showing us,
9 Dr. Israel?

10 A. It just adds the -- Dr. Crawford's
11 regression results, which, obviously, you know,
12 I first saw in his written testimony. So it
13 added those results to the comparison that we
14 showed earlier for my results versus the Bortz
15 survey.

16 And you can see, you know, it's
17 actually quite similar to what we said before.
18 There is close correlation in the rankings.
19 There is close correlation in the values for
20 the top categories. There's an agreement on
21 what the bottom three categories are.

22 So it's -- it's very much confirmatory
23 of the match that I saw between my results and
24 the Bortz survey.

25 Q. Okay. And did you have any role at

1 all in the design or conduct of Dr. Crawford's
2 regression?

3 A. No, not at all.

4 Q. And did he have any involvement in
5 your regression?

6 A. No. We didn't speak about any of this
7 or have any interaction.

8 Q. Geoff, you can take that down now.

9 I wanted to move now to the second
10 study you told us about, your analysis of the
11 payments made by cable networks. And I think
12 you said you referred to those as your cable
13 content analysis.

14 A. Yes.

15 Q. Okay. And, Geoff, could you bring up
16 slide 11, please.

17 Dr. Israel, can you just walk us
18 through this and generally describe the
19 methodology of your cable content analysis?

20 A. Sure. I'll try to make it simple.
21 There's a lot of numbers on this page.

22 So I think easiest is just to walk
23 across the column. So this is looking at TBS
24 and TNT, two cable networks. I mean, to me
25 they are particularly interesting cable

1 networks because they are put -- they put
2 together bundles of content. Obviously, trying
3 to find content that is valuable to -- to CSOs
4 and ultimately subscribers of CSOs. And, you
5 know, their content is -- is -- has some sports
6 content but not that much. And that's what
7 gets summarized.

8 So in column A, you can see the -- the
9 total number of hours of sports content shown
10 on TBS and TNT. So for TBS, it's that 684 next
11 to the JSC number. And then you can see the
12 total number of hours of non-JSC content, just
13 making up the rest of the hours. So you can
14 see that JSC hours make up just under 2 percent
15 of the 1.95 percent of the total hours.

16 Column B then adds a viewing dimension
17 to the numbers. So HHVH -- I think these
18 numbers have been used in previous iterations
19 of the proceeding, but HHVH stands for
20 household viewing hours. Basically, that just
21 weights each of the hours of each program by
22 how many households were watching the program.
23 So it's sort of applying a ratings number to
24 the -- to the programming.

25 And so you can see the number for JSC

1 and non-JSC. And the JSC then makes up about 5
2 and a half percent of viewing. So somewhat
3 more viewing per hour on JSC that brings that
4 viewing number up.

5 But then when you go to the
6 expenditures number, you know, as is well-known
7 from my work in the industry generally, that
8 the cost, the amount being paid for the sports
9 content is substantially higher. So in the
10 case of each TBS and TNT, it's, you know, in
11 the 44 to 45, 46, mid-40s percentage. So you
12 can see 44.4 for TBS and 45.46 for TNT.

13 And, again, that's -- that's
14 consistent with, you know, my general
15 understanding from work in the industry that
16 these networks pay -- you know, nearly half of
17 their programming expenditures are on sports
18 content.

19 And so the bottom line then is just
20 that these networks are paying substantially
21 more per hour of -- of programming or per hour
22 of viewing for sports content than for
23 non-sports content.

24 Q. So, for example, if we look at that
25 figure 40.11 under column D, what does that

1 indicate?

2 A. So it's easier just to walk down the
3 numbers and, you know, get to the 40.1. So the
4 1.5 million that's there, that says that the
5 cost to TBS of an hour, per hour of sports
6 programming, what it pays per hour of sports
7 programming, it shows is 1.5 million.

8 What it pays per hour of non-sports
9 programming, it shows is 37,581. And so the
10 40.11 says an hour of sports programming costs
11 TBS 40 times as much as an hour of non-sports
12 programming.

13 Again, the key here is it's
14 consistent, I think, with what is generally
15 known in the industry, is just, per hour, the
16 sports programming is substantially more
17 expensive.

18 Q. Okay. And can you explain the 13.66
19 in column E?

20 A. So that's the same basic calculation.
21 It's just now it's what it costs per household
22 viewing hour, so not just per hour shown, but
23 per household. So think of it as -- take a
24 household that watches a show for an hour, what
25 are we spending per -- per such household

1 viewing hour?

2 So you can see it's -- it's 84.5 cents
3 for the JSC programming. It's just over 6
4 cents for the non-JSC programming. So it's
5 costing TBS 13.66 times as much.

6 And, again, what's most important to
7 me here is sort of the direction of the
8 effects. You're just -- you're seeing
9 substantially more being spent per hour shown
10 or viewed for sports programming than
11 non-sports programming.

12 Q. Okay. So we've been looking here at
13 payments by -- and not to have you go through
14 them all, but I take it the figures for TNT are
15 then shown in the lower half of the chart?

16 A. That's correct. And they are similar.
17 The ratios are slightly lower, but, again, my
18 key takeaway is, you know, by large amounts,
19 the cost per hour of sports programming is
20 higher.

21 And, again, not surprising, I think
22 this is generally recognized in the industry.

23 Q. Okay. So we've been looking here at
24 payments by cable networks. In paragraph 51 of
25 your written direct testimony at page 30, you

1 discuss the fees that cable systems pay to
2 carry cable networks.

3 And did you help prepare a slide
4 summarizing those data?

5 A. Yes.

6 Q. Okay. Geoff, if you could put up
7 slide 15, please.

8 And please explain these numbers and
9 their significance to your analysis.

10 A. So this is going back to CSOs paying
11 for networks, which is, you know, similar to
12 CSOs paying for the distant signals in this
13 proceeding.

14 So what I wanted to do here was just
15 compare CSOs pay what's called affiliate fees
16 in the industry. That's the cost they pay per
17 subscriber, per month. They have a price like
18 that for basically every cable network.

19 So I wanted to compare the price that
20 they pay for the -- for the cable networks that
21 do have JSC content or don't, just as one more
22 indicator of what these payments look like in
23 the industry.

24 So you can see that the -- you know,
25 and obviously this is -- the networks that

1 carry JSC like TBS and TNT are not carrying
2 just JSC. So it's just an indicator across
3 networks that do or don't carry any of the JSC
4 programming.

5 So you can see that the price per sub
6 per month or the average affiliate fee for the
7 networks that carry the JSC programming is
8 about 75 cents versus about 17 cents for the
9 networks that don't.

10 Q. Okay. Geoff, you can take that down.

11 Dr. Israel, you'll see in addition to
12 the binder with your testimony, there's a big
13 binder up there with some other witnesses'
14 testimony in it?

15 A. I see that.

16 Q. So if you could look in there at
17 Dr. Gray's written rebuttal testimony.

18 A. Okay.

19 Q. And if you could just go to paragraph
20 59 on page 24, and Dr. Gray says, "While CSOs
21 may place a high value on live team sports
22 programming carried by certain cable networks,
23 as described by Dr. Crawford, economic
24 principles suggest they bundle these
25 sports-focused cable networks with other

1 channels, distant signal channels and local
2 broadcast channels, each with little or no
3 sports programming."

4 Does that alter any of your
5 conclusions?

6 A. I mean, no. We know that in the case
7 of what the CSOs are carrying with the distant
8 signals in other programming or what the, you
9 know, cable networks are carrying, they are
10 bundling together different types of content.

11 All of my analysis is designed to, you
12 know, take that bundling as given and see what
13 they're paying or how much they're valuing the
14 different types of content that they're
15 carrying. So the fact that they're bundling
16 together different types of content, you know,
17 doesn't change anything. It's sort of the
18 heart of my analysis to unpack what the value
19 of the pieces of the bundle are.

20 Q. Okay. Then going on to the next
21 paragraph, paragraph 60, Dr. Gray says, "After
22 negotiating programming deals with cable
23 networks carrying live team sports programming,
24 CSOs may then have a sufficient quantity of
25 that type of programming to bundle for its

1 current or potential subscribers. That is live
2 team sports programming would be less valuable
3 to CSOs than other types of programming."

4 Do you agree or disagree with that and
5 why?

6 A. I mean, obviously, the CSOs have more
7 than just distant signals. So they have
8 content of various types from broadcast and
9 cable networks.

10 And so the analysis is that --
11 everything I'm doing in the analysis is looking
12 at the value of the distant signal content
13 conditional on other content that they have.

14 But, obviously, their other content
15 includes, you know, syndicated programs, news
16 programs, religious programs. So there's no
17 basis that I can see to say that because they
18 have other sports, that means the distant
19 signal sports content is worth less or same for
20 other content.

21 You need to do the analysis like I
22 have done to figure out what that value is,
23 conditional on the other programming they have.

24 Q. And just as CSOs have other sources of
25 sports programming, do CSOs also have other

1 sources of, for example, Program Suppliers-type
2 programming?

3 A. Sure. I mean, they have many, many
4 cable and broadcast networks. So they're going
5 to have other syndicated shows. They're going
6 to have other news shows. They're going to
7 have other religious shows.

8 And that's what -- you know, that's
9 the nature of this industry, is CSOs carry
10 large bundles of content. And as we mentioned
11 earlier, the -- you know, the way the free
12 markets in this industry work is they negotiate
13 for content to add to that bundle.

14 So the job here is to see how much the
15 additional content is worth. And that's what
16 the regression and my other analysis does.

17 Q. And if you could turn back to
18 paragraph 31 of Dr. Gray's rebuttal, he does
19 some manipulations to your regression as set
20 forth in what he calls Israel modified royalty
21 shares.

22 Have you reviewed those calculations
23 and the underlying documents that were produced
24 for them?

25 A. Yes.

1 Q. And what did you conclude about
2 Dr. Gray's modifications to your regression?

3 A. So I concluded that they weren't
4 valid. I'm happy to explain why.

5 Q. Please do.

6 A. So, I mean, he makes a couple of
7 changes to -- to the regression. So one of
8 which we talked about earlier is to eliminate
9 all of the CSOs that only pay the minimum
10 payment.

11 That's throwing away a lot of data.
12 So you're not -- you're not learning based on
13 the choices that those systems are making.
14 You're not learning of the relationship between
15 all the control variables based on those
16 systems. You're not -- and you're not able to
17 compare those systems to systems that choose
18 more.

19 So, first of all, it's throwing away
20 lots of information to throw away these systems
21 that are making choices and making that
22 particular payment.

23 JUDGE FEDER: Are there any minimum
24 fee systems in your analysis that did not opt
25 to carry any distant signals?

1 THE WITNESS: I don't -- I know there
2 are some that don't carry all the way to the
3 minimum. There may be some that don't choose
4 to carry any. Yeah.

5 And because the economics of those
6 systems may be somewhat different, I think both
7 Dr. Waldfogel and I put in a dummy variable or
8 an indicated variable for the minimum fee
9 systems to allow for them to have different
10 payments and different economics. So in my
11 view, that's the way I control for that sort of
12 difference as opposed to just dropping them
13 from the analysis.

14 The other change, a major change, that
15 Dr. Gray makes is he changes the nature of the
16 measure of the royalties by a lot. He does a
17 couple things to it.

18 Instead of using the actual royalty
19 payment, he first takes the royalty payment and
20 subtracts off what the minimum fee would have
21 been. And he then takes the logarithm of that
22 difference.

23 My main complaint with that is really
24 the first part, in subtracting off the minimum
25 payment. What's critical about everything

1 we're doing here is you want to be able to look
2 at relative value, what's the -- what's the
3 relative amount that I pay for different types
4 of content.

5 So if you have one system that pays
6 \$100 and carries one type and another system
7 that pays \$200 and carries another type, you
8 would want to see that \$200 is twice as big as
9 \$100. So you can do the relative value.

10 If you subtract off the minimum
11 payment, right -- suppose the minimum payment
12 was 100 -- then that first system would be zero
13 for its new variable and the second system
14 would be 100 for its new variable.

15 Taking the log is kind of a technical
16 thing, but the real issue is when you do that
17 subtraction of the minimum payment and reset
18 where zero is, you mess up all the relative
19 payments that people are making in a way that I
20 think is consequential. You're no longer
21 measuring relative payments. You're measuring
22 something else.

23 And, therefore, I just don't consider
24 that valid when our goal is to measure relative
25 value.

1 BY MR. LAANE:

2 Q. Okay. Switching witnesses on you, if
3 you could turn to Dr. Lisa George's rebuttal
4 report, Exhibit 4007. And have you reviewed
5 the adjustments to your regression that she
6 discusses beginning at page 17 of her rebuttal
7 testimony?

8 A. Yes.

9 Q. Okay. And, first, could you just
10 generally summarize the types of changes she
11 made to your regression?

12 A. I think there are three main
13 categories. She used them -- for Canadian
14 minutes, in particular, she used some different
15 categorization that she said reflected better
16 the actual Canadian programming on Canadian
17 signals. So that's Number 1.

18 Number 2, she -- all those minutes
19 coefficients we saw before, the value of the
20 minutes, she split those up so that there was a
21 value for CSOs inside the Canadian zone or
22 outside the Canadian zone. So she let the
23 value differ across different types of CSOs.

24 And then, third, she -- where I had a
25 single variable measuring the number of local

1 broadcast channels the CSO carried, which I
2 considered one more measure of the size of the
3 CSO, she split that out into a large number of
4 different counts of different types of local
5 signals.

6 Q. And focusing on the first change you
7 mentioned, about the categorization of the
8 minutes, if you use Dr. George's
9 categorizations but keep your model, and after
10 you got her rebuttal, did you take a look to
11 see what would happen if you took her
12 categorizations but ran them through your
13 model?

14 A. Yes, I did.

15 Q. And what impact does that have on your
16 results?

17 MR. MacLEAN: Objection. Your Honor,
18 this is a new analysis that hasn't been offered
19 in written testimony.

20 MR. LAANE: He's responding orally to
21 rebuttal which had attacked his analysis on
22 this basis. He's not going to put in any new
23 study or quantitative figures, but just explain
24 what he found was the impact of accepting that
25 portion of her criticism that he should have

1 used the Canadians' categorizations.

2 JUDGE BARNETT: He may do that.

3 Overruled.

4 THE WITNESS: So it has only a very
5 small effect. If you use the categorizations
6 that Dr. George provided and then, you know,
7 update the regression using those
8 categorizations, none of the coefficients or
9 the implied shares change by much at all, maybe
10 a percentage point.

11 BY MR. LAANE:

12 Q. But adopting her other changes to your
13 model does change the results?

14 A. Yes.

15 Q. Okay. Do you have an opinion on
16 whether those changes to your model were
17 economically appropriate?

18 A. I mean, yes, I find them
19 inappropriate, in particular, the -- well, I
20 can mention both, but the main one is the
21 addition of many control variables for
22 different types of local stations, different
23 local content.

24 I mean, the reason you add a control
25 variable would be that you don't think that

1 source of variation should be used to measure
2 the valuation. So it's certainly true that
3 different CSOs that have different local
4 signals available to them make different
5 choices about what distant signals to carry.

6 And that -- those different choices
7 reflect their valuations on the distant
8 signals. But that's an economically valid
9 source of differences in the decisions that
10 systems are making.

11 So it's not something that you should
12 control away or you're throwing away variation
13 that's relevant. I mean, those are valid
14 sources.

15 The types of control variables that I
16 would include are things like about the size of
17 the system, because the size of the system is a
18 totally separate basis for why royalties get
19 higher. Controlling for size, I want to see
20 all of the differences in the distant signal
21 choices that different CSOs make, and I want to
22 use that in my analysis.

23 And by controlling for it, you're not
24 letting the regression rely on that interesting
25 source of variation.

1 She also split the minutes up, the
2 values up into inside the Canadian zone and
3 outside the Canadian zone. I mean, ultimately
4 what matters is the overall average value, so I
5 don't see a reason to do that, but really my
6 main concern is by adding these controls, she
7 is eliminating important variation that we can
8 use to learn about the valuation on the
9 signals.

10 Q. Okay. I'd like to go back now to your
11 written rebuttal testimony, so back to the
12 smaller binder.

13 A. Okay.

14 Q. Exhibit 1087. And you address several
15 witnesses and several issues. So in the
16 interest of time, I just want to focus on a few
17 areas and leave the rest to your written
18 testimony.

19 First, if you could turn to page 16,
20 you discuss -- or you state at paragraph 34 --
21 well, first, you're discussing generally there
22 Dr. Gray's computation of what he calls volume,
23 correct?

24 A. That's right.

25 Q. Okay. And you state that "Gray's

1 Table 1 is flawed and misleading, because it
2 does not account for the number of CSOs that
3 receive each distant signal, let alone the
4 number of subscribers to whom the programming
5 is retransmitted."

6 Could you please explain that for us?

7 A. It's basically when he's computing
8 volume, it's just volume of minutes. So if a
9 minute of a given type of programming is
10 retransmitted by any CSO to any number of
11 subscribers, be it 5 or 5 million, that counts
12 as one minute.

13 And so he's just taking shares of
14 those minutes, but a minute is a minute no
15 matter how many people actually have access to
16 that minute. And so that's, to me, not a
17 meaningful measure of sort of how widely
18 distributed or how -- you know, how important
19 that minute is.

20 Q. Okay. And if you could look at Table
21 4 on page 18.

22 And, Geoff, if you could bring up
23 slide 17, please.

24 So what are you comparing here and
25 why, Dr. Israel?

1 A. So this is Dr. Gray's volume measure
2 that we just discussed, where a minute is just
3 a minute, versus Dr. Crawford's modification of
4 that, where Dr. Crawford weighted each minute
5 by the number of -- really the number of
6 subscribers who would have received that minute
7 on their cable system.

8 And so you can see it makes -- it's --
9 it makes a large difference when you account
10 for the number of subscribers. So the sports
11 share, for example, goes up by roughly ten
12 times when you account for the fact that, you
13 know, sports minutes in WGN, for example,
14 being, you know, sent to systems that have many
15 more subscribers.

16 Q. Now, if you could turn to paragraph 65
17 of Dr. Gray's rebuttal.

18 A. Back to his rebuttal?

19 Q. Yes. Sorry about that.

20 A. It's okay. Okay.

21 Q. Paragraph 65.

22 A. Um-hum. Sorry. There's just a lot of
23 pages in this binder. Yep.

24 Q. Okay. And we can see here he's
25 comparing what he says are the number of

1 minutes of live team sports and other sports in
2 his data set.

3 Did he weight those numbers by the
4 number of distant subscribers receiving the
5 programming?

6 A. No.

7 Q. If you do weight by distant
8 subscribers, what impact does that have on the
9 ratio of live team sports minutes to the other
10 sports minutes in his data set?

11 A. I mean, it makes an enormous
12 difference. The ratio here -- here I think it
13 sort of looks like about 30 percent or so other
14 sports. And if you actually weight by
15 subscribers similar to what's in the table on
16 the screen, I think that falls below 5 percent
17 for other sports.

18 Q. Now not just limited to sports but as
19 a general matter, even if one does adjust for
20 the number of distant subscribers, is the
21 volume of retransmitted minutes a sound basis
22 for allocating relative value?

23 A. No, just as a matter of economics,
24 minutes are kind of a unit of how many of the
25 product there are. You obviously need to

1 multiply that by some measure of price or value
2 to be able to make a comparison.

3 Q. Then going to page 21 of your rebuttal
4 testimony, you address Dr. Dr. Gray's analysis
5 of what he describes as viewing. And have you
6 reviewed the written testimony of Dr. William
7 Wecker and Gary Harvey critiquing Dr. Gray's
8 viewing analysis?

9 A. Yes.

10 Q. Okay. Just putting to one side the
11 methodological issues that Dr. Wecker and
12 Mr. Harvey raised about the Gray methodology,
13 do you have a view on whether viewing is an
14 appropriate way to measure relative value in
15 these proceedings?

16 A. Yeah. I mean, in my view, it's not.
17 I mean, viewing is one characteristic of
18 programming. You know, my experience in the
19 industry, you know, sometimes people look at
20 viewing for certain purposes, but I think it's
21 generally known and accepted that viewing
22 doesn't capture value.

23 There's a couple reasons for that.
24 One is the buyers of the programming here are
25 CSOs. Right? They're putting together bundles

1 of programming, and so viewing is not a --
2 something a CSO does. It's something
3 subscribers do. But viewing by its nature
4 doesn't capture the value the CSOs put on
5 diversified programming and putting together
6 bundles of different programs.

7 Even from the point of view of the
8 subscribers, you know, viewing is a choice of
9 what to watch. It doesn't reflect the
10 intensity of the preference. So it doesn't --
11 you know, somebody might watch one program over
12 another because it's slightly more valuable to
13 them, and in another case it might be massively
14 more valuable to them. So by just counting up
15 viewing, you're not capturing even at the
16 subscriber level anything like a willingness to
17 pay or a monetary value on the content.

18 Q. Now I want I talk to turn briefly to
19 Dr. Stec. And, of course, we have both a Stec
20 and Steckel. So Stec is the one I'm referring
21 to here.

22 And did you see Dr. Stec's assertion
23 that the Bortz survey measures willingness to
24 pay and that, in his view, relative willingness
25 to pay does not equal relative market value?

1 A. I did.

2 Q. Okay. And if we assume that what the
3 Bortz survey measures is CSOs' willingness to
4 pay, can you tell us whether or not in your
5 opinion that would be useful in assessing
6 relative market value?

7 A. I think it's quite useful. I think
8 it's the right question in this industry. A
9 little discussion of this before. I mean, if I
10 think about how this industry functions, we
11 have nice analogies, right?

12 I mean, there's lots of cable networks
13 and other broadcast networks that are
14 negotiated over and paid for in a free market.
15 And the way that that market works is that
16 the -- in every case that I know of, the
17 network or group of networks in some cases and
18 the CSO negotiate over a price.

19 And so Dr. Stec does an analysis where
20 he looks -- you know, he sort of looks at a
21 market-wide supply-and-demand curve and says
22 what would the market price be? That might be
23 right in some other industries, but here we
24 know that prices are set by these negotiations
25 and -- in between networks and CSOs.

1 And in those negotiations, standard
2 economics tells us they're negotiating to
3 divide up the value that the network creates
4 for the CSO. And so, you know, the willingness
5 to pay or sort of the maximum value that the
6 network puts on -- or the CSO puts on that
7 network, you know, is the key driver in
8 standard economic analysis of negotiations.

9 So the relative willingness to pay, in
10 my mind, is the key driver of what would be the
11 relative negotiated price for different types
12 of content.

13 Q. Okay. I now want to turn briefly to
14 the Horowitz survey.

15 And, Geoff, if you could bring up
16 slide 18, please.

17 At paragraph 68 of your rebuttal, you
18 state that the actual marketplace evidence
19 supports use of the Bortz survey, not the
20 Horowitz survey, and rejects Mr. Horowitz's
21 claim that not including a separate "other
22 sports" category invalidates the Bortz results.

23 Could you please explain that opinion
24 for us.

25 A. Sure. So, I mean, the first part, the

1 corroboration of the surveys relative to each
2 other. I mean, this slide has what the Israel
3 and Crawford regressions find relative to what
4 the Bortz and Horowitz surveys find.

5 And I think it's clear that the -- you
6 know, going back to what the regressions do,
7 which is sort of match overall correlations in
8 the values and then, you know, match rankings
9 of the values, I think it's clear that the
10 regressions better match Bortz than Horowitz.

11 You can see, you know, a major
12 difference between the Bortz and Horowitz
13 results is they basically flip around the
14 shares put on sports and Program Suppliers.
15 They change the rankings and basically reverse
16 the two.

17 Both the Israel and Crawford
18 regression results, you know, are much closer
19 to Bortz and find sports -- similar sports
20 shares to Bortz and find that sports has
21 substantially more value than Program
22 Suppliers' content.

23 And then if you go to, you know, the
24 next two down, again you see that the Israel
25 and Crawford results match the ranking of the

1 Bortz survey and not the Horowitz survey.

2 And I think the other part of what you
3 asked was about the "other sports" category.

4 And as I understand it, the criticism that has
5 been made is that the Bortz sports category
6 might include -- people might at least think it
7 includes other sports, not just JSC, and maybe
8 that inflates the value in the Bortz survey.

9 But, in fact, contrary to that, the
10 Israel and Crawford regressions both correctly
11 put all of the other sports content into its
12 appropriate category. So in my regression, for
13 example, other sports, goes in Program
14 Suppliers or CTV or wherever it should go.

15 So I don't have any -- the issue of
16 putting "other sports" in with sports. And yet
17 my values, and my sports value in particular,
18 very closely matches Bortz, indicating that's
19 not driving his results.

20 Q. All right. Thank you.

21 Your rebuttal also discusses
22 Mr. Mansell and, again in the interest of time,
23 I'll leave most of that to the written
24 testimony. But I did want to ask you a little
25 bit about his assertions about the migration of

1 sports.

2 And, Geoff, if you could put up slide
3 19, please.

4 And, Dr. Israel, based on your review
5 as compared to the last time period the Judges
6 considered, '04-'05, had there, in fact, been a
7 decline in the relative amount of live team
8 sports on distant signals as compared with the
9 2010 through '13 period?

10 A. No. I mean, this -- this table that's
11 on the page or on the screen now compares the
12 Crawford volumes we talked about a minute ago
13 with a similar calculation that was done in
14 2004-2005. So both of them are looking at
15 volume shares weighted by subscribers
16 appropriately for compensable minutes.

17 And you can see that if -- you know,
18 in fact, as it turns out, within the distant
19 signals in particular, the volume share of
20 sports has gone up a fair bit over the two time
21 periods.

22 Q. What if we were to assume just
23 hypothetically that there had been a decline in
24 the relative amount of sports? Would that
25 impact the reliability of your regression or

1 the Crawford regression?

2 A. No, that -- no, I don't see how it
3 could. Again, volume is not value. And,
4 importantly, whatever -- you know, whatever
5 changes in the marketplace are happening over
6 time are, you know, captured in the data.

7 So the Bortz survey is asking people
8 as of 2010 through 2013. The Israel and
9 Crawford regressions are using data from that
10 same time period. So the whole purpose of
11 doing the empirical analysis, again, is to
12 capture whatever changes have happened in the
13 marketplace.

14 So the fact that there have been such
15 changes wouldn't invalidate the studies.

16 Q. Okay. Now I want to turn to
17 Dr. Steckel, and in the interest of time again,
18 I'll leave most of it to your written
19 testimony, but I did want to ask you about your
20 statement at paragraph 50 of your rebuttal that
21 you disagree with Dr. Steckel's assertion that
22 one should focus on the opinions of cable
23 subscribers rather than the opinions of CSOs.

24 And can you explain why you disagree
25 with Dr. Steckel on that?

1 A. I mean, CSOs are the buyers of the
2 content. So if you want to determine the value
3 of a product, and you want to do so with a
4 survey or your regression, you look at the
5 behavior or the answers of the buyers of the
6 content. And here that's the CSO.

7 Part of what they're doing is
8 reflecting what their subscribers value, but
9 ultimately what matters is the CSOs'
10 willingness to pay, given that -- you know,
11 given all the factors that determine the value
12 they place on the content.

13 Q. Okay. And Dr. Steckel makes various
14 criticisms of the Bortz survey. If he were
15 correct about those criticisms, would you
16 expect the survey results to align with actual
17 marketplace evidence?

18 A. No. I mean, in my view, economists
19 often ask questions about surveys and surveys
20 are very valuable, but it's important to match
21 the surveys to marketplace data. And that's --
22 you know, I think the best answer in my view to
23 any question somebody raises about a survey is
24 to go see if the survey matches what's in the
25 marketplace. That's, in my view, sort of the

1 fundamental reason to do what I've done.

2 JUDGE STRICKLER: Does it work the
3 other way around too, that if you look at
4 actual marketplace results through a regression
5 analysis, that you should check those results
6 against the survey to make it more reliable?

7 THE WITNESS: I mean, I think it's
8 fair. I mean, when I say corroborate, I think
9 it's fair to see the extent to which they match
10 one another.

11 I mean, in -- in this case, you know,
12 my view is that the Bortz survey goes directly
13 to the question that we want to answer with a
14 continuous scale that lets people answer it and
15 give their actual relative value, whereas the
16 regression is drawing on kind of zero/one
17 choices that are a little more discrete and
18 maybe not -- don't let you quite fine-tune the
19 values as much.

20 So in my view, the Bortz survey sort
21 of gets at the heart of the matter and the
22 regression is more of a check just because of
23 the nature of the data. So that's how I think
24 about it. But I would agree that the match in
25 each direction is relevant.

1 JUDGE STRICKLER: Thank you.

2 BY MR. LAANE:

3 Q. And, finally, I just wanted to make
4 sure we were clear on one thing about minimum
5 fee systems. So you did include minimum fee
6 systems in the regression if the -- if that
7 system carried at least a distant signal; is
8 that right?

9 A. Right. That would be correct. So
10 then it would have a distant signal and it
11 would have some minutes to show up in the
12 regression.

13 Q. Okay. But a minimum fee system that
14 carried no distant signals at all was excluded
15 from the data set for the regression; is that
16 right?

17 A. Right. I mean, it would have no
18 minutes of the any of the types of content. So
19 it was a question before, and maybe I
20 misunderstood it, I was thinking of whether
21 there were any such systems, but the regression
22 itself, which is actually looking at the number
23 of minutes, obviously needs at least one signal
24 so that there are some minutes.

25 Q. Okay.

1 MR. LAANE: Thank you, Dr. Israel. I
2 have nothing further at this time.

3 CROSS-EXAMINATION

4 BY MR. CHO:

5 Q. Good morning, Dr. Israel.

6 A. Good morning.

7 Q. My name is Dustin Cho and I represent
8 the Public Television Claimants.

9 Dr. Israel, I'm going to start by
10 talking about the shares that you calculated
11 based on your regression analysis.

12 A. Okay.

13 Q. Let me see if we can get our slides
14 up. There we go.

15 So it's your testimony that your
16 regression shares corroborate the Bortz survey
17 share for sports, right?

18 A. Yes. I'm -- generally, I think the
19 regression -- the regression results
20 corroborate the Bortz survey.

21 Q. In particular, for sports?

22 A. Certainly for sports. But my overall
23 conclusion is that these results -- you know,
24 given my experience in economics, that these
25 sorts of regression results are a close match

1 for what the -- for the Bortz survey.

2 Q. Well, in fact, your regressions share
3 for sports is within one percentage point, I
4 think, of the average Bortz share for sports;
5 is that right?

6 A. Yes.

7 Q. And your regression share for the
8 Commercial Television Claimants is within 2
9 percentage points of the average Bortz share?

10 A. I don't remember the numbers, but that
11 sounds right.

12 Q. Okay.

13 A. I mean, it certainly looked -- the
14 bars are very close on what we have in front of
15 us.

16 Q. But there's a bigger difference for
17 the other parties between their Bortz shares
18 and their shares according to your regression,
19 right?

20 A. Yes.

21 Q. You didn't report any confidence
22 intervals for the shares that you calculated
23 based on your regressions, did you?

24 A. I don't believe I included confidence
25 intervals for the shares as such. I certainly

1 included standard errors for the coefficients.
2 So one could adjust those to compute confidence
3 intervals.

4 Q. Okay. But you noted in your direct
5 testimony that only sports and the Commercial
6 Television shares, according to your
7 regression, were within the range of annual
8 results of the Bortz survey, right?

9 A. I think that's right. I think -- I
10 think what I said was that for Program
11 Suppliers, it was -- you know, you can see it
12 here now that you put it up -- very near the
13 bottom end of the range, but the other two were
14 within the range, yeah.

15 Q. And you're just comparing, you know,
16 over the four years of Bortz shares, what the
17 low was, what the high was, and then whether
18 your regression estimate for that share fell in
19 that range?

20 A. That's what I'm doing here, yes.

21 Q. So your regression gives Program
22 Suppliers more than 4 percentage points less
23 than the average Bortz survey?

24 A. Yes. It's just over 4 percent below,
25 based on the regression shares.

1 Q. And your regression's average share
2 for Program Suppliers is lower than the lowest
3 share that it received in any of the years of
4 the Bortz survey?

5 A. Right, it's slightly lower. Again, my
6 general view, given what I've seen from
7 regressions in surveys, is that these numbers
8 are -- are matching quite well. But, yes, I
9 agree with that.

10 Q. And your regression suggests that
11 Devotional programming has very little if any
12 value to cable operators?

13 A. I mean, again, I would say that my
14 regression results generally corroborate Bortz
15 and finds -- the regression itself finds a low
16 share for Devotional. I'm not claiming the
17 regression indicates no value for Devotional.
18 But, certainly, the regression finds a low
19 share for Devotional, zero.

20 Q. Well, the Bortz survey, on the other
21 hand, gives an average share to Devotionals of
22 nearly 5 percent?

23 A. Yes.

24 Q. And then there's the biggest
25 difference on this chart, Public Television.

1 The share you calculated for Public Television
2 is more than 8 percentage points greater than
3 the Bortz share for Public Television; is that
4 right?

5 A. More relevant -- than what comes out
6 of the Bortz survey. I understand there's
7 discussions and Mr. Trautman includes some
8 adjustment for Public Television that I haven't
9 been that close to. I think that adjusts his
10 number up some. But, yes, it's a higher number
11 than comes out of the survey.

12 Q. Well, in fact, your regression's
13 valuation of Public Television programming is
14 more than two and a half times greater than the
15 Bortz share for Public Television, isn't it?

16 A. It certainly is, again, that much
17 higher for what's in the survey. I think it
18 gets somewhat closer after the adjustment
19 Mr. Trautman talks about. I don't remember the
20 exact number there.

21 Q. Okay. Well, here's what you said on
22 this issue: "For the three lower ranked
23 categories, programming categories (Public
24 Television, Devotional, and Canadian), my
25 regression model agrees with the Bortz Survey

1 on the relative share of the sum of public
2 broadcasting, plus Devotional, plus Canadian
3 categories, a total of roughly 9 to
4 13 percent."

5 Is that right?

6 A. Yes, that's -- that was one way I
7 looked at how well it was matching to the lower
8 valued categories. As I mentioned before, in
9 my experience, regressions of this type often
10 struggle to match at the lower end. And so I
11 wanted to look at various metrics of how well
12 it was doing.

13 Q. Did the Bortz survey ask cable
14 operators to value the sum of Public
15 Television, Devotional, and Canadian
16 programming or did the Bortz survey ask
17 respondents to provide valuations for each of
18 those categories separately?

19 A. It asked for each category.

20 Q. And how about your regression? Did it
21 lump together all three of those categories of
22 programming or did it analyze the value of
23 those three categories separately?

24 A. No, the regression measured each one
25 separately.

1 Q. So what's the significance of your
2 observation here that your regression model
3 agrees with the Bortz survey on the relative
4 share of the sum of those three categories?

5 A. I mean, frankly, I almost think about
6 it in reverse. I mean, it's saying if it
7 matches the sum of those three, then it matches
8 the sum of the top three.

9 And so I was just basically looking at
10 whether it sort of got the overall split right
11 among the top categories and the lower ranked
12 categories. It was really just one metric to
13 see how it was doing.

14 And what I largely think about, is it
15 generally getting the amount that goes to the
16 higher ranked categories right? Because,
17 again, in my experience, that's what
18 regressions of this type are best at.

19 Q. Well, another question about your
20 statement here. Doesn't your regression
21 indicate that Public Television's share alone
22 is more than 3 percentage points more than the
23 Bortz survey's average shares for all three of
24 these categories combined?

25 A. Again, that's true, just for the sum,

1 taking the Bortz survey directly. Again, I
2 understand there was some adjustment made to
3 these shares, and I think that makes the sum
4 quite close. But, yes, I agree with your
5 statement for the survey without the
6 adjustment.

7 Q. Well, is it fair to say that your
8 regression contradicts the Bortz survey as to
9 the relative value of Public Television
10 programming?

11 A. I don't see it as a contradiction. My
12 view of these regressions is they can generally
13 corroborate overall rankings and they do better
14 at the high end. I would agree it gets a
15 higher number for Public Television, but I
16 consider this, the correlation that we're
17 seeing here, strikingly good from my economic
18 experience.

19 So there's differences in Public
20 Television is higher, but I don't consider
21 these results a contradiction of the Bortz
22 survey.

23 JUDGE STRICKLER: When you say "these
24 results," you mean overall or specifically to
25 Public Television?

1 THE WITNESS: I mean overall. I mean,
2 I agree it's higher for Public Television, no
3 question about it. My view is that regressions
4 like this are best at sort of overall
5 corroboration and best at the stuff that's
6 carried more often.

7 So I consider them to be a
8 corroboration of the overall findings for
9 Bortz. I certainly agree it gets a higher
10 number for Public Television.

11 JUDGE STRICKLER: Would you say that
12 your regression fails to confirm the Bortz
13 survey results as it relates to Public
14 Television before the additional adjustments
15 are made to the Bortz survey?

16 THE WITNESS: I think I would say the
17 regression indicates a higher value for Public
18 Television than for Bortz. It certainly
19 supports, I think, some adjustment for Bortz.

20 My view is that we shouldn't use the
21 exact number from the regression at the low
22 end, but I think it's fair to say that my
23 regression indicates a higher value than -- for
24 Public Television than would be in the raw
25 Bortz data.

1 JUDGE STRICKLER: Thank you.

2 BY MR. CHO:

3 Q. So did you -- when you were deciding
4 whether or not your regression confirms the
5 Bortz survey results, did you look at any
6 adjustment to the Bortz survey or were you
7 comparing it with the Bortz survey as
8 Mr. Trautman presented it?

9 A. I mean, I think I've done both over
10 the course of my analysis. Certainly when I
11 first looked at the numbers, I saw the Bortz
12 survey numbers absent any adjustment. But
13 during the course of the testimonies, I've seen
14 that there were adjustments that were made, so
15 I considered that as well.

16 Q. You didn't discuss that in any of your
17 testimony, did you?

18 A. No, that's fair. I mean, there has
19 been ongoing discussions in rebuttals and
20 things, so I've continued to review what people
21 have done, but it's fair that my initial and
22 most of my comparisons in the testimony were of
23 the Bortz numbers themselves.

24 Q. So along those lines, I want to ask
25 you what you meant by these two sentences in

1 your written rebuttal testimony. You wrote,
2 "As noted above, my empirical analysis of
3 marketplace outcomes supports the results of
4 the Bortz surveys for royalty allocation. As
5 such, I support the results of the 2010-13
6 Bortz surveys for the royalty allocation to all
7 parties, including Devotional Claimants."

8 Why do you support using the Bortz
9 survey shares for all parties, including
10 Devotional Claimants, when your empirical
11 analysis and marketplace outcomes does not
12 support the results of the Bortz surveys for
13 all of the parties individually?

14 A. Again, I think the appropriate way to
15 use the regression like this is to -- overall,
16 I think the right question is, overall, does it
17 indicate that the survey results are on point
18 or generally correlated?

19 And it was given -- as I mentioned in
20 an earlier answer, the empirical data we have
21 in this case is quite good, but it's -- you
22 know, it requires sort of discrete zero/one
23 choices between different types of content,
24 whereas the Bortz survey lets people make more
25 fine-tuned indications of their value.

1 So in my mind, the question is the
2 survey is asking the right question. I just
3 want on to make sure the survey is not missing
4 marketplace outcomes generally. And when I
5 find that it's not, that the correlation is
6 quite good in my experience, then that says I
7 have faith in the survey and, therefore, I
8 would rely on the survey because I think it's
9 going right to the relevant question.

10 Q. How far apart -- for what you call the
11 smaller categories, how far apart would your
12 estimate from a regression have to be from the
13 Bortz survey share for you to feel that it was
14 not corroborating that party's share?

15 A. I don't have an exact number. I list
16 in my reports the way I looked at that. I
17 think, as I said, it's relevant that it's
18 getting the overall top categories quite close.
19 It's getting the rankings quite close.

20 If the rankings were different more
21 than one time, say, or even the rankings were
22 different or if the -- you know, if it didn't
23 have, basically, the right overall value for
24 the top categories, I'd start to worry more.

25 But because, in my experience,

1 regressions of this type don't do as well in
2 lower valued products that aren't consumed or
3 valued as high, I generally wouldn't discount
4 the survey based on missing at the lower end,
5 as long as it's getting the overall rankings
6 right and getting the splits right at the high
7 end.

8 JUDGE STRICKLER: If the sentence --
9 say that you wrote -- the second sentence
10 that's up on the screen there, instead of the
11 phrase "all parties," but it had said the
12 royalty allocation to each party, including
13 Devotional Claimants, would you still stand by
14 that sentence if you made that change?

15 THE WITNESS: I would stand by the
16 sentence. I do think, and as I've continued to
17 review the testimony and understand the details
18 of the Bortz adjustment and the fact that the
19 survey, as I understand it, wasn't sent to CSOs
20 that only carried public, I think an adjustment
21 to public is supported by the -- especially
22 given that the survey people themselves are
23 saying an adjustment should be made, I think
24 the regression supports the adjustment.

25 JUDGE STRICKLER: If we had to

1 choose --

2 THE WITNESS: But --

3 JUDGE STRICKLER: I'm sorry.

4 THE WITNESS: No, no.

5 JUDGE STRICKLER: If we had to choose
6 between the adjustment that was made to the
7 Bortz survey and your regression results as it
8 relates particularly to the category of Public
9 Television, which one would you say is more
10 reliable?

11 THE WITNESS: I mean, I would tend to
12 favor an adjustment that works off the survey,
13 just because I've seen these sorts of
14 regression results in other settings at the low
15 value, you know, have some difficulty matching
16 exactly the numbers.

17 My view of the regressions -- and
18 others may have other views -- is they should
19 corroborate the overall rankings and the
20 general patterns. I don't think these
21 regressions are designed -- because of the sort
22 of lumpiness of the decisions that people can
23 make, I don't think they're designed to be plus
24 or minus 2 or 3 percent on the valuations.

25 I think they're designed to indicate

1 whether the surveys are generally reliable.

2 JUDGE STRICKLER: So you think your
3 regression does not corroborate the adjustment
4 to the Bortz survey as it relates to Public
5 Television and, therefore, we should rely on
6 the Bortz survey?

7 THE WITNESS: I think it corroborates
8 that an adjustment is appropriate. I think
9 it's consistent with saying public is -- you
10 know, especially now that I've heard all of the
11 testimony, that public seems low in the overall
12 survey. But I -- so I think it corroborates
13 the adjustment. I just wouldn't put forward
14 the regression as giving us the exact number of
15 the adjustment.

16 JUDGE STRICKLER: You think the more
17 accurate adjustment is the adjustment that was
18 made to the Bortz survey in the survey work,
19 rather than in the regression work you used?

20 THE WITNESS: Just to be clear, I have
21 not done a detailed evaluation of the various
22 adjustments that were made. So I don't want my
23 testimony to be that I know the exact
24 adjustment.

25 But I think an adjustment to the

1 survey to reflect who the survey was sent to is
2 consistent with my view that the survey is
3 going to the right exact question and can give
4 a more refined, precise number than the
5 regression.

6 JUDGE STRICKLER: Thank you.

7 BY MR. CHO:

8 Q. In your rebuttal testimony you write,
9 "It is also notable that the Bortz surveys, my
10 regression analysis, and the Crawford
11 regression analysis all value Sports within
12 roughly 3 percentage points of each other,
13 while the Horowitz valuation (30 percent) is 5
14 percentage points below the lowest, and 8
15 percentage points below the highest valuation
16 from the other studies."

17 Right?

18 A. Yes.

19 Q. Now, if I swap out a few words in that
20 sentence, is it also notable in your opinion
21 that the Horowitz surveys, your regression
22 analysis, and the Crawford regression analysis
23 all value Public Television within roughly 4
24 percentage points of each other, while the
25 Bortz valuation, at 5.1 percent, is 8

1 percentage points below the lowest and 12
2 percentage points below the highest valuation
3 from the other studies?

4 A. I mean, I think I'd say a couple
5 things. Again, I certainly think that's --
6 that comparison supports an adjustment to
7 Bortz. I mean, the reason I made the statement
8 that I did was that I understood much -- or two
9 reasons.

10 One is, again, I think the regressions
11 do their best work at the high end when you
12 have content that's got more value. That's
13 what I've seen in my experience.

14 But, two, I understood a lot of the
15 debate between Horowitz and Bortz to be about
16 this other sports category and what effect it
17 had. And so the sports comparison seemed
18 particularly important.

19 But, again, I think that it's fair to
20 say that the regressions are supporting some
21 adjustment upward for public.

22 Q. So you said you haven't looked closely
23 at the adjustments that have been proposed with
24 respect to Public Television for the Bortz
25 survey; is that right?

1 A. I haven't looked at the
2 quantification. I understand they have to do
3 with the fact that the Bortz survey was not
4 sent, I think, to systems that only carried
5 public.

6 So I -- and that, therefore, there
7 would need to be an adjustment up. But I have
8 not -- my understanding is there are different
9 views on what that adjustment should be, and I
10 have not compared them in that detail.

11 Q. Well, would it surprise you that
12 Mr. Trautman, who has testified about a couple
13 of different types of adjustments, said all of
14 them would fall below even the low end of the
15 Horowitz, Israel, and Crawford shares for
16 Public Television?

17 A. I think I recall seeing that.

18 Q. In your opinion, do your regression
19 and Dr. Crawford's regression and the Horowitz
20 survey corroborate each other with respect to
21 Public Television's share?

22 A. Again, I mean, my view for the
23 corroboration question is it's -- it's an
24 overall correlation and ranking. And so I -- I
25 really, particularly at the low end, don't

1 think of corroborating category by category.

2 I think of asking the question does
3 the survey seem to produce results that are in
4 line with marketplace outcomes?

5 Q. I guess I want to pull that apart. So
6 you said you don't think of the corroborating
7 category by category, but didn't you do exactly
8 that with respect to sports?

9 A. I certainly look at in more detail at
10 the valuations at the higher end and, again,
11 looked at sports because there was this debate
12 about other sports.

13 But I -- and I think the correct
14 overall way to look at the survey is whether it
15 matches the rankings, whether it generally
16 correlates with the values given, and then if
17 you're going to dive in in more detail, you
18 know, regressions tend to do better at the high
19 end, and so I would -- I would put more
20 emphasis on that.

21 Q. Okay. We're at a good stopping point.
22 Oh --

23 JUDGE STRICKLER: You say regressions
24 do a better job at the high end. What's your
25 cutoff for the high end for this particular

1 regression?

2 THE WITNESS: I mean, I've tended to
3 think of the top three categories and the
4 bottom three categories.

5 JUDGE STRICKLER: Thank you.

6 MR. CHO: We're at a good stopping
7 point if you'd like to take a break or I can
8 keep going.

9 JUDGE BARNETT: How much more do you
10 have?

11 MR. CHO: I would guess 45 minutes.

12 JUDGE BARNETT: We'll go ahead and
13 take our morning recess, 15 minutes.

14 (A recess was taken at 10:28 a.m.,
15 after which the trial resumed at 10:47 a.m.)

16 JUDGE BARNETT: Please be seated. Mr.
17 Cho?

18 MR. CHO: Your Honor, one piece of
19 housekeeping business.

20 During the break we agreed, I believe
21 all the parties agreed to admit five exhibits
22 that were filed by the Joint Sports Claimants
23 on Friday: Exhibits 1112, 1113, 1114, 1115,
24 and 1118.

25 JUDGE BARNETT: Thank you. 1112

1 through 1115 inclusive are admitted, and 1118
2 is admitted.

3 (Exhibit Numbers 1112, 1113, 1114,
4 1115 and 1118 were marked and received into
5 evidence.)

6 BY MR. CHO:

7 Q. Thank you. So before the break, Dr.
8 Israel, we were talking about how your
9 regression may corroborate as to the three
10 largest shares; is that right?

11 A. I think it matches them well. So
12 that's one -- one sign that it corroborates the
13 survey results.

14 Q. And in your direct testimony you talk
15 about it confirming the rank order of the top
16 four and the royalty share allocation of the
17 top three.

18 Why did you look at top four for the
19 rank order and royalty share allocation for
20 only the top three?

21 A. I mean, I wasn't trying to just look
22 at one or the other. I was just summarizing
23 various ways that I -- that I concluded that
24 the regression results corroborated the survey.

25 Q. So it is your opinion that the Public

1 Television category is not one of the larger
2 categories that you should look to to see
3 whether or not the regression that you ran
4 corroborates the Bortz survey?

5 A. I mean, again, it is my opinion that I
6 should look at the overall set of results to
7 see if they generally match what's in the Bortz
8 survey.

9 It doesn't surprise me that, for some
10 of the smaller ones, some of the differences
11 are bigger.

12 But really my overall opinion is that,
13 you know, in my professional experience, this
14 sort of match between a regression and a survey
15 is -- is quite good relative to what I have
16 almost ever seen.

17 Q. I think you keep using the word
18 smaller or larger. And I think it is important
19 to understand what you mean by that.

20 So what are you looking to when you
21 decide whether or not Public Television belongs
22 in the larger category that you should look to
23 or the smaller category that you shouldn't look
24 to?

25 A. Again, I didn't make any sort of a

1 priori decision about what was large or what
2 was small. I looked at the overall set of
3 regression results and I asked myself: Are
4 these consistent generally with what the Bortz
5 survey has found? And I said yes.

6 And there are some differences. And
7 the differences were in the three smallest
8 categories. A couple of those got negative
9 numbers. We have talked some about that. I
10 don't think it is literally a negative value.
11 Public's number was too small. That justifies
12 some adjustment.

13 But, again, it wasn't an a priori
14 decision about what was large or what was
15 small. It was just looking at the body of
16 evidence once I had it and asking whether that
17 seemed like the sort of match that indicates
18 support for the Bortz survey.

19 Q. You put up or you were asked earlier
20 this morning about this table a couple of
21 times.

22 And if you look at the Crawford
23 numbers in -- in your rebuttal report, it looks
24 like Public Television actually had the largest
25 share of compensable minutes by Claimant group

1 weighted by subscribers. Is that right?

2 JUDGE BARNETT: I'm sorry, Mr. Cho.

3 For the record, "this table"?

4 MR. CHO: Oh, I'm sorry. This is
5 Table 11 on page 34 of the written rebuttal
6 testimony of Dr. Israel, which is Exhibit 1187,
7 I think.

8 JUDGE BARNETT: Thank you.

9 THE WITNESS: Yes. On this table the
10 Crawford results show the largest weighted
11 minutes for Public.

12 BY MR. CHO:

13 Q. Is that an indicator that Public
14 Television is a larger Claimant group or a
15 smaller Claimant group when you're talking
16 about, you know, which shares should be
17 corroborated by the Bortz survey -- by your
18 regression?

19 A. My discussion until now has been in
20 terms of value shares and value shares from
21 previous proceedings and things. On this
22 particular metric, Public has -- seems to have
23 the most minutes.

24 Q. And turning to your written direct
25 testimony, which is Exhibit 1003, this is page

1 18 with your regression coefficients.

2 A. Um-hum.

3 Q. Is the regression coefficient for
4 Public Television actually the third largest,
5 greater than Program Suppliers?

6 A. Yes. I mean, the product of the two
7 puts Program Suppliers well ahead of the
8 coefficient and the minutes but, yes, Public is
9 third in the coefficients.

10 Q. So would that also be an indicator
11 that maybe it is a larger category as opposed
12 to a smaller category for purposes of
13 determining whether or not your regression is
14 corroborating the Bortz survey?

15 A. I mean, again, I look at -- I mean, my
16 comparison has been by the bottom line value
17 shares, but certainly on the coefficients it's
18 third.

19 Q. Okay. Let's talk a little bit about
20 your regression in the year 2013.

21 Your regression does not include the
22 year 2013; is that right?

23 A. That's correct.

24 Q. So based on your statement on page A-1
25 of your rebuttal testimony, which is

1 Exhibit 1187, and it is up on the screen --

2 A. Okay.

3 Q. -- I take it the reason you didn't
4 include 2013 is because you didn't categorize
5 any programming data for 2013?

6 A. No, didn't include any data for 2013
7 in the regressions, the regression data or the
8 programming categorization.

9 Q. I guess what I'm trying to get at is,
10 is one of the reasons why you didn't do that
11 because you didn't have any programming data
12 categorized for 2013?

13 A. I mean, I would say we didn't go
14 through and categorize the data for 2013
15 because just generally I didn't have regression
16 data for 2013.

17 So it's fair to say I didn't do it
18 because it hadn't been initially part of the
19 regressions, and I didn't have the data.

20 Q. Well, did you have access to any
21 programming data from 2013?

22 A. I honestly don't know all of the
23 background. I think that none of that data was
24 -- was purchased. I think that's right. I
25 mean, generally, I didn't have access to any

1 data from 2013 to do the regressions from my
2 point of view.

3 I honestly don't know sort of the
4 back, you know, my staff and sort of what data
5 had been purchased or not purchased. From my
6 analysis, I just didn't have any data from
7 2013.

8 Q. Did you ask counsel or anyone for
9 access to data from 2013?

10 MR. LAANE: Objection to the inquiry
11 into discussions with counsel.

12 BY MR. CHO:

13 Q. Did you ask anyone for data from 2013?

14 A. No. I mean, as I mentioned in my
15 direct testimony, I had already been working
16 for some time on 2010 to 2012, and because I
17 wanted to see if there was a corroboration.

18 If it corroborates for those three
19 years, that gives me confidence, you know, the
20 survey is doing a good job for those three
21 years.

22 So given the assignment was to -- to
23 check the corroboration, I didn't, you know, I
24 decided 2013 wasn't necessary to answer that
25 question.

1 Q. So you never asked anyone for 2013
2 data?

3 A. That's correct.

4 Q. Would you have preferred to have had
5 the data for all four years?

6 A. I mean, again, I mean, all else equal,
7 another year of data is another year of data.
8 But given that the question is to corroborate,
9 you know, if it corroborates for the first
10 three years, then the survey is doing a good
11 job.

12 So I saw minimal value in adding
13 another year.

14 Q. You don't actually know what the
15 results of adding another year would have been
16 until you add the other year; is that right?

17 A. I mean, at this point I have not run
18 my regression through 2013. I have seen what
19 Dr. Crawford did. I have seen the comparisons
20 of his numbers to my numbers across the various
21 years.

22 So I now have even more information to
23 say that 2013 doesn't appear to have changed
24 the results. But really it was just a decision
25 that you need an experiment to decide if the

1 marketplace data corroborates Bortz. And 2010
2 through 2012 was a good experiment for that
3 question.

4 Q. On page 7 of your rebuttal testimony
5 you state that Dr. Crawford gets his highest
6 implied royalty allocation for sports in 2013,
7 indicating that if you had included data for
8 2013 in your regression analysis, it likely
9 would have found an even greater average share
10 for Sports programming, right?

11 A. I mean, it certainly indicates that in
12 his case the Sports share went up, yeah.

13 Q. But that's what you wrote in your
14 testimony, right, on page 7 of your rebuttal
15 testimony?

16 A. Right. I mean, I did write that. But
17 the ultimate conclusion of that paragraph is
18 Dr. Crawford's analysis corroborates the Bortz
19 survey for 2013, and indicates that my focus on
20 the period 2010 through 2012 does not bias my
21 results.

22 So all I'm trying to say is that my
23 conclusions are not biased by using those first
24 three years.

25 Q. Well, but in this particular footnote

1 you are actually saying that, if you had
2 included 2013 in your regression analysis, it
3 likely would have found an even greater share
4 of the average value of Sports programming.
5 Isn't that what you're saying here?

6 A. Yeah, the footnote indicates that, if
7 anything, the Sports share in particular would
8 have gone up some, yes.

9 Q. Okay. And in this statement you are
10 referring to figure 20 of Dr. Crawford's
11 testimony, which is for the record page 45 of
12 Exhibit 2004. And it is up on the screen.

13 Is this the table you were talking
14 about?

15 A. I think that's correct, yes.

16 Q. Dr. Crawford's implied royalty
17 allocation for Public Television in 2013 is
18 above his average share for Public Television
19 in all four years; is that right?

20 A. Yes, looks like it is the second
21 highest year but it is above the average, yes.

22 Q. And for what it is worth, Mr.
23 Trautman's Bortz share for Public Television is
24 actually the highest in 2013 of all four years.
25 Is that right?

1 A. That looks to be correct, yes.

2 Q. So is it fair to say that if you had
3 included data for 2013 in your regression
4 analysis, you likely would have found a greater
5 average value for Public Television
6 programming?

7 A. I mean, these indicators, at least,
8 you know, comparing to these other two
9 empirical analyses suggest yes, yeah.

10 I mean, again, ultimately I am just
11 trying to corroborate what is in Bortz, so it
12 wouldn't change my conclusion, but these
13 indicators make it look like the share would be
14 a little higher.

15 Q. So it looks like for 2013 the Bortz
16 survey actually gave a lower share to sports
17 than it did for the average of all four years.

18 Do you still think that your
19 regression likely would have found a greater
20 average share for Sports programming if you had
21 included the 2013 data?

22 A. I mean, I can't say for certain. The
23 Crawford results indicate, yes, Bortz seems a
24 tiny bit lower. I mean, as you say, I don't
25 know if I haven't done it. But all of these

1 numbers are very close together, indicating
2 that nothing about the corroboration would
3 change.

4 Q. Well, do you think the Bortz surveys
5 are right, that sports value is lower than
6 average in 2013, or do you think the Crawford
7 analysis is right, that sports value was
8 highest in 2013?

9 A. I mean, I think both analyses are
10 indicating it is very close to the average.
11 Ultimately, as I have said, my view in the
12 proceeding is that the Bortz survey asks
13 exactly the right questions.

14 So I would, you know, I'm trying to
15 corroborate that. But I think that what I take
16 away from these sorts of numbers as an
17 economist is 2013 in both cases looks a lot
18 like the average.

19 Q. So then why did you state in your
20 report that, if you had included 2013, you
21 likely would have found a greater average value
22 for Sports programming?

23 A. I mean, because Dr. Crawford uses a
24 regression methodology, that is probably more
25 analogous to my regression methodology. So my

1 best guess would be what happened to the other
2 regression. So I would conclude it would
3 likely be very close.

4 I don't know what would happen, having
5 not had the data. But every one of these
6 indicators tells me I would continue to
7 corroborate.

8 And if I had to, you know, guess, it
9 would just be a guess now, for the exact value,
10 I would say the other regression probably gives
11 me the best indicator of what would happen.

12 Q. So we shouldn't draw any significance
13 from the fact that you included that footnote
14 in your report?

15 A. I mean, obviously, you know, I was
16 making a point about what would happen to the
17 Sports share in particular, so that that number
18 would not be biased. And I think you should
19 say my best estimate is that the Sports share
20 in 2013, if anything, would be a little bit
21 higher.

22 But, again, my entire testimony, you
23 know, my point is does it or does it not
24 corroborate Bortz? And I think we see that
25 across all the different sources.

1 Q. Okay. I want to ask you a few
2 questions about your programming data.

3 You relied on a four-week sample of
4 programming data for each six-month accounting
5 period; is that right?

6 A. 28 days, just to be clear, it is not
7 four weeks in a row. It is 28 days from --
8 from the six-month period.

9 Q. Thank you. Four weeks worth of data?

10 A. Yeah.

11 Q. And you only had that data for three
12 of the four years, 2010 through 2012?

13 A. Correct.

14 Q. And unlike the data that you were
15 working with, Dr. Crawford's data set included
16 all of the programming data for all four years,
17 right?

18 A. That's my understanding. I haven't
19 been deep inside his data, but I think he
20 included all of the days and then categorized
21 them algorithmically or something. But beyond
22 that I have not investigated it.

23 Q. But your understanding is that he
24 included all of the programming data for all
25 four years?

1 A. That's my understanding, yes.

2 Q. In your opinion, for the 2010 to '13
3 period, are the shares calculated by
4 Dr. Crawford more accurate than the shares that
5 you calculated in your direct testimony?

6 A. I really don't know. He included more
7 days but used a different algorithm for
8 categorizing that I have not reviewed closely.

9 And my opinion, based on what I've
10 seen, is that they are probably similar, but I
11 have not done a careful check of exactly how he
12 categorized things.

13 Q. So you have no opinion as to whether
14 his results are more accurate for the four-year
15 period than your results are for the four-year
16 period?

17 A. For the four-year period? Sorry.
18 Yeah, I mean, he includes 2013. So I wouldn't
19 put my results as having any categorization for
20 2013. So he gives an estimate for 2013 that I
21 don't.

22 For 2010 through 2012, I am confident
23 that my categorizations are accurate, and I
24 just -- I wouldn't put myself forward as having
25 reviewed his.

1 Q. So if we had to try and use one or the
2 other study or both studies to try and
3 determine valuations for the four-year period,
4 which is more accurate in your opinion?

5 A. I mean, again, he obviously has 2013
6 and I don't, but I -- I -- I don't feel that I
7 can give a relative comparison of mine versus
8 his because that's just not an analysis I've
9 done.

10 Q. All right. Now I want to ask you some
11 questions about your analyses of the value per
12 hour of sports and other categories of
13 programming.

14 In your written direct testimony one
15 of the things you did was to assess the
16 relative value per hour of sports programming
17 versus other types of programming. Right?

18 A. I mean, generally, yes. But are you
19 referring to some specific analysis?

20 Q. No, no. I am asking generally.

21 So did you look at that same metric
22 value per hour of programming in the Bortz data
23 for WGN-only systems?

24 A. Not that I recall, no.

25 Q. So for WGN-only systems, the 2010 to

1 2013 Bortz surveys explicitly identified to
2 each respondent the number of hours of
3 compensable programming in each category,
4 right?

5 A. Sorry, could you repeat that?

6 Q. Yes. So for WGN-only systems, they
7 were given a special programming summary?

8 A. Yes.

9 Q. And the Bortz survey actually
10 explicitly identified to the respondents to
11 those surveys the number of hours of
12 compensable programming in each category,
13 right? Is that your understanding?

14 MR. LAANE: There is no foundation for
15 this line of questioning.

16 MR. CHO: Your Honor, the foundation
17 is in the Bortz report, which he reviewed.

18 JUDGE BARNETT: I don't understand the
19 objection, Mr. Laane.

20 MR. LAANE: He hasn't been here
21 testifying about the Bortz survey. I don't
22 know if there is any foundation to be asking
23 him about details like WGN programming summary.

24 JUDGE BARNETT: Well, he has been
25 testifying at length about the Bortz survey.

1 Overruled.

2 Whether he knows about the detail
3 underlying the Bortz survey, he can answer or
4 not answer. That's up to him.

5 THE WITNESS: So my recollection is
6 that there was a different -- information given
7 to people who were WGN-only systems. I don't
8 recall as I sit here whether it listed the
9 number of hours of compensable versus
10 non-compensable.

11 I recall that it provided information
12 on that topic.

13 BY MR. CHO:

14 Q. Okay. Well, based on your analyses of
15 the value of programming per hour, what would
16 you expect the relative value of sports
17 programming per hour to be compared with the
18 relative value per hour of the other categories
19 of programming on WGN?

20 A. I mean, my general conclusion from my
21 analysis is that the value of sports
22 programming is higher per hour than of other
23 categories of programming. So I -- I think
24 that would apply to WGN.

25 My conclusions are based on that

1 finding overall.

2 Q. How many times, roughly, greater?

3 Just very roughly would you expect sports
4 programming value per hour to be?

5 A. I mean, I don't have a specific number
6 times greater on one particular signal. It is
7 going to -- I have an overall number based on
8 like type of content that's in the distant
9 signals. And another overall number is based
10 on the content that's on, say, TBS or TNT. But
11 I couldn't offer a number for the specific
12 content on one signal, a multiple.

13 I mean, everything I have seen
14 indicates the sports content is many times more
15 valuable, but I couldn't offer an exact number
16 for one signal.

17 Q. Well, the numbers that you present in
18 your report, what -- what were those about for
19 sports programming versus other programming?

20 A. I mean, it depends on which analysis.
21 It varies depending on the analysis.

22 Q. Well, what analyses do you think are
23 most relevant to this proceeding where we're
24 trying to determine the value of sports
25 programming on, say, WGN?

1 A. I mean, so, for example, in the
2 regression analyses that look at values per
3 minute, I mean, you would have to compare --
4 you know, it breaks it out by category. So you
5 would have to compare sports to a specific
6 other category.

7 But it's, you know, it's ten times
8 more than some, four times more than others.
9 It depends on the category. But it certainly
10 shows sports value per minute being higher than
11 the other categories.

12 Q. Okay. Let's walk through an example
13 survey response chosen and filed by the Joint
14 Sports Claimants on Friday. And this is
15 Exhibit 1118.

16 MR. CHO: And, Your Honors, this is a
17 restricted document.

18 JUDGE BARNETT: Is there anyone in the
19 hearing room who is not privy to confidential
20 information or who has not signed a
21 non-confidentiality agreement? I don't see
22 anyone. Thank you. Thank you, Mr. Cho.

23 (Whereupon, the trial proceeded in
24 confidential session.)

25

1 O P E N S E S S I O N

2 JUDGE BARNETT: We can reopen the
3 door.

4 BY MR. CHO:

5 Q. So it looks like the movies category
6 had the highest average Bortz survey value per
7 hour for WGN-only cable systems throughout the
8 four-year period, right?

9 A. It does. Again, movies are not very
10 many hours and I have not myself looked at them
11 separately before.

12 But if we break out movies, it appears
13 to have the highest computed value per hour.

14 Q. Right. And from 2010 to 2011 to 2012,
15 there was a big change in the number of movies
16 that the respondents were supposed to be
17 valuing, from 116.5 hours down to 49 hours and
18 then down all the way to 9.5 hours, right?

19 A. Yeah, I see that, yes.

20 Q. But the respondents' valuations in the
21 movie category don't look like they changed
22 that much, did they?

23 A. I don't know what we mean by "that
24 much." They stay roughly the same between the
25 first two years and then drop quite a bit to

1 the third year.

2 Q. Okay. Well, in 2010 the average movie
3 valuation was 18.3 for the 116.5 hours of
4 movies?

5 A. That's what it says, yes.

6 Q. And then the next year, there were
7 less than half the number of hours of movies
8 but the valuation actually goes up to 19.5,
9 right?

10 A. That's what it says, yes.

11 Q. And then in 2012, there were less than
12 ten hours of movies, but the valuation only
13 fell to 10.1, not even a 50 percent drop?

14 A. Right. I mean, I don't know anything
15 about the underlying movies that were being
16 shown, but, yes, it appears that whatever that
17 set of movies was, the value was similar in the
18 first two years and then the number of movies
19 dropped and the value dropped, but not by as
20 large a percentage.

21 Q. The respondents didn't know what
22 movies were being shown either, because they
23 were given that card that just said movies,
24 right?

25 A. I mean, the respondents are reporting

1 on their valuation of the movies given their
2 overall set of content. I don't know actually
3 what they know about what was available in
4 different years, on WGN or otherwise.

5 Q. Well, didn't Mr. Trautman say that the
6 reason he needed to provide that programming
7 summary was because they didn't necessarily
8 know what's compensable and what's not, which
9 movies were compensable and which weren't on
10 WGN in those years?

11 A. I really don't know what he said on
12 that topic. I do know, my recollection is he
13 indicated he wanted to provide clarity on the
14 compensability question. But I don't know what
15 he said specifically.

16 Q. Okay. To your knowledge, did movies
17 get that much more valuable from 2010 to 2012?

18 A. I really don't know.

19 Q. Sports value per hour is about
20 one-fifth of movies value per hour, followed
21 closely by Devotional programming.

22 Is that consistent with your analysis
23 of the value per hour of sports programming?

24 A. Where are we looking on here?

25 Q. We have highlighted the numbers which

1 are just the -- the averages for the four-year
2 period.

3 A. Oh.

4 Q. And movies had an average value per
5 hour of .72. Sports had an average value per
6 hour of .13. And Devotional had an average
7 value per hour of .09.

8 So is that consistent with your
9 analysis of the value per hour of sports
10 programming?

11 A. Again, I have never done a comparison
12 of sports to movies. So what I see here, if I
13 were to do the analysis I have done, is that
14 sports is higher than syndicated, news, or
15 Devotional.

16 I have never done sports as syndicated
17 exactly either, but I have done sports to
18 Program Suppliers, which obviously is mostly
19 syndicated when you rolled those together.

20 So the ratios are different than what
21 I found in -- in, you know, depending on which
22 analysis, including a different set of systems
23 and content, but the overall ranking looks the
24 same.

25 I mean, not the same in order, but you

1 asked me about sports in particular.

2 Q. So you said that you don't have
3 experience in movies. If we put that aside, do
4 the ratios between sports, syndicated programs,
5 news programs and Devotional programs, do those
6 ratios of the value per hour for those
7 categories look consistent with your
8 experience?

9 A. Consistent? I mean, again, sports is
10 highest. Devotional is higher than it was in
11 the regressions, as I indicated, you know, I
12 thought it probably was, given that the
13 regressions don't always do as well with some
14 of the lower value categories.

15 The regressions are, you know, my
16 regressions are really weighted to give more
17 weight to the larger dollar systems because
18 they pay in more dollars.

19 So the ratios are certainly in a, you
20 know, have sports first, otherwise the order is
21 somewhat different and the relative values are
22 somewhat different.

23 Q. But you didn't even just use your
24 regression analysis to come to these
25 conclusions about the value per hour of sports

1 programming, did you? I mean, you also looked
2 at, for example, TNT, TBS, other data on the
3 relative value of sports programming per hour
4 and specifically the magnitude of the
5 difference, right?

6 A. Yeah, that's fair.

7 Q. So are these valuations consistent
8 with that analysis?

9 A. I mean, they are consistent with the
10 fact that an hour is not an hour. It depends
11 on the type of programming, and that sports is
12 the highest. But this particular set of sports
13 and these systems, the ratio is not as large as
14 it is in some of my other analyses.

15 Q. In fact, it is substantially
16 different, isn't it?

17 A. The ratio -- the ratio here between,
18 say, Sports and other types of programming is
19 different than it is for, you know, the TBS or
20 TNT analysis or my regressions. Again, each of
21 those has a different set of content.

22 So the way to think about this is that
23 each analysis tells you an hour is not an hour.
24 It depends on what type of programming. Sports
25 tends to have the most value.

1 If you want to think about the full
2 set of systems and the relevant set of content
3 here, you go to something like my regression or
4 Bortz that looks at the full set of systems and
5 the content here.

6 At no point am I applying a ratio from
7 one of my analyses to some other set of
8 content.

9 Q. Okay. So you are saying that, you
10 know, we shouldn't be looking at your analyses
11 on TNT or TBS because that was a different type
12 of programming than this; is that right?

13 A. I am saying you should take two things
14 from those analyses. Most importantly, that an
15 hour is not an hour, that you have to think
16 about what kind of content it is.

17 And, secondly, that consistently
18 across the different sources, and I think
19 generally known in the industry, sports tends
20 to have a higher value per hour. Those are the
21 two things I would take out.

22 I mean, I want to be clear that I
23 don't think -- at no point would I say you
24 should take the TBS multiple and apply it to
25 the content at issue in this case. I think you

1 should say an hour is not an hour and that a
2 large body of evidence says sports hours tend
3 to be more valuable than other types of hours.

4 Q. Would you say that your research on
5 the value per hour of programming corroborates
6 or refutes or some other word when compared
7 with the Bortz valuations per hour of
8 programming on WGN-only systems?

9 A. I mean, again, ultimately my analysis
10 is value per minute times minutes across the
11 full set of content.

12 So the fact that when I take a value
13 per minute and multiply it by the actual
14 minutes I get shares that look a lot like Bortz
15 overall means that it's corroborating the Bortz
16 shares.

17 To the extent underlying the Bortz
18 shares there is people in their heads doing how
19 many minutes times value per minute, the match
20 in the overall shares indicates that my
21 analysis is corroborating what the Bortz survey
22 found, only when applied to the full set of
23 content and only when thinking about that
24 bottom line share calculation.

25 Q. I know you want to talk about the

1 bottom line share calculation, but the fact is
2 you did an analysis of the value per hour of
3 programming, sports programming, relative to
4 other types of programming, right?

5 A. I did a regression analysis that
6 computes a value per minute as a way to compute
7 a bottom line share. Right? But if the value
8 per minute, I mean, underlying the Bortz shares
9 there are minutes of programming and valuations
10 per minute.

11 The minutes of programming underlying
12 Bortz and the minutes of programming underlying
13 my regression, it's the same content. Right?

14 So if my overall bottom line matches,
15 it means that it is matching the -- when you
16 add the valuation piece.

17 Q. But the -- so maybe in your opinion
18 the bottom line matches, but does the halfway
19 point, the value per hour or value per minute,
20 does that match between your analysis and the
21 Bortz survey?

22 A. I mean, again, for 2012 through --
23 2010 through 2012, which is what I looked at,
24 it is the same underlying content.

25 So if the same underlying content is

1 on these signals, there is so many minutes of
2 each type of programming, so --

3 JUDGE STRICKLER: The subset that
4 counsel is showing you that's on the screen is
5 WGN-only systems.

6 THE WITNESS: Correct.

7 JUDGE STRICKLER: The fact that those
8 numbers, that subset is so different than what
9 was in the overall Bortz survey and in your
10 regression, does that suggest to you that there
11 must be something different from the WGN-only
12 systems in the minds of the CSOs that would
13 account for that difference?

14 THE WITNESS: I mean, certainly their
15 valuations for that specific set of systems are
16 different. I haven't -- I mean, I don't want
17 to oversell what I have done. I haven't dived
18 into these specific systems and their
19 valuations. I mean, the bottom -- the overall
20 set of valuations comes out similar,
21 incorporating these.

22 But I would agree that these -- some
23 of these are different and in some cases quite
24 different from the overall average. And my
25 focus has been on the overall average.

1 JUDGE STRICKLER: Because your focus
2 wasn't on this subset, you can't opine as to
3 why this subset is different?

4 THE WITNESS: I honestly don't know
5 why this subset is different.

6 JUDGE STRICKLER: Okay.

7 BY MR. CHO:

8 Q. In your opinion, are the Bortz survey
9 responses reliable measures of the value per
10 hour of compensable programming on WGN?

11 A. My opinion is that the Bortz survey
12 responses are reliable measures of the overall
13 value of the programming.

14 I don't know -- and, therefore, as I
15 have said, reliable measures sort of by math of
16 the overall value per hour of all of the
17 content.

18 Q. But you said you are not a survey
19 expert, right?

20 A. I am an expert on the marketplace data
21 that indicates that the marketplace data
22 corroborates what is in Bortz.

23 Q. Isn't it true that the Bortz survey
24 respondents for WGN-only systems were the only
25 Bortz respondents who were actually given

1 detailed programming data for the distant
2 signals they were valuing?

3 A. That's consistent with my
4 recollection. I don't, again, now we're into
5 details of what instructions were given to each
6 that are not all crystal clear in my head as I
7 sit here, but my recollection is there were
8 instructions that were given to the WGN-only
9 systems in particular.

10 Q. Those are the systems we have been
11 talking about?

12 A. Yes.

13 Q. And, In fact, the only programming
14 information given to all of the other Bortz
15 respondents was the call sign of the station?

16 A. That I just don't recall.

17 Q. So the only -- the WGN-only
18 respondents we have been talking about had the
19 most programming information of all the Bortz
20 respondents. Is that fair to say?

21 A. Again, I'm sure other people can
22 characterize the survey details more than I
23 can. My recollection is the WGN-only systems
24 were given some additional information, yes.

25 MR. CHO: Okay. I pass the witness.

1 JUDGE BARNETT: Thank you, Mr. Cho.
2 Mr. MacLean, you look poised, I mean, and
3 ready.

4 MR. MacLEAN: Always poised.

5 JUDGE BARNETT: Always poised.

6 CROSS-EXAMINATION

7 BY MR. MacLEAN:

8 Q. Good morning, Dr. Israel. I am
9 Matthew MacLean. I represent the Settling
10 Devotional Claimants.

11 A. Good morning.

12 Q. I first want to start out with some
13 common ground, and I'd like to show you your
14 direct testimony, Exhibit 1009, at page 9.

15 A. Do you want me to turn to that or is
16 it coming on the screen?

17 MR. LAANE: Do you mean 1003?

18 MR. MacLEAN: I think it is 1003.
19 Yes, thank you. 1003.

20 THE WITNESS: At page 9?

21 MR. MacLEAN: Page 9, 1003.

22 THE WITNESS: I got it.

23 MR. MacLEAN: Apparently we have to
24 boot up a computer or something.

25 BY MR. MacLEAN:

1 Q. Okay. So taking a look at this quote
2 at the top of the page --

3 A. That's helpful. Thanks.

4 Q. And this is actually a quote from a --
5 from an opinion of the Judges' predecessors,
6 the Copyright Arbitration Royalty Panel; is
7 that correct?

8 A. It looks like it is from their report
9 in May of 1996.

10 Q. And you say, "the critical
11 significance of the Bortz survey is the
12 essential question it poses to cable system
13 operators, that is: What is the relative value
14 of the type of programming actually broadcast
15 in terms of attracting and retaining
16 subscribers? That is largely the question the
17 Panel poses when it constructs a simulated
18 market. Further, the question asks the cable
19 system operator to consider the same categories
20 we are presented here in the form of Claimant
21 groups, that is, sports, movies, and the
22 others. That is also what the Panel must do."

23 Now, even though you put this, this
24 language in the words of the CARP, is this also
25 your opinion about the Bortz survey?

1 A. Generally, yes. There is maybe some
2 specific words I would write differently but
3 generally yes.

4 Q. And is it your opinion that the Bortz
5 survey is the best methodology presented for
6 the valuation of the -- of the program
7 categories in this proceeding?

8 A. That's my opinion, yes.

9 JUDGE STRICKLER: Are you saying the
10 Bortz survey is the best survey or that survey
11 -- the survey approach is the best approach?

12 THE WITNESS: I think the Bortz
13 survey, I mean, again, my guiding principle
14 here in evaluating the surveys is how well they
15 match the marketplace data.

16 And so I think the -- I think two
17 things: The survey, I do agree, is asking
18 exactly the right question and then the survey,
19 the Bortz survey in particular, appears to
20 match the marketplace data better than the
21 Horowitz survey, which is the other one I'm
22 aware of.

23 JUDGE STRICKLER: So your measure of
24 whether a survey is accurate is whether it
25 matches the marketplace data that you calculate

1 through your regression?

2 THE WITNESS: And I would also include
3 the Crawford regression and things like that.
4 But, yes, I mean, at least I think I would say
5 what I can add to the discussion is a
6 comparison to the marketplace data.

7 JUDGE STRICKLER: Thank you.

8 BY MR. MacLEAN:

9 Q. But Bortz is best, is what you would
10 say?

11 A. I mean, I would say what I say here,
12 yeah, I think it is the best thing we have
13 available, given the question that it asks and
14 given that, again, what I can add in my
15 expertise is how well it matches the
16 marketplace.

17 Q. And, of course, for this proceeding,
18 Bortz, some improvements have been made to the
19 Bortz survey methodology; is that right?

20 A. That's my understanding, yes.

21 Q. So would you say the best of the best
22 got better?

23 A. I mean, I really have not been
24 involved in previous proceedings. So I -- I
25 can't really comment on Bortz in previous

1 proceedings.

2 Q. So let me, since we just referenced
3 PTV, let me talk a little bit about what Mr.
4 Cho went through with you.

5 And I am going to -- could I have the
6 ELMO, please? I am going to put up my very
7 slick graphic here.

8 And this is what Mr. Cho showed you
9 with regard to the Bortz survey breakdown
10 computed into a value per hour for WGNA-only
11 systems.

12 Do you -- do you remember these
13 numbers that Mr. Cho just showed you?

14 A. Yes.

15 Q. Roughly? Okay. So one thing you can
16 see here is that for WGNA-only systems -- first
17 of all, would you regard WGNA-only systems as
18 being a representative sample of the universe
19 of systems out there?

20 A. No, I have no reason to think it is
21 representative. That's why I kept stressing it
22 was just results for that subset.

23 Q. And you can see that here, the
24 Devotional category, if you compute it into a
25 value per hour approach, the Devotional

1 category is somewhat higher than, for example,
2 the news category. Is that right?

3 A. Yeah, on this value per hour
4 calculation, yes.

5 Q. Now, if WGNA -- if WGNA is made
6 available, unlike many stations, on a
7 nationwide basis, would you expect -- I believe
8 the example that Mr. Cho showed you was from
9 Louisiana -- would you expect people,
10 subscribers in Louisiana, to be particularly
11 interested in Chicago news?

12 A. I don't know. I'm sure many of them
13 aren't. Some of them may be.

14 Q. Do you have any -- any expectations
15 about the level of religiosity in -- in the
16 Louisiana area?

17 A. I really don't know.

18 Q. Okay. With regard to sports, is it --
19 is it possible that nationwide, on a signal
20 like WGNA, that nationwide people might be less
21 interested in Chicago area sports than, for
22 example, people living in the Chicago area?

23 A. I mean, I imagine that's true among
24 viewers. Again, as I stress in my testimony, I
25 think we should be talking about what CSOs

1 value to put on their systems.

2 But if your point is there is
3 differences in sports preference nationwide
4 relative to a particular city, I agree with
5 that.

6 Q. And, of course, you have stressed a
7 number of times that number of hours is not
8 really a measure of value. Would you agree
9 with that?

10 A. Yes.

11 Q. So is it possible, for example, that
12 cable systems might put a certain degree of --
13 that there might be some nonlinearity in the
14 valuation that cable systems put onto programs?
15 Maybe a little bit of Devotional programming
16 goes a long way. Is that possible?

17 A. I mean, sure, it's possible. I don't
18 know in particular. But my experience in the
19 industry is there is not a great linkage
20 between hours and value.

21 And sometimes it can be that you want
22 a small amount of some different content to
23 give that option to your viewers, that that can
24 have value, a lot of value to people.

25 Q. Even -- even very religious people,

1 how many hours a week would you ordinarily
2 expect them to spend in church?

3 A. I don't know. I mean, if I was doing
4 well, it would be an hour, but I don't know
5 beyond that.

6 JUDGE STRICKLER: Is this a subject of
7 your expertise?

8 (Laughter.)

9 THE WITNESS: No.

10 BY MR. MacLEAN:

11 Q. Mr. Cho also pointed out that the
12 Bortz survey respondent -- Bortz survey
13 questionnaire very helpfully pointed out that
14 the Devotional programming at issue was early
15 on Sunday mornings, like 5:30 a.m. Is that
16 right?

17 A. Yes.

18 Q. And in Chicago, when it is 5:30 a.m.
19 in Chicago, what time is it on the West Coast?

20 A. Also not an area of my expertise, but
21 I believe it is 3:30.

22 Q. And what time is it on the East Coast?

23 A. 6:30.

24 Q. Okay. So it varies across the
25 country, right?

1 A. Yes.

2 Q. Okay. Let's take a look at your -- so
3 now that we have gone through the best of the
4 Bortz, let's take a look at the -- your
5 regression specification, which is Israel
6 direct, page B-13.

7 Now, we're all very comfortable now
8 looking at regression specifications, having
9 seen a few. But I just want to make a couple
10 of points about yours.

11 Yours -- this regression specification
12 is in the functional form of a linear
13 regression; is that right?

14 A. Yes.

15 Q. And here you have the level number of
16 total royalty fees paid by the CSOs your
17 dependent variable, right?

18 A. That's correct.

19 Q. And then you -- your -- your
20 specification essentially assumes that that
21 total royalty fee amount is going to vary as a
22 level function of each of your control
23 variables. Is that right?

24 A. I don't think I would say it assumes
25 it will vary in that way. I think I would say

1 that the regression finds the best linear
2 function to predict the royalty fee.

3 Q. Okay. But you are not looking for any
4 sort of non-linear function here, right?

5 A. That's correct. It is consciously
6 measuring the relationship between dollars and
7 levels, and these other variables measured in
8 levels.

9 So it is intentionally looking for the
10 best linear predictor, because that's the
11 economic functional form that I considered most
12 relevant.

13 Q. Okay. Now, if you look down to where
14 you have beta 9, that's your coefficient for
15 number of subscribers from previous accounting
16 periods, right?

17 A. That's correct.

18 Q. Okay. So this -- this -- what you are
19 expecting to see or what this -- this
20 specification essentially assumes is that the
21 total royalty fee paid by the CSO bears a
22 linear relationship with the number of
23 subscribers from previous accounting periods;
24 is that correct?

25 A. I mean, again, the way I view these

1 regressions, I don't think it is making an
2 assumption about. I think it is saying it is
3 going to find the best linear predictor, the
4 best linear relationship it can find.

5 Q. Okay. Now, why would you control for
6 the linear number of subscribers in a
7 level/level relationship with the level number
8 -- level royalty fee paid by the CSO?

9 A. I mean, my most basic reason for
10 almost every specification decision was to be
11 consistent with what had been done previously.

12 But when I evaluated it, again, I
13 think it is reasonable to ask for, as the
14 number of subscribers goes up, you know,
15 looking for the best linear relationship, so
16 looking for how much the bid in 9 would
17 multiply how much more you would pay in
18 royalties.

19 So it is pretty common in regressions
20 to sort of look for these sorts of linear
21 relationships letting the coefficient multiply
22 up the number of subscribers.

23 Q. And your goal here by including this,
24 this control variable, is to essentially remove
25 the influence of the number of subscribers of

1 the system on the total royalty fees paid so
2 you can look at what you are trying to see
3 through your -- through your other
4 coefficients; is that right?

5 A. I think it is to control for the
6 number of subscribers. I mean, in combination
7 with the other control variables, I think it is
8 controlling for the size of the system.

9 Q. Are you -- are you concerned that
10 using the level number of subscribers with the
11 level royalty fee paid is simply replicating
12 the royalty fee calculation?

13 A. No, not at all. For purposes of the
14 size calculation, I would like to, you know,
15 measure the way that size affects the formula.

16 Q. That's the goal, right, to include --
17 to include a control for number of subscribers
18 that correctly models how it -- how number of
19 subscribers would affect the total royalty fee
20 paid; is that right?

21 A. I mean, I would say the goal is to
22 control for the number of subscribers. Again,
23 I have consciously maintained a linear
24 relationship because it has been used before.
25 It is very standard in regressions.

1 But, yes, I would agree the goal is to
2 control for the number of subscribers.

3 Q. Now, I see you also have a control at
4 beta 7 for other prorated minutes; is that
5 right?

6 A. Right. That's minutes that couldn't
7 be classified into one of the categories. I
8 think generally because I just didn't have data
9 in the data I used.

10 Q. Have you -- have you considered what
11 the effect of the regression would have been if
12 you had included a control for total minutes or
13 total prorated minutes instead of other minutes
14 or other prorated minutes?

15 A. I mean, I haven't done that. My
16 expectation as I sit here is that it wouldn't
17 change anything.

18 Q. Well, wouldn't a control for total
19 minutes mean that you are measuring the average
20 contribution of one category versus taking away
21 the average contribution of whatever is in your
22 category of "other"?

23 A. I mean, that's fair. You would have
24 to interpret the coefficients correctly. So
25 another minute of, say, Program Supplier would

1 add one to the total and one to Program
2 Suppliers. So you would have to do the math.
3 But I don't -- I don't -- if you did the math
4 right, I don't think it would change the
5 regression meaning.

6 Q. Well, it would change the meaning of
7 the coefficients, right?

8 A. An individual coefficient would change
9 but you would still have the same information
10 in the regression.

11 Q. You would just have to do some algebra
12 to draw that information out?

13 A. Yeah. I think it is arithmetic but,
14 yeah, you would have to do some math to draw it
15 out.

16 Q. Fair enough. Okay.

17 So let's take a look now at your
18 regression results. That's Exhibit 1003, page
19 18, tab V-1.

20 A. Okay.

21 Q. So these, in your view, as I
22 understand it, these, these coefficients, these
23 regression coefficients, are representative of
24 -- and I believe you are now saying average
25 value per minute. Is that your -- is that your

1 view?

2 A. Yes. I mean, I think they are
3 measuring the average value per minute across
4 the systems and the data.

5 Q. And you have positive coefficients for
6 Sports, Program Suppliers, Commercial
7 Television and Public Broadcasting; is that
8 right?

9 A. Yes.

10 Q. And then for -- you have negative
11 coefficients for Canadian, Devotional, and
12 network programming; is that right?

13 A. Yes.

14 Q. And I see that it is actually most
15 strongly negative, your coefficient is the most
16 negative with regard to network programming.
17 Is that right?

18 A. That's right. We had some discussion
19 of that before, that it is important to
20 remember that programming is likely duplicative
21 of the network programming from the local
22 broadcast station.

23 Q. Well, in some markets it is
24 duplicative, right?

25 A. Yes.

1 Q. Some markets, for example, have an NBC
2 station, right?

3 A. Yes.

4 Q. And you would expect those markets to
5 be less likely to import an NBC signal on the
6 whole; is that right?

7 A. I mean, I guess all else equal. I
8 don't know what else they may be importing the
9 signal for.

10 Q. And then some markets might not have
11 an NBC station of its own, right?

12 A. I suppose that's possible. I don't
13 know the counts of how many have the network.

14 Q. I am not asking the count. Some
15 markets do have an NBC station. Some markets
16 do not. Is that correct?

17 A. I think most do. But it seems right
18 to me there could be some smaller markets that
19 didn't.

20 Q. And if there is a smaller market that
21 doesn't have an NBC station, that might be very
22 valuable to -- to import an NBC station; is
23 that right?

24 A. For that particular market, that
25 sounds right.

1 Q. And if those markets that are
2 importing that NBC station tend to be small
3 markets with very low fee-paying systems, you
4 would expect the importation of that NBC system
5 to actually reduce the coefficient for network
6 programming, for example; is that right?

7 A. I mean, I would expect the size of the
8 system to be controlled for by the control
9 variables we talked about before.

10 Q. Well, let's -- let's -- let's put
11 aside the number of subscribers because that's
12 only one component that goes into the amount of
13 receipts that a system has. Is that right?

14 A. Right. That's why I said before that
15 I -- when you were asking me questions, that I
16 consider the full set of controls to be
17 relevant, not just the number of subscribers.

18 Q. Okay. Well, you don't have a control
19 for the amount of receipts of the system; is
20 that right?

21 A. That's right. I mean, I stuck to what
22 had been done before. So I have things like
23 subscribers, number of channels, median income,
24 various -- count of broadcast channels,
25 multiple controls that I think are measures of

1 size.

2 Q. Okay. So let's assume all your
3 controls are working as intended for a moment.
4 Okay?

5 If you have a system that has a lower
6 -- that is a lower fee-paying system, importing
7 a network station, all else being equal, would
8 that tend to increase or decrease the
9 coefficient for network programming?

10 A. I mean, I don't -- again, you say the
11 controls are working as intended, so the
12 controls should, therefore, be soaking up the
13 effect of size.

14 So I would think that that additional
15 indicator would be measuring the value of the
16 programming to the best of the regression's
17 ability, not measuring size.

18 Q. Well, what does a negative coefficient
19 mean then?

20 A. We talked about this some. I think
21 the negative coefficient -- as we just
22 discussed, there are likely, in the case of
23 network, there are likely systems importing
24 network programming that don't really value the
25 network programming per se.

1 And so it could well be that, in the
2 case of network, the value on the network
3 programming per se is negative.

4 Q. Okay.

5 A. That would show up in the regression
6 as saying relatively -- given the type of
7 program we're talking about, relatively few
8 systems are paying for it because they already
9 have a duplicative, another network source.

10 Q. Well, it doesn't say anything about
11 the number of systems that are paying for it.
12 It says something about how much those systems
13 are paying. Isn't that right?

14 A. Right. I think that's fair. But I am
15 just saying you don't see -- if there was no
16 duplicative network programming, then you might
17 expect to see in the data lots of systems
18 bringing in network programming, even though it
19 cost a lot of money.

20 And the fact that you don't see that,
21 I think, is driven by the fact that there is,
22 in fact, duplicative network programming.

23 Q. Okay. I am putting up another very
24 slick graphic where we're going to graph fees
25 against minutes of some category of

1 programming. Okay?

2 A. Okay.

3 Q. Let's say network programming. All
4 right?

5 A. Okay.

6 Q. So what -- first of all, you have a
7 negative, a negative coefficient here. So how
8 would I draw my -- my regression line here?

9 A. Holding everything else constant and
10 just drawing that particular part of the line,
11 it would slope downward. So you would start
12 high and go down.

13 Q. And I could only draw a straight line
14 because you used a level/level regression
15 specification, right?

16 A. It is a linear regression, yes.

17 Q. Linear regression. Okay. So where do
18 you expect the data to fall? If I have got a
19 low number of minutes of network programming,
20 where do I -- where would the -- I mean, this
21 regression line would suggest that people with
22 low numbers of minutes of network programming
23 are paying a lot of fees, right?

24 A. I mean, all else equal, everything
25 else held fixed, which is a lot of other

1 things, then the low number of network minutes
2 would tend to correspond to a higher number, a
3 higher amount of fees.

4 Q. And then those systems that are paying
5 lower amounts of fees are, according to your
6 regression, all else being equal,
7 retransmitting more minutes of network
8 programming. Is that right?

9 A. I mean, I agree all else equal. But
10 the all else equal matters a lot because there
11 are other control variables in the regression.

12 Q. I agree. So what this, your
13 regression is really showing is that those
14 systems that are retransmitting a lot of
15 network minutes are paying comparatively low
16 fees, correct?

17 A. All else equal, I think that's right,
18 yes.

19 Q. And if these systems that are -- that
20 are retransmitting a lot of network minutes,
21 but paying low fees, decide they want to --
22 let's say they get an NBC station in their
23 area, and they decide to start to drop that
24 network programming.

25 What would that do to your

1 coefficient, if these systems that pay, that
2 pay low fees start retransmitting fewer minutes
3 of Devotional -- I mean, I'm sorry, of network
4 programming? You can see where I'm going next.

5 A. I mean, I would need, holding
6 everything else fixed, you are right about
7 which way the relationship goes, right. But
8 everything else is not held --

9 Q. I didn't say which way the
10 relationship goes. I'm actually asking you
11 this.

12 A. And then holding everything else
13 fixed, the way I would say it is on average in
14 the data, holding everything else fixed, a
15 smaller number of network minutes tends to be
16 associated with higher fees and vice versa.

17 Q. And if those systems that are paying
18 lower fees start dropping the network minutes
19 that they are carrying, will that tend to
20 reduce or raise the coefficient?

21 A. Reduce or raise the coefficient or the
22 payment?

23 Q. The coefficient. Your coefficient.
24 If these systems out here (indicating) drop
25 their network -- their network minutes, what's

1 that going to do to the coefficient; make it
2 more negative or more positive?

3 A. I mean, mechanically -- I don't know,
4 actually. It depends on where they are and how
5 they line up, what the residual is relative to
6 the line.

7 I mean, their minutes would go to
8 zero. But maybe I should, and maybe I am just
9 not seeing it as I sit here, but if you take a
10 particular system, I think you would have to
11 know where it sits relative to the line to know
12 what it would do to the coefficient.

13 Q. Well, I'm just saying let's say we
14 just take all these out. Okay? We're just not
15 going to have any -- any data points over here
16 because all the -- all of the low fee-paying
17 systems out there said: Forget it. We're sick
18 of this network programming. We don't like it.
19 It has negative value. We're getting rid of
20 it.

21 Now, if all you have left are these
22 high fee-paying systems with few minutes of
23 network programming, where is your regression
24 line going to be then?

25 A. I mean, it depends on the slope of

1 those dots that you have left.

2 Q. These are the only dots I have. These
3 are the only -- yeah, it depends on the slope
4 of the dots.

5 A. And that looks relatively flat the way
6 that you have drawn it.

7 Q. Okay. So you would have a flat
8 regression line, right?

9 A. I mean, the way you have drawn the
10 dots, I think so, but I don't know what the
11 slope of those dots actually is in practice.

12 Q. So really when you see a regression
13 line sloping downward, what that is saying is
14 that lower fee-paying systems are
15 retransmitting more of that kind of
16 programming; isn't that right?

17 A. No, because all else is held constant.
18 And you can't just make a bivariate
19 relationship statement from a multivariate --
20 there is lots of variables in the regression.

21 Q. Well, I only have two dimensions to
22 work with on the paper.

23 A. And, therefore, you can't make the
24 statement that you are trying to make. The
25 statement that I would say is that, given that

1 we're holding size constant, it is telling me
2 that, when I see a network of a given size, the
3 ones that have some network programming tend to
4 be ones that pay lower fees.

5 One interpretation of that would be
6 that they are only going to bring in the
7 network programming if it is relatively
8 inexpensive, given where they are on the
9 royalty payment, because it is not worth that
10 much to them to bring network programming in
11 because a lot of them have a duplicative
12 source.

13 Q. And another -- and another
14 interpretation would be that if it's a lower
15 fee-paying system, they are more likely to be
16 in a market that doesn't have its own network
17 programming and, therefore, values that network
18 programming, wouldn't that be?

19 A. I don't think that's a valid
20 conclusion given the other controls in the
21 regression.

22 Q. Well, what control would -- you have
23 pointed out your distant subscriber control
24 variable -- I mean, I'm sorry, your number of
25 subscriber control variables.

1 What other control?

2 A. Number of channels. Program systems
3 in smaller markets tend to carry fewer
4 channels. Number of broadcast channels is
5 directly controlled for in the regression,
6 which is part of your story. Median income.

7 These are all things that are getting
8 at the receipts that a system pays so that you
9 can't -- what you are trying to say is that
10 minutes of network programming or other types
11 of programming must be proxying for size, but
12 there are multiple control variables that are
13 measuring size.

14 So this is all conditional on those
15 control variables, which changes the whole
16 story.

17 Q. In your review of the data, have you
18 seen that there are, in fact, distantly
19 retransmitted stations out there that have
20 substantially all Devotional minutes?

21 A. I don't know about substantially all.
22 I -- I -- I just don't know.

23 Q. You haven't seen one way or the other?

24 A. I don't. I mean, I think I -- no, I
25 just don't know. I mean, I believe there are

1 signals that transmit substantially more
2 Devotional than others. But substantially all,
3 I just don't know.

4 Q. If -- if a -- if a station that was
5 substantially all Devotional minutes was
6 retransmitted at all, would that be
7 inconsistent with the notion that those minutes
8 have negative value per minute?

9 A. I mean, it would depend on -- I don't
10 know the financial arrangements behind it
11 rebroadcasting.

12 I mean, look, I think generally the
13 fact that people carry and transmit Devotional
14 programming means Devotional programming has
15 some positive value, which is why I take my
16 results on Devotional to say that number is low
17 but not zero and, therefore, have supported the
18 Bortz survey as a measure.

19 Q. In fact, a negative coefficient could
20 be an indicator of positive value, if it shows
21 that smaller -- that smaller fee-paying systems
22 are choosing to retransmit that programming.
23 Isn't that true?

24 A. Again, I don't think that's a valid
25 interpretation from a regression that has

1 multiple controls for size.

2 Q. You can't say it is not a valid
3 interpretation?

4 A. I think I can, because the regression
5 is designed to have multiple controls for size.
6 So we have to take all of those measures of
7 size out.

8 Your implication in your drawing could
9 well go the other way. Once you have got these
10 other controls for size in there, the presence
11 of a Devotional signal probably doesn't tell
12 you much about size, and certainly can't tell
13 you it's small because they have already
14 directly controlled for that.

15 Q. And I will ask you the same question
16 with respect to Canadian. If it were the case
17 that systems within the Canada zone tended to
18 be smaller, on average, tend to have lower
19 fees, lower receipts and lower fees on average
20 than systems elsewhere in the country, that
21 could create in your regression a negative
22 coefficient for Canadian programming, couldn't
23 it?

24 A. Again, I think that the controls for
25 size here are quite complete and quite

1 adequate. So I don't see that.

2 Q. You think -- you think because you
3 have controlled for size, that's impossible?

4 A. I think because I have controlled for
5 size, that could -- that interpretation is at
6 least highly unlikely. There are multiple
7 controls for size. That's -- let me say it
8 this way.

9 As an econometrician, if I'm concerned
10 about something like what you're saying, what I
11 would want to do is control for size. And I
12 have done that with multiple variables.

13 JUDGE STRICKLER: Can you, staying on
14 page 18, can you list which ones are your
15 controls that you would identify as your
16 controls for size?

17 THE WITNESS: Excuse me, number of
18 subscribers.

19 JUDGE STRICKLER: Right.

20 THE WITNESS: Number of activated
21 channels. I think a count of broadcast
22 channels in that same category. And then I
23 would say the median household income because
24 size is gross receipts, and so that measures --
25 that is going to be correlated with how much is

1 paid.

2 Sort of the accounting period, the
3 changes over time, that's going to be more a
4 measure of the increase in the price over time.

5 But as far as cross-areas, I think it
6 is subscribers, channels, and broadcast
7 channels get at measures of the size of the
8 area and the system, and then household income
9 gets at things that are going to be correlated
10 with payments.

11 JUDGE STRICKLER: Thank you.

12 BY MR. MacLEAN:

13 Q. You were asked some questions by Mr.
14 Cho about confidence intervals of your shares.
15 And you said you didn't calculate confidence
16 intervals of your shares. Is that right?

17 A. I didn't present any, correct.

18 Q. And actually it would be very, very
19 difficult to calculate, compute confidence
20 intervals with regard to shares because your
21 shares of any one category are dependent on the
22 shares in other categories. Is that right?

23 A. Yeah. I mean, you have to do
24 something more than just a simple linear
25 calculation.

1 Q. Okay. But you did say that confidence
2 intervals could be calculated for your
3 coefficients, correct?

4 A. Right. I think it would be
5 straightforward to compute confidence
6 intervals. You can do it almost off the page
7 for the coefficient. And, therefore, pretty
8 straightforward to do it for dollar amounts,
9 which would be coefficients times minutes.

10 Q. Okay. And the way that we would
11 calculate confidence intervals, we take your
12 standard error, we would multiply that by 1.96
13 and that would be your confidence interval
14 above and below, correct?

15 A. Approximately, yes.

16 Q. Okay. So if we were to do that for --
17 we will start with sports programming. Okay?
18 If we were to calculate confidence intervals
19 here, we would get a confidence interval
20 ranging from 0.003 to 9.669.

21 Does that look about right to you? I
22 have a calculator if you would like it.

23 A. There is actually one here handily,
24 but that looks -- I mean, I think the math is
25 roughly correct, yes.

1 Q. Okay. So you can say with confidence
2 that sports programming is worth somewhere
3 between a fraction of a penny per minute and
4 \$9.67 per minute?

5 A. I think I can say a lot more than
6 that. And, again, this is, just to be clear,
7 this is why I think it's important in my view
8 to think of this analysis as corroborative of
9 the Bortz survey.

10 Q. Well, let's go through -- we don't
11 want to just focus on one here because I know
12 you operate on all of them. So let's go down
13 to Program Suppliers.

14 Program Suppliers, your confidence
15 interval goes from .265 to .673. Does that
16 look about right?

17 A. I mean, yes, on the math. The answer
18 I was giving before is important, though,
19 because a confidence interval acts like the
20 regression is the only piece of information
21 that I have.

22 Q. Well, sir, you will have a chance on
23 redirect, if your counsel wants to give it to
24 you, to talk about what you think is important.
25 But I would like to focus on what I think is

1 important for a moment.

2 If we take a look at Commercial
3 Television, your confidence interval there is
4 going to be about 3.14 to 1.706, right?

5 A. Again, that's the confidence interval
6 from the regression. That's not my confidence
7 interval because my analysis is based on all
8 the data in the record.

9 Q. So based on this, you can say with
10 confidence that Commercial Television
11 programming is worth an average of between 31
12 cents and \$1.71?

13 A. I can say a lot more than that if I
14 combine this with the Crawford regression and
15 the Bortz survey.

16 Q. All right. So let's take a look at
17 Public Television. Confidence intervals from
18 0.060, 6 cents, to 1.260, \$1.26.

19 Does that confidence interval look
20 right?

21 A. That looks like the correct confidence
22 interval from the regression coefficient, yes.

23 Q. Canadian will be negative \$1.39, so
24 people are trying to get rid of their Canadian
25 programming, I guess, and negative about 56

1 cents.

2 Is that confidence interval about
3 right?

4 A. I think you have done the math right,
5 yeah.

6 Q. Devotional would be negative \$1.18,
7 basically, to negative about 22 cents. Is that
8 about right?

9 A. Yeah, it looks like the math is right.

10 Q. Do you think our friends in Louisiana
11 would agree with that?

12 A. I don't know what they are agreeing
13 with because I don't know what substantive
14 conclusion you are trying to draw, given how
15 these are being used.

16 Q. And for network we have got a
17 confidence interval of negative \$1.55 to
18 negative about 42 cents, right?

19 A. Yeah, it looks like you have done the
20 math right.

21 Q. And if you take a look at the range of
22 these confidence intervals, you will see that
23 there is a dividing line between those that are
24 positive and those that are negative.

25 But, in fact, all of your positive

1 coefficients are within each others' confidence
2 intervals, every single one of them. Isn't
3 that right?

4 A. Maybe. You can't really do that
5 comparison because there is a correlation that
6 you would have to account for. But, yes, as
7 far as the math that you have done, that's
8 true, it doesn't have any statistical meaning.

9 JUDGE FEDER: Mr. MacLean, you are
10 going off the screen to the right. Slide it
11 over a little.

12 MR. MacLEAN: Oh, I'm sorry. There we
13 go.

14 BY MR. MacLEAN:

15 Q. Basically what you've got here is a
16 four-way statistical tie for the top four in
17 your -- in your -- in terms of top four in
18 value coefficients; is that right?

19 A. No. You can't draw that conclusion
20 from the math that you have done, because there
21 you would have to account for the correlation
22 between -- I'm not trying to get too technical,
23 but you can't just compute the confidence
24 interval on each one and compare.

25 Q. Because there is some correlation

1 between them; is that what you are saying?

2 A. Right. You have to -- if you wanted
3 to -- if you are saying you want to test the
4 hypothesis that two of those coefficients are
5 equal, you would have to do that in a way that
6 accounts for the correlation between the
7 coefficients.

8 Q. Don't you -- don't you have separate
9 coefficients so that you can account for that
10 correlation?

11 A. I mean, if you had the underlying
12 correlation, yes. It is not on here and I
13 don't have it where I sit. And it is not
14 reflected by this comparison of the confidence
15 intervals.

16 But the relevant point is that the
17 purpose of the regression is to get the best
18 estimates and to compare those best estimates
19 to the Bortz survey. Right?

20 And the confidence intervals are
21 really only important if I have no other
22 information to compare it to, so I am testing a
23 hypothesis based on just the regression.

24 All that I take from the regression is
25 that these coefficients and values are

1 corroborative of Bortz, which in my
2 professional opinion would be really unlikely
3 to have a match between two totally different
4 analyses, if the analyses were not valid.

5 Q. Well, Bortz gives a positive value to
6 Canadian programming, right?

7 A. Right, it's a low but positive value.

8 Q. And that's quite inconsistent with the
9 idea of there being a negative value to
10 Canadian programming, right?

11 A. I mean, I would agree it's positive,
12 not negative. It is quite consistent with the
13 rankings and the things that I went through in
14 my direct testimony.

15 Q. Would you say that positive is
16 inconsistent with negative?

17 A. I mean, yes, if those two statements
18 -- those two words are inconsistent with each
19 other. I think saying that Canadian is one of
20 the smaller categories and the ranking is right
21 is what I take --

22 Q. Actually positive is an antonym of
23 negative, right?

24 A. That sounds right.

25 Q. And same with Devotional. Bortz, the

1 Bortz surveys give Devotional a positive value;
2 is that right?

3 A. That's correct.

4 Q. And you would agree with me that a
5 positive value is inconsistent with a negative
6 value for Devotional programming, correct?

7 A. Yeah. I would agree that it's -- yes,
8 they're antonyms, as you said. I think it is
9 consistent with the ranking and the relative
10 size, but I would agree that the value is not
11 negative.

12 Q. And do you -- do you find it, as an
13 economist, do you find it at all in accordance
14 with expectation that there would be a negative
15 value to network programming?

16 A. We talked about that at length. Given
17 the duplicative nature, I don't find it
18 surprising.

19 The key for me, though, is, as an
20 economist who does these sorts of regressions
21 all the time, the finding of a negative value
22 for a small category is consistent with what I
23 see regularly.

24 It indicates that for the smaller
25 categories, it can sometimes be hard to find a

1 positive value, if not that many people are
2 paying a high price for it.

3 Q. Just to close the loop on the
4 confidence intervals, as with the positive
5 confidence intervals, the confidence intervals
6 of all the negative coefficients also overlap
7 with one another, do they not?

8 A. With the same caveat about that not
9 being a statistically-meaningful comparison,
10 yes.

11 JUDGE BARNETT: Are you switching
12 gears, Mr. MacLean?

13 MR. MacLEAN: I am.

14 JUDGE BARNETT: Okay. Then let's take
15 our noon recess. We will be at recess until
16 1:10.

17 (Whereupon, at 12:11 p.m., a lunch
18 recess was taken.)

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1 AFTERNOON SESSION

2 (1:18 p.m.)

3 JUDGE BARNETT: Please be seated.

4 Mr. MacLean?

5 MR. MacLEAN: Thank you, Your Honor.

6 BY MR. MacLEAN:

7 Q. Dr. Israel, I'd like to now talk with
8 you about whether and to what extent your
9 regression corroborates or is corroborated by
10 Dr. Crawford's.

11 A. Okay.

12 Q. So if we could take a look at -- this
13 is Exhibit 2004, page 40, figure 16. It will
14 be up on the screen in a moment.

15 If we could blow up that figure. So
16 this is -- this is Dr. Crawford's estimation of
17 average marginal value of one distant minute by
18 Claimant category. Do you see that?

19 A. Yes.

20 Q. Okay. So -- and just to remind you,
21 you remember that Dr. Crawford's --
22 Dr. Crawford used a log-linear regression, so
23 he had to basically convert his logarithmic
24 coefficients to a value, but these were the
25 results of his -- following his conversion. Do

1 you recognize that?

2 A. I mean, I haven't studied this table
3 recently, but, yes, that looks right.

4 Q. Okay. So I'm going to focus here on
5 the bottom, the bottom line, the 2010 to 2013
6 average marginal value for all four years. Do
7 you see that?

8 A. Yes.

9 Q. Okay. So as you've seen, I put a lot
10 of time and effort into my high-speed graphics.
11 So -- but I'd like you to help me with the next
12 one.

13 Could you, in order, go through these
14 -- these marginal values, average marginal
15 values from highest to lowest, tell me -- tell
16 me what category it is and what the -- what the
17 stated value is?

18 A. From highest --

19 Q. Highest to lowest.

20 A. So Sports is first at .896. Then
21 Commercial with .134. Then Canadian with .112.
22 Then Program Suppliers with .064. Public with
23 .051. And Devotional with .030.

24 Q. Okay. Now let's take a look at
25 Exhibit 1003, that's your direct testimony,

1 page 18, Table V-1, which is your regression
2 results. And here you -- you don't need to do
3 a conversion because you used a linear
4 regression specification, but these -- these
5 coefficient results you've said represent your
6 average marginal value, correct?

7 A. Right. I mean, I think of them all as
8 relative to the other values, because it
9 depends what you're holding constant, but, yes,
10 they're my relative average values.

11 Q. Okay. Well, actually, I think you've
12 said that this is actually -- could actually be
13 read as dollars and cents, 4.84 for sports
14 programming, if we ignore the confidence
15 intervals, right?

16 A. I mean, again, holding everything else
17 constant, so, yes, I agree with that holding
18 everything else constant, but ultimately what I
19 would draw from them is relative values.

20 Q. Okay. So say -- let's do the same
21 exercise, read me the coefficient and the
22 category of programming from highest to lowest.

23 A. Do you want me just to do the six
24 again?

25 Q. Yes, the six -- the six categories.

1 A. So Sports is first with 4.836.
2 Commercial is second with 1.01. Public is
3 third with .660. Program Suppliers is fourth
4 with .469. Devotional is fifth with
5 minus .701. And Canadian is sixth with
6 minus .973.

7 Q. Okay. Can I have the ELMO, please.
8 So here are the results side-by-side.
9 Now, I see first you have -- you have -- we
10 have Sports and Commercial Television first and
11 second, in both -- in both columns, correct?

12 A. Yes.

13 Q. But in yours, you've got sports at
14 less than five times the marginal value of CTV.
15 In Dr. Crawford's, he has it about eight times
16 or close to eight times the marginal value of
17 CTV, correct?

18 A. Yes, the relative values are
19 different. I can't do the math, but that seems
20 roughly correct, 5 and something just below 8.

21 Q. And, of course, both you and
22 Dr. Crawford claim to have been -- to have put
23 these numbers into dollars and cents values.
24 So in just direct terms, your value for sports
25 programming is about five times what

1 Dr. Crawford's marginal minute -- value per
2 minute for sports programming is; is that
3 right?

4 A. And, again, because other things are
5 held constant, I really think the relative
6 values are what you can look at.

7 Q. Well, you have -- you have Public
8 Television third in order, right?

9 A. Correct.

10 Q. Dr. Crawford has it fifth in order,
11 second to last, right?

12 A. That's right.

13 Q. You have Program Suppliers fourth in
14 order -- you both have Program Suppliers
15 fourth, but you have it less than Public
16 Television and Dr. Crawford has it more than
17 Public Television, right?

18 A. Those two are flipped one spot, yes.

19 Q. You have Devotional fifth and
20 negative, correct?

21 A. Correct.

22 Q. Dr. Crawford has it fifth but -- I'm
23 sorry, last but positive. Correct?

24 A. Correct.

25 Q. And you've agreed with me already that

1 negative is inconsistent with positive, right?

2 A. Right. The logarithmic form is going
3 to give you positives for all of them.

4 Q. Well, that's -- I mean -- that's not
5 correct, but we'll -- we'll go on to the next
6 one.

7 CCG, you've got it strongly negative,
8 right?

9 A. Correct.

10 Q. It's supposed to be a point there.
11 Dr. Crawford has it strongly positive and, in
12 fact, third in order of relative marginal
13 value, correct?

14 A. He does have it third, yes.

15 Q. All right. You can take that down
16 now.

17 I want to talk a little bit about some
18 of the sensitivities -- you can take this down
19 too -- some of the sensitivity tests that were
20 conducted. You did discuss Dr. Gray's
21 sensitivity in which he eliminated all of the
22 minimum fee systems, right?

23 A. Among other changes, yes.

24 Q. And you -- and you said that by
25 eliminating all of the minimum fee systems, he

1 was in essence reducing -- taking away data,
2 reducing the amount of data that he was using
3 in the -- in the regression; is that right?

4 A. Yes.

5 Q. Did you know that Dr. Crawford's test
6 had a dummy variable for every single system
7 accounting period?

8 A. Yes. He used a different source of
9 identification. He looked within systems. I
10 looked across systems. That's why you get some
11 differences in numbers and it's rather striking
12 that these shares end up matching so well.

13 Q. And you're aware that by using a dummy
14 variable for every system accounting period, he
15 was essentially removing the influence of those
16 systems with a single subgroup?

17 A. As I said, his -- his methodology, I
18 think, by design was to look within system
19 across subscriber groups. So, yes --

20 Q. And thereby removing in essence the
21 influence of all data that contained -- that
22 was from a system containing only one
23 subscriber group, correct?

24 A. I mean, you can't look within those so
25 I would agree with that. I mean, I think it's

1 a substantial plus that he used a very
2 different source of variation than I did;
3 therefore, got different numbers as you showed
4 but got very similar shares.

5 Q. Well, similar shares. He gave
6 Devotional a positive share, right?

7 A. He gave it one of -- the lowest share
8 but a positive share.

9 Q. And you would have given Devotional a
10 negative share, had you calculated -- had you
11 computed negative shares, correct?

12 A. I mean, that's just not my
13 methodology, so -- and it hasn't been the
14 methodology when these linear regressions have
15 been used in previous iterations either.

16 Q. And when you say Dr. Crawford and you
17 got similar results, what you basically mean is
18 top-three matching, you had the -- you had the
19 same three systems -- same three categories in
20 the top three, right?

21 A. I mean, on the basis that I presented
22 in my direct testimony, so similar matches for
23 the top three and similar overall ranking.

24 Q. Now, Dr. Erdem also did some
25 sensitivity testing on your -- on your

1 regression, correct?

2 A. He -- yes, he made some changes to the
3 regression.

4 Q. Okay. Well, one of his changes was to
5 test for non-linearities, correct?

6 A. He added an extra set of variables to
7 the regression. It's not a test for
8 nonlinearity I've seen in 30 years of doing
9 this.

10 Q. Well, what did you do to test for
11 non-linearities?

12 A. I mean, as I indicated, my method was
13 to use a linear regression, that has been used
14 in the past. That's -- my methodology was to
15 test for the best linear predictor, consciously
16 to keep it simple and to match what had been
17 done and accepted in prior versions of the
18 proceedings.

19 Q. So is that an answer that you did not
20 test for nonlinearity?

21 A. Right, I maintained a linear model
22 throughout.

23 Q. How would you test for nonlinearity,
24 if you were to look for -- look to see if there
25 was nonlinearity?

1 A. I mean, you could try other functional
2 forms. I've seen people do things like,
3 instead of linear numbers, put a log number on
4 the right-hand side. Something like you could
5 add a -- you know, something like that,
6 something that's an actual function that's
7 sometimes used in economics.

8 What Dr. Erdem did was add logarithmic
9 variables on top of linear variables, something
10 that I've never seen and I think would probably
11 break most regression specifications.

12 Q. Well, I think he actually added
13 quadratic terms, didn't he?

14 A. No, he added logs.

15 Q. If you add a linear -- a log term
16 keeping the linear term in, that allows
17 curvature, doesn't it?

18 A. I mean, it doesn't match any
19 functional form that I've ever seen justified
20 as a matter of economics. A linear function
21 measures a change in levels. A log function
22 approximates a change in percentages.

23 Q. Did you conduct any tests for the --
24 for sensitivity to influential observations?

25 A. I mean, I certainly noted that there

1 were influential observations and, therefore,
2 checked the data to make sure the data were
3 reliable. It's what you want to do. If you
4 see there are certain large observations, you
5 want to make sure the data don't have errors.
6 You certainly don't want to remove the most
7 important observations as Dr. Erdem did.

8 Q. Wouldn't sensitivity -- wouldn't it be
9 important to you to know if your regression was
10 sensitive to influential observations,
11 regardless of whether you make the decision to
12 discard those observations or not?

13 A. All regressions are sensitive to
14 influential observations. If you have a larger
15 data -- observations in your data, they're
16 going to matter. The question is, is there any
17 basis to think those observations are wrong?

18 Q. Well, it's not just wrong. Couldn't
19 an influential observation -- couldn't
20 sensitivity to influential observations be
21 indicative of the possibility of a missing
22 variable?

23 A. Generally, it's indicative of the fact
24 that those observations contain a lot of
25 information. So in my view, if you have data

1 and you're trying to measure a relationship
2 between fees and programming across the
3 systems, you have certain observations that are
4 informative because they are large or they have
5 more signals or for any reason, then you make
6 sure those data are correct, and if they are,
7 you leave them in because they're highly
8 informative.

9 And I would note that the sources
10 Dr. Erdem's cites agree with me on that topic.

11 Q. I think Dr. Erdem also agreed that --
12 that it's not appropriate to simply throw out
13 influential observations simply because they're
14 influential, right?

15 A. That's the test he performed on my
16 regression.

17 Q. Well, he was testing sensitivity,
18 wasn't he?

19 A. Every regression that has ever been
20 run is going to be sensitive to the removal of
21 influential observations.

22 Q. Have you ever -- are you familiar with
23 the illustration called Anscombe's quartets?
24 It's used in statistics sometimes.

25 A. I don't recall it. No, I don't think

1 so.

2 Q. Let me put it on the screen and see if
3 you recognize it. You might recognize it from
4 statistics 101 or something.

5 Have you ever seen something like this
6 before (indicating)?

7 A. I don't know if I've seen it in
8 exactly this form, no. I mean, I can recognize
9 what's being done here in terms of fitting --
10 it looks like it's fitting a line in various
11 patterns in the data.

12 Q. Well, the first one would be an
13 example of sort of a typical linear regression
14 line through a series of data points, right?

15 A. I mean, it's an example of fitting a
16 line to those points, yes.

17 Q. The second one would show basically a
18 quadratic curve with an average regression line
19 running through it, right?

20 A. Right. As I said before, I would say
21 that's fitting the best linear predictor to
22 those points, and they appear to have a curve
23 to them, yes.

24 Q. Right, but when you look at the actual
25 data in this example data set, there's clearly

1 a curve, but the line is going to draw just a
2 linear regression through there, right?

3 A. I agree. It's going to fit the line
4 -- what linear regression does is fit the line
5 that best predicts the points. And I agree
6 those points appear to have a curve.

7 Q. Okay. And then down here in the third
8 example, we see a very closely -- you know, a
9 very close straight line of points with one
10 outlier up here, throws off the whole
11 regression line in that direction. Do you see
12 that?

13 A. I mean, I don't agree with the
14 characterization, but I do see that there is
15 one point that is different from the rest.
16 And, again, if I saw that point in the data, I
17 would check to make sure that was a valid
18 observation in the data.

19 And if so, it's informative.

20 Q. Well, and there could just be
21 something different about that point that could
22 have been captured with a -- with a control
23 variable, right?

24 A. I mean, in theory, anything is
25 possible. But if you have a specification that

1 accounts for the relevant pieces and that's a
2 differential observation, you certainly would
3 want to include it in a calculation.

4 Q. And then in the fourth example here,
5 we've got a bunch much data points that are not
6 correlated at all with a single, basically,
7 influential observation that governs the entire
8 regression line, right?

9 A. I mean, yes, because in that case,
10 what you're trying to do in a regression is
11 look at the relationship of Y, the vertical
12 stuff, on X. So you actually only got one dot
13 that gives you any information in that last
14 regression because there's only one value that
15 has a different X.

16 Q. Right. And you didn't test for any
17 non-linearities, right?

18 A. I mean, I maintained the linear,
19 fitting the linear relationship. That's
20 correct.

21 Q. Your regression is sensitive to
22 influential observations, and yet you didn't do
23 any analysis to -- about why there were
24 influential observations, right?

25 A. I don't know what you mean by no

1 analysis. They're influential because of their
2 size, because of the systems or the signals
3 they chose to carry. I checked to make sure
4 there were no errors in the data.

5 Throwing out influential observations
6 is changing the data, right? I mean, an
7 analogy would be if I test a drug on 1,000
8 people and only 2 of them die, those would be
9 highly influential observations. You wouldn't
10 want to remove them from your analysis.
11 They're important to the information that you
12 gained.

13 Q. I don't think anybody is disagreeing
14 with you there. But wouldn't you want to know
15 how sensitive a regression is to an influential
16 observation?

17 A. As long as the observations are
18 correct, I would want to learn from that
19 information.

20 Q. Well -- now, you also conducted
21 sensitivity in which you, as you put it, threw
22 in additional variables, right?

23 A. Threw in? I think one of my
24 sensitivities looks at controls for DMA. One
25 of them adds another control for the 3.75

1 systems. And one of them just looks at sports
2 versus other categories.

3 Q. So what makes your sensitivity so much
4 better than Dr. Erdem's?

5 A. I mean, they're not adding variables
6 for no apparent reason or dropping data that
7 provides information.

8 Q. So what were your reasons for adding
9 the variables you added?

10 A. DMA, you might be concerned -- I mean,
11 you have raised questions about whether there
12 are geographic differences that are largely
13 driving things. So it -- you know, that would
14 use another form of identification that just
15 looks within the DMA. So I was interested to
16 see if that would be -- would give a different
17 sort of answer.

18 The 3.75, I mean, obviously, that's
19 part of the formula. So you want to make sure
20 that you're accounting for the formula. And
21 Sports versus other is obviously just a -- you
22 know, a direct test on the relative value of
23 Sports. So each of them is testing for
24 something specific and economic, as opposed to
25 just dropping observations or throwing in

1 variables that don't have any particular
2 economic meaning.

3 Q. And I believe you testified in your --
4 in your written report that your conclusions
5 are not affected by these reasonable changes in
6 model specifications?

7 A. That sounds right.

8 Q. And here at Table C-I-3, that's
9 C-Roman numeral I-3, are the results of your
10 sensitivity regressions, correct?

11 A. Yes.

12 Q. And in model 3 here -- and just as a
13 reminder, model 1 is your principal
14 methodology, correct?

15 A. Yes.

16 Q. And then model 3 is your model in
17 which you include an indicator variable by DMA,
18 correct?

19 A. Yes.

20 Q. Model 3 is, in fact, your only
21 regression that specifically controls for
22 geography; is that right?

23 A. I mean, it has -- it's the only one
24 that controls DMA by DMA. Other ones have
25 variables that differ by geography.

1 Q. But none that control specifically by
2 geography; is that right?

3 A. I mean, again, none that -- no other
4 ones that control for the specific geographic
5 location, correct.

6 Q. So if we take a look at your
7 regression results here, you still have
8 positive result for Program Suppliers, right,
9 positive and statistically significant, right?

10 A. Yes.

11 Q. And you still have positive and
12 statistically significant result for public
13 broadcasting, right?

14 A. Yes.

15 Q. Still have a negative coefficient for
16 Devotional programming?

17 A. Yes.

18 Q. Still have a negative coefficient for
19 Canadian programming?

20 A. Yes.

21 Q. But if we compare across, comparing
22 what you've got for model 3 and your original
23 model, you'll see that your Program Suppliers
24 coefficient is now about 50 percent higher. Do
25 you see that?

1 A. Yes.

2 Q. Do you think Program Suppliers would
3 agree that your conclusions aren't affected by
4 this reasonable change in the model
5 specification?

6 A. I mean, again, the question I'm asking
7 ultimately is do the rankings and the shares
8 generally support Bortz? I'm sure they would
9 say that was higher, but I don't take that as
10 changing the overall rankings or the
11 corroboration.

12 Q. Public Television also, about
13 50 percent higher in your -- in your model than
14 in your model 1, correct?

15 A. Yes.

16 Q. You think Public Television would
17 agree that your conclusions were not affected
18 by this reasonable change?

19 A. Certainly, the quantitative
20 conclusions of the regression are different. I
21 don't think it changes the overall
22 corroboration.

23 Q. Well, you say quantitative change. I
24 mean, we're talking numbers here. It's all
25 quantitative, right?

1 A. Well, I'm also looking at relative
2 ranks and things, but, yes, I agree that column
3 3 is somewhat different. I mean, as you said,
4 column 3 includes a large number of dummy
5 variables. We talked earlier about how I'm not
6 surprised that there's some statistical
7 insignificance in that. But what -- you know,
8 what I take from it is even with that large
9 number of dummy variables, the relative ranks
10 are different, but not, you know, reversed or
11 dramatically different.

12 Q. Well, you say -- you say relatively
13 large number of dummy variables or -- large
14 number of dummy variables. Let's be precise.
15 You've got 210 dummy variables, right?

16 A. That sounds right.

17 Q. 210 DMAs, so you've got 210 dummy
18 variables?

19 A. I don't remember the count, but that
20 sounds right.

21 Q. Okay. A lot less than 7300 dummy
22 variables, would you agree?

23 A. Yes, although if you're referring to
24 Dr. Crawford's regression, he uses subscriber
25 group level data so he has a lot more

1 observations than I do.

2 Q. Sure. Well, how many observations did
3 you have?

4 A. I don't remember as I sit here.

5 Q. Okay, let's --

6 A. Six accounting periods times the
7 number of systems.

8 Q. Okay. Let's take a look at your
9 summary, your summary data, and we can -- we
10 don't need to guess.

11 Summary statistics, page A-6 of
12 Exhibit 1003. Let's just go to page B-1, which
13 is the -- which is the regression results.

14 Oh, actually, never mind, leave it on
15 the ELMO. I've got it right here. What am I
16 doing. Observations, 5,465. Right?

17 A. Correct.

18 Q. Okay. I'm sorry. I should have gone
19 right to that. Okay. So you've got about
20 5,465 observations. And how many variables do
21 you have with the inclusion of -- of DMA fixed
22 effects?

23 A. I mean, there's going to be 210 DMAs,
24 plus 6 accounting periods, plus -- there's
25 probably 230 some.

1 Q. 230 some, okay. So way more -- you've
2 got way more than ten observations per -- per
3 variable in your regression, right, even in
4 your fixed effects regression?

5 A. That's true, although it's going to
6 vary, it's going to matter a lot how many
7 different systems you have in a given DMA,
8 which DMAs that you're able to use and not use.
9 But, yes, and as far as total counts, I agree.

10 Q. And are you familiar with the one in
11 ten rule in statistical analysis?

12 A. I don't believe there's any such rule.
13 Some people have rough guide rules of thumb
14 about how many observations per variable, but I
15 don't think those are ever given any credit.

16 Q. Okay. But you've got plenty of
17 observations per variable when you're using 210
18 dummy variables for -- by DMA, right?

19 A. There's no problem with the overall
20 number of observations relative to variables.
21 The DMA fixed effects might change which
22 specific DMAs are driving the results, but
23 there's no problem with the overall -- what's
24 called degrees of freedom. There's plenty of
25 data.

1 Q. Okay. So, I mean, you agree here that
2 your results when you control for DMA, they're
3 actually quite a bit better for Program
4 Suppliers and Public Television, right?

5 A. I mean, they certainly change for
6 those two numbers, yes.

7 Q. And, I mean, let's be -- let's be
8 honest here. We've -- and, you know, who are
9 we if we can't say nice things about our
10 opponents. Public Television, look, they've
11 actually got -- we make fun of them sometimes,
12 but they've some good stuff, right? I mean,
13 can you imagine subscribers might value Public
14 Television programming?

15 A. I certainly think subscribers value
16 it, yes, and I do enjoy the programs.

17 Q. Absolutely. And similar to
18 Devotional, this is one of the program
19 categories that subscribers value so much that
20 they are willing to donate their own money just
21 to keep it on the air, right?

22 A. Again, this is beyond much of what
23 I've studied but, yeah, I agree there are
24 people who value it very much.

25 Q. All right. Program Suppliers, I mean,

1 we -- we use general interest as sort of a
2 disparaging term, but, I mean, there's a reason
3 this is a general interest programming, right?
4 Yeah.

5 A. I mean, certainly, all of this
6 programming has value. The question is how
7 much value to specific cable systems, which is
8 what we're here to study.

9 Q. Now, you've got this strongly negative
10 result for Canadian, but think about this,
11 okay? Can you imagine living in a foreign
12 country or a country foreign to where your
13 family is, how much you would value programming
14 from -- from your country of origin?

15 A. I mean, not particularly because I
16 haven't done it, but, yes. Again, I agree that
17 the programming certainly has value.

18 Q. But now let's take a look at what your
19 control for geography does to Sports and
20 Commercial Television. Sports becomes
21 statistically insignificant; isn't that right?

22 A. I mean, the standard error goes up
23 slightly because of the addition of the
24 additional fixed effect, so, yes.

25 Q. The standard error goes up slightly;

1 is that what you said?

2 A. From 2.46 to 3.16.

3 Q. Well, if you would like to, we can do
4 the -- we can do the confidence interval on
5 that.

6 A. I mean, you can do it. Confidence
7 intervals on sensitivities -- I mean, now we're
8 even one level deeper. The point of a
9 sensitivity is generally to see if there is
10 a -- how sensitive is coefficient is.

11 Q. So the confidence interval here on --
12 for sports programming is going to be between
13 negative 6.75 up to positive 9.651. Does that
14 look about right?

15 A. Again, you've done the math right,
16 but --

17 Q. Thank you.

18 A. -- the concept of a confidence
19 interval is as though that's the only piece of
20 information you have.

21 Q. Well --

22 A. It's almost exactly the same number as
23 4.8. That's what you take from the --

24 Q. What you're really saying here is with
25 confidence you can say that sports is somewhere

1 in the range of the least valuable to the most
2 valuable category of programming when you
3 control for geography?

4 A. Non-remotely, right, because there's
5 four different regressions here with four
6 different sets of variables, all of which have
7 sports ranked first.

8 Q. Well, which --

9 A. The odds of that happening by chance
10 are preponderously low.

11 Q. Which of these regressions has the
12 highest R-squared -- has the best R-squared?

13 A. I mean, you add a bunch of DMA fixed
14 effects, you're going to get a higher
15 R-squared. The notion of choosing a regression
16 to maximize R-squared is given zero credit in
17 economics.

18 Q. It means -- you chose this model as a
19 reasonable model, right?

20 A. I chose it as a sensitivity check to
21 add DMA controls.

22 Q. And you chose it because there is a
23 reasonable econometric reason to do it, right?

24 A. I think -- I thought it was reasonable
25 to add those controls and look to see what the

1 overall pattern was, yeah.

2 Q. Well, look what happens to CTV
3 programming. They go from strongly positive
4 and statistically significant to negative and
5 statistically insignificant?

6 A. Right.

7 Q. Do you think CTV would agree that your
8 -- your conclusions don't change based on the
9 -- your sensitivity here?

10 A. I think they would probably think that
11 one changes a lot, and say when it's the most
12 localized of programming, you probably
13 shouldn't control for every single DMA.

14 Q. What are the only two categories here
15 of programming that have a positive and
16 statistically significant coefficient when you
17 control for geography?

18 A. Under that regression, it's Program
19 Suppliers and Public Television.

20 Q. Program Suppliers and Public
21 Television are the only program categories that
22 have a positive and statistically significant
23 coefficient under this control for DMA; is that
24 right?

25 A. Right. Again, I think what's most

1 important is the extent to which coefficients
2 match across columns.

3 Q. Okay.

4 A. And so I don't think it's valid to do
5 a hypothesis test or a confidence interval on
6 one regression when you're looking at four.
7 It's just not the way to use the tool. But,
8 yes, that's -- in that column, that is what it
9 says.

10 Q. Can we take a look at Exhibit 6036,
11 which is Dr. Gray's direct testimony, page 19.
12 Okay. So I'm putting up in front of you --
13 this is -- these were the shares from
14 Dr. Gray's, MPAA's witness, Dr. Gray's shares.

15 A. I see that.

16 Q. And if you go through every year,
17 2010, '11, '12, '13, and who are the two top
18 shares in each of those years?

19 A. It looks like Program Suppliers and
20 Public.

21 Q. Every year, right?

22 A. It looks like it, yes.

23 Q. And so on the top two comparison
24 methodology, one interpretation of your control
25 for DMA is that you've just corroborated

1 Dr. Gray's results, haven't you?

2 A. Not remotely. Even if you want to
3 talk about significance of a single column, you
4 don't compare significance to get important to
5 compare coefficients. Significance -- or
6 confidence intervals tell you something about
7 the precision of those coefficients, but you
8 can't step from a statement about statistical
9 significance to a statement about magnitude of
10 value.

11 Q. Well, other than JSC, whether you talk
12 about the -- the absolute value of that
13 coefficient or whether you pay attention to the
14 fact that it's actually showing no
15 corroboration, you're matching two of the top
16 three categories, aren't you?

17 A. I think I lost something in your
18 question. Not at all based on the statistical
19 significance measure. You could look at the
20 coefficients, and then I would encourage you to
21 look at the overall body of results that I
22 presented and the shares that I presented.

23 Q. Certainly, one interpretation of your
24 DMA control test is that you're actually
25 matching the top two of Dr. Gray's shares based

1 on his analysis, correct?

2 A. Again, no. You can't -- you can
3 question the significance of the sports
4 coefficient, but you can't compare shares,
5 which are a measure of value times minutes, to
6 a question of which coefficients are or are not
7 significant. Shares are about the size of the
8 coefficient.

9 Q. And, of course, you are aware that
10 Dr. Gray, when he calculated these shares, was
11 missing a large body of his data, correct?

12 A. I believe other people have commented
13 on that, yes.

14 Q. Let's go back to the ELMO here. So in
15 spite of your results, when you control for
16 DMA, I take it you would still say that Bortz
17 is the best methodology?

18 A. I think it's the appropriate
19 methodology to use in the case, yes.

20 Q. Is Bortz a better methodology than
21 your regression methodology?

22 A. I mean, they answer different
23 questions, as I've said. I think -- as I
24 mentioned earlier, I think because the
25 regression, you know, has to learn what it can

1 learn from kind of discrete and a limited --
2 you know, a discrete set of choices that these
3 systems make, I think Bortz gives you a more
4 refined measure because it asks people directly
5 for their valuations.

6 So I think Bortz directly measures the
7 valuations, and the purpose of a regression is
8 to make sure those valuations are consistent
9 with what's in the marketplace.

10 Q. Okay. Would you say that Bortz is a
11 better methodology than these regressions even
12 though, for example, the last warm-up question
13 in the -- in the -- in the Bortz survey was
14 about cost instead of value?

15 A. I mean, yes. Again, given that the
16 ultimate question is the relevant question and
17 its corroborated by the evidence in the
18 marketplace.

19 Q. Would you say that Bortz is better
20 than the regression methodologies, even though
21 in the WGNA program list, it lists the Chicago
22 Cubs, the Chicago White Sox, and the Chicago
23 Bulls in the WGNA program listings?

24 A. Now I think I've lost your thread. I
25 mean, ultimately, those sorts of surveys issues

1 I haven't delved into. The way I have
2 addressed whether those sorts of things matter
3 or not is to see whether it matches the
4 regression methodologies that I've used and
5 that have been used in this proceeding in the
6 past.

7 Q. Do you think that Bortz is better than
8 the regression methodologies even though after
9 they made these changes, the Sports share went
10 up several points and the Devotional share went
11 down several points?

12 A. I mean, again, I think Bortz is asking
13 the relevant question. And what I can bring to
14 the table is that when you use the basic
15 regressions that are -- that I use and that
16 have been used in the past, it's corroborated
17 with the market data. That's really what I can
18 add to the discussion of how valid the survey
19 is.

20 Q. Do you think the Bortz survey is a
21 better methodology even though it leaves this
22 WGNA non-compensability issue just enough
23 unaddressed so that they can argue with a
24 straight face that the Devotional shares should
25 be reduced further?

1 MR. LAANE: I object to the question,
2 Your Honor.

3 JUDGE BARNETT: Sustained.

4 BY MR. MacLEAN:

5 Q. In spite of these issues with the
6 Bortz surveys, could you explain to the Judges
7 why they should use the Bortz survey instead of
8 a regression in which the sports share is
9 statistically insignificant?

10 A. First of all, the sports share is
11 significant in my main regression and highly
12 corroborated in value across all my
13 regressions.

14 But, second of all, as I've explained,
15 the Bortz survey asks the direct relative
16 valuation question. It gets -- it's asking the
17 question that I believe this proceeding needs
18 to answer. And it's corroborated in its
19 rankings and its top three valuations by two
20 separate regression analyses.

21 MR. MacLEAN: Thank you, nothing
22 further.

23 MR. COSENTINO: Your Honor?

24 JUDGE BARNETT: Mr. Cosentino.

25 MR. COSENTINO: Thank you.

1 CROSS-EXAMINATION

2 BY MR. COSENTINO:

3 Q. Good afternoon, Doctor.

4 A. Good afternoon.

5 MR. COSENTINO: I'm sorry, Your Honor.

6 Are you ready for me to proceed?

7 BY MR. COSENTINO:

8 Q. So we generally have been referring to
9 your work as a regression, right? But that's
10 -- we refer to the Israel regression, the
11 Crawford regression, the George regression,
12 Waldfogel regression, but it's more than that,
13 correct? Regression is just a tool within the
14 whole analysis?

15 A. That's fair.

16 Q. Okay. And just trying to get my
17 technology up. All right. We're going to do
18 this without it.

19 A. I'll resist any joke about it being a
20 distant signal.

21 (Laughter.)

22 JUDGE FEDER: You didn't resist very
23 hard.

24 (Laughter.)

25 THE WITNESS: Fair point.

1 BY MR. COSENTINO:

2 Q. So -- all right. So, okay.

3 In fact, the process that you use
4 is -- and help me understand this -- you
5 probably research the task, you build a model,
6 you collect your data, you run your regression,
7 and then you do your valuation? Is that the
8 kind of process?

9 A. You mean what I did in this specific
10 case or what I would do?

11 Q. Sure, in this particular case.

12 A. I mean, this case is somewhat unique.
13 That's why I asked because there was a
14 preexisting record of regressions in the -- in
15 the previous proceedings. So in this case, I
16 researched it, as you said, first, but that was
17 heavily guided by sticking quite closely with a
18 small number of changes to previous regressions
19 so that I was using a tool that had previously
20 been useful and obviously wasn't creating
21 something to achieve some specific purpose.

22 Q. Okay. So --

23 A. But other than that I would agree, I
24 researched it, including the previous
25 proceedings, and then went on to collect the

1 data, run the regression, and evaluate the
2 regression.

3 Q. All right. So in the research, you
4 looked at Waldfogel's regression analysis?

5 A. Yes.

6 Q. Okay. And his testimony?

7 A. Yes. It has been a little while since
8 I read his testimony, but definitely I did.

9 Q. But this was back when you were coming
10 up with your idea of how you were going to
11 approach this?

12 A. Right. I mean, I was very consciously
13 attempting to link back to what he and
14 Dr. Rosston had done.

15 Q. Okay. And you read Dr. Rosston's
16 written testimony?

17 A. Yes. Again, those have both been a
18 while so my recollection will be fuzzy, but,
19 yes, I did.

20 Q. Okay. Did you read the decisions of
21 the CARP and the CRB with respect to those
22 regressions?

23 A. Yes, I believe so. I believe I read
24 all of them, but, again, that was all very
25 early.

1 Q. Okay. Do you recall what else you
2 read at that time?

3 A. I really don't remember a full list of
4 what I read. I know I read Waldfogel and
5 Rosston and the decisions. Nothing else is
6 coming to mind.

7 Q. Okay. Did you read any of the old
8 Bortz reports?

9 A. I don't think I read the Bortz -- the
10 previous Bortz reports, but that might be
11 wrong. It's possible early on I reviewed -- I
12 certainly had reviewed some of the shares and
13 the results, but I don't remember if I read an
14 entire Bortz report from before.

15 Q. Okay. And then you developed your
16 model at that point to emulate, was it
17 Waldfogel's model?

18 A. Yes, that's fair.

19 Q. Okay. Is it -- and the differences
20 between your model and Waldfogel's model, can
21 you summarize those?

22 A. Sure. There's just a few. And
23 they're pretty minor differences. One of them
24 was really not a difference in the model, just
25 a difference in how the minutes were counted

1 because since the last proceeding, there has
2 been this -- I think a change in the law and
3 therefore an increased use of subscriber
4 groups, as I understand where the system only
5 has to pay for the subscribers actually
6 receiving the content.

7 I used a prorated minutes measure that
8 accounted for what percentage of the
9 subscribers received the distant signal. I
10 also -- again, not really a change to the model
11 but just to the data -- used 28 days of
12 programming guides to get the minutes mix as
13 opposed to 21.

14 And then one more -- I added a control
15 variable, basically, for the network minutes.
16 I think he had had just a low-power bucket but
17 not anything else as separate from the
18 categories. But I also added a network
19 control. Those are the ones I remember.

20 Q. Okay. And I wanted to ask you about
21 within the model, the purpose of the -- the
22 purpose of the regression approach, right, I
23 think you said you want to learn from choices.
24 Do you recall?

25 A. Yes.

1 Q. Okay. And what are the choices we
2 want to learn from?

3 A. What -- I would say what signals and
4 then ultimately what types of content systems
5 make, what they choose to carry.

6 Q. Okay. So what cable system operators
7 decide to carry, those are the choices that are
8 relevant?

9 A. Correct.

10 Q. Okay. And the model should reflect
11 the environment in which those choices are
12 made?

13 A. I'm not sure I understand the
14 question. I mean, generally, it should be
15 built to reflect the factors that affect the
16 price on the choices.

17 Q. Okay. But it should reflect what
18 choices are available; would you say that?

19 A. I mean, I think it should reflect the
20 choices that are made. I think the choices
21 that are made indicate the value that people
22 put on the content. So I'm not sure what to
23 say beyond that.

24 Q. Okay. Now, we mentioned -- you
25 mentioned earlier on direct that you understood

1 that the Canadian signals could not be carried
2 throughout the country. Is that correct?

3 A. Yeah. My general understanding is
4 there is a Canadian zone in which those signals
5 are -- I guess I'm not sure of the exact lines
6 of the law, I'm not a lawyer, but I think
7 they're at least generally and perhaps
8 completely available within a Canadian zone.

9 Q. Okay. And not available outside the
10 Canadian zone?

11 A. My recollection, I think, is they
12 can't be carried under the compulsory license
13 outside the Canadian zone, but, again, I'm not
14 a lawyer. So I may have the details of the law
15 wrong, but that's my general understanding.

16 Q. No, and I think that's right.

17 So a decision by Canadian -- by a
18 cable system within the Canadian zone to carry
19 a Canadian signal is one of these choices that
20 you're trying to document, right, and learn
21 from?

22 A. I would say yes, but also the
23 decisions made by all the systems.

24 Q. Okay. And so there are many cable
25 systems within Canadian zone. Not all of them

1 carry Canadian signals. And that tells us
2 something about how they value Canadian
3 signals, correct?

4 A. I agree, those choices tell us
5 something, yes.

6 Q. Okay. Now, for systems that are
7 outside the Canadian zone, do the cable systems
8 have a choice to carry a Canadian signal?

9 A. No. I mean, in the way I interpret
10 the model, that would mean that's one of the
11 many reasons why they don't put value on that
12 content because it's not something they're
13 legally allowed to carry.

14 Q. Well, is that a lack of value or lack
15 of choice?

16 A. I'm not sure as an economist I draw a
17 distinction. I think what I want to understand
18 is what content people pay for for any of the
19 various reasons they choose to carry it, right?
20 So it might be they don't carry stuff outside
21 the Canadian zone because they can't. It might
22 be because some people in more distant markets
23 don't carry a signal because it's too far
24 distant.

25 I think ultimately -- that's why I

1 said what I said earlier; ultimately, I think
2 what's relevant economically is what they
3 choose to carry, and one of the reasons they
4 might make that choice or not make that choice
5 might be regulatory restrictions.

6 Q. But if there's a regulatory
7 restriction, it's not a choice, is it?

8 A. I mean, again, maybe that's a legal
9 distinction. As an economist, the way I think
10 about it is people carry what has value for
11 them and there's various reasons why they may
12 or may not carry -- I generally don't try to
13 control for every reason why they do or don't.
14 I just try to see what people do and,
15 therefore, on average, which different systems
16 have value for different content.

17 Q. You --

18 A. I take your point legally. As an
19 economist, there are so many different reasons
20 why systems might make that choice, that I'm
21 not trying to distinguish each reason. I'm
22 just trying to understand what they carry and
23 what they pay for what they carry. And if one
24 of the reasons is a legal reason, that's one of
25 the reasons.

1 Q. All right. There was an example that
2 was used earlier last week by an economist of a
3 signal in Windsor and a signal in Detroit.

4 A. Okay.

5 Q. And both are carried, for example,
6 within the Canadian zone by cable systems.

7 A. Okay.

8 Q. And none are carried outside the
9 Canadian zone.

10 A. Okay.

11 Q. Now, do we know more about the cable
12 system operators' interest in the Detroit
13 signal which can be carried outside the
14 Canadian zone but is not, than we know about
15 the Windsor signal, which can't be carried
16 outside?

17 A. I mean, we have one more reason that
18 might apply to the Windsor signal. It might be
19 that a system doesn't want to carry either or
20 has reasons why they do or don't want to carry
21 Detroit. But I would say in each case we know
22 that systems that choose not to carry it aren't
23 paying for it.

24 And I would agree that in the case of
25 Windsor, we have one more potential explanation

1 for that.

2 Q. Okay. But you haven't modeled
3 anything that would take that into account in
4 your model?

5 A. I mean, I don't think I agree with
6 that. I think what I've modeled in all these
7 cases is the decisions that are made and,
8 therefore, the average valuation.

9 So if the average valuation in the
10 case of Canadian signals is a mixture of the
11 Canadian zone that can carry it and has value
12 and, I agree with you, a number of non-Canadian
13 zones that can't carry it and, therefore, place
14 zero value on it, I think what I'm computing is
15 that overall average.

16 I don't think that's substantively
17 different, by the way, from -- you know, just a
18 different regression methodology, but it's not
19 substantively different from modeling the
20 Canadian zone and modeling the rest of the
21 country, getting zero for one and a positive
22 number for the other and averaging the two.

23 I mean, I think that's what Dr. George
24 has done. And I don't think those are
25 answering different questions. I just think --

1 I think there's other differences in my
2 methodology and Dr. George that explain why we
3 get different answers.

4 Q. All right. Well, let's move on then
5 to that. One of the next steps in this process
6 is gathering your data, right? Now that you've
7 got a model, you need to load up your data.

8 In your report, you talk about getting
9 your data on program classifications from TMS
10 Gracenote, correct?

11 A. Well, I got the list of programming
12 from TMS Gracenote. So that -- that's like a
13 channel guide you would see on your TV. And
14 then from that, working with Mr. Trautman and
15 Mr. Klein and my team working with him, we used
16 those program listings to -- we classified the
17 programs that were listed and, therefore, got
18 the mix of programming on each signal.

19 Q. All right. Now, after the direct
20 cases in this proceeding were filed, several
21 parties amended or corrected their
22 categorization. Dr. Crawford corrected his,
23 Dr. George adjusted hers, and eventually, I
24 believe, Dr. Erdem modified his list of
25 programs that appeared on Canadian signals.

1 Did you review that?

2 A. I mean, I recall that Dr. George had a
3 different list or some differences from mine in
4 the Canadian signals. As far as the timing of
5 when people modified their classifications, I
6 mean, I don't remember. We -- we took care to
7 classify using the TMS data up front, and I
8 stuck with those classifications.

9 Q. Okay. Did you ever review any of the
10 data from the Canadian Radio, Television, and
11 Telecommunications Commission?

12 A. I personally did not. I don't know if
13 the team did or not. I do know that my
14 analysis used our TMS-based classifications
15 throughout.

16 Q. Okay. Eventually, Dr. George filed a
17 rebuttal which indicated that about half a
18 million minutes of programming -- I think that
19 was her top 50, amounted to over half a million
20 minutes of programming, were misclassified in
21 your regression model.

22 A. Right.

23 Q. Did you correct your regression model
24 after that?

25 A. We talked about it on direct. What I

1 did was use those classifications as a test to
2 see if they changed my results. And they --
3 basically none of the estimated coefficients or
4 shares moved by more than a percentage point or
5 so.

6 So I did not change my original
7 classifications, but I checked to see if that
8 made a material difference.

9 Q. Okay. But you didn't -- I mean,
10 that's not available anywhere for anyone to
11 look at, right?

12 A. I mean, it only came from Dr. George
13 in her rebuttal. So I tested once she put that
14 in her rebuttal testimony.

15 Q. Okay. After you've assembled your
16 data, then you run your regression and that
17 gives you a -- basically this coefficient of
18 interest, which is essentially a price, right?

19 A. I think of it as a value, really,
20 because it's being driven by the demand side
21 choices. So I think it's indicating the amount
22 that people pay given the regulated pay
23 structure and, therefore, the value they must
24 put on the content, if they're willing to pay
25 that much and still carry it.

1 Q. It's a value per minute?

2 A. Given that I measure things in
3 minutes, it's really the value per these pro
4 rated minutes, but, yeah, I think it's fair to
5 call it a value per minute.

6 Q. Okay. And then you multiply it by
7 compensable minutes to determine your shares,
8 correct?

9 A. Right. And as I mentioned earlier,
10 you're controlling for a bunch of other stuff.
11 So I think the right way to think of them is
12 relative values per minute. And I think the
13 thing you can best do with them is use them to
14 figure out relative values and, therefore,
15 relative shares.

16 Q. Okay. But by themselves, these
17 coefficients don't -- I mean, you're not
18 suggesting we compare the coefficients and
19 determine relative value based on those, right?

20 A. Only relative value per minute. You
21 then have to multiply by the number of minutes
22 to get the share.

23 Q. Right.

24 A. So you have to multiply the value
25 times the units, basically, the value per unit

1 times the units.

2 Q. Right. Because the units -- you know,
3 the typical valuation process is how many of
4 something do you have and what are they worth
5 each?

6 A. Precisely.

7 Q. All right. Now, your results come out
8 with a negative coefficient for Canadians, for
9 Canadian Claimant content. Dr. Waldfogel's
10 results came out with a 3.3 percent share for
11 Canadian Claimants.

12 Do you recall that?

13 A. I didn't recall the exact number
14 but --

15 Q. Okay. Well, I'd show it to you. But
16 I think it's actually in your testimony.

17 A. Yeah, I mean, it sounds right. I just
18 didn't want -- I didn't recall the exact
19 number.

20 Q. Okay. Can you turn on the ELMO.

21 A. There it is.

22 Q. There we go. See it, 3.3?

23 A. Yes.

24 Q. Okay. Now -- and there was another
25 table that you had which showed Dr. Ducey's

1 compensable minutes versus Dr. Crawford's
2 compensable minutes. Do you recall that?

3 A. Yes.

4 Q. And there was a move from 4.5 percent
5 for the Canadians to 6.6. Do you recall that?

6 A. I don't recall the specific numbers,
7 but I -- that sounds like it could be right. I
8 certainly don't question you.

9 Q. So this is from your rebuttal
10 testimony.

11 A. Yes.

12 MR. COSENTINO: And, Your Honor,
13 though it says restricted at the top, I believe
14 this page is not.

15 MR. LAANE: That's correct.

16 JUDGE BARNETT: Thank you.

17 THE WITNESS: Yep, I agree. I see the
18 numbers.

19 BY MR. COSENTINO:

20 Q. Okay. So in terms of the total amount
21 of compensable programming for the Canadian
22 Claimant groups, it has gone up by about
23 50 percent, correct?

24 A. That sounds right.

25 Q. And, in fact, we have more compensable

1 minutes than sports?

2 A. I mean, just in terms of this volume
3 of minutes measure.

4 Q. Right.

5 A. They were about the same before and
6 now it's half a percentage point higher.

7 Q. So even though we have gone up by
8 50 percent, your regression compared to
9 Dr. Waldfogel's regression knocks us down to
10 zero?

11 A. I mean, the regression, as you've said
12 itself, finds a negative value per minute,
13 which I make zero. And then it leaves -- it
14 leaves a zero. As I've indicated, I think
15 there's value and I think the Bortz survey is
16 the way to get at it, but I agree that because
17 the regression itself, similar to what
18 Dr. Rosston found the first time, by the way,
19 and does not find a positive value per minute,
20 the regression itself returns a zero.

21 Sort of 4.5 versus 6.6 ends up not
22 affecting it because it has got a zero value.

23 Q. Okay. Now, you have -- you have, as
24 you just did, touted the Bortz survey numerous
25 times as being a better tool than your

1 regression. Is that fair?

2 A. I mean, I think it's a better tool for
3 purposes of assigning the ultimate valuation
4 because I think it goes right to that question
5 in a more continuous, precise way than the
6 regressions can do.

7 Q. But during the course of your
8 testimony today when you have volunteered that
9 you're not a survey expert -- is that correct?

10 A. That's fair. What I can bring to the
11 table is understanding what question the survey
12 asks and that, as an economist, it's the
13 relevant question, and then confirming that the
14 results are consistent enough with marketplace
15 data, corroborated by marketplace data that I
16 would feel comfortable using them.

17 Q. All right. When we went -- when we
18 talked about these steps, research and the
19 model, collecting the data, running the
20 regression, determining relative value, do you
21 have a sense of how much time you put in over
22 the last several years doing this?

23 A. I really don't. I mean, I started
24 working on this case -- you guys know these
25 proceedings go on. I started working on this

1 case, I think, five or six years ago. I really
2 don't know the total time.

3 Q. I mean, do you have -- you mentioned
4 staff at some point. How many people do you
5 have working for you on this project?

6 A. Oh, there's at least two that I
7 interact with regularly. They may have people,
8 you know, who help with some of the programming
9 and things, but I mean it's certainly hundreds
10 of hours of my time and theirs, but beyond
11 that, I can't give you the -- how many
12 hundreds.

13 Q. Okay. And do you know how long it
14 takes to respond to a Bortz survey?

15 A. I don't know exactly.

16 Q. Do you have any idea?

17 A. I mean, I really don't know the exact
18 number of minutes. I have seen the questions.
19 I really -- I have not gone through it. I
20 would be guessing.

21 Q. Ten minutes, 15 minutes?

22 A. I really don't know.

23 Q. Okay. Do you think it compares to the
24 amount of time you put in to doing your
25 regression analysis?

1 A. I'm sure I spent more time doing the
2 regression analysis. Regressions by their
3 nature take a longer time to do than filling
4 out a survey. I mean, I don't make much of
5 that but --

6 Q. Well, you've referred to the survey
7 responses as fine-tuned, precise, and refined.

8 A. I would --

9 Q. Working rather quick?

10 A. I would compare a survey response to
11 one of the data points in the regression, not
12 to the process of running the regression.
13 That's more like the process of Bortz writing
14 the survey and taking the survey and running
15 the analysis, right? I think a survey response
16 is a data point.

17 And it's a data point that let's a CSO
18 indicate its value in a continuous way, rather
19 than just having these kind of discrete
20 decisions about what to carry. So I think it's
21 important that the two roughly corroborate each
22 other, but given that, the Bortz survey lets
23 people give a precise valuation as opposed to
24 just a discrete carriage choice over a
25 generally small number of signals.

1 Again, I think they're both important.
2 I think, though, the key here is that they
3 are -- that there's corroboration.

4 Q. And corroboration, in your view, is
5 just that the top couple -- the top largest
6 categories match?

7 A. Yeah, as I've said, I think the keys
8 are that the top three categories -- the
9 ranking is the same. And at the very top, the
10 valuations are quite similar. I mean, again,
11 given my experience with regressions, that's a
12 really good match for marketplace data to what
13 a survey gives you.

14 Q. All right. Thank you. I have no
15 further questions.

16 JUDGE BARNETT: Thank you,
17 Mr. Cosentino.

18 Other cross-examination for this
19 witness? Mr. Olaniran.

20 CROSS-EXAMINATION

21 BY MR. OLANIRAN:

22 Q. Good afternoon, Dr. Israel. My name
23 is Greg Olaniran and I represent Program
24 Suppliers.

25 A. Good afternoon.

1 Q. According to your testimony, one of
2 the tasks that you were assigned by the Joint
3 Sports Claimants to do was to review the Bortz
4 report that was done by Mr. Trautman; is that
5 correct?

6 A. Yes, generally to review the results
7 for purposes of them seeing if they were
8 matched by market data.

9 Q. And on page 1 of your testimony, you
10 cite that the report assessed relative fair
11 market value of the different -- of the
12 different programming categories.

13 Do you see that?

14 A. Where?

15 Q. It's on page 1, paragraph 6 of your
16 testimony. The point is you referred to
17 relative fair market value.

18 MR. LAANE: Are you referring to page
19 2, Greg?

20 MR. OLANIRAN: It might be.

21 BY MR. OLANIRAN:

22 Q. Actually, yeah. I'm sorry, it's page
23 2.

24 A. Yeah, I found it.

25 Q. Thank you.

1 A. I see that, yes. And, I mean, I know
2 sometimes fair market value has a legal term.
3 I mean it in the sense of an economist as far
4 as what the value of the content would be in a
5 market -- in a free market.

6 Q. Well, I just wanted to make sure that
7 when you used the phrase "relative fair market
8 value," do you also mean the relative
9 marketplace value, which is the phrase that's
10 used fairly frequently in the course of these
11 proceedings?

12 A. Yeah, I do. As an economist, I'm not
13 distinguishing between those terms.

14 Q. Okay. And you've said that the Bortz
15 questions are the right questions. Do you
16 recall saying that?

17 A. Yes.

18 Q. And that -- that goes to the heart of
19 the matter. Do you recall that?

20 A. Yes.

21 Q. I think you said also it's continues
22 -- it's -- it asks the right questions. I
23 think I said that. I'm trying to -- you used
24 quite a few different ways to describe Bortz.
25 I just wanted to make sure I capture that.

1 So -- but, in essence, you believe
2 that the Bortz survey results are evidence of
3 relative marketplace value of the different
4 categories of programming at issue in this
5 case, correct?

6 A. Correct.

7 Q. And before preparing your testimony,
8 did you review -- I think you said earlier you
9 didn't review the Bortz report for 2010 through
10 2013; is that correct?

11 A. I have reviewed the Bortz report for
12 this.

13 Q. Before you prepared --

14 A. Oh.

15 Q. -- your testimony, did you review the
16 2010 through '13 Bortz report?

17 A. I don't recall. I certainly have
18 reviewed it in the proceeding. I think before
19 my -- and certainly before I finalized my
20 testimony, I believe that I reviewed it.

21 Q. Do you recall whether or not you
22 reviewed it before you began preparing your
23 testimony?

24 A. I don't know that I read it before I
25 began preparing my testimony. As I mentioned

1 earlier, I certainly did my regression analyses
2 and things and designed the initial -- the
3 original regression having not seen the Bortz
4 results.

5 And I certainly now have reviewed the
6 Bortz results. There has been multiple rounds
7 of reports. So exactly when I had reviewed it
8 and how that lines up with the timing of the
9 original and rebuttal report, I don't remember
10 as I sit here. I think it was late in the
11 process of preparing the direct testimony.

12 Q. Okay. Did you review the -- the Bortz
13 survey results? And I'm distinguishing between
14 report itself and the survey results. Did you
15 have access to the survey results before you
16 began preparing your testimony?

17 A. Not before I began preparing it, but
18 certainly before I finalized it.

19 Q. You saw the results before you
20 finalized your testimony; is that right?

21 A. I mean, there's tables with the
22 results in my testimony, so, yes.

23 Q. And did you also -- in preparing your
24 testimony, did you review any of the completed
25 surveys?

1 A. I certainly didn't systematically go
2 through all the completed surveys. I had seen
3 the survey form. I don't remember if I saw one
4 filled out by an actual respondent or not.

5 Q. But you did at some point before
6 completing your testimony review the survey
7 responses?

8 A. Before completing my testimony, I
9 certainly reviewed a survey and I had access to
10 the data that gave the implied valuations from
11 Bortz. I did not -- I'm not saying that I went
12 through every line of the data that they
13 collected. I reviewed the survey and I
14 reviewed the ultimate results of the survey
15 that are presented in the Bortz report.

16 Q. I'm actually asking about the
17 questionnaire -- the completed questionnaire
18 itself, whether or not you got a chance to
19 review it before completing your report.

20 A. Any completed questionnaire or --

21 Q. A completed questionnaire.

22 A. Yeah, as I said, I reviewed the
23 questionnaire forms. I don't recall whether I
24 reviewed one that was filled out or not. What
25 I'm certain I did was review the survey

1 instrument and then the summarized data.
2 Whether I reviewed a specific filled-out survey
3 form, I don't remember.

4 Q. You have no recollection whatsoever
5 about reading a completed questionnaire with
6 allocations in it?

7 A. Yeah, I just don't remember whether I
8 saw one that was filled out by an actual
9 respondent or not.

10 Q. Do you recall the questions?

11 A. I mean, generally, yes. There's four
12 main questions.

13 Q. The questions that were in the
14 questionnaire, whether it's a completed one or
15 not?

16 A. Yeah, I recall there being four main
17 questions in the questionnaire. And I've gone
18 through those.

19 Q. Okay. And so you recall -- put up
20 6020, please, Exhibit 6020.

21 Can we go to Question 2b. I'm sorry,
22 is this -- I'm sorry.

23 JUDGE BARNETT: Are these individual
24 survey responses restricted?

25 MR. OLANIRAN: It is. But my question

1 is not going to go specifically to the
2 responses, just the question itself.
3 Otherwise, we can close the door just to be
4 safe.

5 JUDGE BARNETT: Well, the survey form,
6 if it is restricted, is currently on view to
7 the world. And if you're going ask questions
8 about this that should be restricted in the
9 record, then we need to not only close the door
10 but restrict the record.

11 So are you going to ask questions that
12 are not going to impinge upon any confidential
13 information?

14 MR. OLANIRAN: That is correct, Your
15 Honor.

16 JUDGE BARNETT: All right.

17 MR. OLANIRAN: And I will focus just
18 on the question, on Question 2b, the text of
19 Question 2b, not the responses to Question 2b.

20 BY MR. OLANIRAN:

21 Q. Are you okay?

22 A. Yes.

23 Q. Have you had a chance to look at that
24 question?

25 A. Yes.

1 Q. And so in this question, the
2 respondent has been asked a question about the
3 order of importance of certain program
4 categories to the system. Do you see that?

5 A. I do.

6 Q. And let's go to Question 3. I'll give
7 you a second to take a look at that.

8 A. Yeah. I mean, I'm familiar with this
9 question.

10 Q. Okay. And do you agree that the
11 Question 3 is asking the respondent, again, to
12 do some type of ranking based on how expensive
13 the programming is, right?

14 A. How expensive they think the
15 programming -- it would be to acquire the
16 programming, yes.

17 Q. Okay. And then let's go to Question
18 4a. And this is the constant sum question,
19 right?

20 A. I think that's what it has been
21 referred to, yes.

22 Q. Okay. And then Question 4a, the
23 respondent is being asked the dollar amount the
24 respondent would have spent on each category of
25 programming in this particular year in

1 question, right?

2 A. Right. He's asked to estimate the
3 relative value and then ultimately asked what
4 -- of the fixed dollar amount, what percentage
5 would have been spent on each category, yes.

6 Q. Okay. Now, did each of these
7 questions, 2b, 3, and 4, require the respondent
8 to have a particular type of market in mind
9 when they're responding to it?

10 A. My understanding is they're asking for
11 a given cable system that this person -- the
12 first question asks them if they were
13 responsible for purchasing content for a cable
14 system. And then 2, 3, and 4, I think, ask
15 them to think about purchases for that cable
16 system.

17 Q. Well, let me be more -- in Question
18 2b, what market was the respondent supposed to
19 have in mind when responding to that question?

20 A. I'm not sure -- the only reason -- I
21 don't want to miss you. I'm not sure I know
22 what you mean by what market?

23 Q. In other words, is it a market with
24 regulation where a Section 111 compulsory
25 license exists, or is it an unregulated market?

1 A. I mean, I think 2b, they're just asked
2 to rank sort of how they value this content for
3 their cable system.

4 Q. So your testimony is that they weren't
5 supposed to have any particular market in mind;
6 is that right?

7 A. My understanding of this question is
8 they're just being asked to rank how important
9 they are to their cable system.

10 Q. I understand that. But is it your
11 testimony also that they were not supposed to
12 have any particular market in mind when they're
13 answering that question?

14 A. Yeah, I mean, if there's instructions
15 above what's on the screen now, I don't recall
16 whether there was a reference to any market.
17 My recollection is they were just asked to rank
18 -- to think about their cable system and how
19 they would rank the relative importance of the
20 content for their cable system.

21 Q. Well, let's -- and let's go to
22 Question 3. And I think I'll ask you the same
23 question about Question 3.

24 Do you think the respondent was
25 supposed to have in mind a particular type of

1 market in responding to the how expensive
2 question?

3 A. Again, my recollection, and there may
4 be other instructions I'm not recalling, would
5 be they'd think about the purchase of that
6 content as it applied to their cable system.
7 So I think they would be thinking -- I don't
8 know if they were directed a certain type of
9 market interaction, but I think they were asked
10 just, in their view, how expensive it would be
11 to acquire content of this type in their, you
12 know, sort of professional responsibility of
13 acquiring content for their cable system.

14 Q. So in formulating your approach to
15 what you were asked to do by Joint Sports
16 Claimants, it wasn't important to you, with
17 respect to Question 2 or Question 3, whether or
18 not the respondent had a particular market in
19 mind in responding to those questions?

20 A. I understood Question 2 and 3 to be of
21 a nature I see in lots of work when we -- when
22 I work with survey experts, that they ask
23 certain -- sometimes called warm-up questions,
24 to get people thinking about the type of
25 content or the type of product at issue.

1 So I understood and left to the survey
2 expert that idea of warm-up questions. And I
3 focused my attention on valuations as described
4 at Question 4.

5 Q. So the answer to my question is that
6 it was not important to you whether or not they
7 had a particular market in mind?

8 A. For Questions 2 and 3, I think that's
9 correct in the sense that they were -- I
10 understood them to be warm-up questions and I
11 defer to the survey experts on asking good
12 warm-up questions.

13 Q. Let's talk about Question 4 then. And
14 with regard to Question 4a, was the -- was the
15 respondent supposed to have a particular type
16 of market in mind, whether the market was
17 regulated or not regulated?

18 A. I mean, no. It appears to me they
19 were -- what they were supposed to have in mind
20 is the relative value to their cable system
21 therefore, if they divided up that relative
22 value, what they would spend.

23 Q. So --

24 A. My job as an economist, I think, is to
25 take those relative values and infer what they

1 mean about the marketplace, as I understand the
2 marketplace would exist based on my work in
3 this industry.

4 Q. I understand. My question is whether
5 in formulating a response to that question,
6 whether or not a respondent was supposed to
7 have a particular type of market in mind, be it
8 regulated or unregulated market.

9 A. I mean, I think they are just being
10 asked if you had to divide up based on your
11 value -- it's quite clear at the beginning of
12 the question -- if you were going to divide up
13 dollars based on your relative value, not
14 mentioning a specific marketplace, just divide
15 up what it's worth to you across these six
16 categories, how you would do it.

17 Q. So, again, it wasn't important -- in
18 formulating the analysis of marketplace
19 behavior, it wasn't important to your analysis
20 whether or not the respondents had in mind a
21 particular type of market?

22 A. I mean, I think of this as measuring
23 the value place by the buyer, right? So I --
24 in various ways in my work all the time, I
25 think about measuring the value buyers place on

1 things. And then it's my job as an economist
2 to think about what that would say about the
3 marketplace.

4 So I don't take this as the -- it's
5 not -- the answer to your question is no, I
6 don't take it as important for the buyer to do
7 the work of understanding what the marketplace
8 will look like. I think it's important for the
9 buyer to indicate his or her valuation on the
10 product.

11 Q. So what the respondents -- well,
12 strike that.

13 Do you think the respondents should
14 have had a market in mind when responding to
15 these questions or no?

16 A. I think the buyer should have the how
17 valuable they think the content is and
18 something like their willingness to pay for the
19 content in mind.

20 JUDGE STRICKLER: Did you have an
21 understanding as to whether or not --
22 objectively from looking at the questions,
23 whether the respondents should do their
24 relative valuation of these distantly
25 retransmitted categories based on already

1 having other channels and other programming in
2 their cable system or that they should consider
3 this sort of ab initio, if they were creating a
4 cable system, or value it in some other order
5 of arrival, if you will.

6 THE WITNESS: I mean, my -- I think
7 the way I would understand it would be they
8 would have in mind the other content they have
9 on their cable system, and this would be
10 additional content.

11 The reason I have that in mind --
12 sorry.

13 JUDGE STRICKLER: That's okay. Please
14 go ahead.

15 THE WITNESS: -- is just I do work a
16 fair bit with people who do these sorts of
17 purchasing decisions in other contexts. And
18 even if they're buying the cables -- you know,
19 they negotiate sort of quarterly with some
20 cable network system, and so they're going to
21 go negotiate with Disney, they have in mind the
22 content we have, and Disney is now going to be
23 the incremental content because that's who
24 we're negotiating with.

25 So in my experience, the way they

1 think about these is one at a time, this is now
2 the one on the margin, as we'd say as an
3 economist, and I'm thinking about its value,
4 given the stuff that I've already contracted
5 for.

6 So that was my understanding, and I
7 think that's how one of these purchasers would
8 think about it.

9 JUDGE STRICKLER: So you wouldn't do
10 it in sort of a heuristic Shapley value type of
11 situation; you're saying they already come to
12 this or at least it's your understanding that
13 the question presupposes an existing complement
14 of programs on the Disney Channel, on ESPN, on
15 all the other -- the other program channels
16 that they have and now they're going to value
17 these distantly retransmitted programs in their
18 categories with the assumption that they
19 already have the prior programming?

20 THE WITNESS: That's right. That's
21 how I think about it because that's how I see
22 these guys in practice when they go to any of
23 these negotiations. They're sort of one of the
24 time. They've nailed down the last one. And
25 now it's I've got to come and negotiate with

1 Disney, given that I've got the last one. And
2 they run valuations based on that.

3 That's just -- I think that certainly
4 is my understanding. And I think that's how
5 they think about it.

6 JUDGE STRICKLER: That certainly
7 doesn't sound like an unreasonable way to
8 approach it. Do you really see anything in the
9 -- in the structure of the question that would
10 lead a respondent to presuppose that they
11 already had the prior programming? Or is that
12 just your -- just your informed assumption
13 based on your own industry expertise?

14 THE WITNESS: I mean, certainly, it's
15 more the latter in my case. I have not -- I
16 mean, I -- like we could -- obviously, the
17 document speaks for itself, and I don't recall
18 if there was a specific statement that said
19 assume that you have it. But my opinion on
20 that is really based on just my experience and
21 how these guys think about acquiring content.

22 JUDGE STRICKLER: You said earlier
23 that you -- one of the reasons why you were --
24 what you were doing was trying to confirm the
25 accuracy of the Bortz survey is because you

1 thought the Bortz survey asked the right
2 questions and narrowing in on the particular
3 question, which is the constant sum question.

4 THE WITNESS: Yeah.

5 JUDGE STRICKLER: Do you think it lays
6 out that foundation as to whether or not the
7 existing program line-ups were already there,
8 the Disney, as you say, the ESPN and the
9 others, or do you think this question is
10 ambiguous in that regard such that the
11 respondent doesn't have enough information to
12 determine what the contours of the existing
13 channel selection are before they answer the
14 question?

15 THE WITNESS: No, I understand your
16 question.

17 So, I mean, I guess, when I read this
18 question in the context of the way I see
19 purchasing done in this industry and it says
20 assume you spent a fixed dollar amount and what
21 percentage would you spend, my understanding is
22 just I think the person who was in charge of
23 doing the purchasing would do these sorts of
24 negotiations all the time and they do -- I
25 think they would generally see it as

1 conditional on what they have. But I don't
2 know, as I sit here, whether there's a specific
3 line in the question that says that or not. I
4 don't remember.

5 Throughout -- I will say that
6 throughout my entire analysis, I have had in
7 mind the way -- because, obviously, what we
8 need to do is think about what a market would
9 look like, right? And so the way I've thought
10 about what a market would look like is there's
11 an existing market for cable networks that
12 works a certain way in which they negotiate,
13 they figure -- you know, they sort of have a
14 willingness to pay that gets divided up between
15 them and the provider.

16 And there I know that what they do is
17 negotiate for each of them conditional on
18 having the other stuff in mind. So what I've
19 done for myself is port this into that world
20 and here leave it to the survey expert what
21 they put in the question, but my understanding
22 that that would match what they do is just that
23 that's the way -- for me, that's the way I see
24 these guys do purchasing.

25 JUDGE STRICKLER: Thank you.

1 BY MR. OLANIRAN:

2 Q. Do you -- I want to ask you, you
3 talked a second ago and certainly quite a bit
4 of your analysis is based on cable networks.

5 I want to talk about the broadcast
6 signals.

7 A. Okay.

8 Q. Okay? So in your analysis, did you
9 focus at all on what broadcast signals would
10 look like absent the compulsory license?

11 A. I mean, not the explicit legal regime.
12 As I said, I think broadcast networks are now
13 -- also negotiated through a very similar
14 procedure that determines what gets paid for
15 things like retrans fees, and so I, again,
16 ported this into that world in which you're
17 negotiating over the price of a network.

18 Q. Well, let's assume then that the
19 Section 111 license did not exist and we had a
20 market in which -- what market -- what would
21 the market look like in your vision of the
22 market structure where Section 111 didn't
23 exist? Who would the buyer of programs be?

24 A. You mean --

25 Q. Under your approach to this

1 marketplace behavior?

2 A. Sure. And I'm sure there has been
3 lots of views and testimony, but my mental
4 model is the model for -- that currently exists
5 for the licenses to retransmit broadcast
6 networks for cable networks.

7 So in the case of broadcast networks,
8 it's through retrans fees, which today are
9 often bundled with cable networks or for cable
10 networks. In either case, there is a
11 negotiation between a content provider and a
12 CSO or a broader cable system for a price per
13 subscriber per month for the network of content
14 as a network. So that's the way that I've --
15 to me, it's natural to think about these
16 distant signals as one more network that would
17 be part of that cable system/content provider
18 negotiation.

19 Q. So your vision of the market, though,
20 that would be the content provider, the
21 copyright owner in this case, would be
22 licensing the program to the broadcast signal;
23 is that right?

24 A. Yes. So in my vision of the way
25 things work today, the network, be it a

1 broadcast network or cable network, puts
2 together a bundle of programming for which they
3 have to acquire copyrights.

4 Q. Are you equating broadcast networks
5 and cable networks in this hypothetical market?

6 A. I don't know what you mean by
7 "equating."

8 Q. Are you treating them the same?

9 A. Only in the sense that I -- what I see
10 in the marketplace is cable systems negotiating
11 with networks, be that broadcast networks or
12 cable networks. They're clearly not exactly
13 the same content, but in both cases, I see
14 cable systems negotiating with networks as
15 networks.

16 Q. Are cable systems -- are cable
17 networks FCC-regulated as are broadcast
18 signals, broadcast stations?

19 A. Now you're going to get beyond all the
20 regulations I know. There certainly is FCC
21 oversight in both cases. In -- in the --
22 specific FCC rules are different, I think, for
23 broadcast networks and cable networks, but all
24 I'm saying is that in both cases I see cable
25 systems negotiating with networks as networks,

1 not as separate copyright owners.

2 Q. And, again, in this marketplace of
3 your framework, who is the buyer in that
4 marketplace and what are they buying?

5 A. CSO is the buyer and they're buying --
6 and, again, now we're going to get into whether
7 I have the legal words right, but in my head,
8 they're buying the licenses or whatever it
9 takes to be able to show that content on their
10 cable system.

11 Q. So the CSOs are buying the content
12 directly from the copyright owner or are they
13 buying from -- are they buying from -- who are
14 they buying from?

15 A. From the network.

16 Q. What network?

17 A. They're buying from -- if it's a cable
18 network, it is a cable network. If it's a
19 broadcast network, they may be buying from a
20 local affiliate or a set of local affiliates or
21 the network itself, in the case of the ONOs,
22 but they're buying from a network that may be a
23 national network or may be a set of localized
24 networks, but in each case, they're buying from
25 a network provider who provides a set of

1 contents.

2 Q. Are they buying the entire signals or
3 are they buying individual programs?

4 A. Entire signals in general.

5 Q. Okay. So -- but what you're saying is
6 a cable system is going to be acquiring an
7 entire signal from a broadcaster or some other
8 type of cable network; is that a fair way to
9 describe it?

10 A. I mean, that's how I see the
11 marketplace working today for content other
12 than these distant signals.

13 Q. Okay. Now, with respect to the
14 content that the broadcaster is -- is carrying,
15 where is the broadcaster getting that content
16 from?

17 A. Now we're beyond things that I've
18 analyzed closely. My understanding would be
19 that they're putting together, you know,
20 programs and other things for which they are
21 acquiring copyrights. But, frankly, the
22 process of how the network puts together the
23 content and all those negotiations is not
24 something that I have studied or worked on as
25 closely.

1 Q. You haven't focused on how
2 broadcasters acquire content that ultimately
3 winds up in a bundle to the cable system; is
4 that correct?

5 A. Not in great detail. I understand
6 that they negotiate with, you know, content
7 providers who -- for whom they have to acquire
8 rights and there's detailed, long contracts
9 about what rights they do and don't have to
10 redistribute that content. But beyond -- I
11 don't know if there's more to your question
12 than that.

13 Q. But in your view, the market -- the
14 way the market is currently structured would
15 remain the same, except that the way that the
16 compensation would be structured would be
17 different; is that right?

18 A. I'm not sure what you mean by "remain
19 the same."

20 Q. In other words, a broadcaster would
21 acquire content from somewhere to fill up their
22 broadcast, their daily -- their broadcast day,
23 if you will, and then the cable system would
24 make a deal with a broadcaster to retransmit
25 that particular station?

1 A. I mean, that certainly is the mental
2 model I've had in mind. I mean, my analysis is
3 ultimately an analysis of relative value for
4 content.

5 So, I mean, we could go to another
6 type of hypothetical market you have in mind,
7 then I still think the relative -- as long as
8 there's negotiations for content and the CSO is
9 buyer of some content, I don't think it would
10 change anything in my analysis.

11 We could talk about specific cases if
12 you want, but certainly the mental model that
13 I've had in mind has been porting it into the
14 existing kind of broadcast network or cable
15 network process in which the CSO is a buyer,
16 they buy the rights to a network, and the
17 network has separately put together the rights
18 to sell that content.

19 Q. But you haven't given any thought to
20 that primary market where the individual or
21 multiple programs are acquired by the broadcast
22 network in this case?

23 A. But it's fair to say that my analysis
24 has treated the CSOs as the ones making choices
25 and the CSOs as the buyers. And I have not

1 done an analysis, a separate analysis of what
2 you're calling the primary market.

3 Again, as I said a minute ago, I think
4 ultimately you're going to -- you know, the
5 relative -- I don't see that the relative
6 valuations of the content I have here wouldn't
7 ultimately be the relevant values, but I have
8 not done a separate analysis besides what's
9 presented in my reports.

10 And my reports focus on the CSO as the
11 buyer of a network.

12 JUDGE STRICKLER: And because your
13 reports and your regression deals with the
14 market as it exists, you're not showing us what
15 might happen through your regression in a
16 hypothetical market; you're showing us what
17 actually -- what choices are actually made in
18 terms of implicit or shadow prices based on
19 what cable system operators have, in fact, done
20 in terms of the signals that they decide to
21 distantly retransmit?

22 THE WITNESS: I think that's fair. I
23 mean, I'm using -- the only thing I would add
24 to it -- and apologies if this was obvious in
25 the question -- but I'm using the existing

1 purchase choices as a way to infer value.

2 But when I say -- I mean, obviously as
3 an economist, I have to think about, you know,
4 how does that value map into some hypothetical
5 free market? And as I said earlier, what I
6 have in mind is -- for that hypothetical free
7 market is a negotiation between a CSO and a
8 network, although I think it could be a
9 negotiation between a CSO and a set of content
10 providers.

11 What matters is, in an economic model
12 of that negotiation, they're dividing up the
13 buyer's willingness to pay and so those
14 valuations -- I think of the relative
15 valuations as being the key determinant of what
16 the relative negotiated prices would be in that
17 free market.

18 JUDGE STRICKLER: So you're saying if
19 the signal was, based on your analysis that --
20 or you could apply your analysis even to a
21 disaggregated situation where rather than
22 importing -- retransmitting this signal and
23 purchasing the signal in its entirety, a cable
24 system that decided to negotiate separately
25 with each -- programs within each category

1 would still -- in that hypothetical framework,
2 still come up with the same relative
3 valuations; is that you're saying?

4 THE WITNESS: I think so because
5 the -- I think those negotiations would have
6 more transactions costs and be more difficult
7 negotiations, but, you know, sort of basic
8 models of bargaining and economics that you're
9 splitting up the buyer's willingness to pay.

10 So as long as you've measured the
11 buyer's willingness to pay across categories of
12 content, I think whether those are prebundled
13 for you or separated out, I think the key
14 driver would still be those relative
15 valuations.

16 MR. STRICKLER: Now, if you were going
17 to try to map it onto this kind of
18 disaggregated negotiation, wouldn't viewing of
19 the individual programs within the categories
20 then become of greater importance? In other
21 words, if I'm a cable system operator and I
22 think I want a syndicated show, I'm going to
23 negotiate one price for a syndicated show that
24 I think people are more apt to watch because
25 that might be a proxy for subscribership,

1 whereas a program that people are not watching
2 in their local market, maybe that's not going
3 to happen -- even though I like that category,
4 it may be a really lousy show within that
5 category, so I'm not going to pay for it.

6 So doesn't -- if you disaggregated in
7 that manner, doesn't viewing then become of
8 relatively more importance than if you keep it
9 aggregated at the signal level?

10 THE WITNESS: I'm going to think for
11 one second just to --

12 JUDGE STRICKLER: Absolutely.

13 THE WITNESS: I think -- I mean, in
14 general, I think my view on viewing is that
15 viewing is some indicator of popularity of some
16 programs, but it still is not the value to a
17 cable system. Right?

18 A cable system still might want a
19 program that has relatively little viewing
20 because it diversifies its offering, and so
21 even if you disaggregate, if you have two
22 things that -- two shows that hit exactly the
23 same spot, but one has more viewing than the
24 other, I'm not saying that's irrelevant, but I
25 still think the valuations are about a lot more

1 than viewing; they're about diversification.

2 And I -- I know -- you look like you
3 have another question, so --

4 JUDGE STRICKLER: Go ahead, please.

5 THE WITNESS: The -- and I certainly
6 think that when you rolled it up, I almost
7 think in that world you could think the CSO
8 sort of rolling up to like categories of
9 content. And I still think when you still roll
10 it up, the same basic forces would apply as far
11 as what's the overall value of that category of
12 content in terms of how it diversifies my
13 offering.

14 JUDGE STRICKLER: But when -- assuming
15 you were disaggregating and you were
16 negotiating with individual content providers,
17 if you had two different shows, there was a
18 niche sewing program, which didn't have a whole
19 lot of viewership but you thought you could get
20 some marginal subscription revenue from that,
21 all other things being equal, wouldn't you want
22 the sewing program that has three times the
23 viewership than another sewing program?

24 THE WITNESS: If literally everything
25 else is held equal, they're the same sewing

1 program, just one has a better host so it has
2 more viewing, then I think I agree that viewing
3 would be a factor there.

4 But I think that when you start
5 thinking about sewing programs that are
6 somewhat different and then you roll them up to
7 say all syndicated programs that include sewing
8 and cooking and every other type of
9 programming, then it would be about -- much
10 more about the diversified bundle unless -- it
11 wouldn't be about the sum of the viewing.

12 JUDGE STRICKLER: Thank you.

13 BY MR. OLANIRAN:

14 Q. And just to be clear, your idea of the
15 hypothetical market is that the buyer would be
16 the CSO and the CSO could either acquire an
17 entire bundle in the form of a station or
18 actually purchase individual content from
19 copyright owners; is that correct?

20 A. I mean, my view of the market that
21 I've had in mind is I think -- through the
22 analysis, has been an analogue to what exists.
23 So I think the most natural view of the market
24 is CSOs buying networks of content.

25 The only addition I was making in

1 response to the question is that I think as
2 long as the -- however the CSO aggregates up,
3 as long as the CSO is aggregating up these
4 categories of content that we're talking about,
5 the same relative value calculations would
6 drive the relative payments.

7 Q. And under what circumstance would the
8 CSO be buying individual content as opposed to
9 acquiring entire signals?

10 A. I haven't thought about a specific
11 circumstance. I think the most natural way to
12 model the market, because we have an existing
13 market -- we have an existing free market for
14 the vast majority of what CSOs purchase.

15 So I think the natural way to model
16 that market is the CSO buying the network of
17 content, the signal as a whole.

18 Q. And it would be very unusual, would it
19 not, for a CSO to actually acquire individual
20 content unless it was actually building its own
21 signal or network, if you will?

22 A. I don't know -- I mean, I don't want
23 to overstate it. So I don't know if there are
24 cases where that happens for certain programs.
25 I certainly agree, as I just said, that the

1 case that I know best that seems to be the
2 common case is that a CSO buys an entire signal
3 or an entire network.

4 Q. And you used the phrase "aggregating
5 up the content." Could you explain what you
6 mean by aggregating up the content?

7 A. Let me just -- at various points in
8 the marketplace, people buy rights to content
9 and put them together into shows and then
10 networks. I'm just saying that, again, I think
11 the natural way to model it is the way that it
12 generally exists, which is that CSOs buy
13 networks or buy signals.

14 But if they aggregate -- if they
15 purchase it in some more disaggregated way,
16 buying shows and roll them up, I don't think
17 that would change any of my answers.

18 Q. I also want to follow up on another
19 discussion you had earlier today regarding
20 whether you saw the Bortz 2013 report before
21 preparing your report. I think you said that
22 you did not.

23 And so my -- you did say, however,
24 that before you prepared your report, you saw
25 Dr. Waldfogel's testimony. Is that correct?

1 MR. LAANE: I'm going to object that
2 it misstates his testimony.

3 THE WITNESS: I'm certain I saw the
4 Bortz 2010 to 2013 report before I prepared my
5 report. Again, as I mentioned a minute ago,
6 there are numbers from that report in my
7 report.

8 I think what I said in response to
9 some questioning from the Judges was that I
10 started from the Waldfogel process and I put
11 together my regression methodology before I saw
12 the Bortz survey results. I was working on it
13 as far back as five or six years ago.

14 So, yeah.

15 BY MR. OLANIRAN:

16 Q. And I may have misstated, but you did
17 not see the Bortz 2010 through '13 report
18 before you started preparing your report?

19 A. Did not see it before I started
20 because I would take "started" as meaning
21 beginning my regression approach and planning
22 my regression. I certainly -- I mean that
23 process started years before there was a Bortz
24 report.

25 JUDGE STRICKLER: But you saw the

1 Bortz 2010-2013 results before you completed
2 your methodology?

3 THE WITNESS: Correct, before I
4 completed my report. I had run regressions
5 before I ever -- the basic regressions you see
6 here before I ever saw the Bortz results.

7 JUDGE STRICKLER: Did you change your
8 report after you saw the Bortz results?

9 THE WITNESS: The main regression, I
10 believe, I don't want to misstate, the
11 sensitivities had been in place for quite
12 sometime, before --

13 JUDGE STRICKLER: So your answer is
14 no, you didn't make any changes to your own
15 report or analysis after you saw the results of
16 the Bortz 2010-2013 study?

17 THE WITNESS: Certainly not to the
18 regression analysis. There were changes to the
19 report, right.

20 JUDGE STRICKLER: Any changes of
21 substance?

22 THE WITNESS: No. When I say changes
23 to the report, I just mean I added the tables
24 and the analysis doing the comparison, but no
25 changes to my methodology.

1 JUDGE STRICKLER: And no changes of
2 substance?

3 THE WITNESS: Correct.

4 JUDGE STRICKLER: Thank you.

5 BY MR. OLANIRAN:

6 Q. And did you -- in your research
7 process before you began preparing your report,
8 did you look at the '04-'05 Bortz report?

9 A. I -- I certainly saw the results from
10 that report. I don't recall as I sit here
11 whether I read that report from cover to cover.

12 Q. Did you, in reading Dr. Waldfogel's
13 report -- it certainly made a lot of references
14 to the '04-'05 Bortz report, did it not?

15 A. Yes.

16 Q. Okay. With regard to your regression
17 analysis, and I think -- now, are you offering
18 the regression analysis as independent evidence
19 of marketplace value or only as corroborative
20 of the Bortz survey?

21 A. I'm offering my regression as
22 corroborative of the Bortz survey.

23 Q. Only as corroborative?

24 A. That's my view, correct.

25 JUDGE STRICKLER: Does that mean if

1 there was no Bortz survey, you wouldn't hold
2 out your regression results as indicative of
3 appropriate value?

4 A. No, if there was no Bortz survey, then
5 I think you would look to the regressions that
6 exist as the best measures that we have. My
7 statement is only that, given there is a Bortz
8 survey and that it asked the direct question, I
9 think in that context, the right way to treat
10 the regression is as corroborative.

11 JUDGE STRICKLER: Again, a
12 hypothetical. There is no Bortz survey. You
13 did your report and didn't rely on the Bortz
14 report and you didn't see -- you didn't change
15 your methodology or your results in any kind of
16 substantive manner, as you just testified,
17 after you saw it.

18 So if the Bortz report never existed,
19 would you be holding out your regression as
20 good evidence of relative value for this
21 proceeding?

22 THE WITNESS: I mean, I think it's
23 fair. My regression, I also think Dr. Crawford
24 did a good regression. So I think my view
25 would be in that hypothetical world, I would

1 think those are the two best pieces of evidence
2 that have been presented.

3 JUDGE STRICKLER: Okay.

4 BY MR. OLANIRAN:

5 Q. So then you're saying that it's not
6 independent of -- it's not simply
7 corroborative; it's an independent evidence of
8 marketplace value?

9 A. I was asked a hypothetical, if there
10 was no Bortz report. And I think that my
11 regression would provide and Dr. Crawford's
12 would provide the best evidence in the record.

13 Given that there is a Bortz report, my
14 view is that my regression should be used as
15 corroborative of the Bortz report.

16 Q. I think you're saying that it's both
17 independent and dependent and corroborative?

18 A. I'm saying my answer depends on which
19 world we're in. As I've said today, I think,
20 given the question that Bortz asks, given the
21 detail with which it can measure the
22 valuations, I consider it to be the best
23 evidence available.

24 So if better evidence exists, then I
25 think it's natural to say, well, that's a

1 survey. Was the regression generally
2 corroborated?

3 Of course, if that survey didn't
4 exist, I would have to think about what's the
5 best thing that's left.

6 Q. Well, let me ask you differently.
7 What if the survey existed and the Judges
8 didn't find the Bortz -- the Bortz survey
9 acceptable? Would you still -- would your
10 regression analysis still be considered
11 evidence of marketplace value?

12 A. I mean, I think that's analogous --
13 obviously, the Judges make the decision. So if
14 they took the Bortz survey out and decided, for
15 whatever reason, they weren't going to rely on
16 it, I think -- my testimony is I think the
17 other best pieces of evidence in the record are
18 my regression and Dr. Crawford's regression.
19 So at that point, I think those would be the
20 best remaining things to rely on.

21 JUDGE STRICKLER: That's because you
22 don't see any other survey evidence in the
23 record after your own analysis of that survey
24 evidence that that's more persuasive, more
25 probative than the regressions?

1 THE WITNESS: Right. I do think it's
2 important that the survey analysis be
3 corroborated by marketplace evidence. Many
4 people have raised many questions about the
5 various surveys. So if I've seen a survey like
6 the Horowitz survey that I don't think is
7 corroborated by the marketplace evidence, then
8 I think I wouldn't want to rely on that.

9 BY MR. OLANIRAN:

10 Q. And what are you referring to as the
11 marketplace evidence exactly? Is it your
12 regression or -- and what else?

13 A. I think it's my regression -- I mean,
14 it's what's in my report. So I think
15 ultimately the marketplace evidence is my
16 regression, my cable content analysis for the
17 two propositions that I put that forward for,
18 that an hour is not an hour, it depends on
19 value, and sports hours tend to have more
20 value. So I think that's marketplace evidence
21 of those two phenomena.

22 And I think as I've referred many
23 times in my reports to the Crawford regression,
24 that's another piece of marketplace data.
25 There may be more. I might not be remembering

1 everything in my reports. The reports speak
2 for themselves. But that's what I'm thinking
3 of now.

4 Q. So your key pieces of marketplace data
5 is your regression, your cable content analysis
6 and Dr. Crawford's analysis?

7 A. Those are the ones -- again, my two --
8 my direct testimony and rebuttal testimony
9 speak for themselves. Those are the ones I'm
10 recalling now. And, certainly, I think all
11 three of those are important marketplace
12 evidence.

13 Q. And were you aware that Dr. Crawford
14 was going to file testimony in this case at any
15 point during the preparation of your report?

16 A. Certainly nothing in my first report
17 changed. I think I found out that there was --
18 Crawford was the expert. I know Greg. We went
19 to graduate school together. But I think I
20 found that out like a day before my report was
21 filed or the day it was filed.

22 Q. You're talking about your rebuttal
23 testimony or your direct testimony?

24 A. Direct testimony. It might have been
25 when they got exchanged. I don't remember. It

1 was definitely after my report was finalized
2 and I found -- or at the very end I found out
3 -- I knew there would be testimony from
4 commercial and from the other Claimants, and I
5 found out very late in the process that it was
6 the Crawford testimony.

7 Q. Just quickly about your regression.
8 The coefficients that you calculate for each
9 program category represent the value of each
10 additional minute; is that a fair way to
11 describe it?

12 A. I think we refined it some to be
13 better. I think the right way to say it is
14 that they are the average valuations of
15 incremental sets of minutes that CSOs purchase,
16 holding everything else constant. So,
17 ultimately, I think they're best used as
18 measures of the relative valuation of -- the
19 relative average valuation of these minutes.

20 Q. And in terms of what this coefficient
21 means, is it fair to say that the variations in
22 the level of royalty fees are explained by the
23 variations in the additional minutes of each
24 type of programming? Is that a fair way to
25 characterize it?

1 A. No, I think a fair way to characterize
2 the regression generally is that it explains
3 variation across cable systems and over time in
4 royalty fees as determined by variation in the
5 number of minutes, as well as variation in the
6 other control variables that primarily measure
7 the size of the system.

8 Q. Setting your regression analysis
9 aside, do you have a basic understanding of how
10 royalty payments are determined under Section
11 111; is that correct?

12 A. Say that again -- under Section 111?

13 Q. I'm sorry. Under the compulsory
14 licensing scheme?

15 A. Yes.

16 Q. And in your hypothetical market, would
17 a compulsory licensing scheme still exist?

18 A. No.

19 Q. Okay. And how, just in general terms,
20 what your understanding is of how royalty
21 payments are calculated?

22 A. Under the compulsory licensing scheme?

23 Q. Yes.

24 A. I mean -- and, again, my report talks
25 about Form 3 CSOs. My general understanding is

1 there's -- the royalty payments are a
2 multiplicative percentage of the gross receipts
3 of the CSO. I think there's a minimum of, I
4 think, 1.064 times the gross receipts, a
5 percent of the gross receipts, and then it
6 scales up, but at a decreasing rate as you add
7 more signals.

8 Q. So, basically, the royalty fees are
9 based on such totally prescribed formula for --
10 that the cable systems follow, correct?

11 A. That's correct.

12 Q. And it's the type of stations,
13 correct? You consider the type of stations
14 that the system is carrying, right?

15 A. You mean in terms of what its DSE
16 equivalent is?

17 Q. Right.

18 A. Yes.

19 Q. And then you look at the gross
20 receipts, correct?

21 A. Yes.

22 Q. And several other factors that are
23 prescribed within the statute and the
24 regulations, correct?

25 A. I mean, I think it's basically gross

1 receipts, what the DSE equivalent is, and then
2 this measure of how many DSE equivalent signals
3 you're carrying. I think those are the basic
4 factors. And there's also certain rules about
5 these 3.75 percent systems, but --

6 Q. Okay. And so to the extent there are
7 variations in the royalty payments made by
8 cable systems, that will be based on changes
9 within carriage, perhaps; let's say they're
10 carrying five signals versus no signals at all,
11 right?

12 A. Right. As I've said, I think the
13 variation that I'm studying that drives my
14 results is the decision about what signals to
15 carry.

16 Q. And, in fact, the factors that you
17 need to calculate royalty obligations under the
18 compulsory licensing scheme are completely
19 agnostic to the mix of programming you're
20 carrying; isn't that right?

21 A. I mean, the formula doesn't
22 distinguish -- well, other than the -- the DSE
23 equivalents, that may be different for, you
24 know, network versus public versus -- but other
25 than that, the formula doesn't distinguish --

1 the formula is based on how many signals you
2 choose. Of course, you as a CSO have to decide
3 what type of signals to carry, given the
4 implied price.

5 Q. In fact, if you carried no distant
6 signal or you're carrying one independent
7 signal with 100 minutes of sports, you're still
8 going to pay the same thing, correct?

9 A. I think if you're up to the minimum
10 payment, you pay the minimum payment.

11 Q. That would be a yes?

12 A. I was just trying to clarify, but,
13 yes, anything up to and including the minimum
14 payment pays the minimum payment.

15 Q. Now, you said this a few times and I
16 want to make sure I get this right. You said
17 earlier that what your cable content analysis
18 shows is that an hour is not just an hour and
19 it depends on what type of programming you're
20 carrying. Do you recall that?

21 A. Yes.

22 Q. And what do you mean by an hour is not
23 an hour?

24 A. I mean you can't just add up the
25 number of hours carried or the number of hours

1 viewed and say that that determines value
2 because the value per hour differs for
3 different types of content.

4 Q. And why do you say that? Why does it
5 differ?

6 A. That's the various evidence throughout
7 my report, shows that people in various
8 contexts pay more per hour for different types
9 of content.

10 Q. I understand that part of it. Why do
11 they pay more for different types of content?

12 A. There could be multiple reasons. The
13 different content serves different needs for
14 them for their CSO.

15 Q. Who is "them"? Are you talking about
16 subscribers or CSO?

17 A. CSO. The CSOs are the buyers, if
18 that's ever not clear, and different content
19 serves different needs in putting together a
20 bundle of programming for subscribers.

21 Q. Does subscriber interest play any part
22 in the reasons for why different types of
23 programming would be valued differently?

24 A. I mean, certainly the CSOs are trying
25 to attract, retain, maximize the willingness to

1 pay of subscribers. So, certainly, they are
2 aggregating the interest of subscribers, is a
3 big part of what they do. But ultimately that
4 means they determine the value that best serves
5 the diversified set of subscribers they're
6 trying to serve.

7 Q. And how are they -- what part of --
8 how are they measuring what the subscribers'
9 interests are in trying to put a diversified
10 programming together?

11 A. I mean -- so now we're again going
12 into things that I know from lots of work I do
13 in this industry. I mean, the calculations I
14 see them do are some combination of how does
15 this content help me attract subscribers,
16 retain subscribers, or maximize what I can
17 charge subscribers.

18 So I've seen them do very economic
19 calculations that basically just say how much
20 more profitable will we be as a CSO if we carry
21 this content.

22 Q. And how are they determining whether
23 or not a subscriber would be attracted to the
24 programming they put together?

25 A. I mean, they do lots of things. They

1 do -- they look at when they've had blackouts
2 and haven't had certain content, how many
3 people leave. They look at what -- you know,
4 what sort of prices they've been able to charge
5 in the marketplace when they have certain
6 content or not have certain content.

7 The calculations that I've seen them
8 do are very much driven by how much more money
9 can they make if they have this content than
10 not.

11 Q. Now, they don't care -- do they care
12 if subscribers are watching the program or not?

13 A. I mean, care? As we said a minute
14 ago, they -- certainly the value that
15 subscribers puts on different types of content
16 matter, but it's nothing close to a one-for-one
17 correlation with viewing. It's based on
18 attracting, retaining, and being able to charge
19 CSO subscribers, that viewing is one of, in my
20 experience, dozens of factors that they
21 consider.

22 Q. And what else beside viewing would
23 measure the attractiveness of a subscriber to
24 particular types of programming?

25 A. I mean, one example, there's many,

1 but, I mean, again, this is -- these guys do
2 this for a living. But one example would be
3 when I have content, how many more subscribers
4 stay with my system and don't leave.

5 And another example would be when I
6 have certain content, can I put it on a tier of
7 programming on my CSO that becomes more
8 attractive so I can charge more for it? Those
9 things are -- you know, because they're trying
10 to put together diversified bundles and they're
11 trying to serve diversified subscribers, in my
12 experience, those things are quite distinct
13 from the number of people who watch the
14 program.

15 Q. Now, do you know whether CSOs research
16 whether or not subscribers that have left were
17 watching particular programming?

18 A. Again, in my experience, they study
19 primarily who leaves and who comes. Whether
20 one variable they might look at in a model of
21 that along with many others might be who was
22 watching, it's possible. I really don't know.

23 JUDGE STRICKLER: When these bundles
24 are created, given your experience in working
25 with people in the industry, are the bundles

1 also created as a form of -- or do they explore
2 them as a form of price discrimination so that
3 they can increase the willingness to pay of
4 individuals who are already subscribing because
5 the bundle creates an ability to reveal a
6 higher willingness to pay? If that makes
7 sense.

8 THE WITNESS: Generally yes, or just
9 to -- I mean, I think the answer to that is
10 yes. They certainly put together, you know,
11 tiers of programming. So if they have more
12 programming, they might be able to put together
13 some sports tiers or children's -- I mean, they
14 put together all sorts of different packages so
15 that they can sell those.

16 And I think you're right to say that
17 one function that plays is that they can better
18 price discriminate.

19 JUDGE STRICKLER: So you could add
20 program B and then sort of an agent allows you
21 to charge more for program A because A is now
22 bundled with B, so the overall bundle is worth
23 more than the two individuals programs?

24 THE WITNESS: I think that's possible.
25 But I think it's also possible that you might

1 add program B and C, such that you can create
2 two tiers, one of which has A and one of which
3 has B and C, and better sort out your customers
4 in terms of what their preferences are.

5 JUDGE STRICKLER: Thank you.

6 BY MR. OLANIRAN:

7 Q. With regards to the programming
8 minutes, you basically treat all the minutes
9 the same; is that right? You don't make any
10 distinction about the type of programming with
11 respect to the minutes; is that right?

12 A. I'm not sure I understand. I
13 certainly use minutes as the unit of
14 observation, but I measure them by type of
15 content, so I have minutes in each type of
16 content and I measure the value of those
17 minutes separately for each type of content.

18 Q. What do you mean by you value for each
19 type of content? Are you talking about the
20 coefficient?

21 A. Yeah.

22 Q. Okay. But that's the only way in
23 which you distinguish the minutes, correct?

24 A. I mean, I distinguish them, first of
25 all, by putting them in these buckets by what

1 type of content it is.

2 Q. Okay.

3 A. So I don't treat the minutes the same.
4 I treat them as Program Supplier minutes or
5 Sports minutes or Commercial minutes. And
6 then, yes, within each of those buckets, I let
7 that number of minutes have a different
8 coefficient to reflect its different value.

9 Q. You don't look, say, at time of day
10 that the program was on that's -- to determine
11 -- to put some form of valuation, to value that
12 particular time of day differently from the
13 remainder of the other minutes, right?

14 A. Yeah, that's correct. I treat the
15 minutes -- I don't distinguish by time of day.

16 Q. And you don't distinguish by
17 demographics either?

18 A. I mean, I don't measure the valuations
19 differently by demographic mix. I mean, that,
20 sort of what demographics the minutes attract
21 is part of the valuation that the CSO puts on
22 the minutes.

23 So different demographic mixes
24 associated with different kinds of content are
25 one driver of the difference in the

1 coefficient, but beyond that, I don't do more.

2 Q. So within the syndicated programs
3 bundle, for example, my American Idol at 8:00
4 p.m. on a Wednesday night is valued the same as
5 Watching Paint Dry at 3:00 a.m. in the morning;
6 is that a fair way to describe that?

7 A. I mean, I think I would say what I
8 report is an average across those two different
9 types.

10 Q. Anyhow, you conclude that -- you know,
11 your model confirms that sports programming is
12 worth substantially more than other
13 programming, all the other, I guess, five or
14 six categories of programming; is that right?

15 A. Yes.

16 Q. Okay. And that assertion is really
17 based on the value per minute that you
18 calculate for the -- for the sports
19 programming; is that right?

20 A. I would say it's a conclusion based on
21 all of the various studies put forward in my
22 reports. I mean, the regression determines a
23 value per minute for categories. The cable
24 content analysis looks at what people pay for
25 it. But -- so I would say it's a conclusion

1 based on the empirical evidence we've been
2 talking about.

3 Q. Do you agree that WGNA was the most
4 highly retransmitted broadcast signal during
5 the 2010 through '13 period?

6 A. I think that's right.

7 Q. And it also has the largest subscriber
8 reach of any distant broadcast signal, correct?

9 A. I think that's right.

10 Q. And it's also attributed with most of
11 the -- most of the compulsory license fees that
12 are deposited for each year are attributable to
13 WGNA's; is that correct?

14 A. I don't know the exact percentages,
15 but that sounds right.

16 Q. Okay. And do you know the source of
17 the calculations for the fees generated?

18 A. No, I don't think I know explicitly.
19 I think I've seen some discussion of a fees gen
20 calculation, but that's not something that I've
21 studied.

22 Q. So you don't know who calculates it?

23 A. No, I don't.

24 Q. Okay. Do you know whether it's --
25 it's -- it's a calculation that's prescribed by

1 statute?

2 A. I just -- if we're talking about the
3 specific sort of fees gen variable I referred
4 to, I really don't know much -- anything about
5 it. It hasn't been something I've used in my
6 analysis.

7 Q. Okay. Does WGNA have, by itself, the
8 highest share of the compensable JSC
9 programming than any other distant signal?

10 A. Can you repeat that?

11 Q. Does WGNA have the highest share of
12 compensable programming in minutes for sports
13 than any other distant signal?

14 A. You mean just total minutes it airs or
15 minutes times subscribers who view it or -- I
16 don't know. I mean, I know there's -- WGNA
17 goes to many, many systems and it airs a lot of
18 sports. So I know it's important to the
19 overall sports-watching.

20 Whether it's the most minutes as
21 minutes are measured in some way, I don't know.

22 Q. Minutes weighted by subscribers.

23 A. I think so.

24 Q. Now, you've also testified that the
25 regression results corroborate the Bortz

1 results; is that right?

2 A. Yes.

3 Q. And, in fact, you describe your
4 regression results as compelling because they
5 yield extremely similar numbers to the Bortz
6 numbers for sports in particular. Do you
7 recall that?

8 A. Right. I found that compelling
9 evidence for the valuation on sports in
10 particular, yes. And then I go on to talk
11 about other similarities.

12 Q. You also said that the similarity of
13 your regression results and the Bortz results
14 are compelling economic evidence of proper
15 allocations of the top three categories. Is
16 that right?

17 A. Yes.

18 Q. And that the proper split between the
19 top three categories and the bottom three
20 categories, right?

21 A. Right. Those are the sort of ways in
22 which Bortz -- in which the regressions
23 corroborate Bortz that we talked about this
24 morning.

25 Q. I'm curious, is there a survey

1 principle that supports the notion that your
2 regression results are corroborative of the
3 Bortz results simply because there's similarity
4 in the ranking order of the results?

5 A. I don't know if it's a survey
6 principle. I can say my -- you know, my work
7 in economics and econometrics, if you find two
8 very different methodologies that produce
9 similar rank -- similar valuation rankings, you
10 know, that, frankly, usually doesn't happen and
11 is unlikely to happen by chance that you would
12 do six in a row in the right order.

13 So I think if you think about what's
14 the probability that would happen if it weren't
15 true, that's quite corroborative that the
16 survey is measuring the right thing.

17 Q. And what two -- what two analyses are
18 you referring to, the Bortz survey and your
19 analysis or your analysis on Dr. Crawford's?

20 A. Here I was referring to Bortz and my
21 analysis.

22 Q. Okay. And -- but this is just by --
23 there's no economic principle or statistical
24 principle that guides you in this particular
25 assertion?

1 A. I mean, sure, there's a statistical
2 principle, right? The statistical principle
3 would say if Bortz had the rankings wrong and
4 then I went and used another completely
5 independent method, what would be the
6 probability that just by chance that other
7 independent method would rank them from one to
8 six in the same order?

9 And think about drawing six
10 consecutive numbers like out of a hat. The
11 odds that you would match the ranking would be
12 very low.

13 So, statistically, the fact that the
14 rankings go in the same order is strong
15 evidence that that order -- that the survey
16 that generated that order was a valid survey.

17 MR. OLANIRAN: Perhaps you had a
18 question.

19 JUDGE BARNETT: I want to know when
20 we're at a breaking point. How much more do
21 you have?

22 MR. OLANIRAN: I probably have another
23 20 minutes or so.

24 JUDGE BARNETT: Okay.

25 MR. OLANIRAN: Or so.

1 (Laughter.)

2 JUDGE BARNETT: Do you want to ask
3 your follow-up question and then we can take
4 our break?

5 BY MR. OLANIRAN:

6 Q. I just had one more question. Does it
7 matter -- strike that.

8 What if the ranking order in those two
9 analyses were 10, 11, 12 -- in one was 10, 11,
10 12, and the other one was 24 and 1? Would you
11 conclude that they are similar because the
12 ranking order is the same?

13 A. You mean what if the values underlying
14 them were --

15 Q. Yes. Were 10, 11, and 12, and 24 and
16 1?

17 A. Then I would look at the rank ordering
18 as one piece of evidence that was
19 corroborative, but in that case I would say
20 your top values are quite far apart. In my
21 experience, as I said before, something
22 regressions should do well is measure the value
23 of kind of the most important categories.

24 Q. So rank --

25 A. I would say the ranking was

1 consistent, but it certainly wouldn't match
2 what I found here, which is that not only the
3 ranking but many of -- but the values at the
4 top and the split of value between the top and
5 the bottom are all consistent.

6 Q. So mere ranking alone really does not
7 -- is not evidence of corroboration, is it?

8 A. It's one indicator.

9 MR. OLANIRAN: Okay. I can take a
10 break. Thank you.

11 JUDGE BARNETT: We'll be at recess for
12 15 minutes.

13 (A recess was taken at 3:17 p.m.,
14 after which the trial resumed at 3:36 p.m.)

15 JUDGE BARNETT: Please be seated. Mr.
16 Olaniran?

17 MR. OLANIRAN: Thank you, Your Honor.

18 BY MR. OLANIRAN:

19 Q. Dr. Israel, would you please turn to
20 page 22 of your testimony.

21 A. The initial -- my original testimony?

22 Q. Yes. Exhibit 1003.

23 A. Okay.

24 Q. Are you there?

25 A. Yes.

1 Q. Okay. And let's look at Table 4-4 --
2 I'm sorry, V-4.

3 A. Okay.

4 Q. Are you there?

5 A. Yes.

6 Q. And this is a table that you rely on
7 for the proposition that your regression
8 results corroborate the Bortz results, correct?

9 A. Yeah, that's what I rely on it for,
10 that's correct.

11 Q. And that table shows the four years of
12 the Bortz results, the four-year average and
13 then your regression average, right?

14 A. Yes.

15 Q. Okay. And I think -- and it is the
16 four-year Bortz average that you compared to
17 your regression results that's in the last
18 column to establish that there is a
19 corroboration between your results and the
20 Bortz results; is that correct?

21 A. I mean, that's one thing that I
22 compare. The text also does some comparison of
23 the range of the Bortz results to my results
24 and some other comparisons.

25 Q. And you don't -- you didn't present a

1 year-by-year regression analysis for this
2 proceeding, correct?

3 A. I didn't present results year-by-year.
4 As my report indicates, I did do a statistical
5 test to see if the coefficients were different
6 by year.

7 And the statistical tests found they
8 were not. There was no evidence that they were
9 different by year. So, therefore, I collapsed
10 them into a single average.

11 Q. When you say you did a test to see
12 whether the coefficients were different by
13 year, what do you mean by that?

14 A. So there is a thing in a regression
15 called an F test. But basically you ask
16 whether, if you let the regression be more
17 flexible, so that it had different
18 coefficients, different values per minute for
19 each year, you know, is there a statistical
20 support for that sort of variation.

21 And I did that statistical test and
22 didn't find support for that variation. So
23 that would indicate that, according to the
24 statistics, it's valid to collapse the results
25 into a single combined average.

1 Q. Do you understand that the royalty
2 funds at issue in this case are separate funds
3 for each year?

4 A. Yes.

5 Q. And do you also understand that the
6 Claimants to each year's fund may not always be
7 the same from year-to-year?

8 A. I guess I didn't know that detail, but
9 I take your word for it.

10 Q. Okay. And so if they are
11 year-by-year, if there are significant
12 mismatches between your analysis and the Bortz
13 results, the way that you have presented your
14 analysis would mask those mismatches, would
15 they not?

16 A. I mean, no, I don't agree with that
17 because, as I said, there is no statistical
18 evidence for significant differences across the
19 years in my regression.

20 So I think doing that sort of
21 year-by-year comparison with my regression
22 would not make sense given that the regression
23 doesn't find statistically-significant
24 differences across years.

25 Q. And so -- but, in fact, because your

1 regression is a three-year average, to the
2 extent those variations exist, when you match
3 -- if you had done a year-to-year and you had
4 done a head-to-head comparison with Bortz
5 versus your regression, but if there were
6 significant differences between the results,
7 notwithstanding, you know, the statistical
8 test, we would not know, would we, because you
9 didn't do a year-to-year?

10 A. I mean, you wouldn't see them here
11 but, again, that's because I don't want to show
12 results that aren't statistically meaningfully
13 different by year and present that as a valid
14 year-by-year comparison.

15 Another way to say it is, given that
16 there is no statistically-significant
17 differences across the years of my regression,
18 the best way to present the results is to pool
19 them so that you get the benefit of the three
20 years combined.

21 Q. You are polling a three-year versus a
22 four-year, are you not?

23 A. It is true that I am comparing the
24 three years versus a Bortz four-year number. I
25 mean, you can look at the numbers for 2013

1 relative to his average and see where that
2 would move the needle.

3 Q. And in your testimony you discuss how
4 your regression results fall within the minimum
5 and maximum ranges of the Bortz results for
6 Sports, Commercial Television, Public
7 Television, and Program Suppliers.

8 Do you recall that? I think it is in
9 paragraph 40 of page 21, I think, of your
10 testimony you said that.

11 A. Right. We discussed this earlier. I
12 think I said it falls within the range for
13 Sports and for Commercial.

14 For Program Suppliers, it is just
15 below the bottom end of the range.

16 Q. And I think you said Public Television
17 also, did you not?

18 A. I don't know. I mean, for Public
19 Television, my number is not within the range
20 of the Bortz numbers. As we discussed, there
21 has been -- that provides some support for an
22 adjustment to the Bortz numbers, as we
23 discussed this morning.

24 Q. But in paragraph 40 of your -- of your
25 testimony, you say that for the four highest

1 valued categories of programming, the 2012
2 results are in accord with the results of the
3 2010 Bortz survey on the -- on the rank order.

4 So you are not contesting that all
5 four fall within; you are saying that they just
6 are in the same rank order. Is that right?

7 A. Correct. That first sentence is, as
8 we have been saying, there is a rank order
9 comparison and then there is a comparison of
10 the value particularly for the top categories.

11 That first sentence is about the ranks
12 and then I go on to the value comparison.

13 Q. Now, did you do an apples-to-apples
14 comparison to determine where your regression
15 -- where your regression values fall within the
16 2010-2012 Bortz result ranges?

17 A. I don't know what you mean by an
18 apples-to-apples.

19 Q. Did you do a Bortz average from 2010
20 to 2012 versus your average from 2010 to 2012?

21 A. I haven't done that particularly. I
22 talked about the evidence that I looked at from
23 Crawford and Bortz to indicate 2013 wouldn't
24 move the needle materially, but I have not
25 explicitly laid out the same years.

1 As I mentioned earlier, I was trying
2 to corroborate, so I looked at the full Bortz
3 data versus my full data. But I have not done
4 the just 2010 through 2012 on Bortz.

5 Q. Can you please put up the next slide,
6 please.

7 Dr. Israel, I have a demonstrative
8 exhibit that I wanted you to take a look at.
9 And the exhibit has -- the first column has the
10 list of the different program categories. And
11 then it has the Bortz results for three years.

12 The next column after that is the
13 2010-'12 Bortz average for those three years.
14 And then the next column is your 2010 through
15 '12 regression.

16 And then following that is the
17 question whether or not if your regression
18 falls within the Bortz minimum/maximum
19 estimates.

20 Have you taken a minute to look at
21 that?

22 A. I see it, yes.

23 Q. And, I mean, the column labeled D is
24 actually a calculated column. If you need to
25 check the math on that, there's a calculator

1 next to you.

2 A. I will take your word for it.

3 Q. Okay. I don't know.

4 A. I will take the word of whoever did
5 the calculation.

6 Q. Yeah, subject to -- subject to check.
7 And so when you adjust for apples-to-apples
8 with three-year averages, so with respect to
9 your regression results for the Sports program,
10 do they fall within the minimum/maximum range?
11 Does it -- does your regression average fall
12 within the minimum/maximum range for Sports?

13 A. Yes.

14 Q. And what about for Program Suppliers?

15 A. No, it is slightly below the bottom
16 end as it was in my previous comparison.

17 Q. And what about for Commercial
18 Television?

19 A. Yes.

20 Q. And what about Public Television?

21 A. No, it is higher, as we discussed.

22 Q. And for Devotional and Canadian
23 Claimants, they are not in the range at all,
24 are they?

25 A. Right, because it gives you the zero

1 value, as we've discussed. I would notice that
2 that pattern of yes's and no's is exactly what
3 it was when I did my 2010 to 2013 comparison.

4 Q. And with regard to -- we can close
5 that screen.

6 In your regression analysis, the
7 coefficient is the price, if you will, is it
8 not, and if you think in terms of -- and
9 correct me if I am wrong, this is how I think
10 about it -- in terms of market value, you are
11 looking at some type of price and then you are
12 looking at some type of quantity. Is that
13 right?

14 A. I mean, as we discussed, the price is
15 coming out of the regulations. So I think the
16 coefficient is correctly thought of as a
17 measure of the buyer's side value on the
18 content.

19 Q. But -- I'm sorry.

20 A. Go ahead.

21 Q. So what do you mean by the price is
22 coming out of regulation? What price are you
23 referring to? The coefficient?

24 A. No, I mean the -- the regression is
25 based on buyers choosing programming, given a

1 fee schedule which is set by the statute. And
2 so the price that the buyer has to pay for more
3 content is whatever the fee schedule says.

4 And the regression then looks at
5 choices made given that fee schedule to
6 determine the values that the buyer puts on the
7 content.

8 So I think it is very similar to
9 something that in industrial organization is
10 called a hedonic regression. But it is
11 basically measuring the value that buyers put
12 on different product characteristics as a
13 function of what they have to pay for them.

14 Q. What is a function of that value in a
15 marketplace where royalty payments don't exist?

16 A. I mean, as I have discussed, the way
17 the market -- in every setting where there is a
18 free market between a CSO and a network
19 provider, that I know of, those prices get set
20 by negotiation between the network and the CSO.

21 And economics teaches us that the
22 value that will be arrived at in those
23 negotiations is basically some fraction, often
24 assumed to be 50/50, but it is not
25 insignificant, it is some fraction of the

1 buyer's willingness to pay.

2 And so the function of those buyer
3 values is that they set the value or what
4 economists call the surplus that is being
5 negotiated over when the network and the CSO
6 negotiate to arrive at a price.

7 Q. But the royalty payments that you've
8 used don't exist in that market, in the
9 hypothetical market. Once regulation is gone,
10 so are the royalty payments, correct?

11 A. Correct, but the values are the
12 buyer's actual values and those are what drive
13 the negotiation to determine the price.

14 Q. I mean, what -- if royalty payments
15 didn't exist, you don't have any other evidence
16 of what the value would be, other than the
17 cable content analysis, correct?

18 A. No. The evidence of the value is
19 based on the choices that buyers make. I mean,
20 as I have said, it is very common in economics
21 to have regulated prices and to learn from the
22 decisions that buyers make given those
23 regulated prices.

24 So that the information -- I am not
25 assuming the price schedule stays the same.

1 I'm assuming that the values that I derive from
2 the choices that buyers make given that price
3 schedule are still the relative -- relevant
4 values to determine the prices in the free
5 market.

6 Q. But those values are not based on the
7 free market, are they?

8 A. They are based on the choices that the
9 buyers make, given the price schedule. What
10 you want to do is measure the buyer's values.

11 So given a price schedule, whether it
12 be regulated or determined from a market, if
13 you see the choices that buyers make given
14 those prices, you could determine what the
15 buyers value.

16 Q. On those choices within the regulated
17 market?

18 A. They are choices -- buyers face a
19 price schedule and they make choices. It is
20 very common in economics.

21 In fact, it has been done in a fair
22 bit of my own research, where you take choices
23 that are made in one regulatory setting, you
24 use those choices to infer what -- the value
25 the buyers must put on the product, and then

1 you use those values to determine what would
2 happen in a different market.

3 Q. You haven't answered my question. Are
4 those choices the choices that your modeling
5 made in the regulated market or not? Yes or
6 no.

7 A. They are made with regulated prices
8 but that doesn't change the analysis.

9 Q. Well, is that a yes or a no?

10 A. They are made -- your question was are
11 they made in a regulated price setting?

12 Q. The choices that you have modeled, are
13 they not made in a regulated -- in a regulated
14 environment?

15 A. They are made in a regulated
16 environment, against a regulated price control.

17 Q. And I wanted to -- I know earlier when
18 you were talking to -- when you were being
19 examined by Mr. MacLean, he mentioned
20 comparisons within Dr. Crawford's results and
21 your results, but he used figure 16, I think,
22 in Dr. Crawford's results.

23 And so if you look on the screen,
24 there is another demonstrative exhibit that
25 took the results right out of yours and Dr. --

1 the results of your coefficients, and
2 Dr. Crawford's testimony, figure 19, I believe,
3 and your -- and your regression coefficients,
4 which I think is on page 22 -- 52.

5 And, again, not to belabor the point,
6 Dr. Crawford's result, I believe, is when he
7 uses the non-duplicated minutes. So in making
8 that -- this comparison, for live team sports,
9 Dr. Crawford has, as you can see .963, and you
10 have, again, 4.836.

11 Would you consider this a significant
12 difference in coefficient results?

13 A. I mean, again, as I said, the numbers
14 are quite different, but you can't compare --
15 given the difference in the functional forms,
16 the log and the linear and what is controlled
17 for in the regressions, you can't -- there is
18 no meaning to just comparing those two numbers.

19 Q. So are you answering my question with
20 a yes or a no? Is this a significant
21 difference?

22 A. I honestly --

23 MR. LAANE: I object. The question
24 can't fairly be answered with a simple yes or
25 no.

1 JUDGE BARNETT: Sustained.

2 BY MR. OLANIRAN:

3 Q. With respect to -- with respect to
4 live team sports, looking at Dr. Crawford's
5 regression, is there significant mathematical
6 difference between the two numbers?

7 A. I mean, I don't know. Significant to
8 me would mean is there a statistical
9 difference.

10 Q. I am not asking about a statistical
11 difference.

12 A. That's what the word significant means
13 to me. But if you mean is there a large --
14 there is a -- I don't know how to answer that.
15 The numbers are clearly different. They are
16 not economically comparable. So I don't know
17 how to interpret the size of that difference.

18 Q. Actually I said is this a significant
19 mathematical difference, not in the statistical
20 sense.

21 A. I mean, they are different. I don't
22 know how to say if it is significant if I don't
23 know how to interpret the numbers.

24 Q. Well, there is -- there is a
25 difference of probably about close to \$3, about

1 3 plus dollars; is that correct?

2 A. Yes, there is a difference of that
3 amount.

4 Q. And then for Program Suppliers,
5 Dr. Crawford has Program Suppliers at .069.
6 And in your regression, you have Program
7 Suppliers at .469, your coefficient of Program
8 Suppliers at .469. Right?

9 A. Right. Again, I have to stress those
10 are measuring different things. One is the
11 marginal minute in a logarithmic regression.
12 One is the linear average as we discussed
13 earlier but, yes, that's the difference between
14 the numbers.

15 Q. So you are saying there is a
16 difference between your coefficient results and
17 Dr. Crawford's?

18 A. Because there is such a -- there is a
19 difference in the whole regression
20 specification, then there is going to be a
21 difference in the coefficients. And you really
22 need to go to the shares to measure the
23 comparison.

24 Q. Well, let me make sure I understand
25 this then. The regression -- the coefficients

1 of the results of the regression analysis are
2 for each of you; is that correct?

3 A. Yes, but they mean something different
4 in the two regressions.

5 Q. I understand. I understand what you
6 are saying. But the minutes that you use are
7 not part of the regression; is that right?

8 A. I mean, they are data in the
9 regression. They are not part of the
10 regression output.

11 Q. The values that are in this
12 demonstrative are the values that you apply to
13 the minutes to get an implied share?

14 A. They certainly are from my column.
15 Because mine is linear. So you can multiply
16 the coefficient times the minutes and get the
17 implied share.

18 Dr. Crawford has a logarithmic form,
19 which means the coefficient, you can't just
20 multiply it times the minutes. You need to
21 account for the non-linear form he is using.

22 Q. So basically in terms of the
23 corroboration that you speak to with regard to
24 your results and Dr. Crawford's results, you
25 are really referring to just implied share,

1 correct?

2 A. That's correct.

3 Q. And the implied shares include the
4 minutes which are not part of the regression
5 results at all; is that correct?

6 A. They are not part of the regression
7 results, I agree with that.

8 Q. Dr. Israel, you said that you prepared
9 your regression analysis for 2010 and 2012
10 sometime before the Judges issued an order
11 consolidating the 2013 cable royalty year with
12 2010 and 2012. Do you recall that?

13 A. I mean, certainly acquired the data
14 for the earlier years and had begun doing the
15 work. I don't remember the timing of when the
16 order came out. But what I'm certain of is we
17 had already acquired the data for 2010 to 2012
18 when 2013 was added.

19 Q. And why, again, did you not do a
20 regression for 2013?

21 A. Because I saw the purpose as to
22 corroborate to see if the Bortz survey results
23 are matching what's going on in the
24 marketplace. And in my view, having a
25 three-year comparison provides a good

1 experiment to do that corroboration.

2 Q. And you didn't think it was important
3 to do a 2013? Did you seek to do it at all?

4 A. No, I mean, I -- again, the question
5 from my point of view, the assignment I had
6 been given was take the Bortz survey results,
7 see if they are consistent with marketplace
8 evidence.

9 And, you know, if they are consistent
10 for three years, that's a very strong
11 corroboration of a survey. So I didn't -- I
12 had a very nice experiment based on the first
13 three years to answer the question I had been
14 asked to answer.

15 Q. And the statistics test that you
16 mentioned that you did, was that a statistical
17 test with regard to your comparison of your
18 results in Bortz or your results in
19 Dr. Crawford's?

20 A. I mean, the statistical test -- I am
21 not sure which statistical test you mean.

22 Q. You mentioned a statistical test to
23 see whether or not doing another year's
24 regression would have made a difference.

25 A. The test I actually meant was within

1 my own regression to see if 2010, 2011, and
2 2012 were different from each other. And they
3 weren't. So I reported the average.

4 The -- the test I did to look at 2013
5 was really just comparing the coefficient --
6 the shares that I got versus what Crawford got
7 when he added '13 versus what Bortz had in
8 2013. And those shares were -- were quite
9 similar.

10 Crawford 2013 matches Bortz 2013 as
11 well as the earlier years. Crawford 2013
12 matches my earlier years quite well. And so
13 that just -- it was one more piece of evidence
14 that adding 2013 hadn't changed the story in
15 any material way.

16 But, again, my key, what you can take
17 away from my regression which is on 2010 to
18 2012, is that marketplace evidence from those
19 three years corroborates what is in Bortz.

20 Q. And in general, if you had all of the
21 data that you needed, the computer to construct
22 a regression model, how long would it take you
23 to do that, if you had all the data?

24 A. If I started with all the data? What
25 am I being asked to do, just add another year?

1 Q. Yes.

2 A. If I already had all the data, then
3 running the regression would be -- you would
4 have to clean it and check it, but running the
5 regression would be reasonably quick.

6 Q. What's quick, a day, two days?

7 A. I don't know. More like weeks
8 probably by the time you check the data and
9 everything. But certainly a week, two weeks,
10 something like that, once you have all the
11 data, which is -- and clean it. That's a big
12 part of the process.

13 Q. Okay. You said you didn't recall when
14 the Judges ordered consolidation of 2010
15 through '12 and 2013; is that right?

16 A. That's right.

17 Q. Let me represent to you that the
18 Judges issued an order on September 9 of 2015.
19 All right?

20 A. Okay.

21 Q. When did you submit your testimony?

22 A. The date is on it. I think it was
23 late 2016.

24 Q. That would be December of 2016; is
25 that correct?

1 A. Yes.

2 Q. So between September 2015 and December
3 2016, you didn't think it was important to do a
4 regression analysis for 2013?

5 A. I mean, again, my answer is going to
6 be the same. I thought the three-year test, if
7 you compare three years of market data to three
8 years from a survey, you have a nice
9 experiment.

10 And so I concluded I had met the
11 assignment I had been given, which was to see
12 if the Bortz results were corroborated by
13 marketplace evidence.

14 It was marketplace evidence from 2010
15 to 2012. And then later results came out from
16 2013 from Crawford, which provide one more
17 piece of evidence.

18 But my decision was based on the fact
19 that I could give an affirmative corroboration
20 answer based on a three-year experiment.

21 Q. And did anyone ask you to do the 2013
22 analysis at all?

23 A. No.

24 Q. I'm sorry?

25 A. I said no. I didn't know if you

1 didn't hear me.

2 Q. No one cared whether or not you did
3 the 2013 analysis?

4 MR. LAANE: Objection, argumentative.

5 JUDGE BARNETT: Sustained.

6 BY MR. OLANIRAN:

7 Q. On page 9 of your testimony, you quote
8 language from the CARP's '90-'92 determination
9 allocating royalties among various Claimants
10 for the '90-'92 royalty years.

11 Do you recall that?

12 A. Yes.

13 Q. And you should have somewhere
14 thereabouts where you sit a black binder with a
15 green cover. Do you have that? It might be
16 behind you, I think.

17 A. Yeah. There is a few of them. I hope
18 I get the right one. Okay.

19 Q. Would you please look at the
20 exhibit marked as Exhibit 6034.

21 A. 604?

22 Q. 6034.

23 A. I see it.

24 Q. And is that the report that you quote
25 on page 9 of your testimony?

1 A. Let me just confirm.

2 Q. Well, you can go to, I think, page 65,
3 I think, of that report and compare it to the
4 quote you have on page 9 of your testimony.

5 A. Yep, I see it.

6 Q. And that's the quote that you have in
7 your testimony on page 9; is that correct?

8 A. It looks like it, yes.

9 Q. Okay. And so is this the report that
10 you relied on in -- as part of your testimony,
11 right?

12 A. I certainly reviewed it and certainly
13 relied on this conclusion about the Bortz
14 survey. I don't, as I sit here, remember every
15 page of it. But, yes, certainly I relied on it
16 for purposes of its conclusions about the Bortz
17 survey.

18 Q. Okay. And this is just, for the
19 record, this is the cover letter to that report
20 that's dated May 31st, 1996. And it is -- the
21 subject line is Covering Arbitration Royalty
22 Panel, Cable Royalties For the Years 1990
23 through 1992. Right?

24 A. That's what it says, yes.

25 Q. Okay.

1 MR. OLANIRAN: Your Honor, move to
2 admit Exhibit 6034.

3 JUDGE BARNETT: 6034 is admitted.

4 (Exhibit Number 6034 was marked and
5 received into evidence.)

6 BY MR. OLANIRAN:

7 Q. Now, you spoke earlier about viewing,
8 in response to many of the questions that you
9 said that CSOs don't care about viewing. Is
10 that right?

11 A. No, I don't think I said that. I
12 think I said they ultimately care about the
13 effect of additional content on their
14 profitability, of which viewing is one of many
15 factors.

16 Q. But you didn't think viewing was a
17 component of value, did you? You don't think
18 viewing is a component of value?

19 A. I mean, again, I think viewing -- the
20 extent of viewership is one characteristic of
21 content. I'm not saying it is entirely
22 irrelevant. I am just saying it is not the
23 same thing as value and there is many other
24 relevant factors.

25 Q. Are you aware of -- do you know

1 whether or not this report speaks to whether or
2 not viewing is part of value?

3 A. I don't recall as I sit here. I think
4 I recall in previous statements people saying,
5 you know, in general reports saying viewing was
6 one component of value, as I -- as I have said,
7 but I don't recall the specific language in
8 this report, or in this finding.

9 Q. Let me -- would you please turn to
10 page 44 of that report, of Exhibit 6034.

11 A. 44?

12 Q. Yes. Are you there?

13 A. Yes.

14 Q. And let me direct your attention to
15 the fourth line in the carry-over paragraph, do
16 you see that, the second -- the third full
17 sentence? It is on the fourth line. Do you
18 see that?

19 A. Yes.

20 Q. Would you please read that into the
21 record through the end of that paragraph?

22 A. Sorry. Where do you want me to start?

23 Q. "It is," do you see that?

24 A. "It is disingenuous"? There?

25 Q. Yes.

1 A. I can read it. "It is disingenuous to
2 say that the cable system is interested only in
3 attracting subscribers but is totally
4 unconcerned with whether or not the subscriber,
5 in fact, watches the programming. As was
6 stated by Sieber, who testified for the Program
7 Suppliers, cable system operators are more
8 willing to carry the more heavily watched,
9 higher rated services. Cable system operators
10 receive Nielsen data in a variety of ways."

11 Q. Let me also direct you to the last
12 paragraph on that page. It is the one that
13 starts with "in conclusion."

14 A. Yes.

15 Q. Would you please read that into the
16 record?

17 A. Sure. "In conclusion, we accept the
18 Nielsen data for what it purports to be, a
19 survey of actual conduct with adequate accuracy
20 for the larger Claimant groups in particular.
21 We cannot quantify the Nielsen statistics as
22 evidence of market value other than to say that
23 actual viewing is very significant when weighed
24 with all other factors."

25 Q. Okay. Now, the language you just read

1 is inconsistent with your testimony this
2 afternoon, is it not?

3 A. I think it is completely consistent
4 with my testimony. Consistent.

5 My testimony is that viewing is one
6 characteristic of programming, I don't say it
7 is irrelevant, but it is one of many factors.
8 I think that's what this says.

9 MR. OLANIRAN: I have no further
10 questions, Your Honor. Thank you.

11 JUDGE BARNETT: Thank you, Mr.
12 Olaniran. Anything from Commercial Television?

13 MR. STEWART: No, Your Honor.

14 MR. LAANE: One very brief follow-up,
15 Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. LAANE:

18 Q. If you go back, Dr. Israel, to
19 Exhibit 6034 and page 65 that you were asked
20 about?

21 A. Remind me of the page again.

22 Q. 65.

23 A. Yep.

24 Q. At the very bottom of that page, did
25 the Panel indicate that the Bortz survey was

1 focused more directly than any other evidence
2 to the issue presented, relative market value?

3 A. That's what it says, yes.

4 MR. LAANE: Nothing further.

5 JUDGE BARNETT: Is Mr. Hartman
6 available?

7 MR. LAANE: He is, Your Honor.

8 JUDGE BARNETT: Then let's get
9 started.

10 (The witness stood down.)

11 JUDGE BARNETT: Thank you, Dr. Israel.
12 Sorry.

13 THE WITNESS: Thank you.

14 JUDGE BARNETT: Thank you.

15 Please be careful finding your way to
16 the chair.

17 MR. HARTMAN: Yes, I will not trip on
18 anything.

19 JUDGE BARNETT: If you would, please,
20 raise your right hand.

21 THE WITNESS: Sure.

22 Whereupon--

23 DANIEL HARTMAN,
24 having been first duly sworn, was examined and
25 testified as follows:

1 roundtable discussion, we certainly would pursue it.

2 So that's all I have to say on that.

3 And I believe, Mr. Garrett, you are -- we
4 have a witness on your list today.

5 MR. GARRETT: Yes, Your Honor.
6 Mr. Singer.

7 JUDGE BARNETT: It's an obstacle
8 course there. Please be careful.

9 THE WITNESS: Okay.
10 Whereupon--

11 ALLAN SINGER,
12 having been first duly sworn, was examined and
13 testified as follows:

14 JUDGE BARNETT: Please be seated.

15 THE WITNESS: Thank you.

16 MR. CANTOR: Good morning, Your
17 Honors. Dan Cantor of Arnold & Porter for the
18 JSC.

19 DIRECT EXAMINATION

20 BY MR. CANTOR:

21 Q. Good morning, Mr. Singer.

22 A. Good morning, Mr. Cantor.

23 Q. Would you please introduce yourself
24 for the Court.

25 A. I am Allan Singer.

1 Q. Would you give us an overview of your
2 professional background.

3 A. Yes. For the last 20 years -- for
4 over 20 years, I've been a programming
5 executive in the cable television industry,
6 during which my job has been evaluation of
7 programming content, both in the acquisition of
8 programming content for cable companies and
9 television networks and also in the licensing
10 of programming from networks to cable companies
11 and other distributors.

12 Q. What was your most recent job in the
13 cable industry?

14 A. From 2011 until a little over a year
15 ago, I was senior vice president of programming
16 at Charter. At Charter, I was the head of
17 programming, the head of the programming
18 department.

19 And my job was the evaluation of --
20 the evaluation, valuation of programming and
21 subsequent negotiation and acquisition of such
22 programming for Charter's cable systems.
23 During that time, part of my responsibility
24 would have been overseeing decisions made
25 relating to distant broadcast signals.

1 Q. Where did you work prior to Charter?

2 A. From 2009 through 2011, until 2011, I
3 worked at the Oprah Winfrey Network. My job at
4 Oprah -- I was the executive vice president of
5 distribution and strategy. And my job at Oprah
6 was the exact opposite of what it was at
7 Charter. I was selling Oprah's content for her
8 new network to the distributors, to the cable
9 companies, Verizon and AT&T, and to DISH and
10 Direct, the two DBS providers.

11 Q. And let's just go a step further back
12 in time. Where did you work prior to the Oprah
13 network?

14 A. Prior to the Oprah Network, I was at
15 Comcast in several programming positions. I
16 started in about 2002, 2003, again on the
17 network side of the -- of what the -- the
18 networks that Comcast owned. I was senior vice
19 president of programming investments. I
20 managed the Comcast programming networks at
21 that time, E!, Style, G4, also negotiated,
22 again, as I did at Oprah, against the large
23 distributors if we had a renewal. So if E! had
24 a renewal with DirecTV, I would negotiate that.
25 I'd work on the rate card, which I also had

1 done at Oprah.

2 And -- and I did business development.

3 I helped develop a bunch of networks at
4 Comcast, TV1, G4, Sprout, and I also did some
5 business planning and acquired rights, the more
6 expensive rights for the networks. I would
7 assist in that and building a business plan
8 around that.

9 Over time, that segued to acquiring
10 more and more sports rights. And I became
11 senior vice president of sports business
12 development at Comcast, and I was essentially
13 just acquiring sports rights at the time,
14 developing a bunch of regional sports networks
15 for Comcast in Chicago, the Bay Area, with the
16 New York Mets, Sports Net New York. I worked
17 on some of the rights agreements here in
18 Mid-Atlantic, and I -- I acquired National
19 Hockey League rights for what was the Outdoor
20 Life Network and what we transitioned to a
21 national sports network that we called Versus.

22 I ended up my tenure at Comcast going
23 back to the cable company and doing the job
24 that I had prior to that, negotiating against
25 the networks. I was SVP of content

1 acquisition, I think it was called.

2 Q. And, finally, let's just take one more
3 step back in your employment history. Prior to
4 Comcast, would you tell us about your work in
5 the cable field?

6 A. Yeah, briefly I started in 1996 at
7 Telecommunications, Inc., TCI, which was at the
8 time what Comcast is today, the very largest
9 cable company. I worked my way up to SVP of
10 programming and headed up the department. The
11 company by then had been bought by AT&T, so I
12 was the head of programming at the largest
13 cable company when Comcast bought that company.

14 Q. And in these various positions in the
15 cable industry, did you have an opportunity to
16 evaluate and value different types of
17 programming?

18 A. My job throughout my -- throughout my
19 career has been the valuation of television
20 programming, ascribing a price to it, trying to
21 obtain the highest rate that I thought the
22 Oprah Winfrey Network could get while
23 maintaining carriage, justifying to financial
24 departments at large companies the acquisition
25 of expensive programming and how we'd make a

1 business plan around it.

2 MR. CANTOR: Your Honors, the JSC
3 offer Mr. Singer as an expert in the valuation
4 of television programming in the cable
5 industry.

6 JUDGE BARNETT: Hearing no objection,
7 Mr. Singer is so qualified.

8 MR. CANTOR: Thank you.

9 BY MR. CANTOR:

10 Q. Mr. Singer, have you been retained as
11 an expert in this proceeding by the JSC?

12 A. Yes, I have.

13 Q. Would you please tell us about your
14 assignment.

15 A. I was asked to provide advice to the
16 JSC concerning the factors that a programming
17 executive at a cable system would use in
18 valuating programming and specifically how
19 those factors would interrelate with cable
20 companies trying to manage increasing
21 programming expense, and, finally, whether
22 those factors -- how those factors -- whether
23 they were consistent or not with the Bortz
24 survey's findings relating to distant broadcast
25 signals.

1 Q. You should have in front of you a
2 binder that has Exhibit 1008 and 1009 in it.
3 If we start with Exhibit 1008, would you please
4 tell us what that is?

5 A. This is my written direct testimony in
6 this matter.

7 Q. And would you please tell us what
8 Exhibit 1009 is?

9 A. It's my written rebuttal testimony in
10 this matter.

11 Q. And did you prepare both Exhibit 1008
12 and 1009?

13 A. Yes, sir.

14 Q. Do you declare that Exhibit 1008 is
15 true and correct and of your personal
16 knowledge?

17 A. Yes.

18 Q. And, likewise, with regard to
19 Exhibit 1009, do you declare that Exhibit 1009
20 is true and correct and of your personal
21 knowledge?

22 A. Yes.

23 Q. Thank you.

24 Let's talk about, if you would --
25 provide for us some background regarding the

1 factors that a cable operator in the period
2 2010 to 2013 would have considered in
3 determining what programming to carry and how
4 much to pay for it.

5 A. Well, it's a little rudimentary, but
6 the cable television video business is about
7 having people pay you money for subscription
8 television for a panoply of cable television
9 networks that are paid networks, unlike
10 over-the-air broadcast networks.

11 So the two major factors historically
12 have been is this programming such that it will
13 help me acquire customers or retain customers?
14 By 2010, cable television's video product was a
15 mature industry in around 30, 35 years in its
16 present format, depending on when you want to
17 tether that.

18 And as such, acquisition was becoming
19 less and less important at least for the cable
20 company, which was the original incumbent
21 provider of video. And several reasons for
22 that. The cable companies and the satellite
23 companies that we were directly competing with
24 provided 99 percent of the same video content,
25 so it wasn't that distinguishable unless you

1 took something off that the other side had that
2 your customers needed.

3 So it was hard to sell -- as a cable
4 company, it was hard to get acquisition by
5 saying you had a different video product.
6 Secondly, for all the companies, there was a
7 hard-core segment of customers that just don't
8 want to pay for television. And it's a hard
9 nut to crack. So it's easier to keep a
10 customer that you have than to go get a new
11 one.

12 So although acquisition remained
13 important, if you looked at what cable
14 companies were doing at this time, it would be
15 to sell the video product in a bundle with
16 high-speed data and with phone, which the
17 satellite companies didn't have. The video
18 product was basically indistinguishable if you
19 didn't drop something that they had that
20 customers wanted. So retention became the real
21 key. Is this the type of programming that I
22 need to launch because I'm not going to have
23 customers, I'll lose customers? Or is it the
24 type of programming that, if I don't keep on, I
25 have the risk of losing customers?

1 You also have to remember at this time
2 around 2010, 2011, the marketplace was judging
3 cable companies by how many subscribers, video
4 subscribers, it was losing. Being the
5 incumbent, with the phone companies having
6 moved into the business and satellite having a
7 very aggressive product, how many customers did
8 you lose?

9 So losing customers could equate to
10 losing market -- the market value of the
11 company and your stock price. Healthy
12 companies like Comcast at this time were losing
13 about 1,000, 2,000 customers a quarter.
14 Unhealthy companies were losing quite a bit
15 more a quarter, video customers. And it was
16 impacting their stock price.

17 For all those reasons, retention ends
18 up being the critical factor in evaluate -- a
19 very critical factor in evaluating television
20 programming at this time.

21 Q. Did management of costs play a role in
22 your considerations?

23 A. The management of costs also became an
24 overlying primary concern at this time. For
25 the video business, all the distributors,

1 80 percent of your expense is the programming,
2 is what you're paying the networks. At the
3 same time, programming costs were escalating by
4 about 8 to 10 percent, primarily driven by
5 sports costs escalation.

6 So that's not very tenable,
7 particularly when customers are understandably
8 complaining about their annual rate increases
9 to try to cover those costs, which it just
10 couldn't. So managing -- managing programming
11 expense, while you're trying to determine
12 whether or not content justifies continued
13 carriage or launching because you'd lose a
14 customer become interrelated.

15 JUDGE STRICKLER: Excuse me. Good
16 morning, Mr. Singer. Co.

17 THE WITNESS: Sure.

18 JUDGE STRICKLER: How are you?

19 THE WITNESS: Hi.

20 JUDGE STRICKLER: You said cost
21 increases were going up 8 to 10 percent. Was
22 that annually?

23 THE WITNESS: On an annual basis, I
24 apologize. Yes.

25 JUDGE STRICKLER: From very roughly

1 2010 to 2013?

2 THE WITNESS: Yes.

3 JUDGE STRICKLER: And you said it was
4 particularly in the sports area, I think you
5 said?

6 THE WITNESS: Particularly in sports
7 areas. Sports costs constituted 40
8 some percent of cable companies' expense.
9 Sports costs were going up 5 to 7 and a
10 half percent on an annual basis for the large
11 sports networks and for the regional sports
12 networks. Regional sports networks average
13 rate increases were about 7 percent.

14 When you come out of contract with a
15 sports network, you would frequently have huge
16 escalators. We'd call it a step-off. So if I
17 was paying \$4 for a regional sports network,
18 when I came out of contract for it, they'd want
19 \$4.60. If I was paying \$3 for product and they
20 -- and they created a new network, like Sports
21 Net New York, the new network would cost \$3 on
22 its own, something -- roughly.

23 JUDGE STRICKLER: Maybe I didn't
24 appreciate the time frame, but you said cost
25 increases were about 8 to 10 percent, and then

1 you said particularly sports, and then you said
2 5 to 7 and a half percent. That struck me as
3 lower than the 8 to 10 percent. I suspect I'm
4 missing something in there.

5 THE WITNESS: You are because we're
6 also having these step-offs during this time
7 period where new networks are being created or
8 sports networks are -- excuse me, sports
9 networks are migrating. So you'd have the Mets
10 network. The Mets network starts. Mets
11 network had been part of Cablevision's FOX
12 Sports New York.

13 So FOX Sports New York's prices are
14 escalating by 7 percent a year, but then you
15 have another \$2 tied up to that when SNY
16 launches in New York. And that was going on at
17 this period of time.

18 You had a panoply of national rights
19 that were transferring to new networks. You
20 had a panoply of regional rights that were also
21 transferring to new networks which had this
22 huge step-off effect.

23 JUDGE STRICKLER: I see.

24 THE WITNESS: Same thing going on with
25 broadcast television at the time too. So when

1 a broadcaster came out of contract, if you had
2 been paying the broadcaster 30 cents, three
3 years later you might be paying them a dollar.

4 So on top of the 5 to 7 percent sports
5 increases, you were having these increases
6 popping on and on a fairly consistent, periodic
7 basis.

8 JUDGE STRICKLER: And you referred to
9 it as sports in your testimony, and then your
10 example was in professional team sports.

11 THE WITNESS: Yes.

12 JUDGE STRICKLER: Were these expenses
13 going up at this level for all sports or are
14 you focusing just on team sports, which, as you
15 may know, refers to --

16 THE WITNESS: Right.

17 JUDGE STRICKLER: -- the Sports
18 Claimants category here?

19 THE WITNESS: In my testimony, I -- I
20 would be using the term "team sports" in my
21 testimony today. When I think of sports costs,
22 when a cable decisionmaker thinks of sports,
23 they're thinking of the four major sports
24 leagues and they're thinking of the NCAA major
25 sports. The other sports don't have a separate

1 allocated price generally in the industry and
2 don't have these same type of escalators.

3 JUDGE STRICKLER: Thank you.

4 THE WITNESS: Thank you.

5 JUDGE BARNETT: Mr. Singer, I believe
6 you prefaced this discussion by saying -- by
7 setting us in the time frame of 2010.

8 THE WITNESS: Yes, ma'am.

9 JUDGE BARNETT: And I know our concern
10 here is 2010 to 2013.

11 THE WITNESS: Right.

12 JUDGE BARNETT: Are you about to tell
13 us what happened after 2010?

14 THE WITNESS: Thank you very much. I
15 apologize for not being clear.

16 I was saying that at 2010, this is
17 what things look like. This was continuing
18 over time. For instance, I think in 2013 at
19 Charter, we got our year-over-year cost
20 increase down to 5 percent, but the next year
21 they were jumping up above 10 percent when pure
22 companies like Comcast and DirecTV were
23 announcing 10 percent increases. The two
24 largest companies.

25 So we were able to manage it for this

1 one time period by doing some extraordinary
2 and, frankly, crazy things with programming,
3 but the next year it just went -- it went right
4 back up. So what I was describing was
5 happening through this whole period of time
6 and, frankly, is escalating beyond '13, '14,
7 and '15.

8 This is going on today. And it's --
9 and there's other issues today too.

10 JUDGE BARNETT: Certainly. I'm sure
11 your attorney will get into that, but --

12 THE WITNESS: Yes, ma'am.

13 JUDGE BARNETT: -- I just wanted to
14 make sure that you were talking about the time
15 frame that is at issue in this hearing.

16 THE WITNESS: Yes. I was setting the
17 stage for 2010, but that -- my description is
18 what's going on during this time period,
19 including these types of annual increases.

20 JUDGE STRICKLER: And when you say you
21 were able to keep costs down by doing some
22 extraordinary and crazy things, it's hard to
23 leave that hanging out there in the programming
24 context of this proceeding.

25 (Laughter.)

1 JUDGE STRICKLER: What extraordinary
2 and crazy things were you doing?

3 THE WITNESS: Well, I'm obviously not
4 a very well-prepared witness. But what we did
5 was we threatened to take things off, to take
6 some channels off.

7 There were costs -- Charter had
8 costs -- it had come out of bankruptcy and it
9 had costs that, from my experience at Comcast
10 and in the industry, looked high, and we
11 basically said we're just going to drop it if
12 -- we'll risk losing customers if we have to;
13 we'll just drop it.

14 We had a major, major premium service
15 that was out of contract, and we said -- that
16 we had a flat rate for. We paid them X, tens
17 of millions a year on an annual basis. We said
18 we'll pay you half, or we just don't offer it
19 to customers anymore. That was crazy because
20 some percent of our customers were receiving
21 that premium service as part of a bundle, and
22 we would have had to figure out a way to --
23 figure out something else to give the customers
24 for value.

25 JUDGE STRICKLER: So a commercial game

1 of chicken?

2 THE WITNESS: Yes, it was. It's --
3 with the programming expenses going up like
4 this, it was some hard -- there's hard
5 negotiations with many of the people here,
6 including the Joint Sports Claimants. So, yes.

7 Hard negotiations, I'd call it, as
8 opposed to chicken. I think some of the things
9 we felt we really had to do.

10 JUDGE STRICKLER: Thank you.

11 THE WITNESS: Yes, sir.

12 BY MR. CANTOR:

13 Q. Mr. Singer, you've been talking about
14 the goal of customer retention and also the
15 balance of cost control. Given these two
16 factors, were there particular characteristics
17 that you were looking for during this time
18 period in programming?

19 A. Right. Well, when we're trying to
20 make these hard decisions in the one year we
21 did what I said was crazy things, we're looking
22 at content and we're seeing whether it's --
23 whether it has certain categorization --
24 whatever the word is. Is it differentiated?
25 Does it have some type of signature

1 programming? Is there something unique about
2 it?

3 It's differentiated versus other
4 programming within that genre even. Are
5 customers passionate about it? Is it something
6 that people really feel that they need to have?
7 And that's not just broad passion. That can be
8 niche passion. You know, we're going to lose
9 some customers if we don't have this type of
10 passionate product.

11 And, lastly, is it the type of
12 product, the availability of which is somewhat
13 limited, particularly is it limited just to
14 this network? You can only get Game of Thrones
15 on HBO, for instance. That would be a good
16 example. As opposed to just content that's
17 available or a program that's available on a
18 wide variety of networks or platforms, because
19 we have streaming services available at this
20 time that are outside of our subscription
21 television window.

22 Q. Would you please give us an example of
23 the type of differentiated limited programming
24 that you're talking about?

25 A. Well, sports checks every one of the

1 boxes if you think about it. It's distinct.
2 Each sport is distinct. Each league is
3 distinct. There's signature programming, major
4 event program that you must-have, like The
5 Final Four in basketball. There's -- the
6 event, the athletes themselves, some teams are
7 signature. The Cubs are a signature, iconic
8 team. The athletes themselves, Lebron James,
9 Tom Brady. I could have said Kurt Cousins, but
10 not any longer. You know, they're -- they, in
11 and of themselves, are brands. There's nothing
12 that a broad segment of customers consistently
13 are as passionate about as sports teams. Their
14 their college football team, their alums, their
15 local hockey, their local basketball team, a
16 baseball team they grew up with. I don't
17 really need to waste time talking about the
18 passionate nature of sports fans.

19 And, lastly, sports is -- has very
20 limited availability. The exhibition is
21 generally just on one channel. It's not on
22 several channels, so it's not like a rerun that
23 might be on two or three cable networks and a
24 broadcaster. It's only generally on one
25 channel, the channel somewhat associated with

1 the product. And related to the limited -- the
2 limited availability is it's live. It's the
3 last live programming that we have.

4 When I started, when I started in '96,
5 '97, tune-in program was really important. The
6 Sopranos were coming on Sunday, the initial
7 exhibition, at 8:00 o'clock. That's when you
8 watched. Even though HBO had Plexus and you
9 could watch it later, tune-in was critical.

10 When I would go to E!, they'd have a
11 big grease board with every network and what
12 was programming and counter-programming. That
13 doesn't exist any more.

14 In limited circumstances, you do want
15 to be there when the season finale or the
16 season premier is on or a series finale, but
17 generally the last of the tune-in programming
18 with some exceptions is sports. It doesn't
19 lend itself to latter exhibition. Even if you
20 do DVR it, you're not watching it unless you're
21 keeping it for the archive or you played in the
22 game. You don't know what's going to happen.
23 It's true reality programming. At the start of
24 the game, you don't know who is going to win.
25 You don't know who is going to be a hero or who

1 is going to be a loser.

2 So not only is it -- does it have
3 limited availability on one channel generally,
4 almost exclusively, but it also has this live
5 component that doesn't lend itself to latter
6 exhibition of recording or on-demand.

7 Q. Are there other examples -- are there
8 examples other than sports of this type of
9 signature differentiated programming that
10 you're talking about?

11 A. Sure there are. On a one-off basis,
12 news can be that way. News, obviously, is
13 live. It's timely. Although we have a lot of
14 different news channels, people prefer to get
15 their news from MSNBC or a Fox News, depending
16 on the points of view, and are loyal to certain
17 ones of these channels or CNN.

18 If there's an event of national import
19 or tragedy like last week, people turn to news
20 in that same way and are passionate, it's
21 important. I mentioned series finales. Hit
22 series absolutely can be that way. A hit
23 series can drive a network, can drive my
24 decision to carry not just the network but two
25 or three other networks associated with it.

1 And hit series ties in to the other
2 things that I've talked about too. Is it
3 available on another platform? So ratings can
4 be an indication that something is popular and
5 passionate, but that's not necessarily the end
6 of the story.

7 A show like Mad Men had passionate,
8 passionate viewers, but it never got a superior
9 Nielsen rating. At the same time, I had to
10 carry AMC because my customers expected and
11 wanted to have Mad Men. And I had to carry the
12 three other networks that those guys owned
13 because I wanted to carry Mad Men.

14 Regionality can also be important.
15 For instance, farming communities, you had --
16 at this period in time, you had to have the
17 Weather Channel. Weather wasn't as widely
18 distributed on devices as it is today. So a
19 farming community, you'd want something like
20 the Weather Channel. So regionality can impact
21 certain types of programming as well.

22 Q. How about syndicated reruns or old
23 movies? Do those have the signature or
24 differentiated qualities that you're talking
25 about?

1 A. It doesn't meet the standards that I
2 just walked through. It -- syndicated
3 programming and movie reruns have an absolute
4 place in our universe, and they get a
5 consistent Nielsen rating.

6 When we had Outdoor Life Network, they
7 would put on a movie that would have some
8 outlying tie to the outdoors, simply because
9 they'd get a consistent point 3 rating, which
10 for that network was really, really high and
11 would help them make their advertising
12 requirements for the month.

13 Nielsen ratings are really important
14 because the cable television industry has two
15 revenue streams, the network side. It has what
16 the distributors like me would pay, and it has
17 advertising that they would make.

18 For a general entertainment network,
19 advertising comprises two-thirds of the revenue
20 that the general entertainment network would
21 receive.

22 What I was paying was only one-third.
23 And Nielsen ratings are obviously the benchmark
24 by which advertising -- the advertising
25 community and networks look at programming. So

1 although that programming may get a Nielsen
2 rating, that's important for advertising.

3 It's undifferentiated. It's not
4 signature programming. If it's a hit show, if
5 it's a hit show that has been on broadcast for
6 years like How I Met Your Mother, it's a latter
7 exhibition.

8 And although they might -- TBS might
9 show three or four of those a night and get a
10 consistent rating at that point at night, I am
11 not going to lose customers because shows like
12 that are going to be available on other
13 networks, either cable networks, frequently
14 they're still available on broadcast, they're
15 available on-demand, they're susceptible to
16 DVRs, so they have wide availability over many,
17 many platforms besides this particular channel
18 and, frankly, outside of the subscription
19 television industry.

20 So it has a lot less value. It has
21 value in that it gets a consistent rating and
22 provides revenue to the networks, and I'm happy
23 that it's on because it depressurizes my hard
24 conversations with these networks. I want them
25 to make money off of advertising, but when I'm

1 making a determination do I need to continue to
2 carry this network or not, it -- it won't
3 impact me that this rerun or these older movies
4 aren't on if I decide to take a network off.

5 Q. So let's talk about Charter's carriage
6 of distant signals for a little bit. During
7 the period 2010 to 2013, did Charter carry
8 WGNA?

9 A. Yes, it did.

10 Q. Why did Charter carry WGNA?

11 A. WGNA had 109 to 120 some games of the
12 Chicago Cubs, the Chicago White Sox, and the
13 Chicago Bulls. WGNA had been on cable systems
14 for the longest of times, had been launched
15 with certain cable systems when they wanted a
16 super-station and wanted a large panoply of
17 sports, when ESPN still had tractor pulls and
18 there wasn't the panoply of national sports
19 services, and it continued to be on because of
20 those sports.

21 You had a huge, huge number of games
22 for a pretty reasonable dollar value. The
23 expense was not that high. And of those games,
24 at least for Charter, we had certain systems
25 that were outside of the Chicago DMA, like in

1 Wisconsin, that might have been the Brewers, in
2 the MLB territory for the Brewers, which is --
3 are not big fans of the Cubs, but we had so
4 many transplanted people from Chicago, it was
5 like a regional sports network in certain ones
6 of our markets.

7 Iowa was another company that I worked
8 at, it was in the Cardinals' MLB territory, but
9 it was Cubs country. The Iowa Cubs were there,
10 and even though I was spending a lot of money
11 for Fox Sports Net Midwest and the Cards, I had
12 to have the Cubs on.

13 So it has a regionality focus. Also
14 it's a national team, it's an iconic national
15 team. And it's a lot of tonnage. If the Bulls
16 become good again and are like the Warriors and
17 you have all those Bulls games on, that has
18 real value. You can't parse out I only want
19 the Cubs and I don't want the Bulls anymore.
20 It all comes together. But it's a good value
21 proposition.

22 And, lastly, my two primary video
23 competitors, cable's two primary video
24 competitors, DirecTV and DISH, have had it on
25 for a long time. If I don't have it, it

1 appears that I am no longer competing with them
2 in sports. I've lost a huge tonnage of games.
3 I can lose that Cubs fan that's in L.A. or
4 Maryland. But also it just has a perception
5 that we don't have sports quality. And, again,
6 I could lose customers.

7 JUDGE STRICKLER: Excuse me,
8 Mr. Singer. Can I call your attention, please,
9 to paragraph 19 of your written direct
10 testimony. I think that's Exhibit 1008, if you
11 have it in front of you.

12 THE WITNESS: Sure.

13 JUDGE STRICKLER: Tell me when you're
14 there, sir.

15 THE WITNESS: Sir, is it 19?

16 JUDGE STRICKLER: Paragraph 19 --

17 THE WITNESS: Oh, excuse me.

18 JUDGE STRICKLER: -- page 7.

19 THE WITNESS: I was looking --

20 JUDGE STRICKLER: Maybe I misspoke.

21 THE WITNESS: No, you didn't.

22 JUDGE STRICKLER: Oh, yes, I can.

23 THE WITNESS: Page 7, I got it. I'm
24 here. Yes, sir.

25 JUDGE STRICKLER: Okay. So it says,

1 "Managing programming expense also is a crucial
2 consideration for any CSO. Much of these costs
3 be can be explained by the critical necessity
4 to carry sports services so as not to lose
5 subscribers, and the high cost associated with
6 sports programming relative to other types of
7 programming."

8 THE WITNESS: Yes.

9 JUDGE STRICKLER: That's the end of
10 the paragraph. You're referring there, of
11 course, not to the retransmission of distant
12 stations but the general acquisition -- cost of
13 acquisition of sports otherwise?

14 THE WITNESS: Yes, sir.

15 JUDGE STRICKLER: Because sports is
16 critical in that regard, does that mean that in
17 your negotiations with the NCAA or the NHL or
18 the NBA, or what have you, that they are able
19 to squeeze out a lot of the value for
20 themselves knowing it's so important to the
21 cable company that it reduces the profitability
22 of those -- of those systems in terms of
23 subscribership revenue because they know you
24 have to have them, so they -- they sort of are
25 sitting in the -- to use a baseball expression,

1 the catbird seat?

2 THE WITNESS: That's absolutely true,
3 and it's -- the exercise here, as I understand
4 it, is we're trying to step outside of the
5 copyright royalty and find what the marketplace
6 would bear. What evidence is there in the
7 marketplace for valuation of the various
8 programmers on distant signals?

9 JUDGE STRICKLER: Right.

10 THE WITNESS: If you do that, we have
11 two places where we're going to show that,
12 which Mr. Cantor and I will probably talk
13 about.

14 We have what you just described, which
15 is what's happening to the distributor that
16 they are able to drive that, and not just drive
17 that, but when the NCAA does their deal with
18 Turner, who bought those rights, and Turner
19 comes to me, they're not just getting top
20 dollar for TNT and TBS. I'm carrying TruTV and
21 TCM and all these other things within the
22 bundle of Turner's services because I have to
23 have the NCAA and I have to have the NBA, so
24 I'm paying more for TNT than any other general
25 entertainment programmer.

1 The second marketplace is what happens
2 to Turner when they talk to the NCAA and they
3 drive a billion dollar fee for three weeks of
4 programming, three weeks of prime-time
5 programming. And they're driving fees that are
6 absolutely extraordinary, given what Turner is
7 paying for fine programming, including some of
8 the programming here, syndicated programming.

9 JUDGE STRICKLER: Well, that leads me
10 to my question based on paragraph 19. If these
11 sports networks or whoever their distributors
12 are who you negotiate with, the sports leagues,
13 I should say, and whoever the distributors are,
14 are able to take for themselves so much of the
15 value, what -- aren't you more concerned with
16 the net value that's left over after they drive
17 their hard bargains and doesn't that make
18 sports -- given that fact, does that make
19 sports otherwise less valuable than other types
20 of programming because while the other
21 programming might not be as critical to
22 subscriber retention, you're giving away all
23 the value -- so much of the value of subscriber
24 retention to Turner, to the NCAA, and to the
25 four major leagues?

1 THE WITNESS: One could say that --
2 not during this time period, not during this
3 time period at all, were anyone answering your
4 question in the affirmative that, yeah, it's
5 just too expensive, I'd rather lose customers
6 than pay money and reduce my margins further.
7 No one was answering that question in the
8 affirmative.

9 There is some one-offs going on right
10 now, in the last year or so, where people for
11 the first time -- where large distributors are
12 likely not to carry regional sports networks
13 for that very reason. It went beyond a price
14 point where let's see if we lose customers
15 before we sign up for it again.

16 But at this period of time, this is
17 must-have programming. Cable companies --
18 we're trying to fix the cable company at
19 Charter, who made it the most profitable
20 company in revenue. Over this time period, we
21 couldn't risk losing a sports customer.
22 They're some of our best customers, some of our
23 most passionate customers. It still has huge
24 intrinsic value.

25 And, sir, although today people -- I

1 think distributors are saying enough is enough,
2 Fox just doubled down and bought -- paid more
3 for declining ratings of eight NFL games
4 because they're breaking off part of their
5 company and they still believe in the playbook,
6 buy sports and we'll drive it through
7 distributors.

8 So I think -- I can answer your
9 question more in the affirmative today that
10 people are starting to take a breath and saying
11 do I really need to carry this one sports team
12 for more than I was paying for everything else?
13 At this period of time, it was not happening,
14 it was just -- it was such -- it was just
15 something I had to have that I was just paying
16 an ungodly amount of money for.

17 JUDGE STRICKLER: And the difference
18 -- help me out here. The difference between
19 2010 and 2013, that period, versus today is
20 that the -- the price that's being demanded by
21 the distributors of the -- of the sports
22 programming has risen?

23 THE WITNESS: No. It's just going on
24 the -- to answer the Judge's first question,
25 it's just going on the same scale.

1 JUDGE STRICKLER: So it has increased
2 but it hasn't -- second derivative, it hasn't
3 increased --

4 THE WITNESS: Exactly. Right, but --

5 JUDGE STRICKLER: -- at an increasing
6 rate?

7 THE WITNESS: But just think, I mean,
8 we're doing this (indicating) on 80 percent of
9 the expense, so, yes, so it has gone to a point
10 that you just take your breath and say: Let's
11 not launch this right now at the start of the
12 baseball season and let's see if we lose
13 customers. And if we're losing customers, we
14 will go back and maybe we'll launch this new
15 baseball network. That's very, very recent.
16 Regional baseball network.

17 JUDGE STRICKLER: Thank you.

18 BY MR. CANTOR:

19 Q. Mr. --

20 A. Mr. Cantor, I'm sorry.

21 Q. No problem. Please answer the Judges'
22 questions.

23 A. Okay.

24 JUDGE BARNETT: Or not. At your
25 peril.

1 (Laughter.)

2 THE WITNESS: Okay. I'll do what I
3 can.

4 BY MR. CANTOR:

5 Q. So you were just talking about some
6 more recent phenomena in the valuation of
7 sports and the importance. Does the carriage
8 of team sports remain an important factor even
9 today in the cable industry, notwithstanding
10 some of the cost pressures you were just
11 talking about?

12 A. It does. I know when I left, we
13 hadn't -- we hadn't dived into the deep end of
14 the pool really that we didn't think we had to
15 carry sports. And we actually thought -- we
16 were thinking and considering, you know,
17 expanding our interest in the regional sports
18 network business.

19 So it's not clear. The judge makes a
20 good point, but I don't think it was really
21 applicable at this point in time. And I don't
22 know if -- I think people are still going to be
23 addicted to sports. It's just too powerful,
24 even given the cost.

25 Q. So we were talking about WGNA, and you

1 were talking about the value you attached to
2 the team sports programming on WGNA during the
3 period 2010 to 2013.

4 How did you view the general
5 entertainment sitcom and movie programming that
6 was on WGNA during this period?

7 A. As someone that has been on the
8 network side, I viewed it as important for WGNA
9 and I didn't have a complaint about it, but it
10 wasn't why we had it on. For instance, I think
11 in 2011, WGNA syndicated 30 Rock, which was a
12 great show. It was on NBC broadcast. It was
13 still extremely popular. It wasn't really on a
14 downward slide. And I think that was one of
15 the premier syndicated reruns that WGNA had on.

16 Well, 30 Rock at the time is still on
17 NBC. It's susceptible to being DVR'd, is being
18 DVR'd. And when they bought 30 Rock, Comedy
19 Central syndicated the same package. So when I
20 say that something -- how accessible is it on
21 other networks, the fact that you can watch 30
22 Rock on broadcast television on NBC, the
23 original exhibition, on WGNA, and on Comedy
24 Central and they licensed it, they syndicated
25 it widespread to local broadcast. So it's also

1 all over local broadcast.

2 So -- so at this period of time like
3 one of the really good reruns that they had on
4 WGNA is available on NBC, local broadcasts,
5 which are outside the subscription universe,
6 you can watch them for free, and it's available
7 on another cable network, Comedy Central. It's
8 a good show.

9 They put it on because it got, I'm
10 sure, a decent rating and helped them with
11 their advertising. And that's good. But it's
12 not a reason for me to continue to carry it
13 such as I don't want to lose the Cubs fan in
14 Florida.

15 JUDGE STRICKLER: Mr. Singer, the
16 testimony you just gave reminded me of
17 something else you said before about Turner and
18 negotiations. I don't know which cable company
19 you were with at the time.

20 THE WITNESS: Yes.

21 JUDGE STRICKLER: With Turner, and you
22 said: Well, we want the sports that Turner
23 offers. But then when we get into negotiations
24 there's a whole bundle, we have to pay for it.
25 I think that was the phrase you used, that we

1 have to pay for it.

2 THE WITNESS: Yes.

3 JUDGE STRICKLER: So we had to take
4 TCM, Turner Classic Movies, and TNT and
5 whatever else is in the Turner group of
6 stations.

7 THE WITNESS: Yes, sir.

8 JUDGE STRICKLER: When you decided
9 what to pay for the Turner collection of
10 stations, did you pay extra because they were
11 forcing you to take Turner Classic Movies --
12 let's just assume it was just Turner Classic
13 Movies and, I don't know, Atlanta Braves
14 baseball --

15 THE WITNESS: Right.

16 JUDGE STRICKLER: -- TBS, that's what
17 you were looking at. Did you pay more for
18 something even though you valued it at less
19 than what you were paying for it?

20 THE WITNESS: We paid more for TNT,
21 which is where the primary sports were, the --

22 JUDGE STRICKLER: Just so I
23 understand, when you say we paid more, what
24 does that mean, more than what?

25 THE WITNESS: If you look at TNT as

1 compared to USA Network, which doesn't have
2 team sports on it, TNT gets paid substantially
3 more.

4 JUDGE STRICKLER: And you're saying
5 that disparity is approximately measured by the
6 value of team sports?

7 THE WITNESS: Yes. Then we're paying
8 about 10 cents more for TBS than FX, a
9 comparable network. We're paying -- and, to
10 answer your question, finally, we are paying
11 for Cartoon Network, TCM, TruTV, which we might
12 not have carried.

13 So not only are we carrying them but
14 we are paying them a top license fee, the
15 incremental networks, so the ability for Turner
16 to buy sports not just helps the TNT rate but,
17 to get to your point, helps all the networks in
18 the manner it's sold.

19 JUDGE STRICKLER: Well, let's say the
20 Cartoon Network is part of Turner -- is that
21 what you're saying?

22 THE WITNESS: Yes, sir.

23 JUDGE STRICKLER: So let's say Cartoon
24 Network was worth nothing to you, you just
25 didn't think it was valuable, however you

1 measured value, subscribers or what have you.

2 THE WITNESS: Right.

3 JUDGE STRICKLER: But TBS with the
4 Braves, that was valuable. You understood you
5 were still paying -- that the amount of money
6 you were paying still was -- some of the extra
7 was attributable to the Cartoon Network, why
8 wouldn't you have assumed that was attributable
9 to Braves baseball and TBS if that was the
10 thing that had value? Why would you pay one
11 penny for something that had no value?

12 THE WITNESS: Cartoon Network had a
13 value.

14 JUDGE STRICKLER: Well, I'm doing it
15 by way of assumption.

16 THE WITNESS: TruTV had very little
17 value.

18 JUDGE STRICKLER: I remember Ren and
19 Stimpy. I mean, that's good stuff. I'm not --
20 it was all by way of hypothetical.

21 THE WITNESS: Yeah, I understand.
22 Well, actually, sir, you're thinking exactly
23 the way my CEO at the time thought about this.
24 We're just going to pay Turner -- we have to
25 pay Turner a boat load of money because we have

1 to carry NCAA, NBA, and some -- at this period
2 of time, some occasional MLB playoff games, and
3 we're going to pay them a pile of money, let's
4 negotiate really hard, try to pay as little --
5 do as good a deal financially as we can, do as
6 well as we can on where we need to carry things
7 and get as large a panoply of rights as we can.

8 But he would break it down to it's a
9 pile of money, but the pile of money was being
10 driven by sports.

11 JUDGE STRICKLER: Sure.

12 THE WITNESS: And that's why the pile
13 of money for them was bigger than if you had
14 taken Scripps Networks, which doesn't have
15 sports but has networks which are as high or
16 higher -- or more highly rated than some of the
17 Turner networks, and they're receiving 25 to
18 30 percent of what Turner is getting.

19 JUDGE STRICKLER: For accounting
20 purposes, did you have to allocate the amount
21 that you were paying to the different networks
22 or it was just one lump sum to Turner?

23 THE WITNESS: It was allocated for the
24 different networks based upon the 60 months of
25 the contract.

1 JUDGE STRICKLER: And am I correct in
2 understanding your testimony that, regardless
3 of how you allocated it or how Turner allocated
4 it, you understood economically you were paying
5 the money for the thing that you valued, which
6 was TBS and team or college sports?

7 THE WITNESS: Yes. And I still looked
8 at it as what am I paying for the individual
9 networks vis-à-vis comparable networks as part
10 of the negotiation process. I'm sort of joking
11 but sort of not joking that my CEO got to the
12 point where he looked at it as you originally
13 described it, it's a pile of money that's going
14 up because of sports, the must-have nature of
15 the sports programming. We can't drop it.

16 JUDGE STRICKLER: Thank you.

17 BY MR. CANTOR:

18 Q. And, Mr. Singer, we've been --

19 JUDGE BARNETT: I'm sorry.

20 MR. CANTOR: Please, Your Honor.

21 JUDGE BARNETT: This is a really
22 loaded question, but --

23 THE WITNESS: Okay.

24 JUDGE BARNETT: -- assume someone, a
25 surveyor called you and said: You're in charge

1 of programming for -- or program acquisition
2 for Charter --

3 THE WITNESS: Yes.

4 JUDGE BARNETT: -- and you know in
5 your head you've paid a pile of money for TNT.

6 THE WITNESS: Right.

7 JUDGE BARNETT: And that it's being
8 driven by sports, but you said also in your
9 mind you have assigned a value to those other
10 channels. So if they asked you how much you
11 paid to acquire sports, would you back off of
12 that pile to three-quarters of a pile or would
13 you just say we paid this pile for sports, and
14 that other stuff we didn't pay anything for it,
15 it just came along with the bundle?

16 THE WITNESS: Well, if I'm asked to
17 ascribe valuation, and let's say I was doing
18 the exercise for TNT, ascribing 40 percent of
19 the value, which I think is what Bortz ends up
20 doing, or 38 percent of the value makes sense
21 because there is value to the original
22 programming on TNT. There is value to the
23 other categories of programming on the Bortz
24 survey.

25 So I'm saying that if you look at

1 market -- at the marketplace, these two market
2 points, what distributors are paying and what
3 these big powerful media companies are paying,
4 there's really no comparison. And it doesn't
5 correlate to Nielsen. It doesn't correlate
6 really at all to Nielsen, but that doesn't mean
7 that other programming doesn't have significant
8 value.

9 Game of Thrones is as important as
10 sports. It meets all the criteria that I
11 walked through, that it's on one location and
12 it's distinct and a hit show, a hit show on its
13 initial exhibition broadcast, hits this
14 criteria, and gets great ratings, Nielsen
15 ratings. Nielsen ratings can correlate to this
16 type of popularity.

17 So I would be able to break it down
18 and I wouldn't say sports is 90 percent of WGNA
19 because it's not.

20 JUDGE BARNETT: Okay.

21 THE WITNESS: We do carry it for other
22 reasons.

23 JUDGE BARNETT: So you and presumably
24 -- and you believe your counterparts across the
25 industry can -- can make those fine

1 distinctions?

2 THE WITNESS: Yeah. Your Honor, I
3 don't see them as fine distinctions and I
4 understand I'll probably have some questions
5 about that in a few minutes, but those are
6 fairly simple terms. Devotional, Public
7 Television, broadcast, and the breakout between
8 syndicated movies and -- and syndicated
9 programming are really fairly common and pretty
10 easy to keep clear in one's mind, particularly
11 when you're thinking about the average distant
12 signal and why am I bringing that signal into
13 my market when the guy at corporate is all over
14 you to drop it if you can?

15 JUDGE BARNETT: Thank you.

16 JUDGE STRICKLER: Mr. Singer, you
17 mentioned before -- I apologize for jumping
18 around to different parts of your testimony,
19 but they come back episodically --

20 THE WITNESS: Yes.

21 JUDGE STRICKLER: And you said that
22 now, in the present time, cable companies are
23 now declining to pay what sports leagues or
24 distributors for sports leagues are demanding.
25 They're testing out to see whether or not,

1 they're going to find out, which goes to my
2 question, whether or not that causes a loss of
3 subscribers.

4 THE WITNESS: Yes.

5 JUDGE STRICKLER: When did that
6 phenomenon exist where the cable companies
7 showed resistance of that nature to price
8 increases?

9 THE WITNESS: About -- about two years
10 ago, three years ago. Comcast, which I was not
11 at and I wasn't -- I don't have anything to do
12 with. Comcast has cable systems in the New
13 York DMA that are primarily in north Jersey.

14 And they did not renew Yes Network,
15 which is the Yankees network. And I think Yes
16 Network was off for a summer. It's also when
17 the Yankees were on the down, you know, they've
18 now -- popularity of teams does impact things.
19 The Yankees were on the down and -- and hadn't
20 been in the playoffs for a couple of years.
21 They got back -- they got back on. An
22 agreement was eventually reached, but for
23 baseball season, that was a big thing that
24 Comcast wasn't carrying Yes Network.

25 Time Warner Cable launched a Lakers

1 channel, so in the Los Angeles market, there
2 were two regional sports networks, Fox Sports
3 Net 1 and 2 that Fox owned. It had all six of
4 the pro teams, the two baseball teams, hockey
5 teams, and two basketball teams in that market.

6 And the general cost of Fox Sports 1
7 and 2 was about -- approaching \$7 for the two
8 networks. Time Warner Cable -- the Lakers, the
9 Lakers agreement with Fox was up, and Time
10 Warner Cable ended up spending huge amounts of
11 money for the Laker rights, started a Lakers
12 channel, that was the only thing that was on
13 it, and asked for \$4 for the Lakers channel,
14 when all six of the channels were getting about
15 \$7 to Fox, who were pretty aggressive
16 negotiators. And everyone signed up for it.
17 All the distributors signed up for it at \$4,
18 about \$4.

19 The next year, the Dodgers rights were
20 up, and Time Warner Cable -- they paid like a
21 quarter of a billion dollars to acquire the
22 Dodgers rights, with the thought being DirecTV
23 had huge penetration in the Los Angeles market,
24 and it's worth forcing DirecTV to either have
25 this price -- pay this price or perhaps we'll

1 win back customers for DirecTV if they don't
2 take it.

3 And \$5 was just a bridge too far. So
4 at Charter, for instance, we only had about
5 250,000 customers in the outlying L.A. DMA --
6 we had Long Beach and Malibu. We had about
7 250,000 in the L.A. DMA, and we just -- it was
8 too much.

9 So what we did was we budgeted -- in
10 October before the network launch, we budgeted,
11 we'll launch it in August if we're losing
12 customers. So let's not launch it opening day.
13 We just can't put another 5 on top of the 4 on
14 top of what we're still paying Fox, even after
15 a slight reduction for Fox losing the games.

16 And -- but if we're really bleeding
17 subscribers, we'll do the math exercise that
18 you were alluding to earlier, is it worth
19 putting on.

20 JUDGE STRICKLER: Well, that
21 anticipates what I think is sort of the
22 important question that I -- that comes up, is
23 since this is -- this phenomenon of price
24 resistance, the -- Comcast saying no, if you
25 will, to the Yes Channel, to the Yankee

1 channel, and Charter saying no to the Dodgers,
2 and any other similar ones that you recall
3 given your background in the industry, has
4 there been a loss in subscribership because of
5 the decision not to carry the Yankees on
6 Comcast or the Dodgers on Charter or any of the
7 other situations where that happened? Is the
8 jury still out on that or is there some
9 information in that regard?

10 THE WITNESS: It's a little bit inside
11 baseball.

12 JUDGE STRICKLER: It's a metaphor I
13 assume at this point.

14 THE WITNESS: So we bought Time Warner
15 Cable. And our feeling is that DirecTV is
16 losing subscribers.

17 JUDGE STRICKLER: DirecTV is losing
18 subscribers?

19 THE WITNESS: Yes, DirecTV --

20 JUDGE STRICKLER: Your rival?

21 THE WITNESS: Well, we bought Time
22 Warner Cable so we inherited the Dodgers deal.

23 JUDGE STRICKLER: Okay. But you --
24 okay. I'm done. Go ahead. I'm sorry.

25 THE WITNESS: And the thought, the

1 thought is that they are losing some
2 subscribers --

3 JUDGE STRICKLER: "They" being
4 DirecTV?

5 THE WITNESS: Yes, sir. I'm sorry.

6 JUDGE STRICKLER: The competitor of
7 Time Warner?

8 THE WITNESS: Right. Who have not
9 carried the Dodgers, and the Dodgers also
10 became -- have been a successful team. They
11 were in the World Series. But it's un- -- the
12 jury, I think, is still out. The jury is still
13 out about whether or not it's painful enough
14 that they don't want to continue to carry.

15 We have -- I had a couple RSNs that
16 were up before I left the company, and we
17 determined that we still needed to carry them,
18 even though they were giving us a 15 percent
19 step-off new license fee to keep the carriage.

20 JUDGE STRICKLER: Have you ever
21 answered one of the Bortz surveys?

22 THE WITNESS: No, I've never answered
23 one of the Bortz surveys. I'm not a local
24 field leader.

25 JUDGE STRICKLER: Have you read the

1 Bortz survey?

2 THE WITNESS: I have read the Bortz
3 survey.

4 JUDGE STRICKLER: So you're familiar
5 with -- if I just reference Question 4 of the
6 question about relative value, are you familiar
7 with that question?

8 THE WITNESS: Yes, I'm familiar with
9 that question.

10 JUDGE STRICKLER: If you were given
11 what you know -- if you were answering it about
12 this period now, where there is this price
13 resistance going on --

14 THE WITNESS: Yes, sir.

15 JUDGE STRICKLER: -- would the
16 existence of that price resistance cause you to
17 say that sports, overall, has a lower relative
18 value compared to other -- other types of
19 programming compared to the situation when you
20 didn't have that price resistance?

21 THE WITNESS: We're talking today?

22 JUDGE STRICKLER: Yes.

23 THE WITNESS: Today I -- today I would
24 -- today I would be more thoughtful about it.
25 Today I would be a little more thoughtful about

1 it, but I still -- I still -- and I bought
2 sports rights for Comcast. I was head of
3 sports rights acquisition for this giant,
4 really buttoned-down company that doesn't spend
5 money very freely. So maybe I come a little
6 bit from that perspective. I don't think so.

7 JUDGE STRICKLER: You don't think so,
8 what? I'm not sure.

9 THE WITNESS: I don't think I'm
10 prejudiced towards sports. I think I'm pretty
11 pragmatic about it.

12 JUDGE STRICKLER: Well, I wasn't
13 asking about your prejudice. Whether you were
14 just -- given --

15 THE WITNESS: No.

16 JUDGE STRICKLER: Given the impact of
17 the price resistance saying this game, if you
18 will, is not worth the candle, so we're not
19 going to air it, the fact that that exists as
20 an alternative choice, does that impact at all
21 the relative value you would give to sports
22 compared to the other program categories?

23 THE WITNESS: Not in the Bortz survey,
24 not in the Bortz survey.

25 JUDGE STRICKLER: Why not?

1 THE WITNESS: Because -- because what
2 we've talked about has an impact. Well, WGNA
3 -- let's say WGNA still had sports today.
4 Let's say the Bortz survey today was what it
5 was then with WGNA still having sports.

6 It wouldn't change -- it wouldn't
7 change the way I would answer the Bortz survey,
8 even today, even given a little bit of the
9 uncertainty, the pressurization you're talking
10 about, because WGNA still has the same sports,
11 the same number of sports games at the same
12 really decent value proposition. It's rather
13 inexpensive in the sports scheme. It's really
14 inexpensive in the sports scheme.

15 And to really get back to it on
16 distant signals, even without WGNA, the reason
17 we're carrying -- bringing distant signals into
18 markets when this type of pressure is because
19 of sports.

20 When I have the opportunity to drop a
21 distant signal, the person that runs broadcast
22 relations to me, if I hear that there is some
23 distant signals being carried, I'm -- and we're
24 out of contract or there's an opportunity to
25 reevaluate the decision, I'm saying to her:

1 Why are we not dropping that? Why are we
2 paying for that?

3 And she would then go to the field
4 leader, who is the person that's responsible
5 for this type of decision, because I don't know
6 what those call signs are, and I can look up
7 the call signs, you know, on the Bortz survey
8 and it says WTIV, WRXS. I don't know what that
9 means in Madison, Wisconsin. I can look it up
10 but I still don't have the knowledge that the
11 local field programming leader has.

12 So she calls the local programming
13 person, and they come back and they have to
14 give me a reason why we're not dropping it, why
15 they've made the decision. And it's sports.
16 It's that I'm in Wisconsin, and whatever the
17 DMA is, I'm getting from Fox NFC games for the
18 Packers, but I have all these fans of the
19 Chicago Bears, we've had Chicago Bears games in
20 this market forever, and I've got to spend all
21 this money because I'm going to lose customers
22 if I'm not bringing this Bears Fox feed into
23 this DMA -- into this marketplace.

24 Similarly, if we challenge somebody
25 why are they bringing this Minnesota station

1 in, I have to have the Gophers or I have to
2 have Minnesota Duluth Hockey. There's 20
3 games. It's worth the money. If I don't have
4 the 20 games of the hockey team, I could lose
5 customers.

6 Those were the types of answers that I
7 was getting when I was challenging people to
8 take it off. So even in today's world with all
9 this higher-level pressure, if we were looking
10 at distant signals, I don't think it changes
11 the equation, even today.

12 JUDGE STRICKLER: Thank you.

13 BY MR. CANTOR:

14 Q. Mr. Singer, you were talking a bit
15 about the Bortz survey. And have you reviewed
16 the written testimony of Program Supplier
17 witness John Mansell?

18 A. Yes, I have.

19 Q. So Mr. Mansell writes about what he
20 calls a proliferation of regional sports
21 networks, or RSNs --

22 A. Yes.

23 Q. -- and suggests that the proliferation
24 of those networks de-valued or limited the
25 value of sports on distant signals or team

1 sports on distant signals.

2 Do you have a view of his -- his
3 testimony in that regard?

4 A. Mr. Mansell wrote a report that really
5 accurately describes how compelling sports
6 programming is and how expensive it is. Since
7 2002, 2003 there has been migration of sports
8 to new sports networks, which we've talked
9 about today, the Judges and I have been talking
10 about today. Much of that has been from one
11 broadcast -- excuse me, one paid -- paid sports
12 tier by an ESPN package, or an RSN package to
13 another paid package, more so than the
14 migration from broadcast.

15 There has been some migration of the
16 last bits of sports that's on broadcast to
17 RSNs, when RSNs renew the rights, but it hasn't
18 been that significant. It's not unique to this
19 time period. It has been an ongoing process.

20 And I think with respect to this
21 hearing here, it's irrelevant. It didn't --
22 that type of migration, which has been going on
23 since 2001 or '2, didn't impact WGN, which
24 consistently had the 109 to 120 games. And it
25 also didn't impact my discussion with the

1 Judge, which is if I was having that discussion
2 with a field leader and she said to me, oh, the
3 reason we have it on is because we used to
4 carry this because they had the last ten
5 Brewers games, and I want to bring Brewers
6 games in, we'd drop it if there wasn't that
7 compelling reason anymore.

8 So I don't think it impacts these
9 particular distant signals or this distant
10 signal would have been dropped.

11 JUDGE STRICKLER: I have a question
12 for you.

13 THE WITNESS: Yes, sir.

14 JUDGE STRICKLER: Taking it away from
15 the actual distant retransmission market to
16 what I'll refer to and is referred to in these
17 proceedings as the hypothetical market, if you
18 had to negotiate separately with the individual
19 programming owner, program owners, Copyright
20 Owners of the programs that are on, let's stick
21 with WGNA for the moment, and you had to
22 negotiate separately with Chicago Cubs, Chicago
23 White Sox, Chicago Bulls and all the other
24 distributors of programs, do you think that the
25 -- the owners of the sports, which, as you say,

1 drives the decision to carry the retransmitted
2 stations, if you had to negotiate with them
3 separately, do you think they, like the other
4 sports leagues and other sports distributors,
5 would also try to take for themselves the value
6 that you see in the retransmitted station,
7 knowing that that's on the table, and take as
8 much of that away from -- from you as possible?

9 THE WITNESS: I negotiated with
10 Mr. Reinsdorf, who owned the Bulls and the
11 White Sox, and with the then Tribune ownership
12 for the Cubs to create Comcast Sports Net
13 Chicago. They would look for every crumb.
14 They, understandably, as businesspeople would
15 try to maximize the money that they could
16 obtain.

17 It's hard to answer because I know
18 it's just a hypothetical, but, you know, this
19 is such a unique corner case, the last historic
20 super-station and how it came to be and how it
21 got distributed.

22 And so it's hard to answer the
23 hypothetical, but, yeah, I think the sports
24 teams in a direct conversation that you want to
25 have Cubs games in Florida, or out of market

1 in, you know, Milwaukee, yeah, I think they'd
2 be very aggressive.

3 JUDGE STRICKLER: I appreciate what
4 you said. And you can say it's hard to answer
5 it, but it sounds like, given your experience
6 and your testimony, you really do have an
7 answer because you did negotiate with
8 Mr. Reinsdorf about these very items when they
9 were moved into a cable system rather than onto
10 -- into a distantly retransmitted station, so
11 you know exactly how they negotiate --

12 THE WITNESS: Yeah.

13 JUDGE STRICKLER: -- when they have
14 the opportunity to disaggregate, unbundle out
15 of the retransmitted station, and negotiate
16 solely on their own behalf?

17 THE WITNESS: Yeah, just to be clear,
18 when we created Comcast Sports Net Chicago or
19 NBC Sports Chicago today, they were moving
20 their product from a regional sports network
21 that was owned by Cablevision and we were
22 starting our own -- our new regional sports
23 network.

24 So the four teams were just moving
25 from one Chicago RSN to creating their own RSN

1 with Comcast. It wasn't impacting this type of
2 discussion.

3 JUDGE STRICKLER: And in the
4 hypothetical situation, which is analogous to
5 what you're saying is the real situation when
6 they migrated away into cable, would the
7 bargaining strategy of the White Sox and the
8 Bulls to take every crumb, to use your word,
9 that they could get, would that reduce the
10 value of sports to -- to -- relative to a
11 situation where it was just where they weren't
12 seeking as much and that you would be able to
13 keep the residual?

14 THE WITNESS: Taking every crumb is
15 not -- you know, that wasn't fair to say.
16 They're just being aggressive businesspeople
17 and maximizing the value of their asset, but we
18 were having sort of a colloquial conversation.

19 At the end of the day, two
20 businesspeople aren't going to do the agreement
21 unless there's some value to both sides. So
22 they're not -- they're not strangling the
23 business entirely.

24 At a Comcast Sports Net was a good --
25 Chicago was a good business, even though we

1 paid really high rights fees to our partners.

2 It was a real -- it was a good business.

3 And even though we charged a lot of
4 money for the channel to the distributors, they
5 still had a lot of value. It had a value
6 proposition that was still favorable to
7 distributors. They wanted it on. They wanted
8 to carry it.

9 JUDGE STRICKLER: Thank you.

10 BY MR. CANTOR:

11 Q. Mr. Singer, we've been talking about
12 the testimony of Mr. Mansell, and when we were
13 talking you had mentioned that, I believe, that
14 you looked at the number of games that were
15 carried, team sports games that were carried on
16 WGNA in the period of 2004 and 2005 --

17 A. Yes.

18 Q. -- versus 2010 to 2013.

19 A. Yeah.

20 Q. Is that right?

21 A. Yes. And it stayed static. It stayed
22 static.

23 Q. And did Mr. Mansell in his testimony
24 -- I know he was talking about regional sports
25 networks and the evolution of the market. Did

1 he talk about how the market was evolving at
2 the same time with regard to general
3 entertainment networks?

4 A. No, he didn't. And I haven't seen
5 much discussion about that. And I think it's
6 pretty important to bring up with the Judges
7 that during this time period, I've talked about
8 the importance of the availability of product
9 and if it's unique and exclusive or
10 quasi-exclusive on one location, importance of
11 whether it's live or not, at the same time that
12 I was describing, for instance, 30 Rock being
13 available on NBC, on local broadcasting, and on
14 Comedy Central, we have a proliferation of
15 streaming services such as Netflix and Hulu
16 which are just taking off. And I think 30 Rock
17 might have even been on one of the streaming
18 services as well.

19 And we also have a proliferation of
20 on-demand offerings in which this type of
21 content, prior seasons, is being provided by
22 cable companies as part of the value
23 proposition, so you had prior seasons in a VOD
24 library.

25 So the -- the necessity of carrying

1 Program Suppliers content becomes less and less
2 because not only is it available on many
3 different platforms, broadcast and
4 multi-channel television, but it's also now
5 susceptible so much to recording, to
6 availability on-demand, and to availability on
7 streaming services.

8 So dropping, not carrying a network
9 that has some popular, as reflected in Nielsen
10 ratings, programming, becomes less an issue if
11 many of my customers have Netflix and it's
12 available on Netflix.

13 Q. Did you also review the written
14 testimony of Program Suppliers witness
15 Professor Joel Steckel?

16 A. I did, yes.

17 Q. And Mr. -- or Dr. Steckel testifies
18 that the act of trying to value different types
19 of programming would, in his words, be
20 unfamiliar to a cable industry executive
21 because cable operators purchased rights on a
22 system-wide basis -- you know, for the whole
23 station or whole signal rather than on a
24 program basis.

25 Do you have a reaction to his

1 testimony on that point?

2 A. I think, as I -- as it has come up
3 tangentially with the Judges here, yes, I
4 disagree with that. I think that's not what
5 people are buying. That's not what these
6 executives are looking at.

7 They understand the components of the
8 networks and the quality, which is -- I don't
9 want to belabor the point, which I think we
10 already made.

11 Q. And have you also reviewed the
12 testimony of Program Supplier witness Sue Ann
13 Hamilton?

14 A. Yes.

15 Q. And Ms. Hamilton criticizes the Bortz
16 survey, among other things says that the
17 categories that are used in the Bortz survey
18 and that are used in this proceeding would be
19 confusing to cable operators.

20 Do you have a view as to her testimony
21 on that issue?

22 A. I don't think they are confusing at
23 all.

24 Q. And why not?

25 A. I think it's straightforward. I think

1 -- I can't see them being much more
2 straightforward. If they were different,
3 people would be complaining that they weren't
4 straightforward enough.

5 Q. And Ms. Hamilton also in her testimony
6 asserts that the audience viewing is the most
7 appropriate measure of relative value of
8 programming.

9 In your experience in the -- working
10 with a cable operator, is there a one-to-one
11 correlation between audience viewing levels and
12 value?

13 A. There is clearly not. ESPN is
14 getting, at this period of time, four to five
15 -- approximately four to five dollars, and the
16 equally popular by viewership, by Nielsen
17 viewership, networks are receiving, you know,
18 pennies versus the dollars.

19 Similarly, we talked about TNT. Yet
20 TNT is a popular general entertainment network.
21 It's only receiving about a third of what ESPN
22 -- one ESPN service. So there's absolutely not
23 a one-to-one correlation.

24 And if you look at the marketplace,
25 what the biggest media companies are paying for

1 sports at this period of time and what
2 distributors are then paying for sports
3 vis-à-vis other categories of programming, the
4 marketplace says that Nielsen ratings, although
5 a component in trying to evaluate value, is not
6 a critical component.

7 JUDGE STRICKLER: Mr. Singer, you said
8 there's not -- so you answered counsel question
9 by saying there's not a one-to-one ratio.

10 THE WITNESS: Absolutely not a
11 one-to-one ratio.

12 JUDGE STRICKLER: Is there a ratio?

13 THE WITNESS: It's a component. It's
14 a component in looking at popularity. So I've
15 talked about passion. I talk to passion,
16 signature programming, and I've talked about
17 availability.

18 And one of those categories, it's a
19 component and it can absolutely show -- the
20 Superbowl is one of the most highly rated
21 shows. And some premium -- some great show on
22 broadcast television that rates well, yes, it's
23 important and it shows passion, but it's still
24 -- it has a limited correlation and can have a
25 confusing correlation because you can have

1 something that receives a Nielsen rating that,
2 as we've talked about, is undifferentiated.

3 There's tons of these types of
4 programs on. It's available on many, many
5 platforms. You can watch this particular show,
6 as we've talked about, on many, many channels.

7 So it's a component. And it's a
8 factor. And you want to have popular
9 programming, but that's all it is, is a
10 component. And it's -- I don't think it's the
11 best indicator in any way.

12 JUDGE STRICKLER: How important a
13 component is it?

14 THE WITNESS: It's an important
15 component because it does reflect popularity.
16 You want popular programming, but even that's
17 confusing. I would rather have Mad Men on -- I
18 would rather have Mad Men on, which is getting
19 a 2 rating, than have -- so it's popular but
20 it's not widely popular, given Nielsen ratings,
21 than some undifferentiated movie.

22 JUDGE STRICKLER: Because that will
23 drive subscribership --

24 THE WITNESS: Yes.

25 JUDGE STRICKLER: Mad Men will drive

1 the subscribership, which is the bottom line
2 for the cable company, as opposed to something
3 undifferentiated movie with a higher viewing?

4 THE WITNESS: Yes, sir. Yes, sir.

5 JUDGE STRICKLER: Thank you.

6 MR. CANTOR: I have no further
7 questions, Mr. Singer. Thank you.

8 THE WITNESS: Thank you. Thank you.

9 JUDGE BARNETT: Cross-examination for
10 Mr. Singer?

11 MR. STEWART: I have.

12 JUDGE BARNETT: Mr. Stewart?

13 CROSS-EXAMINATION

14 BY MR. STEWART:

15 Q. Good morning, Mr. Singer. My name is
16 John Stewart and I'm here representing the
17 Commercial Television Claimants group.

18 A. Hi, Mr. Stewart.

19 Q. I just wanted to follow up on a
20 conversation you had with Judge Strickler.
21 First, is it fair to say that during the course
22 of your career you've had two very different
23 kinds of jobs, one working at, in effect, CSOs
24 and acquiring programming and, on the other
25 hand, creating programming to sell to CSOs. Is

1 that right?

2 A. Yes, but I think in the latter case, I
3 was still trying to do the same valuation
4 calculation because, for instance, at Oprah, I
5 created the rate card. We had inherited a free
6 network from Discovery Health.

7 And I was trying to, as a business
8 person, maximize how much money we could get
9 while still keeping the 80 million subscribers
10 and not having people drop the network. So in
11 doing that, I'm trying -- I'm trying to
12 evaluate this. How would I look when I was
13 wearing the other hat?

14 Q. Understood. But I just want to be
15 clear about the two different functions. And
16 so when you were talking about negotiating with
17 Turner and ultimately acquiring an array of
18 channels, that was in your capacity for Charter
19 as in effect a CSO acquiring those channels; is
20 that right?

21 A. Yes, sir.

22 Q. When you were talking about
23 negotiating with the White Sox to create this
24 new version of the regional sports network in
25 Chicago, that was your other job, wasn't it?

1 That was when you were with Comcast and you
2 were creating channels for distribution to
3 CSOs; is that right?

4 A. Yes, sir.

5 Q. And is it your experience that CSOs
6 themselves generally look for someone else to
7 create the channels and just acquire channels
8 as opposed to going into the market, an
9 individual CSO, and creating a new channel by
10 negotiating directly with individual Copyright
11 Owners or program owners?

12 A. At the time period in question, that's
13 substantially accurate. The exception might be
14 the regional sports network space.

15 Q. To the degree that some large MSOs
16 were able to create their new regional sports
17 networks of their own; is that right?

18 A. Yes, sir.

19 Q. And then they would license them to
20 other CSOs; is that right?

21 A. Yes, sir.

22 Q. Okay. Thanks. That's all I have.

23 JUDGE BARNETT: Mr. Lutzker?

24 CROSS-EXAMINATION

25 BY MR. LUTZKER:

1 Q. Good morning, Mr. Singer.

2 A. Good morning. Hi.

3 Q. Hi. My name is Arnold Lutzker and I
4 represent the Devotional Claimants in this
5 proceeding.

6 A. Hi.

7 Q. And I want to follow up on the point
8 you just made in referencing your experience
9 and working with Oprah and starting the O
10 Network. Could you just briefly describe what
11 your responsibilities were there?

12 A. I was executive vice president of
13 distribution and strategy. The Oprah Winfrey
14 Network was a joint partnership between
15 Discovery Communications and Oprah.

16 Discovery had a network with 80
17 million subscribers, which is pretty widely
18 distributed, called Discovery Health Network
19 that didn't have -- didn't receive a license
20 fee. It only had advertising revenue.

21 And Oprah took over half the channel
22 and ran it and programmed the channel. My job
23 was, in part, to convince distributors to
24 continue to carry what they had bought as
25 Discovery Health as OWN and to go from a zero

1 license fee to a reasonable license fee, given
2 the Oprah programming.

3 Q. And you worked with Oprah in terms of
4 creating the programming mix for the network?

5 A. I would love to say that I did. I was
6 right at her elbow every day but, no, I didn't.

7 Q. Was she the driving force of the
8 decisions for the network?

9 A. Ultimately, she was the driving force,
10 yes, sir.

11 Q. To what degree did Oprah's views of
12 spirituality have an impact on the network's
13 distribution and strategy and its program
14 schedule?

15 A. Part of the transition from Discovery
16 Health, which had a content description that
17 said it would be a channel about health and
18 wellness, was to emphasize that we would
19 continue to be meeting that contractual
20 language because Oprah's whole programming
21 philosophy is to live your own life -- to live
22 your best life, a component of which is
23 spirituality.

24 Q. And what was Soul Sunday?

25 A. You got me. I'm sorry. I don't know,

1 sir.

2 Q. You don't -- you don't know, okay. In
3 terms of the comments you made about sort of
4 the differentiated programming you spoke about,
5 passion, signature programming availability,
6 and the like, and in this context you have also
7 identified a number -- and essentially endorsed
8 a number of prior comments made by other
9 representatives, sort of with positions
10 relatively similar to yours.

11 Among those in particular, I noted
12 Judith Meyka, who had worked at TCI and some
13 other places, and I don't know whether you sort
14 of --

15 A. She worked for me.

16 Q. She worked for you. And you reviewed
17 her testimony in the 2004 to '5 proceeding, did
18 you not?

19 A. I did, sir.

20 Q. And you essentially, in your testimony
21 endorsed, the elements of what was her
22 testimony in the 2004 to '5 proceeding; is that
23 correct?

24 A. Sir, I read Judy Meyka's written
25 testimony. I never read any of her oral

1 testimony, but I did sign off and agree with
2 her testimony then.

3 Q. And in her testimony, she describes
4 the signature programming much like you do,
5 that sports drives a lot, but she had a
6 notation in her testimony as well, which you
7 may recall, that recognized to a lesser extent,
8 there are certain other program categories that
9 drive subscribership retention and support.
10 And among those she mentioned was devotional
11 programming.

12 Do you recall that?

13 A. I do.

14 Q. And would you agree with that concept?

15 A. To the same type of limited nature,
16 yes.

17 Q. Okay. And when we talk about limited
18 nature, I mean, even under the Bortz analysis
19 that you've essentially endorsed, the
20 devotional shares is about a tenth the share of
21 the sports. So we're not talking about big
22 programming, but we are talking about
23 programming that helps cable operators retain
24 or attract subscribers.

25 And I think you were talking in the

1 2010 to '13 period, particularly about
2 retention --

3 A. Yes, sir.

4 Q. -- of subscribers. And would you say
5 that devotional programming fits that niche for
6 cable operators?

7 A. I agree with results of the Bortz
8 survey as they relate to devotional and as
9 that's reflected in your question, yes.

10 Q. Great. And turning to some of the
11 questions that Judge Strickler asked about the
12 cost and profitability, would it be reasonable
13 to say that in some instances low-cost
14 programming can go better in the sense to the
15 bottom line, the profitability, of cable
16 operators than some of this very high cost
17 programming?

18 A. Yes, sir.

19 Q. And devotional programming might fit
20 into that low-cost category as far as you're
21 concerned?

22 A. It does, sir.

23 Q. Okay, thank you.

24 And sort of continuing along this
25 theme, you talk about sports and the passion

1 that fans have for sports programming. And you
2 don't look at ratings. You look at sort of the
3 share that you're able to garner from when you
4 retransmit WGN Cubs fans or in the New York
5 area, I grew up in the New York area, the
6 Yankees, the Mets, the Giants, and so forth.

7 And so there's passion among there,
8 regardless of ratings, and they tend to fill
9 stadiums.

10 A. Right.

11 Q. And that -- that becomes indicia for
12 you about value to the cable operators. Would
13 that be true?

14 A. Yes, sir.

15 Q. Now, turning to my relatively smaller
16 group in this context, there are religious
17 ministries that fill sanctuaries with thousands
18 if not tens of thousands of worshippers. And
19 I'm thinking here of some of the younger
20 ministers like Joel Olsteen, who becomes
21 extremely popular during this time period, but
22 legendary ones, worked with Reverend Robert
23 Schuller. We note yesterday the passing of
24 Billy Graham.

25 And I'll add Billy Graham's royalties

1 are at stake in these proceedings going back,
2 in fact, to the 1999 to 2009 period where we're
3 hopefully awaiting sort of final resolution
4 there, but, unfortunately, his ministry will
5 receive whatever share the religious parties
6 get. But these programs, these legendary
7 individuals draw subscribers for cable
8 operators, do they not?

9 A. I don't know if they draw subscribers,
10 but this programming has been part of the
11 subscription offering and with Reverend Graham
12 looking down upon us, I would agree that it's
13 an important genre of programming to have on
14 the cable system and that, absent this type of
15 programming, one could lose a customer.

16 Q. And -- and I noted in I think it was
17 The Washington Post obituary today that there
18 is one phrase that caught my eye, that Billy
19 Graham said, above all, go to church. That was
20 one of his central messages.

21 And for cable subscribers who can't
22 attend the crusades or can't go to the Crystal
23 Cathedral or the Lakewood Church, being able to
24 see on television through the cable
25 subscriptions becomes an important way that

1 they can go to church. Would that not be the
2 case?

3 A. For a segment of our customers, it's
4 important, yes, sir.

5 Q. Thank you. You've talked a lot about
6 WGN, WGNA. Have you actually watched the
7 channel? Are you familiar with the programming
8 on that channel?

9 A. That's the most loaded question yet,
10 but, yes, I have seen the programming on WGNA.

11 Q. And I assume from what you've been
12 saying that you've watched some of the ball
13 games on there?

14 A. Yes, I've seen some ball games.

15 Q. Have you ever watched newscasts?

16 A. I've seen the newscasts on there, but
17 I haven't stopped. But I do know there's
18 newscasts on there.

19 Q. Are you aware that when WGNA is
20 retransmitted, the retransmission of the WGN
21 signal, that many of the newscasts are not
22 retransmitted on WGNA?

23 A. I can't answer the question, sir.

24 Q. In other words, the morning
25 newscasts --

1 A. Yes.

2 Q. -- are you aware that the morning
3 newscast is not retransmitted on WGNA?

4 A. At one point, I was aware of which
5 newscasts were coming over and which weren't.
6 Sitting here right now, I can't answer the
7 question with specificity and be assured that
8 I'm being accurate.

9 Q. But you did have some awareness that
10 WGNA, for purposes of the national
11 distribution, dropped newscasts and inserted
12 other programming?

13 A. I think that -- I believe I had that
14 understanding at one point in time, that seems
15 consistent with --

16 Q. Okay. In your rebuttal testimony, now
17 I'm turning to the question which was raised
18 relative to Ms. Hamilton's comments, she had --
19 she had made some comments, and your testimony
20 indicates -- this is in rebuttal -- that 69 of
21 86 Charter systems that carry WGNA did not
22 carry any other Tribune signal.

23 And it went to the issue of did
24 Tribune bundle WGNA --

25 A. Yes.

1 Q. -- with other Tribune television
2 stations? And Tribune is one of the largest TV
3 broadcasters in the country, is it not?

4 A. Yes.

5 Q. Okay. And so you say in 69 of 86
6 Charter systems, no bundling because we didn't
7 carry a Tribune system. So my question is what
8 about the other 17?

9 A. Well -- well, Tribune was not bundled
10 -- Tribune broadcast signals were not bundled
11 with WGN. It's not the way the transaction
12 worked.

13 I can tell you that -- and I'm being
14 accurate. I can tell you that was the case at
15 prior company I worked at. But I think you can
16 see that if you look at the carriage.

17 And there's a couple components of the
18 carriage. And that's what I was getting at. I
19 hope I'm answering your question. Cut me off
20 if I'm not.

21 So I'm telling you that it wasn't
22 bundled, but you can also see that it wasn't
23 bundled because we had about 80 some percent
24 carriage at Charter -- and that's my
25 recollection for Comcast too. It wasn't

1 ubiquitously carried.

2 And had it been bundled, you would
3 have seen -- it would have been carried
4 everywhere in the company. You're not getting
5 my retransmission consent unless you carry my
6 super-station everywhere. That wasn't the
7 taking place. So you would have seen
8 100 percent carriage.

9 Second, and I think it's more
10 interesting than where you're going, but it
11 gets to the same place, in Charter markets, we
12 had 11 markets that did not carry WGNA that was
13 carrying a Tribune broadcast signal. One would
14 think if it was being bundled, which it wasn't,
15 that someone would have come in and said: Hey,
16 you're not carrying the super-station
17 everywhere, I'll give you -- I'm going to give
18 you retransmission consent at this value
19 proposition, but you certainly have to carry it
20 in every place I have a broadcast station.

21 That wasn't happening either. So
22 those numbers in my rebuttal testimony were
23 sort of to give some independent evidence to
24 support my contention that, in fact, it wasn't
25 bundled.

1 Q. I appreciate that. And that might
2 have been Charter's experience, but at the same
3 time, there were press reports in 2012 that
4 DISH, as an example, and Cablevision were
5 engaged in negotiations and a dispute with
6 Tribune over local carriage of signals, the
7 retransmission consent.

8 A. Sure.

9 Q. You knew about that, did you not?

10 A. I knew that -- they had new management
11 come in. And they had new ownership come in
12 post-bankruptcy that took a much more
13 aggressive position than had been -- had taken
14 place before.

15 And they had disputes with those two
16 companies and they had disputes with DirectTV
17 that were widely publicized. I can't speak to
18 the details of what happened, but as you also
19 know, in this period of time, Gannett, Hearst,
20 Sinclair, all the large, powerful broadcast
21 groups were being aggressive to seek additional
22 value in retransmission consent.

23 So there were lots of these --

24 Q. Well -- I'll let you finish.

25 A. Go ahead, I'm sorry.

1 Q. Was it conceivable that your contracts
2 with Tribune sort of predated the new ownership
3 and didn't come up for renewal until -- until
4 somewhat later? So you were not engaged in
5 this -- this sort of new ownership
6 post-bankruptcy disputes that were going on in
7 2012?

8 A. That -- that is what -- that is true.
9 That's -- that's true. We didn't go to the
10 plate, another baseball analogy, until '14, '15
11 with them, but I guess the more important point
12 for what we're doing here, even if this did
13 take place in the middle of the time period
14 here around '12 or '13, what you're talking
15 about that perhaps it was starting to be
16 bundled in '12, which I'm not sure and I can't
17 testify to, I think the point -- I think the
18 point Ms. Hamilton is making on bundling is
19 it's not a true value proposition because it
20 was just tagging along; if you want Tribune,
21 you have to carry WGNA.

22 So talking about sports on WGNA is not
23 important because that's not where the value
24 was. I think she's -- I'm guessing but I think
25 that's what she's trying to do. But that -- it

1 doesn't matter so much, even if there had been
2 latter bundling, which I'm not sure there was,
3 because you can look back and say the carriage
4 in 2010 and '11, why was it on, because it
5 hadn't been bundled. It wasn't historically
6 part of a bundle, which is what I think Sue
7 Hamilton was saying.

8 So what happened perhaps during this
9 period or didn't happen during this period
10 isn't that relevant to the determination. Can
11 we take a step back and say: Why were these
12 local field leaders saying I carried WGN in the
13 Bortz survey? Which is what I think she's
14 trying to undermine. They didn't make some
15 independent decision regarding that because it
16 had been bundled as part of retrans, which
17 wasn't the case.

18 Q. But, in other words, what you're
19 saying is you don't know for the 2012 and '13
20 period. Maybe prior to -- prior to that, you
21 may have sort of more personal knowledge. Do
22 you know when the retransmission agreements
23 with Tribune -- you said expired in 2014, '15.
24 When did they start? Were they sort of prior
25 to 2010?

1 A. For me?

2 Q. Yeah.

3 A. '11.

4 Q. '11, okay. So 2010 and '11 --

5 A. There was no --

6 Q. -- you're reasonably familiar --

7 A. There was no bundling in '11.

8 Q. Okay.

9 A. There was no bundling in '08. There
10 is no bundling in '03 at Comcast. So if we
11 want to take a look at WGNA independently -- if
12 you want to -- if you want to say that the
13 Bortz survey can look at WGNA independently on
14 a market basis, it's not being impacted -- the
15 launching continued carriage. It's not being
16 impacted by bundling with retrans, contrary to
17 I think Ms. Hamilton's testimony.

18 Q. But for 2012 and '13, you have less
19 personal knowledge about the bundling?

20 A. Yes.

21 Q. Okay. Thank you.

22 And I'll note that in your, I'll say,
23 endorsement of the Bortz survey and the
24 results, there's a 4 to 5 percent range, it
25 goes from 4 in 2010 up to 5.1 in 2013, for the

1 devotional, sort of this smaller segment.

2 And that percent would be consistent
3 with your professional views of sort of if
4 you're making a judgmental allocation of
5 royalties, and you think that's a reasonable
6 allocation, do you not?

7 A. I did, sir.

8 Q. And you wouldn't see any independent
9 basis, based on your experience, for altering
10 that allocation, would you?

11 A. I would not.

12 Q. Okay. Thank you very much.

13 A. Thank you.

14 JUDGE BARNETT: Thank you,
15 Mr. Lutzker.

16 MR. LUTZKER: Thank you.

17 JUDGE BARNETT: Ms. Plovnick? How
18 long are you going to have?

19 MS. PLOVNICK: Maybe 30 minutes.

20 JUDGE BARNETT: Let's take our morning
21 recess before you get started.

22 (A recess was taken at 10:32 a.m.,
23 after which the trial resumed at 10:56 a.m.)

24 JUDGE BARNETT: Please be seated.

25 Once again, this delay is on me. I was

1 listening to music as I was on hold for ten
2 minutes.

3 Ms. Plovnick?

4 MS. PLOVNICK: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MS. PLOVNICK:

7 Q. Mr. Singer, my name is Lucy Plovnick
8 and I represent Program Suppliers in this
9 proceeding. Good morning.

10 A. Good morning.

11 Q. So this mic is kind of over here. I
12 suppose if anyone can't hear me, they will tell
13 me.

14 A. That's good when you stand right
15 there, we hear you best.

16 Q. You can hear me here?

17 A. Yes.

18 JUDGE BARNETT: Mr. Singer, if you
19 could pull your mic just a little closer.

20 THE WITNESS: Thank you, Your Honor.
21 Is that better?

22 JUDGE BARNETT: Yes.

23 BY MS. PLOVNICK:

24 Q. Mr. Singer, you worked at Charter from
25 2011 to 2016; is that correct?

1 A. Yes, I left -- yes, I left in the fall
2 of 2016.

3 Q. And when you worked at Charter, you
4 were the person responsible for programming
5 decisions for Charter?

6 A. I was the person overall responsible
7 for programming at Charter, depending on what
8 the subject matter was, yes.

9 Q. You were responsible, so did you
10 supervise everyone else working under you that
11 was -- that had any responsibility for
12 programming decisions?

13 A. Yes, and I would have signed off on --
14 where it's here, if a decision was made by a
15 local programming authority.

16 Q. Did that include distant signal
17 programming?

18 A. Yes, exactly.

19 Q. So you had the authority to approve or
20 disapprove whatever decisions others were
21 making with regard to distant signal
22 programming?

23 A. I -- I did. I would challenge -- it
24 wasn't just approving -- I would challenge them
25 because I wanted to save the money. We really

1 did.

2 I would challenge them, when they
3 would come up with a basis that they would lose
4 customers, I would defer to their decision, so
5 they were making the decision subject to me
6 signing off on it.

7 Q. Did you ever overrule anyone's
8 decision or say -- you said that they had to
9 justify them to you?

10 A. Yes. I thought about that and I can't
11 remember one time when somebody -- when I did
12 overrule somebody.

13 And I would say to them, I'm taking
14 this to Tom, the CEO. And they would say,
15 fine, I really need to have this.

16 But I can't remember overruling them.

17 Q. You can't remember overruling them but
18 you could have sometime?

19 A. I could have but I don't believe I
20 did. I tried to think whether I -- what
21 instance I might have overruled someone.

22 Q. So let's talk about the programming
23 decisions that you supervised.

24 So when you make a programming
25 decision about whether to carry a distant

1 signal, it's usually a decision about whether
2 to carry an entire broadcast station; is that
3 correct?

4 A. Yes.

5 Q. You don't usually decide about a
6 particular program, within a distant signal,
7 about carriage of one program?

8 A. Well, no, you can't a la carte it, but
9 when you are looking at carrying a distant
10 signal, there has to be a reason. What's on it
11 that we need to carry? What are the components
12 of the programming on it?

13 And in this instance is there
14 something that I have to have or I'm going to
15 lose a customer? So is there a component of
16 the network --

17 Q. But you didn't individually license
18 any of those programs?

19 A. No, you cannot individually license
20 programming.

21 Q. And sometimes when you would make
22 decisions, you would look at multiple stations
23 together as in a bundle. I think you testified
24 about that.

25 A. Not in the case of distant signals.

1 Q. Not in the case of distant signals,
2 but in the case of cable networks or other
3 things, you would look at a bundle situation,
4 you might make a decision about multiple
5 signals at the same time?

6 A. Multiple networks at the same time --

7 Q. Multiple networks at the same time.

8 A. -- that were owned by the same program
9 group, yes.

10 Q. All right. So let's talk about the
11 marketplace for distant signals.

12 So right now cable systems carry
13 distant signals pursuant to a statutory
14 license; is that right?

15 A. Section 111?

16 Q. Section 111 of the Copyright Act?

17 A. Yes.

18 Q. So cable operators do not currently
19 engage in free market negotiations for the
20 carriage of distant signals?

21 A. Well, cable -- no. Cable -- cable
22 system operators are making a determination
23 whether I want to bring a distant signal into
24 my market or not, unless I misunderstood your
25 question. So they are making a market

1 decision. It is not being driven, for
2 instance, as part of an ESPN deal.

3 Q. No, no, but it is within the 111
4 compulsory licensing, you know, the regulation
5 that exists, so the decisions that they are
6 making are being made with the understanding
7 that they are carrying it pursuant to a
8 statutory license; is that correct?

9 A. They are carrying it pursuant to a
10 statutory license, and frequently now they are
11 carrying it pursuant to a grant of
12 retransmission consent. So it would be two
13 components to it.

14 JUDGE BARNETT: What was that last
15 thing you said? I'm sorry.

16 THE WITNESS: Retransmission consent.
17 They are -- they are getting a grant to bring
18 in a distant signal from a broadcast group, and
19 then have to make a determination do I want to
20 do that and enter into that agreement.

21 And, as you are saying, consistent
22 with that I am permitted to do so under Section
23 111, which brings us here.

24 BY MS. PLOVNICK:

25 Q. But it is within this regulated scheme

1 that exists at this time during 2010 through
2 2013, there was a regulated compulsory license
3 in place for the carriage of distant signals,
4 and so the carriage that was going on was
5 pursuant to that license?

6 A. Yes.

7 Q. During that time frame?

8 A. But you would also need the grant of
9 rights from the broadcaster.

10 Q. You would also need retransmission
11 consent at the same time?

12 A. Some type of grant of rights.

13 JUDGE STRICKLER: Did you have to pay
14 separately for that retransmission grant?

15 THE WITNESS: Frequently.

16 JUDGE STRICKLER: In addition to the
17 royalties?

18 THE WITNESS: Yes, sir.

19 JUDGE STRICKLER: You say frequently.
20 But not all the time?

21 THE WITNESS: Yes.

22 JUDGE STRICKLER: And those
23 negotiations --

24 THE WITNESS: For broadcast signal you
25 would have to.

1 JUDGE STRICKLER: For a
2 distantly-retransmitted station, such as we're
3 discussing here today, you'd have to have
4 retransmission consent?

5 THE WITNESS: Generally, but not --
6 generally, yes.

7 JUDGE STRICKLER: And at times but not
8 always you would have to pay separately for
9 that retransmission of the entire station to
10 the station owner?

11 THE WITNESS: Yes, sir.

12 JUDGE STRICKLER: Thank you.

13 BY MS. PLOVNICK:

14 Q. Just to make sure we're clear, you
15 were not engaged in negotiations with either
16 broadcasters, other than these retransmission
17 consent agreements, or copyright owners in
18 order to carry distant signals from 2010
19 through 2013; it was a statutory license?

20 A. Yes, with respect to copyright, it is
21 a statutory license. And I'm sorry, I didn't
22 mean to --

23 JUDGE STRICKLER: So with respect to
24 copyright, it's the statutory license, but with
25 regard to retransmission consent, it's a

1 marketplace transaction?

2 THE WITNESS: Yes.

3 JUDGE STRICKLER: Purely marketplace,
4 in terms of no regulation governing?

5 THE WITNESS: In terms of no
6 regulation governing, yes.

7 JUDGE STRICKLER: Thank you.

8 BY MS. PLOVNICK:

9 Q. So with -- and another feature of this
10 regulated copyright scheme --

11 A. Yes, sir -- yes, ma'am.

12 Q. -- was that you cannot alter distant
13 signals when they are retransmitted; is that
14 correct?

15 A. True. Right.

16 Q. So you can't currently insert
17 advertising into distant signals; you have to
18 take them as they are pursuant to regulation?

19 A. You're not permitted -- well, you're
20 not permitted to insert advertising. You are
21 statutorily not permitted to insert
22 advertising.

23 Cable operators and distributors,
24 other distributors, aren't permitted
25 contractually to insert into broadcast signals

1 either.

2 JUDGE STRICKLER: When a cable system
3 decides whether or not to do the
4 retransmission, enter into a retransmission
5 consent agreement, does the cable company in
6 your personal experience look at the relative
7 value of the programs that are on that station
8 before it decides whether to pay the fee to
9 retransmit the signal?

10 THE WITNESS: I might have
11 misunderstood your question.

12 JUDGE STRICKLER: Maybe I garbled it.

13 THE WITNESS: When we're evaluating
14 retransmission consent, do we look at the
15 various programming components in reaching an
16 agreement? Yes, sir.

17 JUDGE STRICKLER: Thank you.

18 BY MS. PLOVNICK:

19 Q. So when you have been talking today
20 about the 2010 through 2013 time frame and you
21 are talking about decisions with distant
22 signals, you're talking about how those
23 decisions would be made in a regulated market
24 with statutory license in place?

25 A. I -- I agree with what you are saying.

1 But there is an initial decision, do I want to
2 carry it or not, which I see as market. But
3 once we decide to carry it, I'm within the
4 regulatory environment.

5 Q. Are you talking about the
6 retransmission consent decision at that point
7 in time?

8 A. Just do you want to bring a distant
9 signal into this market and add these costs?

10 Q. But the constraints of the regulated
11 market that are in place, that would not factor
12 into that decision that you're talking about,
13 the initial decision?

14 A. It would. It would.

15 Q. So it still has the statutory license
16 inserted or involved in that?

17 A. If I am bringing a PBS in that doesn't
18 have a license fee, I'm still going to pay the
19 statutory license fee. That's your point?

20 Q. Well, I am just trying to get a clear
21 understanding of what the market is that you
22 are talking about when you are talking about
23 this, and during the 2010 through 2013 time
24 frame, which I think is what is at issue in
25 your testimony.

1 A. Yes, sir -- yes, ma'am. Sorry. I
2 apologize.

3 Q. So let me just very quickly ask you a
4 question, because I can't resist, about the
5 Oprah Winfrey Network.

6 A. I'm 0 for 1.

7 (Laughter.)

8 BY MS. PLOVNICK:

9 Q. You said that you helped, I think you
10 say you were responsible -- this is in your
11 Appendix A to your testimony under the part of
12 your resume about Oprah Winfrey Network -- you
13 were responsible for the most successful new
14 network launch in the last 15 years, increasing
15 distribution and establishing a healthy
16 affiliate revenue stream.

17 So did Oprah Winfrey Network carry any
18 sports programming?

19 A. It did not.

20 Q. It didn't?

21 A. I don't believe it did.

22 Q. All right. And you were there from
23 2009 to 2011; is that correct?

24 A. Yes.

25 Q. Okay. Now, Mr. Singer, I want to ask

1 you some questions about the Bortz survey.

2 So when you were working at Charter,
3 were you familiar with the Bortz survey?

4 A. No, I wasn't.

5 Q. And I think you testified today that
6 you never responded to the Bortz survey?

7 A. No, I never responded to the Bortz
8 survey.

9 Q. Did you ever respond to any cable
10 operator survey that was similar to the Bortz
11 survey?

12 A. I don't recall. I don't recall if I
13 ever did. I don't believe I did.

14 Q. All right. If you had responded to
15 the Bortz survey, how many Charter systems
16 would you have responded for?

17 A. I think 100.

18 Q. So you had -- oh, it was 100 different
19 Charter systems that you had authority over?

20 A. You know what, I think we had 100 Form
21 3 systems, is my recollection. My recollection
22 is the Bortz survey relates to the Form 3
23 systems?

24 Q. I believe that's right.

25 A. So I think Charter had approximately

1 100 systems that would have been responsive to
2 the Bortz survey.

3 Q. And if you had been a respondent, then
4 you would have been answering for 100 different
5 systems?

6 A. I couldn't have answered the Bortz
7 survey. I -- I couldn't. The Corporate
8 Programming Department could not have answered
9 the Bortz survey. We would have to have gone
10 to the people that responded to the Bortz
11 survey to be able to answer it.

12 Q. So you would not have considered
13 yourself an appropriate respondent to the Bortz
14 survey?

15 A. I would not have -- I am -- I am the
16 person that has overall authority over
17 programming at Charter. That's what the head
18 of programming would have been at any of these
19 companies.

20 But the actual decision, the actual
21 person responsible for deciding to carry a
22 distant signal or not in these markets would
23 have been the local programming leader there,
24 subject to my sign-off and challenge.

25 Q. So despite the fact that you were

1 signing off and challenging these decisions,
2 you didn't think you had familiarity over the
3 different kinds of distant signal carriage that
4 the systems were carrying?

5 A. On the average Bortz survey, if there
6 is four distant signals being brought into a
7 marketplace, and it says WPVI, WXYZ, I don't
8 know what those are.

9 And I can have somebody in my
10 department Google it or I could Google it and
11 see that this is an independent or this is a
12 Fox from Chicago, but I don't know why it is on
13 until I call the system and say: Why do we
14 have that on?

15 So to really answer the Bortz survey
16 you would need the local programming --
17 designated programming leader.

18 So I would -- I would actually say to
19 Cheryl vons Brecken, who is the person in
20 Minnesota, and she would say Melissa so and so,
21 and we would call Melissa and saying that's --

22 Q. You are saying that's what you would
23 have done if you had been asked to respond to
24 the Bortz survey, but you didn't actually do
25 that because you never did, in fact, respond to

1 the Bortz survey?

2 A. Yes. True.

3 Q. And you are saying you are not
4 familiar with the different call signals that
5 might be listed in the Bortz survey; you
6 wouldn't have any idea what -- what kind of a
7 signal they were, is that your testimony, or
8 what programming was on them without further
9 research and analysis?

10 A. Exactly. And I have a field leader
11 who is responsible for that type of decision.
12 So it is best to leave it to her or to him.

13 Q. All right. So you said that you
14 reviewed the 2010 through 2013 Bortz report in
15 connection with your testimony; is that right?

16 A. Yes.

17 Q. And it is your testimony that the
18 results of the Bortz report are consistent with
19 your experience as a CSO?

20 A. Yep.

21 Q. And particularly with regard to the
22 live team sports category; is that right?

23 A. Yes. Well, all the categories.

24 Q. All the categories. And you spoke in
25 particular about sports programming on WGN here

1 today, Chicago sports programming?

2 A. Yes.

3 Q. All right. So, Mr. Singer, I would --
4 and you testified that live team sports
5 programming on WGN is the most important
6 distant signal programming to cable operators?

7 A. On WGN?

8 Q. That sports programming on WGN was the
9 most important?

10 A. Yes. Yes.

11 Q. All right. Mr. Singer, I would like
12 to direct your attention to Exhibit 6020.

13 MS. PLOVNICK: And, Your Honor, this
14 is going to be a restricted exhibit. I don't
15 think we have anyone here that is not subject
16 to the protective order but I just wanted to
17 call it to your attention.

18 JUDGE BARNETT: Thank you. Let the
19 record reflect there is no one in the hearing
20 room who is not privileged.

21 (Whereupon, the trial proceeded in
22 confidential session.)

23

24

25

1 O P E N S E S S I O N

2 BY MS. PLOVNICK:

3 Q. Go ahead and finish your answer.

4 A. They are applying a value, based upon
5 their experience as to what things cost as
6 relates to why do I bring this station in to my
7 marketplace. And it will vary depending on
8 what the station is and what is on the station,
9 why they have made the decision to bring it in,
10 and their experience as to the value of sports
11 versus news versus devotional.

12 Q. Experience in the cable network
13 marketplace?

14 A. In the cable television programming
15 acquisition business.

16 Q. So it wouldn't be limited to distant
17 signals in your view; it would also include
18 cable network transactions?

19 A. They are being asked to provide
20 valuation, a percent valuation for the distant
21 signals they bring into their market. And in
22 so doing, they are bringing their experiences
23 in purchasing programming.

24 So, yes, how much we pay ESPN in a
25 marketplace, which is so much more than we pay

1 for other categories of programming, factor in
2 how much they have had to pay in their
3 marketplace if a pro team was added to an RSN,
4 and how that related to their overall
5 programming budget factors into their decision.

6 However, they could be bringing one
7 distant signal in that's a PBS station. And in
8 their mind, 100 percent of the value goes to
9 PBS. I don't know. It is statistics and it is
10 all over the board.

11 Q. And those evaluation factors would be
12 the same if the individual was working in
13 marketing as -- it wouldn't change?

14 A. It is a -- you're bolloxed up in a
15 distinction that doesn't exist. The fact that
16 they have a marketing title or a product title
17 or their title is general manager doesn't mean
18 -- doesn't impact whether or not they are the
19 decisionmaker in that particular marketplace.

20 Q. So they would still be considering
21 cable network values while they were doing
22 this, that they would still have that knowledge
23 and take that into account?

24 A. If they were the local programming
25 decision-person in the marketplace, they have

1 been working in programming for some period of
2 time. They have been the interface with
3 corporate for programming decisions that relate
4 to their market.

5 So it might be a marketing person. It
6 might be a person that has some type of
7 programming in their title. I have seen that.
8 It might be a product person. There might be
9 some type of intelligence, competitive
10 intelligence.

11 And frequently it is the GM or area
12 manager or the myriad of titles that different
13 cable companies over 30 years have given to the
14 man or woman that was running the system.

15 Q. But my question -- go ahead.

16 JUDGE STRICKLER: May I?

17 MS. PLOVNICK: Go ahead.

18 JUDGE STRICKLER: I want to try to
19 relate what you are saying. I think it relates
20 to the format of Question 4a in the Bortz
21 survey.

22 THE WITNESS: Yes, sir.

23 JUDGE STRICKLER: I don't think it
24 matters whether it is the WGNA-only or not.

25 THE WITNESS: Yeah.

1 JUDGE STRICKLER: But the question
2 begins -- I'm not going to read the whole thing
3 -- but it begins: "Now I would like you to
4 estimate the relative value to your cable
5 system of the programming," and I will stop
6 there.

7 THE WITNESS: Yes, sir.

8 JUDGE STRICKLER: And then at the end
9 of that paragraph the question is asked: "What
10 percentage, if any, of this fixed dollar amount
11 would your system have spent?"

12 Now, if you were answering this
13 question, given your expertise in the business,
14 would relative value mean the relative value
15 after you have paid the costs or it's, as one
16 of counsel's points earlier, was what drops to
17 the bottom line.

18 THE WITNESS: Yeah.

19 JUDGE STRICKLER: And you would rank
20 value according to what drops to the bottom
21 line, or would you rank value based on how much
22 you spent; in other words, if you spent more on
23 sports than anything else, but it left you
24 with, let's be ridiculous, 1 cent --

25 THE WITNESS: Yes.

1 JUDGE STRICKLER: -- on the bottom
2 line; whereas you spent a much, much smaller
3 amount for Program Suppliers, but it left you
4 with 10 cents on the bottom line, ten times as
5 much.

6 In that situation, which one has the
7 higher relative value?

8 THE WITNESS: Well, you are asking
9 about the specific signals, too. It is tied to
10 the signals.

11 JUDGE STRICKLER: Well, but this
12 question is disaggregating from the signal,
13 right?

14 THE WITNESS: Well, it will -- well,
15 it is still the signals in the totality, I
16 think, right, for the distant signals. So it
17 does aggregate.

18 But I guess to get to your question --
19 and if it was counsel's question, I apologize
20 if I wasn't answering it, it -- I don't think
21 it is for programming expense. It is -- it is
22 what are you valuing of these distant signals
23 that you are bringing in.

24 And it is hard to not factor in an
25 understanding that you have, as an executive in

1 the industry, what are you spending money on?

2 And I think -- I think -- I think that
3 is how you get to this. It is -- it is how --
4 how -- what is the valuation, market valuation
5 that I'm ascribing to this programming.

6 It is hard not to consider what your
7 programming expense is in looking at that.
8 However, if you are bringing a couple PBS's and
9 a devotional in, that could absolutely skew
10 your responses here.

11 JUDGE STRICKLER: Well, again, I
12 appreciate it, but my question is -- is, I
13 think, more general.

14 THE WITNESS: Yes.

15 JUDGE STRICKLER: Which is if you
16 spend \$10 million to get sports, so that's your
17 cost, that's how much you spent, that would be
18 the answer to -- literal answer to the question
19 towards the bottom of 4a, and it leaves you
20 with one penny on the bottom line, and you
21 spent \$10,000 for Program Suppliers, and it
22 leaves you with 10 cents on the bottom line,
23 which has more relative value?

24 How do you respond to this question,
25 just on my hypothetical?

1 THE WITNESS: It's hard.

2 JUDGE STRICKLER: That I agree with.

3 THE WITNESS: Well, the way I
4 understand the survey, I would -- I would be
5 taking these categories and I would be looking
6 at the distant signals that I brought in,
7 whether it is WGN or some combination, and
8 what percent value I'm ascribing to it.

9 And I would be factoring in, you know,
10 what the marketplace cost was of this
11 programming.

12 And it is interesting that it comes
13 out to about 40 percent. I mean, that's
14 interesting from a real high level since that's
15 about what sports programming is costing.

16 JUDGE STRICKLER: So if I understand
17 your answer correctly, you would be thinking of
18 two different things.

19 You would be thinking of how you would
20 disaggregate the value within the signal that
21 you received, because you have already paid,
22 you have paid an amount of royalties under the
23 various -- whether it is this Syn fund or the
24 basic fund or 3.75, you have already paid and
25 now you are trying to figure out which has

1 value because you are not worried about cost
2 because the cost is disassociated, if you will,
3 with the value, is that right?

4 THE WITNESS: Yes, and I think that's
5 why you are going to see in some survey results
6 -- I am not a survey expert, I can't go through
7 these and explain them -- but that's why I
8 think on some survey results you might see
9 syndicated series, despite my testimony, you
10 know, Number 1.

11 They -- if they are bringing in a
12 couple distant signals, and one of the distant
13 signals is a MeTV, which is like TV Land, it is
14 a rerun channel, and that might be where they
15 are putting their copyright royalty, those
16 types of expenses.

17 So that might be in their mind why in
18 this system I bring in a distant signal, and
19 when they are answering the survey and that's
20 what's listed.

21 JUDGE STRICKLER: So let me take what
22 I think is the other thing you said would be in
23 your mind if you were answering this question.

24 Let's forget about the
25 distantly-retransmitted signal for a second.

1 Let's talk about a hypothetical marketplace
2 where there is no regulation.

3 I am going to repeat --

4 THE WITNESS: Yes, sir.

5 JUDGE STRICKLER: -- hopefully my
6 hypothetical in the same general way.

7 You have got sports that costs you \$10
8 million, that's what you spend, and it leaves
9 one penny at the bottom line in terms of the
10 estimate of how valuable it is to the cable
11 system.

12 You spent \$10,000 of Program
13 Suppliers. It leaves 10 cents on the bottom
14 line.

15 Which one has a higher relative value?

16 THE WITNESS: That's not the world --
17 that's not the world within which we live. But
18 I think you would see a higher relative value
19 ascribed to sports in that limited scenario.

20 JUDGE STRICKLER: So you would answer
21 that question by saying the higher relative
22 value is based on the amount that was spent,
23 not the amount that drops to the bottom line?

24 THE WITNESS: If it was just -- if it
25 was that, that extreme, that type of extreme

1 where 99 percent is going to one of the four
2 categories, one of the five categories --

3 JUDGE STRICKLER: Well, that was just
4 to make it vivid. I mean, if that's -- if
5 that's making the question difficult for you, I
6 don't want to keep that, those parameters in
7 the question.

8 THE WITNESS: It is.

9 JUDGE STRICKLER: If sports costs \$10
10 million and it gives you a million dollars to
11 the bottom line, and Program Suppliers cost you
12 \$5 million and it drops \$2 million to the
13 bottom line, which one has a higher relative
14 value?

15 THE WITNESS: I don't know if I would
16 be looking at it the way you are categorizing
17 it. I think I would be falling back on why am
18 I carrying this?

19 I am carrying this because I am going
20 to probably lose customers if I don't have it.

21 It's a small component, for instance,
22 of the programming on WGNA. But why am I
23 carrying WGNA, when I just look at that, I am
24 carrying it because I have to -- I feel like I
25 have to have these sports.

1 So setting aside the amount that I am
2 putting into royalty or whatever the economics
3 are and how that nets out to my bottom line, I
4 am answering the question: What is the
5 relative value?

6 And the relative value -- and I am
7 coming back and saying: Why do I carry this?
8 I carry it because it has MeTV and a syndicated
9 series. I am carrying WGN because it has got a
10 hundred of these games and I feel like I have a
11 lot of Cubs fans or whatever. And I think you
12 then step back and you apply percentages.

13 JUDGE STRICKLER: But my question was
14 to take us out of the retransmission. We're
15 looking at a hypothetical marketplace where
16 there is no regulation for purposes of my
17 question, maybe for purposes of the
18 determination as well, but that's a different
19 question.

20 THE WITNESS: Sure.

21 JUDGE STRICKLER: For purposes of my
22 question, the question is: Do you look at the
23 cost that was paid, imagine you were just
24 picking groups of programs, you were either
25 taking the team sports or you were taking

1 programs, sports costs much more, but the
2 bottom line is that, that programs gives you a
3 higher profit.

4 Which do you care about in terms of,
5 if you were going to say which has the higher
6 relative value, would you say the higher
7 relative value is the category of programming
8 that costs more or the high -- or the category
9 of programming that adds more to the bottom
10 line, which is, bottom line, to go back to the
11 point you made, is either in terms of voiding
12 the cost of lost subscribers or gaining new
13 subscribers?

14 THE WITNESS: I -- it is hard to
15 separate it out. It is hard to say that I am
16 not looking on a market basis and valuing as to
17 something that is so substantially expensive.

18 However, I am not so much looking at
19 the bottom line as I am looking at my product
20 offering. I want to have Comedy Central on. I
21 want to have W -- I want to have a disparate
22 amount of programming, some of which is not
23 going to be that expensive.

24 JUDGE STRICKLER: Well, I understand
25 that. But you don't want Comedy Central

1 because you love Trevor Miller.

2 THE WITNESS: Right.

3 JUDGE STRICKLER: You don't want
4 Comedy Central because you think it is some
5 aesthetic thing that's good, you may feel that
6 way about it, but you want it because it drops
7 to the bottom line.

8 My question is much more of a
9 shorthand question, which is I have already
10 subsumed that the bottom line is what the
11 bottom line is because you have Comedy Central,
12 but Comedy Central knows that so it demands
13 more money if you want to carry it.

14 So my question already subsumes all of
15 those things that you just said. So, again,
16 when you get to the relative value, do you --
17 would you, in responding to this survey, if you
18 were talking about a hypothetical marketplace,
19 would you, again, would you value sports more
20 because it costs much more than programs, in
21 the Program Supplier category, or would you
22 value Program Suppliers more if it happened to
23 drop more to the bottom line, to the profits of
24 the cable company?

25 THE WITNESS: I would value sports

1 more because it costs more and because, unlike
2 any other category, I will lose customers, I
3 will assuredly lose customers if I don't have
4 it, which is going to totally change the bottom
5 line in the way the marketplace, as reflected
6 in my stock price, values my company.

7 So I would have to value sports more.
8 It costs more. It puts me at the most risk of
9 losing subscribers, which is going to change
10 the whole bottom line calculation, and it is
11 going to change the market cap potentially of
12 my company. So I have to value it more.

13 I am not going to discount and put
14 zeros on other things, which is where I was
15 having trouble with the 99 percent valuation
16 thing.

17 But, yes, I have to value sports more
18 because, as much as it is a punch in the gut
19 cost-wise, it is a punch in the gut cost-wise
20 because I have to have it on, and I am
21 retaining my customers by having it on.

22 JUDGE STRICKLER: Thank you.

23 BY MS. PLOVNICK:

24 Q. So I have to confess I don't remember
25 what we were talking about before.

1 (Laughter.)

2 A. I think Mr. Cantor was in that place a
3 couple times, too.

4 Q. So I will just move to something new.

5 A. Thank you.

6 Q. So, Mr. Singer, so I wanted to ask you
7 a few questions about your rebuttal testimony.
8 And one of the witnesses that you responded to
9 was Ms. Sue Hamilton; is that correct?

10 A. Yes.

11 Q. Do you know Sue Hamilton?

12 A. Yes, I know her.

13 Q. Do you both live in Denver?

14 A. We're very close friends.

15 Q. Very close friends. You both worked
16 at Charter?

17 A. Yeah. Sue worked at Charter -- we
18 worked at Charter at separate times.

19 Q. Separate times, but you both held
20 similar positions at Charter at different
21 times?

22 A. Yes, and we worked at the same company
23 and Sue worked for me for a short period of
24 time.

25 Q. All right. So in your rebuttal

1 testimony you criticize Ms. Hamilton's
2 testimony regarding legacy carriage and also
3 you have said some things about WGNA as well.

4 A. Yeah.

5 Q. And I believe also about program
6 categories. So let's just start -- I will
7 start with WGNA.

8 So at the time that you worked at
9 Charter, which was 2011 through 2016, did the
10 cable systems that you were responsible for,
11 did they all carry WGNA?

12 A. No.

13 Q. Did most of them carry WGNA?

14 A. Yes.

15 Q. And during the time period from 2010
16 to 2013, there was a sports programming on
17 WGNA; is that correct?

18 A. Yes.

19 Q. Now, WGNA converted to become a cable
20 network in 2015; is that right?

21 A. Yes.

22 Q. And they discontinued sports carriage?

23 A. Yes.

24 Q. So did your systems continue carrying
25 WGNA after the sports went away?

1 A. Not only did we continue to carry it,
2 we rolled it out to the whole company.

3 Q. You rolled it out to the whole
4 company?

5 A. Yes.

6 Q. As a cable network?

7 A. As a cable network.

8 Q. Notwithstanding that there was no
9 sports?

10 A. Notwithstanding that there was no
11 sports.

12 Q. There is also no news?

13 A. Yes.

14 Q. Yes.

15 A. That is all true.

16 Q. So the -- so what programming was on
17 WGN then?

18 A. It didn't really matter because
19 Tribune at that point in time was telling us
20 that we had to carry --

21 Q. You had to carry --

22 A. -- we had to carry WGNA, which they
23 had never said before, as reflected in the
24 carriage prior to them dropping that bomb on
25 us.

1 Q. But it had syndicated series on it; is
2 that correct?

3 A. Had syndicated series on it.

4 Q. Had movies on it?

5 A. I guess. It wasn't really that
6 important.

7 Q. It wasn't important to you?

8 A. No, we really -- we needed to carry
9 the Tribune broadcast stations. And
10 conditioned on carrying the Tribune broadcast
11 stations, we needed to carry WGN, even though
12 the value had been removed from WGN by removing
13 the sports.

14 And as consideration for that, we paid
15 less overall for the Tribune broadcast
16 retransmission consent than we otherwise would
17 have in the pure marketplace agreement.

18 JUDGE FEDER: Did you even have to
19 carry it in markets where you weren't importing
20 Tribune signals?

21 THE WITNESS: Yes. We rolled it out
22 -- we had to roll it out to the rest of the
23 company. So when I talked about -- so it went
24 on in Tribune markets, but also went in where
25 we weren't carrying it in the non-Tribune

1 station markets. And it went in at a fixed
2 cost that was tagged to what we would have been
3 paying with copyright and license fees.

4 So it stayed static. We rolled it
5 out. But we paid less than we had just paid
6 Tribune for the broadcast stations what we
7 otherwise might have. That was the
8 consideration.

9 BY MS. PLOVNICK:

10 Q. Why did you make that deal?

11 A. Because we paid less money than we
12 otherwise would have.

13 Q. You paid less money than you would
14 have under the statutory license?

15 A. No, I paid less money than I otherwise
16 would have to Tribune if we had just dropped W
17 -- WGN, they said we're shutting it down, and I
18 want the same deal that Sinclair and Gannett
19 gets, I would have been paying overall more
20 money to Tribune than I was by doing these
21 things for Tribune and giving them a huge rate
22 increase.

23 JUDGE FEDER: Overall money for
24 retransmission consent?

25 THE WITNESS: Yeah. Exactly. It went

1 up by like 300 percent.

2 BY MS. PLOVNICK:

3 Q. But W had been carried for a long time
4 prior to this, correct, right, in your Charter
5 systems?

6 A. But it no longer had any value. It
7 didn't have sports. Like you said, it had a
8 bunch of reruns and movies.

9 Oh, they were also coming out with a
10 slate of originals like Salem, that didn't --
11 that I don't think they were on 12 months
12 later.

13 Q. But you -- so it is your testimony
14 then that there are some things that you carry
15 that have no value to you at all, some
16 networks, cable networks that you carry, that
17 you carry them even though they really have no
18 value?

19 A. There are networks that we carry --

20 Q. Cable networks?

21 A. -- as part of -- cable networks, thank
22 you -- that we carry as part of an overall
23 broad -- overall value proposition with large
24 media companies.

25 So when the field leader sees that NBC

1 is up and says, hey, we can drop Chiller in
2 this market. We can't drop Chiller because
3 that is going to be part of the overall
4 NBCUniversal deal.

5 Q. Didn't you testify earlier that when
6 you were making these sorts of deals that you
7 still ascribed separate values to every single
8 one of the different kinds of cable networks
9 that were carried within the bundle?

10 A. Yes.

11 Q. So none of them had a zero?

12 A. They did have a zero. We ascribed the
13 value because there was an allocated license
14 fee of 14 cents or whatever we were paying for
15 it.

16 Q. So you still ascribed a value on paper
17 even though you didn't have a value in your
18 mind; is that right?

19 A. Even though I would have preferred to
20 drop it. But if ESPN is going to say to me I
21 will give you the same rates that I am giving
22 Comcast, DirectTV, all the other guys, and I
23 will put it in writing, give you written
24 protection, but I really need you to launch --

25 JUDGE STRICKLER: The Ocho?

1 (Laughter.)

2 THE WITNESS: The Ocho, the Ocho, if
3 it had sports, it has value.

4 No, you know, okay, you have to launch
5 -- it was a partnership of the innovation, it
6 was a real lousy channel, and we had to launch
7 it, and it was part of the value equation. It
8 was part of, like the Judge said, it's just a
9 bunch of money after a while.

10 But whenever I am looking at my
11 overall costs that I budgeted for my renewal,
12 and what I am paying and I know that I am
13 paying for the ESPN services and ABC broadcast,
14 yeah, I will pay 14 cents as part of that
15 for -- not Freeform, something else. I can't
16 even remember what it is called any more.
17 It's, I guess, an unfortunate part of life.

18 BY MS. PLOVNICK:

19 Q. The bottom line is you didn't drop it?

20 A. The bottom line is I wasn't able to
21 drop it. The bottom line is, one of the
22 reasons why it is interesting here, is that you
23 made determinations as to distant signals, did
24 it have value, can we drop it, because
25 80 percent of our expense went to the top 12

1 media companies, and they were generally able
2 to legally bundle everything together.

3 So you didn't have that much of an
4 opportunity to drop things.

5 Q. Did you carry additional distant
6 signals in place of WGNA?

7 A. No, there was no 100-pack sports
8 package of additional.

9 Q. So your testimony is that even
10 notwithstanding the fact that WGNA converted to
11 a cable network, that you did not import other
12 distant signals in its place?

13 A. My testimony is I don't recall that,
14 when WGNA became a cable network, that we
15 replaced it with another distant signal.

16 Q. You don't recall? Okay.

17 All right. So you also disagree with
18 Ms. Hamilton about the Bortz survey category
19 descriptions. And she said that they would be
20 -- she thought they would be unclear. You
21 disagreed with that?

22 A. They are not unclear.

23 Q. You don't believe they are unclear.
24 But you also testified that you were never a
25 Bortz survey respondent, correct?

1 A. I did testify to that.

2 Q. So you never had to be put in the
3 position to determine whether or not they were
4 clear or not clear?

5 A. I was never put in the position, but I
6 have looked at it. They are not unclear.

7 Q. And you don't even think you would be
8 the person authorized to make such a
9 determination, or empowered to; you said other
10 folks would be the ones having to make that
11 decision?

12 A. With respect to the question about
13 distant signals, it would be better to ask the
14 field leaders that the Bortz survey asked.

15 Q. You don't really know whether they
16 were clear or unclear to those individuals? I
17 mean --

18 A. Within the nomenclature of the
19 industry, they are absolutely clear categories.

20 Q. In your opinion as a top executive?

21 A. In my opinion as a top executive.

22 Q. All right. So you also disagreed with
23 Ms. Hamilton about the importance of viewing to
24 a CSO decision-making. But then when you
25 testified here earlier in response to some

1 questions you said that you thought viewing was
2 important and a component of that
3 decision-making.

4 So you would agree that viewing is
5 important to cable operators?

6 A. I would -- I would agree that viewing
7 is an important component in evaluating cable
8 networks. I don't believe viewing as solely
9 ascribed by Nielsen is necessarily an important
10 component. It can be, but it not necessarily
11 is. And there certainly isn't a one-to-one
12 correlation, no matter how you want to value
13 things.

14 Q. But there is a correlation? That was
15 your testimony earlier.

16 A. There can be a correlation, if there
17 is a popular, must-have series, Game of
18 Thrones, that's going to correlate.

19 Something like 30 Rock on WGN, which
20 can get a rating, has no value, very little
21 value. It has value in that it is making
22 advertising revenue for WGNA and that reduces
23 the pressure on license fees, but that's about
24 the extent of the value.

25 Q. But that's value?

1 A. That's value. The fact that it's
2 supporting an advertising model is absolutely
3 value.

4 Q. So in order to retain subscribers,
5 wouldn't you agree it is important for a CSO to
6 offer programming that the subscribers want to
7 watch?

8 A. In a general matter, but if they want
9 to watch the programming and it is
10 undifferentiated, it is available in many
11 platforms, including outside of the
12 subscription television universe, and free
13 broadcast television or subscription service.
14 It is not something that we really need for
15 retentive purposes.

16 Q. So you don't think that cable
17 subscribers subscribe because they want to
18 watch television?

19 A. That's not what I said, is it?

20 Q. So tell me what you said.

21 A. I said that it can be important. But
22 the simple matter that somebody might want to
23 watch something is not determinative as to
24 whether or not it has value for retentive
25 purposes, if it is something that is available

1 in many platforms, is homogenous and it's
2 undifferentiated, sort of like reruns in old
3 movies.

4 Q. Was sports available on many platforms
5 in 2010 through 2013?

6 A. Sports is available -- team sports are
7 available on many platforms. But the
8 particular team sport, the event, is almost
9 always exclusively on one channel. And when it
10 is not, it is a real -- it is a small carveout.

11 But it is basically only available on
12 one channel.

13 Q. All right.

14 JUDGE STRICKLER: When a show that is
15 on WGN, 30 Rock, for example, is on at a
16 particular time, say 8:30 p.m. on a Tuesday
17 evening, is there any reason to believe that it
18 is available at 8:30 p.m. on a Tuesday evening
19 on any of the other competitive systems?

20 THE WITNESS: It probably isn't, it
21 probably isn't, although it would be available
22 whenever you want on Netflix and on on-demand.
23 And that's one of the things that, you know,
24 Mr. Mansell didn't note, that this change, this
25 technological change that is going on here,

1 really impacts Program Suppliers content more
2 than anybody.

3 JUDGE STRICKLER: The Netflix
4 phenomenon that you just mentioned, did that
5 exist during the period 2010 to 2013?

6 THE WITNESS: Right, and on-demand --

7 JUDGE STRICKLER: Yes or no.

8 THE WITNESS: Yes.

9 JUDGE STRICKLER: Thank you.

10 THE WITNESS: And on-demand,
11 availability of on-demand, and recording. So
12 you can just record Big Bang Theory and add the
13 whole library, if that's what you want to do.

14 JUDGE STRICKLER: If people were doing
15 that to a predominant degree, would the shows
16 even continue to appear on any distribution
17 network?

18 THE WITNESS: That's the question, but
19 the --

20 JUDGE STICKLER: And the answer would
21 be?

22 THE WITNESS: We will see.

23 JUDGE STRICKLER: Thank you.

24 BY MS. PLOVNICK:

25 Q. Another Programs Suppliers witness

1 that you disagreed with was Howard Horowitz in
2 your rebuttal testimony.

3 A. Yes.

4 Q. And you said you disagreed with the
5 decision to add a non-team sports category to
6 the Horowitz survey.

7 A. Yes.

8 Q. And in your testimony you cited some
9 information about non-team sports programming
10 on WGNA as the reason for your disagreement
11 with Mr. Horowitz.

12 Do you recall that?

13 A. That was one of the reasons.

14 Q. Well, so did you examine the volume of
15 non-team sports programming on other signals,
16 other than WGNA, in reaching your conclusions?

17 A. Yes, in that -- well, examine, yes, in
18 that other team sports programming would
19 generally be on the other big three networks
20 besides Fox.

21 So golf, tennis, horse racing, most
22 types would be on CBS, ABC, and NBC, which I
23 don't believe are part of the subject matter
24 here.

25 Q. No, they are not. Did you -- but you

1 didn't do any analysis --

2 A. Can I finish?

3 Q. Go ahead.

4 A. Well, I don't need to analyze that. I
5 know that.

6 Second -- I apologize. I didn't mean
7 to sound that way.

8 Second, when we're looking at the
9 individual channels that are on, I never had
10 anyone come back to me, the non-big fours,
11 broadcast groups, no one ever came back to me
12 and said there is a horse race that we need, we
13 bring this system, this channel in from
14 Minnesota because there is a horse race or
15 there is a lacrosse game or a soccer match.

16 Q. But you didn't do any kind of analysis
17 to determine the volume of non-team sports
18 programming on signals other than WGNA; you are
19 basing these opinions not on analysis but just
20 on your knowledge?

21 A. I think my knowledge is -- is pretty
22 good.

23 Q. But it is not an analysis or any kind
24 of quantification?

25 A. What's analysis or quantification?

1 Q. You did not examine any data regarding
2 the volume of non-team sports programming?

3 A. No, I did not. But I do know that the
4 decision to continue to carry a distant signal
5 would not be based on whether there was horse
6 racing.

7 Q. But that wasn't my question.

8 A. That's the answer. That's the
9 ultimate answer to the question as to why Mr.
10 Horowitz's adding these categories is only
11 confusing and has nothing to do with valuation,
12 if you are looking at team sports, if you are
13 looking at the category of sports.

14 JUDGE STRICKLER: With regard to
15 non-team sports, would you identify
16 professional wrestling as a non-team sport?

17 THE WITNESS: No, it is reality
18 programming. It is scripted. It is scripted
19 television.

20 (Laughter.)

21 JUDGE STRICKLER: Is it really?

22 (Laughter.)

23 JUDGE FEDER: You are shocked?

24 JUDGE STRICKLER: You realize that you
25 are under oath, don't you?

1 (Laughter.)

2 THE WITNESS: Unfortunately the door
3 was open, too.

4 JUDGE STRICKLER: Well, an interesting
5 question, I suppose, would be whether it
6 doesn't matter whether you or I, this audience
7 believes that it is a sport; the question is do
8 the people who watch it believe it's a sport.

9 But that's just as an aside. Is
10 professional wrestling broadcast on any of
11 these distantly-retransmitted stations?

12 THE WITNESS: Not that I'm aware.

13 JUDGE STRICKLER: It's all on cable
14 now?

15 THE WITNESS: Yes, it is all on cable.

16 JUDGE STRICKLER: Okay. Was it all on
17 cable back in 2010 to 2013?

18 THE WITNESS: Yes.

19 JUDGE STRICKLER: Okay. Thank you.

20 JUDGE FEDER: How about things like
21 NASCAR, golf?

22 THE WITNESS: So golf, golf would have
23 been on NBC and cable networks, like The
24 Masters.

25 NASCAR is an example of something that

1 falls through the cracks because NASCAR was on
2 Fox. So there was some amount of NASCAR games
3 that would have been on distantly-broadcast
4 signals that aren't included in team sports.

5 I would say the team sports, in the
6 industry team sports as described in the survey
7 are what's compensable. But NASCAR does have
8 value. And I can't speak to that, but that's a
9 whole -- that is a whole -- the NASCAR races
10 that were on Fox, I think in the overall scheme
11 of things, I haven't done an analysis, it would
12 be small.

13 BY MS. PLOVNICK:

14 Q. But you have not attempted to quantify
15 the volume of NASCAR programming --

16 A. No, I have not.

17 Q. -- on distant signals?

18 A. Yes, I have not.

19 Q. So another -- we talked a little bit
20 about this already, but another Program
21 Suppliers witness you disagreed with was Mr.
22 Mansell, correct, and he -- but you do agree
23 with Mr. Mansell that there has been sports
24 migration over time from broadcast to cable?

25 A. Yes.

1 Q. Now, in part of your rebuttal
2 testimony disagreeing with Mr. Mansell, you --
3 actually on page 9 of your rebuttal
4 testimony -- you cited some analysis, as a
5 basis for your opinion, some tables that
6 appeared in Dr. Israel's testimony.

7 Do you remember that?

8 A. Yes.

9 Q. So did you review any of the
10 information Dr. Israel relied on for his
11 conclusions, the underlying data he used?

12 A. No.

13 Q. And are you aware that the numbers
14 that Dr. Israel used are for subscribers or the
15 volume numbers are weighted by distant
16 subscribers?

17 A. What paragraph?

18 Q. I'm sorry, it should be on page --

19 A. I don't have it in front of me,
20 counsel.

21 Q. Yeah, yeah, I think it's down here at
22 the bottom. You are citing different -- in
23 your footnotes, you say: Written rebuttal
24 testimony of Mark Israel, Ph.D., at pages 17
25 through 18, and Table 4.

1 So I assume you must have reviewed
2 that since you are citing Table 4.

3 A. Is that footnote 13 or 14?

4 Q. I am looking at 13.

5 A. Can we scroll -- I can't see 13.

6 Q. Can you blow that up, please, Dima?

7 A. Can you just scroll down so I can see?

8 Q. Yes, page 9, footnote 13.

9 A. I see footnote 13. Can I see where
10 footnote 13 --

11 Q. Where it came from?

12 A. Yes. Thank you. Data on the
13 compensable --

14 Q. So I am asking you about this because
15 it is in your written rebuttal testimony and it
16 is a source.

17 A. Yes, I am relying upon Dr. Israel's --

18 Q. You are relying on Dr. Israel's
19 analysis and his table?

20 A. For that sentence, yes.

21 Q. Did you examine any of the data that
22 he looked at?

23 A. No.

24 Q. And do you know what he used for
25 weighting when he said weighted by subscribers?

1 A. I don't.

2 Q. All right. You don't know how the
3 weighting was done?

4 A. No.

5 Q. All right. So you just relied on
6 Dr. Israel for this information?

7 A. Yes.

8 Q. All right. So moving on, you had a
9 lot of disagreement with our witnesses.

10 Another witness that you disagreed
11 with was, of our witnesses, was Mr. Pasquale
12 who worked at HBO.

13 A. Yeah.

14 Q. And Mr. Pasquale testified that
15 viewing information was important to HBO in
16 making programming decisions while he was
17 working at HBO.

18 Is that a correct summation of Mr.
19 Pasquale's testimony?

20 A. That sounds pretty accurate.

21 Q. Were you ever employed by HBO, Mr.
22 Singer?

23 A. No.

24 Q. So were you involved in programming
25 decisions on behalf of HBO?

1 A. No.

2 Q. So you don't really have personal
3 knowledge of what HBO considered in those
4 transactions from the perspective of HBO?

5 A. Well, but what is he talking about?
6 He is -- HBO is buying -- creating original
7 programming. And what viewership data is he
8 looking at to create original programming?
9 Expensive, top tier, fabulous original
10 programming.

11 What's the viewership data that he is
12 looking at when they are purchasing and
13 green-lighting an original series, which can be
14 hits and can be big, big misses? So I didn't
15 really understand what he was talking about in
16 the first place.

17 Secondly, what does it have to do
18 here? I mean, what does it possibly have to do
19 here? That made no sense to me. That was my
20 issues with Mr. Pasquale.

21 Q. But you are not speaking from any
22 perspective of having worked at HBO or having
23 knowledge of what HBO did or did not consider
24 in its decision making?

25 A. That's true.

1 Q. All right. And another witness you
2 disagreed with, and the last one I am going to
3 talk with you about, is Dr. Steckel.

4 And this is, again, about Dr. Steckel
5 said that the questions in the Bortz survey
6 would be unfamiliar and the exercise would be
7 difficult for CSOs.

8 Is that a fair characterization of his
9 testimony?

10 A. Yes.

11 Q. And you disagree with Dr. Steckel?

12 A. Yes.

13 Q. But we have already discussed here
14 today that you were not a Bortz survey
15 respondent yourself, correct?

16 A. I was not a Bortz survey respondent,
17 but these people, I've worked with these
18 people. They are very competent and they are
19 very diligent and they are very bright.

20 And they would have understood these
21 questions. It would not have been a difficult
22 task. They would have understood the
23 categories. They would have correctly
24 identified themselves as the person responsible
25 for making these types of decisions.

1 This would not have been a difficult
2 decision for them. I don't know how many of
3 these people Dr. Steckel worked with, and I
4 don't know where he derives his opinions from.

5 Q. Well, Dr. Steckel is an expert in
6 survey research.

7 A. Well, that's great. I don't know if
8 he knows any of these people or he has ever
9 worked with them. I don't know if he has ever
10 worked in television programming.

11 These people are diligent and bright
12 people who accurately answered this survey to
13 the best of their ability. There was nothing
14 in this survey that would have been complicated
15 for them.

16 Q. That's your opinion?

17 A. That's a fact.

18 Q. That's your opinion?

19 A. It's a fact.

20 JUDGE STRICKLER: Your turn.

21 (Laughter.)

22 JUDGE BARNETT: Enough.

23 THE WITNESS: Thank you.

24 MS. PLOVNICK: All right. I have no
25 further questions.

1 JUDGE BARNETT: Mr. Cantor, do you
2 have redirect?

3 MR. CANTOR: None, Your Honor.

4 JUDGE BARNETT: All right. Are we
5 finished with all of the cross-examination?
6 Then may Mr. Singer be excused?

7 Thank you, Mr. Singer, you may be
8 excused.

9 THE WITNESS: Thank you very much.
10 Thank you, counsel.

11 JUDGE BARNETT: And we will be at
12 recess until 1:05.

13 (Whereupon, at 12:06 p.m., a lunch
14 recess was taken.)

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1 And so we are beginning with
2 Mr. Trautman; is that correct?

3 MR. LAANE: That's correct, Your
4 Honor.

5 JUDGE BARNETT: All right.

6 Before you're seated, if you could
7 please raise your right hand.
8 Whereupon--

9 JAMES TRAUTMAN,
10 having been first duly sworn, was examined and
11 testified as follows:

12 MR. LAANE: Good morning, Your Honors.
13 It has been a while since we last spoke. I'm
14 Sean Laane for the Joint Sports Claimants.

15 DIRECT EXAMINATION

16 BY MR. LAANE:

17 Q. Mr. Trautman, would you please
18 introduce yourself to the Judges?

19 A. My names is James Trautman, and I am
20 managing director of Bortz Media & Sports
21 Group.

22 Q. And could you please give us a brief
23 overview of your educational background?

24 A. Sure. I have a Bachelor's degree in
25 economics from Claremont McKenna College and an

1 MBA from the University of Colorado.

2 Q. And what is Bortz Media & Sports
3 Group?

4 A. Bortz Media & Sports Group is a
5 research and consulting firm that assists
6 clients in the media and sports industries with
7 respect to issues relating to valuation,
8 business development, market analysis, survey
9 research, and a variety of other areas.

10 Q. How long have you been with Bortz
11 Media?

12 A. In one form or another, since 1983.

13 Q. And what do you do at Bortz Media?

14 A. I am -- I direct the media and
15 entertainment practice at the firm. And my
16 responsibilities include working with clients
17 in the content, content owners, programming
18 networks, cable system operators, industry
19 associations, broadcast stations, and the like.

20 JUDGE BARNETT: Mr. Laane, could you
21 move that microphone directly in front?
22 Thanks.

23 MR. LAANE: Is that better? Is that
24 better, Your Honor?

25 JUDGE BARNETT: A little bit -- yeah,

1 is it on? It is on. Okay. That's -- more
2 centrally located would be good. Thank you.

3 MR. LAANE: All right.

4 BY MR. LAANE:

5 Q. And is part of what you do in your
6 work market research and analysis?

7 A. Yes, it is. And that includes survey
8 research as well as analysis of industry trends
9 and other types of market analysis.

10 Q. Okay. And do you perform valuation of
11 both networks and programming?

12 A. Yes. We value content rights on
13 behalf of owners of content and then we have
14 been asked to provide fair market valuation,
15 valuations of programming networks, broadcast
16 stations, and cable systems.

17 Q. Now, you mentioned your market
18 analysis works includes survey research. What
19 types of survey research do you do at Bortz
20 Media?

21 A. We occasionally do consumer research
22 but typically are engaged in overseeing
23 business-to-business research and typically
24 through telephone interviewing methodology.

25 Q. And how long have you been engaged in

1 doing survey research work?

2 A. Really since the beginning of my
3 career.

4 Q. Now, putting to one side for the
5 moment the surveys that you've done for these
6 copyright royalty proceedings, about how many
7 surveys have you done for your media industry
8 clients?

9 A. We've completed approximately 75
10 survey research assignments.

11 Q. And do you represent businesses on
12 both the programming side and on the operator
13 or distribution side of the media industry?

14 A. Yes, we do. We represent -- we have
15 represented programming networks including
16 ESPN, Discovery, the former Scripps Networks,
17 A&E, MTV Networks, and a number of others. And
18 on the CSO or operator side of the business,
19 we've worked with Comcast, Cox Communications,
20 the former Time Warner Cable prior to its
21 acquisition by Charter, a number of other
22 smaller cable operators, and the industry
23 association, the NCTA.

24 Q. That's, I guess, the group that now
25 calls themselves the Internet and Television

1 Association?

2 A. That's correct.

3 Q. Okay. And they used to be the
4 National Cable Television Association?

5 A. They were the National Cable
6 Television Association and then the National
7 Cable and Telecommunications Association.

8 Q. Okay. How about television
9 broadcasters? Can you give us some examples of
10 your television broadcaster clients?

11 A. Sure. We've been retained by both the
12 ABC and CBS broadcast networks, and also by
13 station groups including Gannett, Tribune, and
14 Landmark Communications.

15 And we've also worked with PBS and the
16 Corporation for Public Broadcasting as well as
17 individual stations there including -- and the
18 association, the association for Public
19 Television stations.

20 Q. Now, turning to these copyright
21 royalty matters, have Bortz Media and you been
22 involved in previous Copyright Royalty Board
23 proceedings?

24 A. Yes, going back to the 1983
25 proceeding, in fact.

1 Q. And have you testified in previous
2 cable royalty distribution proceedings before
3 today?

4 A. Yes, I testified in the 1990 to '92,
5 1998-'99, and 2004-'05 proceedings.

6 Q. And what, just in general terms, did
7 you testify about in those proceedings?

8 A. The central feature of my testimony
9 was the cable operator surveys that we
10 performed on an annual basis in those years and
11 the years leading up to the current proceeding.

12 Q. And in those proceedings, were you
13 offered as an expert witness and accepted to
14 testify as an expert?

15 A. Yes, I was.

16 MR. LAANE: Your Honors, we would
17 offer Mr. Trautman as an expert in market
18 research, including survey research, applied
19 market analysis, and valuation in the cable and
20 broadcast television industries.

21 JUDGE BARNETT: Hearing no objection,
22 Mr. Trautman is so qualified.

23 BY MR. LAANE:

24 Q. Mr. Trautman, what was your assignment
25 in the proceeding we're here for today?

1 A. Well, it was twofold. First, it was
2 to conduct cable operator surveys for the
3 period from 2010 to 2013 and to prepare a
4 detailed report summarizing the findings of
5 those surveys and the methodology.

6 And then the second aspect of my
7 assignment was to review testimony from other
8 parties relating to that -- that research and
9 provide written rebuttal testimony addressing
10 that.

11 MR. LAANE: If I may approach the
12 witness just to give him a binder with his
13 testimony.

14 JUDGE BARNETT: You may.

15 MR. LAANE: Thank you. Would the
16 court reporter like a copy?

17 BY MR. LAANE:

18 Q. Mr. Trautman, I am handing you what
19 has already been admitted in this matter as
20 Exhibits 1000, 1001, and 1002. Could you first
21 please tell us what Exhibits 1000 and 1001 are?

22 A. Exhibits 1000 and 1001 are my written
23 direct testimony and the accompanying report
24 addressing cable operator valuation of distant
25 signal non-network programming.

1 Q. Okay. And what is Exhibit 1002?

2 A. That is my written rebuttal testimony.

3 Q. And what was your role in the
4 preparation of Exhibits 1000, 1001, and 1002?

5 A. I had direct responsibility for the
6 preparation of all of those.

7 Q. And do you declare that Exhibits 1000
8 and 1001, your written direct testimony,
9 including the incorporated Bortz report, are
10 true and correct and of your personal
11 knowledge?

12 A. I do.

13 Q. And do you declare that Exhibit 1002,
14 your written rebuttal testimony, is true and
15 correct and of your personal knowledge?

16 A. I do.

17 Q. Okay. Thank you, Mr. Trautman.

18 Now what I would like to do is focus
19 in a bit more on your Bortz survey discussed in
20 Exhibit 1001. What is the question your
21 research is seeking to answer?

22 A. We are seeking in our cable operator
23 survey to determine how cable operators would
24 have valued distant signal programming in a
25 free market, absent compulsory licensing.

1 Q. And what methodology did you use to
2 address that question?

3 A. Well, we're seeking to obtain a
4 relative valuation, so we chose to use what's
5 referred to as a constant sum methodology for
6 the key survey question.

7 Q. Okay. And why did you use a constant
8 sum question in the survey?

9 A. We feel -- while it's certainly an
10 accepted market research tool, but in addition
11 to that, we feel that it's particularly suited
12 to allocation of value particularly in
13 instances where you want to get proportionate
14 relative value allocations.

15 Q. Now, putting to one side these
16 proceedings, just in your regular work for your
17 media industry clients, is a constant sum
18 survey a technique that you use?

19 A. Yes, we use it -- we have used it on a
20 number of occasions, but we -- in particular,
21 we feature it in a annual cable advertising
22 study that we do on behalf of cable networks.

23 Q. Is the Bortz survey something that you
24 came up with and designed on your own or did
25 you also have input and expertise from others?

1 A. No, we've -- we've had considerable
2 input going all the way back to the initial
3 survey conducted in addressing the 1983
4 proceeding. That initial input was from two
5 professors at the University of Denver.

6 Subsequently, in terms of making
7 refinements and improvements to the survey, we
8 consulted with Dr. Gregory Duncan from the
9 University of California, Berkeley,
10 Dr. Angeline Li, who was the former head of
11 market research at Cox Communications, a
12 leading cable industry CSO, and we've consulted
13 with Sam Book, who was a market research expert
14 at Malarkey-Taylor Associates, and Dr. Len Reid
15 from the University of Georgia, and others.

16 Q. Now, I want to get into the
17 methodology in a little bit more detail in a
18 minute, but first let's take a look at the
19 bottom line results of the survey.

20 If you could turn to Table I-1 of page
21 3 of your report.

22 And, Jeff, if you could please put
23 that up on the screen.

24 So, Mr. Trautman, can you just, you
25 know, walk us through these results and explain

1 what they mean?

2 A. Sure. Well, the columns associated
3 with each year report the point estimate
4 results from the key allocation question from
5 the -- obtained from the survey respondents for
6 each year in which we conducted the survey.

7 And then the column on the right just
8 reflects the average of those four years.

9 Q. So, for example, if we look at 2010,
10 the figure 40.9 percent for live professional
11 and college team sports, what does that figure
12 mean?

13 A. Well, that suggests that in 2010 that
14 cable operators would have allocated
15 approximately 41 percent of the relative value
16 of their distant signal non-network programming
17 to that live team sports category and then, as
18 you can see down the line, it would have been
19 approximately 19 percent to news and public
20 affairs programs, approximately 16 percent to
21 each of the movies and syndicated shows,
22 series, and specials categories, and
23 4.4 percent to PBS or Public Television,
24 4 percent to devotional and religious
25 programming, and 0.1 percent to the programming

1 on Canadian signals.

2 Q. All right. Thank you.

3 And if you could turn to the next page
4 of your report, I wanted to ask you about
5 Figure I-1. And what is this graph showing us?

6 A. Well, this graph compares the average
7 shown on that previous table for 2010 to 2013
8 to the average from the cable operator surveys
9 that we conducted during -- for the 2004-'05
10 proceeding.

11 And you can see in looking at the
12 graph that there were some changes in the
13 responses in that the valuations on average for
14 2010 to 2013 went up for live team sports and
15 news and public affairs, as well as PBS, and
16 went down for the movies, syndicated shows,
17 series, and specials, and devotional and
18 religious categories.

19 Q. And do you have an opinion on the
20 likely reasons for those changes between the
21 two periods?

22 A. Sure. I believe that there were at
23 least two contributing factors. One is an
24 important improvement that we made to the 2010
25 to '13 surveys, where we were -- came to the

1 realization that there was a declining amount
2 of compensable programming on WGN America and
3 we had also recognized that that was an issue
4 that the Judges had raised in the '04-'05
5 proceeding, and so we came up with a method for
6 identifying the compensable programming on WGN
7 America when it was the only signal carried.

8 And I believe that contributed to
9 these changes. And then, in addition to that,
10 I think overall marketplace trends were a
11 factor. During this time frame, the access to
12 many forms of scripted programming and
13 entertainment proliferated widely and the
14 ability to make use of DVR technology and
15 on-demand technology became more widely
16 available and more widely used. And all of
17 those factors diminished in my experience the
18 relative value of other types of programming in
19 comparison with live programming, particularly
20 including live team sports.

21 Q. Turning now to a little more detail on
22 the methodology, can you just give us an
23 overview on how the survey sample is selected?

24 A. Yes. The survey sample is a
25 stratified random sample, and we use a

1 stratified sample for the purpose of obtaining
2 the most precise estimates that we can by
3 sampling proportionally more of the largest
4 royalty payers in relation to the systems that
5 pay smaller amounts in royalties.

6 Q. And if we could take a look at Figure
7 III-5 at page 38 of your report. And what does
8 this reflect?

9 A. Sorry, I am slower than the screen.
10 This shows the percentage of the total Form 3
11 royalties that are represented in the samples,
12 the cable operator survey samples that we draw
13 in each year.

14 And what you can see here is that we
15 have always had very robust samples. For
16 example, in '04 and '05, we were -- kept -- we
17 were taking samples that accounted for 50 to
18 55 percent of the total royalty pool, but that
19 percentage, due in part to industry
20 consolidation, has increased substantially, so
21 that from 2010 to 2013, our samples actually
22 accounted for between 70 and 85 percent of the
23 total Form 3 royalties.

24 Q. Now, did you see Dr. Frankel's
25 assertion in his amended written rebuttal

1 testimony that you should have included all --
2 should not have included all Form 3 systems in
3 the sampling frame, but instead should have
4 excluded systems carrying no distant signals?

5 A. I did see that, yes.

6 Q. Okay. Could you please explain why
7 you concluded it was appropriate to include all
8 Form 3 systems in your sampling frame?

9 A. Well, I think, first of all, it's
10 important to note that we -- we initially
11 sampled from a base of all Form 3 systems and
12 then exclude the systems with zero distant
13 signals, just as Dr. Frankel suggests, but we
14 felt and have always felt that it's important
15 to go directly to the source in terms of the
16 signaling information. And to do that, we have
17 to use the statements of account.

18 Dr. Frankel, in developing the
19 Horowitz survey sampling plan, relied on CDC
20 data. And while we believe CDC data eventually
21 becomes very accurate, we have found that it's
22 signal carriage information at the time we're
23 selecting our samples, which is shortly after
24 the closing of the royalty periods and the
25 filing dates and all of that, is -- is not as

1 accurate.

2 And so we felt it's better to go
3 directly to the statements of account.

4 Q. And what criteria did you use for
5 drawing the sample?

6 A. Royalties is the sole criteria. We
7 obtain a - what's called a remittance record
8 from the Copyright Office that lists all of the
9 royalty payers and the amount that they paid.
10 That's actually the only information on the
11 list.

12 And we clean that up, identify any
13 duplicates, things of that nature, and then
14 draw our sample based on that.

15 Q. And is there anything in that process
16 that your opinion injects any bias into the
17 survey?

18 A. Not at all.

19 Q. How much, if any, impact did weighting
20 by royalties have on the Bortz survey results?

21 A. Well, I think weighting by royalties
22 is important, but we have looked at our
23 unweighted results and compared them to the
24 weighted results and they are -- they are
25 nearly identical.

1 Q. Now, Dr. Frankel's criticism of your
2 sampling frame methodology was in his recent
3 amended rebuttal testimony. Was your use of a
4 sampling frame that included all Form 3 systems
5 disclosed in your report and the underlying
6 documents produced a year or so ago?

7 A. Yes. There was a great deal of
8 information about the sampling frame, including
9 a list of all the systems included in it and
10 the royalties that they paid and -- and a
11 variety -- a description of the process that we
12 went through and extensive information of that
13 nature.

14 Q. Any reason Dr. Frankel couldn't have
15 taken issue with your sampling frame
16 methodology in his initial rebuttal testimony?

17 A. Not that I can think of.

18 Q. Now, how does the sampling frame
19 methodology for the 2010 through 2013 Bortz
20 survey compare with prior iterations of the
21 Bortz survey?

22 A. It's the same methodology that we've
23 used for many years.

24 Q. Now, once the sample is selected, who
25 actually did the surveys of the systems in the

1 sample?

2 A. THA Research is our survey research
3 subcontractor.

4 Q. And why did you use THA Research?

5 A. Well, we have used THA on these
6 surveys and a number of others that we're
7 involved in since -- but on these surveys since
8 2001. They've been in the business
9 specializing in the cable industry for more
10 than 20 years. They've worked with a number of
11 different programming networks, Discovery,
12 Scripps, the Turner networks, and a variety of
13 others. And we find that they are particularly
14 adept at executive interviewing and have
15 particularly qualified executive interviewers.

16 Q. And were the interviewers informed
17 about who had commissioned the survey or for
18 what purpose?

19 A. No. They, of course, know that they
20 are working for Bortz, but they do not know who
21 our client is or what the purpose of the survey
22 is.

23 Q. And is that standard practice in
24 survey research?

25 A. Yes.

1 Q. If you could turn, please, to page 21
2 of your report and let's take a look at Figure
3 II-2. What is this table showing us?

4 A. This shows for each year our eligible
5 sample and the number of surveys we completed
6 and then that we achieved response rates
7 ranging from 52 to 57 percent, which are
8 excellent in the context of executive
9 interviewing and trying to reach busy
10 executives.

11 Q. All right. Let's go now to the survey
12 itself and if you could please turn to the
13 blank questionnaire form included in your
14 report at Appendix B-17 through 21. And you
15 can see we've got the first question up there
16 on the screen.

17 And we can see this is the survey from
18 2013. Was the same wording for the questions
19 used in each of the four years we're addressing
20 here?

21 A. Yes, it was.

22 Q. Okay. And at the top, this says ADS
23 version H. What does that refer to or I guess
24 it just says version H. What does the version
25 H refer to?

1 A. Well, we modify the wording in the
2 various versions of the questionnaire slightly
3 to make sure we avoid any potential confusion
4 with respondents.

5 And that's based on the signal
6 carriage pattern for a particular system. So
7 if a system carries ABC, CBS, or NBC network
8 signals, we remind them to exclude ABC, NBC,
9 CBS programming from consideration.

10 If they don't carry those signals, we
11 want to remove that reminder so that we don't
12 get them wondering why we're bringing that up.
13 And we make other changes like that and
14 including changes to the number of categories
15 that we ask about. So if no Canadian signal or
16 no Public Television signal or no live team
17 sports programming is carried, we won't include
18 that category in that version of the survey.

19 And, as a result, there are a number
20 of different versions of the survey. This
21 version H, we've included in the report because
22 it's kind of the everything is included survey.
23 So you can sort of -- this is actually one that
24 we don't see very often that actually gets
25 completed, because this assumes that all of the

1 types of signals are carried and all of the
2 other criteria in essence are met for having
3 all of the information in the survey.

4 Q. And if there was a system, for
5 example, where there wasn't sports carriage so
6 there was no line to allocate to sports on the
7 survey, how would that be reflected in the data
8 at the end of the survey?

9 A. Well, in recording the data, we would
10 -- we would record it as a blank, but in
11 calculating the results, we would -- we would
12 treat that as a zero.

13 Q. Okay. Now we can see here Question 1:
14 Are you the person most responsible for
15 programming carriage decisions made by your
16 system during 2013 or not?

17 What's the purpose of this question?

18 A. Well, we're attempting to, obviously,
19 solicit a response from a qualified respondent.
20 So in order to complete the survey, the
21 individual responding is required to
22 affirmatively answer that question.

23 Q. And what happens if they say no, I'm
24 not?

25 A. Then we ask them who would be the

1 person most responsible for programming
2 carriage decisions and get them to refer us to
3 someone else at the system or at the regional
4 level or wherever may be appropriate. And we
5 go on to attempt to reach that individual.

6 Q. Okay. Moving on to Question 2a,
7 please explain this and what would go in the
8 blanks there.

9 A. Well, to start with, we have two
10 warm-up questions, what I refer to as warm-up
11 questions, in the survey. This is the
12 beginning of the first one. And what we're
13 doing here is explaining to the respondent what
14 we're concerned about in this survey in terms
15 of the specific signals.

16 And so we list for them here each of
17 the distant signals that their system carried
18 in the year in question, by their call letters.
19 Then we identify whether each of those signals
20 was a commercial, non-commercial, or Canadian
21 signal.

22 We indicate the affiliation of the
23 system, whether it was a network, independent,
24 or educational station. And we provide to them
25 information on the city of license from which

1 that signal originated.

2 Q. And then moving down to Question 2b,
3 if you could please explain this question and
4 its purpose.

5 A. And so this question is now, based on
6 that station information, we ask them how
7 important to offer to their subscribers certain
8 categories of programming that appeared on
9 those stations were.

10 And, of course, in this version H
11 example, we have all seven categories. And as
12 I mentioned, we can sometimes have as few as
13 four categories. More typically, there are
14 five or six.

15 And those are the categories you see
16 listed there. Another important point just to
17 note is you see the start designation on the
18 left-hand side. We rotate the order in which
19 we read those categories to make sure that we
20 don't have any ordering bias.

21 And then I didn't explain the way the
22 question works.

23 Q. Yeah.

24 A. So this is -- this is a rank order
25 question. And we ask the respondents just to

1 rank from 1 to however many options there are
2 in terms of importance, with 1 being the most
3 important, these various categories.

4 Q. And if you could flip just for a
5 second to page 51 of your report, the Table
6 IV-8 reporting, for us, what the responses were
7 to that question?

8 A. Yes. So this shows, as I indicated, a
9 1 would be the most important ranking, so here
10 a low value is a good thing. And what we can
11 see here, for example, is that the average rank
12 given to the live team sports category was 1
13 and a half across essentially all four years.

14 And that really reflects the fact that
15 virtually every respondent ranked live
16 professional and college team sports either
17 first or second most important to offer. And
18 then you can see the -- the average rankings of
19 the other categories, news and public affairs,
20 movies, and syndicated all being around an
21 average rank of 3, and then PBS 4 to 5, and the
22 other two categories a little lower.

23 Q. Okay. Going back to the
24 questionnaire, and if you could go to page
25 B-19. Now we're on Question 3, and if you

1 could explain this question and its purpose in
2 this survey.

3 A. Yes. So, again, this is the second
4 warm-up question. We're trying to get the
5 respondents here, in both the importance
6 question and this relative cost question, to
7 start thinking about factors that -- that
8 influence relative value.

9 And so we ask them to, again, rank
10 order these categories in terms of the
11 programming that appeared on the distant
12 signals we're interested in, in terms of what
13 they believe the relative cost to acquire that
14 programming would be among those categories.

15 Q. Then moving on, page B-20, Question
16 4a, and if you could explain this one for us.

17 A. Well, this is the constant sum
18 question. And so we begin here by introducing
19 that we are asking them to estimate the
20 relative value to their cable system of each
21 category of programming. We then remind them
22 about the distant signals we're interested in
23 for the second time, listing the call letters
24 again for each of the signals that are carried.

25 And then we go through the constant

1 sum allocation process to ask them to allocate
2 a fixed percentage that adds up to 100 percent
3 to each of the categories at issue.

4 JUDGE BARNETT: Just -- I just want to
5 clarify. This is all done orally?

6 THE WITNESS: Yes, it is, by
7 telephone.

8 JUDGE BARNETT: Thank you.

9 THE WITNESS: Well, there's another
10 version of the questionnaire, and we'll get
11 into that, that has a written component to it,
12 but there is an oral conversation that takes
13 place in that one as well.

14 JUDGE BARNETT: Thank you.

15 BY MR. LAANE:

16 Q. Well, we'll turn to that one probably
17 right after this question, but this is Question
18 4a. Was there a 4b?

19 A. Yes, actually 4b reads the responses
20 back to the respondent and gives them an
21 opportunity to reconsider their allocations, if
22 they see fit.

23 And that -- that certainly happens.
24 And we think it's important to give them a
25 chance to kind of rethink through what they

1 came up with.

2 JUDGE STRICKLER: Excuse me, counsel.

3 Good morning, Mr. Trautman.

4 THE WITNESS: Yes.

5 JUDGE STRICKLER: Question for you.

6 What -- when the respondents are
7 answering and they're giving their percentages,
8 and then you give them as you say an
9 opportunity to go back and consider, do they
10 always get to 100 percent exactly or do they
11 sometimes, when they're done, realize they only
12 got to 89 percent or 112 percent and then they
13 have to reformulate?

14 THE WITNESS: That certainly does
15 happen. I mean, it's -- it's usually not
16 89 percent; it's usually, I would say, 95 or
17 105 would be the most common instance where
18 that happens.

19 But we are asking them to first write
20 down their estimates before they even give them
21 to us. So, generally speaking, you're getting
22 100 percent right away, but there are instances
23 where, you know, the math didn't -- didn't add
24 up, and so they need to make a correction for
25 that.

1 JUDGE STRICKLER: Thank you.

2 JUDGE FEDER: Excuse me. Can we just
3 go back two slides?

4 THE WITNESS: Sure.

5 JUDGE FEDER: This was the -- yeah,
6 this table. I seem to recall you saying that
7 the -- you ran through the rankings and then
8 you made a remark like the last two were even
9 lower. That would be Canadian and devotional,
10 although I'm -- as I look at this, Canadian is
11 ranked in each year higher than PBS. Is that
12 correct?

13 THE WITNESS: Well, I'm sorry. I'm
14 referring to -- because lower is better --

15 JUDGE FEDER: I see.

16 THE WITNESS: -- I was referring to
17 ranked lower in terms of the outcome as opposed
18 to the specific -- the actual number.

19 JUDGE FEDER: Right.

20 THE WITNESS: So, yes, you're correct
21 that Canadian signals typically ranked the --

22 JUDGE FEDER: The number is higher --

23 THE WITNESS: -- the lowest in terms
24 of importance, and therefore their number was
25 between 6 and 7.

1 JUDGE FEDER: Okay. I just wanted to
2 clarify that.

3 THE WITNESS: And you see that that
4 was slightly different in 2013, but yes.

5 BY MR. LAANE:

6 Q. So 1 means the most important?

7 A. Yes.

8 Q. All right. Now, earlier you said that
9 there was a different version of the
10 questionnaire for systems that carried WGN
11 America as their only distant signal; is that
12 right?

13 A. That's correct.

14 Q. Okay. And I want to go over that
15 WGN-only survey quickly in a second here, but
16 first could you just tell us what WGN America
17 and -- is that often called WGNA for short?

18 A. Yes, it is often referred to as WGNA.

19 Q. Okay. If you could just tell us what
20 WGNA is or was and what its role was in the
21 distant signal marketplace in 2010 through '13?

22 A. Well, WGNA, I guess, was what used to
23 be referred to as a superstation and is,
24 therefore, among the distant signals, far more
25 widely distributed and available to -- to many

1 more subscribers than any other distant signal.

2 And, therefore, it is distinct in that
3 regard.

4 Q. And if you could turn to page 26 of
5 your report.

6 And, Jeff, if you could please put up
7 Figure III-1.

8 What does this graph reflect?

9 A. This graph just kind of illustrates
10 that point, that there were between 53 and 57
11 million cable subscribers that received one or
12 more distant signals during this 2010 to '13
13 period. And that's the four bars to the very
14 left of the chart.

15 As you can see, 41 million or more of
16 those received WGN on a distant basis during
17 each of those years. And then what we're
18 showing next to that is the next four most
19 wildly available distant signals. And those
20 four, none of them were available to more than,
21 I think the highest in any year was 1.2 million
22 subscribers.

23 So there's about a 40-to-1 difference
24 between WGN and any other individual distant
25 signal.

1 JUDGE STRICKLER: Just to be clear,
2 when this table, figure shows WGN, that's WGN,
3 not WGNA?

4 THE WITNESS: No, that is WGN America,
5 which is the -- the distant signal that is
6 received by subscribers in this proceeding.

7 JUDGE STRICKLER: Which is different,
8 of course, than WGN?

9 THE WITNESS: Than WGN Chicago, yes.

10 JUDGE STRICKLER: Okay. So the --

11 THE WITNESS: I'll try to -- I'm
12 almost always going to be talking about WGNA or
13 WGN America when I refer to it, but if I'm for
14 any reason talking about the local signal, the
15 local version of the signal, I'll try to refer
16 to it as WGN Chicago.

17 JUDGE STRICKLER: So whenever we see
18 in your testimony or your report WGN, unless
19 you specify otherwise, that refers to WGNA?

20 THE WITNESS: That would be correct.

21 JUDGE STRICKLER: Thank you.

22 BY MR. LAANE:

23 Q. And why did you use a different
24 version of the questionnaire for systems that
25 carried WGNA as their only distant signal?

1 A. Well, in the Judges' order following
2 the '04-'05 proceeding, and certainly we became
3 aware of this during the proceeding, that there
4 was -- and had known about it, I suppose, but
5 that there was a substantial amount of
6 non-compensable programming on WGN and that it
7 wasn't evenly distributed in terms of
8 non-compensable programming among the various
9 categories.

10 And the Judges acknowledged that issue
11 and expressed concern about it in their '04-'05
12 decision. And we had previously thought about
13 if there was something that we could do to
14 address that. And in the 2010 to 2013 surveys,
15 we came up with a methodology to -- to try to
16 address that, at least for the systems that
17 only carried WGN.

18 Q. And what impact were the Judges
19 concerned about that from that disparity you
20 mentioned?

21 A. Well, they felt that it advantaged the
22 Program Suppliers and Devotional categories and
23 that it disadvantaged the JSC and CTV
24 categories.

25 Q. Okay. And if you could turn to page

1 29 of your report, Figure III-4.

2 A. Yes.

3 Q. What is this graph showing us?

4 A. Well, this shows the compensable
5 proportion of programming that appeared on WGN
6 America in 2010 to '13. So what you see is
7 that 100 percent of the JSC and CTV programming
8 that appeared on WGN America was compensable.

9 Only about 10 percent or less of the
10 devotional programming that appeared on WGN
11 America was compensable, and as little as
12 2 percent of the Program Suppliers' programming
13 was compensable in those years.

14 Q. Okay. Let's take a quick look now at
15 the WGN-only questionnaire. And, you know, in
16 particular, if you could just flag to us the
17 extent to which it's -- it's different from the
18 survey we already looked at.

19 So here we have Question 1.

20 A. Yes. And there is really nothing
21 different here except for the fact that we
22 identify that we're looking for the person most
23 responsible for the decision to carry WGN
24 America in Question 1. And then they still
25 have to affirmatively answer that they were the

1 most responsible there.

2 Q. Okay. And then going to Question 2.

3 A. And here is where we introduce the
4 change that we made. And so we indicate to the
5 respondent that it is WGN America that we're
6 interested in, but we also explain to them that
7 we're not interested in all of the programming
8 on WGN America.

9 And so we then provide them, through
10 either e-mail or fax, with a programming
11 summary that details or summarizes, I'll say,
12 the compensable programming on WGN America in
13 the particular year.

14 And then we go on to ask the
15 importance question in the rank order format
16 based on that programming summary.

17 Q. Okay. And, Jeff, if you could just go
18 to the slide from page C-20 of the report.

19 Is this an example of those summaries
20 you were referring to, Mr. Trautman?

21 A. It is. It's the 2013 programming
22 summary. And you can see that it identifies
23 the categories, it identifies programming
24 contained within those categories, and provides
25 other information to assist the respondent.

1 And this was something that, at the
2 time they're responding to the survey, they had
3 in their physical possession.

4 Q. Now, you said this was for WGNA-only
5 systems. What if a system carried WGNA and
6 also other distant signals, would they get the
7 programming summary?

8 A. Well, unfortunately not. We -- we
9 thought about whether we could do that or not,
10 and we were concerned that, first of all, it
11 would place -- could cause a little bit of
12 confusion because we were doing -- handling WGN
13 one way and other signals another way.

14 But we were also concerned that it
15 might place undue importance on WGN as compared
16 with the other signals that we were asking
17 about by -- by providing that additional
18 detail. So we decided against making the
19 change for the other systems, but we still
20 thought that this would partially address the
21 compensability issue and also give us some
22 guidance as to its potential magnitude.

23 JUDGE STRICKLER: When you started
24 your answer, the first word you used was
25 "unfortunately." Why was it unfortunate that

1 you couldn't give this type of survey to those
2 others respondents?

3 THE WITNESS: Well, we would have
4 liked to have fully addressed the
5 compensability issue by dealing with it in all
6 cases where WGN was carried.

7 JUDGE STRICKLER: So does that mean
8 that you did not fully address the
9 compensability issue?

10 THE WITNESS: I don't believe we did,
11 no. We addressed it with the WGN-only systems,
12 and I think it is pretty much fully addressed
13 with those systems or is fully addressed with
14 those systems, but with the systems that --
15 which are quite a lot of systems that carry WGN
16 and other distant signals, the methodology is
17 the same as it has been in the past in terms of
18 their considering WGN as a whole as opposed to
19 just solely the compensable programming on WGN.

20 JUDGE STRICKLER: How, if at all, do
21 you think it affected the reliability or
22 accuracy of your survey that you weren't able
23 to send this type of summary to those other --
24 other respondents?

25 THE WITNESS: Well, I don't think it

1 really affects the reliability of the survey,
2 but I think that certainly -- and I'll actually
3 address this in a minute -- but some adjustment
4 still, additional adjustment, could be
5 considered in terms of the idea that because
6 that -- a portion of that compensability issue
7 still remains, the survey findings might still
8 be a floor for JSC and CTV and a ceiling for
9 the Program Suppliers and the Devotional
10 Claimants.

11 JUDGE STRICKLER: Thank you.

12 BY MR. LAANE:

13 Q. About what percentage of respondents
14 received the WGNA program summary?

15 A. It was approximately -- over the four
16 years, it was approximately 30 percent.

17 Q. If we could move on to Question 3 at
18 page C-18, how does this compare to the survey
19 we looked at earlier for Question 3?

20 A. Well, again, it's the same question
21 from the other survey, just considering the WGN
22 America programming included in the programming
23 summary. And, of course, you see here that we
24 only have the five categories because those are
25 the categories that are on WGN America.

1 Q. Okay. So here again they're referred
2 to the programming summary?

3 A. Yes, absolutely.

4 Q. Okay. Moving on to Question 4,
5 please.

6 A. And the same thing here. It's the
7 same constant sum question, but, again,
8 referring them to the programming summary in
9 terms of allocating their -- or making their
10 relative value allocation.

11 Q. Now, before implementing these new
12 survey procedures for WGNA-only systems, did
13 you do anything to test them?

14 A. Yes. We -- in 2009 we conducted a
15 pilot survey of this WGN America-specific
16 questionnaire to make sure that it was
17 something that respondents could understand and
18 would be willing to participate, receive
19 something via e-mail or fax, and go ahead and
20 be a part of.

21 So we did test that.

22 Q. And do you have an opinion on whether
23 use of the WGNA-only questionnaire improved the
24 Bortz survey?

25 A. I think it was a very important

1 improvement, yes, and I think it did improve
2 the survey. To the point made earlier, there
3 still could be some further adjustment
4 associated with that issue, but it's certainly
5 a step in the right direction.

6 Q. Switching documents on you for a
7 second here, if you could go to your rebuttal
8 testimony, Exhibit 1002, and I wanted to ask
9 you about Table 3 at page 12.

10 Could you explain these data for us,
11 please?

12 A. Yes. So this shows -- of course, we
13 had WGN-only systems in the prior surveys, as
14 well as in the 2010 to '13 surveys, and in
15 2004-'05, we asked them about WGN America as
16 if -- without giving them the information on
17 compensable programming.

18 So we, in this table, are comparing
19 the results that we got from those respondents
20 back in '04-'05, when the compensability issue
21 had not been addressed, to the results we got
22 among those systems when we did address the
23 compensability issue.

24 And what you see here is, frankly,
25 exactly what I think you would have expected to

1 see, that the values attributed to live team
2 sports and news go up pretty substantially and
3 there is a drop in values accorded to the
4 syndicated movies and devotional categories.

5 Q. Okay. Let's, if we could go back,
6 please, Jeff, to Table I-1, your overall
7 results here, Mr. Trautman.

8 In your opinion can the Judges use the
9 results shown in Table I-1 directly to allocate
10 shares to the various agreed categories of
11 programming?

12 A. Well, I think in my opinion these --
13 these results are the best basis for allocation
14 that are available. I certainly acknowledge
15 the compensability issue, that it has not been
16 fully addressed and there could be some
17 adjustment considered for that issue.

18 And then there is another issue which
19 is certainly -- is addressed in both -- in my
20 direct testimony. We do not survey systems
21 that carry only Public Television or only
22 Canadian signals. We don't feel that that
23 really works in a constant sum context and when
24 there's only a single category and really
25 nothing to make an allocation among.

1 And so there does also need to be an
2 adjustment to account for that.

3 Q. Did you take a look at what the
4 results would be using the same type of
5 PTV-only and Canadian-only adjustments used in
6 the 2004 through '05 determination?

7 A. I did. That's on Table 10 of my
8 rebuttal testimony.

9 Q. Okay.

10 A. Okay. And you can see here that it
11 results in naturally an increase in the PTV
12 allocation, as well as an increase in the
13 Canadian allocation. And then the methodology
14 then proportionately decreases the shares to
15 each of the other claimant groups based on
16 their original allocation.

17 Q. Okay. And on the topic of PTV, I
18 wanted to ask you about a statement in the
19 rebuttal testimony from Ms. McLaughlin,
20 Dr. Blackburn saying that PTV systems were
21 under-represented in the Bortz survey.

22 Did you see that testimony?

23 A. I did see that testimony.

24 Q. Okay. And do you have an opinion on
25 that?

1 A. That's not correct. I have looked at
2 the royalty representation of systems that
3 carry PTV signals among our respondents, and I
4 believe there's a table -- is it Table A-5?

5 Q. Jeff, could you put up Table A-5,
6 please.

7 A. Table A-5 shows that comparison. And
8 you can see that there is some fluctuation from
9 year to year, but across the four-year period,
10 our weighted results are based on a carriage of
11 Public Television signals among systems that
12 account for 59 percent -- 59.3 percent of
13 royalties. And that compares to the universe
14 projection of 59.8 percent.

15 So very, very close.

16 Q. Going back to Dr. Frankel for a
17 minute, did you look at his revised estimates
18 for the Bortz results in his amended written
19 rebuttal testimony?

20 A. Yes, I did.

21 Q. And did you see any issues with those?

22 A. Well, I haven't had an opportunity to
23 review the underlying data behind the tables
24 that Dr. Frankel prepared, but just looking at
25 those tables, which purport to account in some

1 fashion for the PTV-only and Canadian-only
2 issue, the -- I can -- I can conclude really
3 that there has to be some sort of calculation
4 error in what was produced because the
5 magnitude of the changes for those two
6 categories as a result of accounting for that
7 issue are well beyond the total royalties in
8 the entire universe that are attributable to
9 those types of signals.

10 JUDGE STRICKLER: You said you didn't
11 look behind -- look at the data itself to see,
12 so you have assumed there's an error. Did you
13 have the data available to see if there was
14 some sort of a computational error?

15 THE WITNESS: Well, that was received
16 very recently. And there were some issues --
17 programs weren't provided, things of that
18 nature. So I -- it was available, but I have
19 not had the opportunity to review it.

20 I'm -- I'm just responding based on
21 what I see in the end result, that it's sort
22 of -- I guess I would express it as kind of a
23 mathematical impossibility, the magnitude of
24 the change.

25 And it's because if you -- the

1 McLaughlin augmentation essentially gives full
2 royalty weight to the PTV-only and
3 Canadian-only signals. In other words, it --
4 it's sort of an indirect method, but it
5 accounts for the entire royalties that are paid
6 by those signals or are accounted for by those
7 signals. And it's then added to the Bortz
8 result for those categories.

9 JUDGE STRICKLER: So it's the
10 inconsistency of the two results that leads you
11 to believe that --

12 THE WITNESS: That there's an error,
13 yes.

14 JUDGE STRICKLER: -- criticisms must
15 be based on an error?

16 THE WITNESS: Yes. And that for you
17 to get a greater result than what McLaughlin
18 calculates is essentially impossible, because
19 she's counting for 100 percent of the royalties
20 attributable to those signals.

21 JUDGE STRICKLER: Now, the data --

22 THE WITNESS: Or systems.

23 JUDGE STRICKLER: The data that you
24 said came relatively recently, you didn't have
25 a chance to analyze, when did you receive it?

1 THE WITNESS: I'm not sure of the
2 date, but a couple days ago.

3 MR. LAANE: Some of it came in Monday
4 night with the amended written rebuttal
5 testimony, but it was then missing some of the
6 necessary input files, which I believe were
7 received Tuesday night, Tuesday evening.

8 JUDGE STRICKLER: Of this week?

9 MR. LAANE: Yes, Your Honor.

10 JUDGE STRICKLER: Thank you.

11 BY MR. LAANE:

12 Q. Mr. Trautman, shifting gears a little
13 bit here, have you reviewed the survey
14 submitted by Howard Horowitz in this matter?

15 A. Yes, I have.

16 Q. And how does the methodology of the
17 Horowitz survey compare with the methodology of
18 the Bortz survey?

19 A. Well, Mr. Horowitz expresses that they
20 started with an effort to mirror the '04-'05
21 Bortz methodology so there are certainly some
22 similarities between the two surveys, but
23 Mr. Horowitz also made -- well, did not make
24 the improvements that Bortz made from '04-'05
25 to 2010 to '13 and, in addition, made some

1 changes to his methodology that I think
2 essentially destroy the reliability of that
3 survey.

4 Q. And did you help us prepare a slide
5 summarizing the key differences between the two
6 surveys?

7 A. Yes, I did.

8 MR. LAANE: Jeff, could you put that
9 up, please.

10 JUDGE STRICKLER: Is this just a
11 demonstrative?

12 MR. LAANE: Yes, Your Honor.

13 BY MR. LAANE:

14 Q. If you could please explain the first
15 bullet for us, Horowitz' addition of an "other
16 sports" category.

17 A. Yes. So as -- as we've been talking
18 about here, there is a maximum of seven
19 categories in the Bortz survey and, of course,
20 that varies depending on which systems carry
21 which signals from system to system, but
22 Horowitz added an eighth category called "other
23 sports" to his survey. And that was really a
24 completely unjustified addition.

25 I'm certainly aware -- it's a big part

1 of my business -- that, you know, there is
2 other sports in the broader cable and
3 television marketplace that is -- is of
4 importance. Some of my clients -- a current
5 client is the PGA Tour, and I've -- I have
6 worked with NASCAR in the past, so -- so I have
7 got a number of clients that might constitute
8 other sports, but in the distant signal
9 marketplace, other sports is really pretty much
10 nonexistent. And so there's just no basis for
11 establishing a category associated with it.

12 And there was a particular problem in
13 the way Horowitz executed the addition of this
14 category, in that in the cases of approximately
15 half, 45 percent, of his respondents carried
16 WGN America as their only distant -- their only
17 commercial distant signal.

18 And on that distant signal there was,
19 I believe, in one year, one-half hour of other
20 sports programming the entire year and ranging
21 from one to two hours of other sports
22 programming in -- in the other three years.

23 And clearly in my mind that wasn't
24 something that would justify the addition of
25 another category to the survey.

1 JUDGE STRICKLER: Wouldn't the survey
2 respondents, know, though, what sort of sports
3 they showed, whether they fit within the
4 original team sports category or in some other
5 one, given that they are the ones who already
6 declared they were knowledgeable about the
7 stations that they retransmitted? So why would
8 they be misled if they are the ones with the
9 knowledge sufficient to answer the questions in
10 the first place?

11 THE WITNESS: Well, we'll actually
12 talk about that when we look into the -- into
13 the next issue with Horowitz, because I think
14 that the design of the Horowitz survey
15 categories was -- particularly with respect to
16 other sports, but certainly with other
17 categories as well, was intentionally
18 misleading and really sort of attempted to
19 elicit an incorrect response.

20 JUDGE STRICKLER: My question -- I
21 appreciate your answer. My question wasn't
22 whether or not the questions were intended to
23 mislead but whether or not you believed the
24 respondents were capable of being misled, given
25 they were the ones with knowledge of their own

1 programming.

2 THE WITNESS: Sure. Well, I do think
3 that they are knowledgeable respondents and
4 they have knowledge of their own programming,
5 but I think that when -- in my experience, and
6 this goes back to some terms I've referred to
7 in prior proceedings, sort of dominant
8 impression and signature programming.

9 And those things are related. And I
10 believe that respondents in these surveys are
11 responding to -- based on their dominant
12 impression of the different programming types
13 that are on the signals that they're being
14 asked about, and that that centers on signature
15 programming that is carried on those signals
16 within each of the categories.

17 And when I refer to signature
18 programming, I'm talking about what, in my
19 experience, is the programming that drives
20 value in the cable programming marketplace.
21 So, for example, I think it's useful to think
22 about, let's say, a cable network.

23 So when we're thinking about maybe the
24 AMC network, something like The Walking Dead
25 series would be a signature -- an example of a

1 signature program that would drive a
2 significant part of AMC's value.

3 And that's not necessarily the only
4 signature program on AMC, but it's a
5 particularly notable one and would be the kind
6 of thing that drives, from the cable operator's
7 perspective, their willingness to carry that
8 network and the value that they attribute to it
9 in terms of their willingness to pay a license
10 fee for it.

11 Similarly, with a network like ESPN,
12 the signature programming would, in my view,
13 consist of the live team sports programming
14 like the NFL telecast, the Major League
15 Baseball telecast, the NBA telecast, and so
16 that would comprise the signature programming
17 on the ESPN Network and would drive the
18 willingness to pay the license fees that ESPN
19 charges.

20 And so I think that the responses in
21 this survey aren't based on, you know, a
22 precise quantification of every program that
23 exists within every category. That's a little
24 different with the WGN-only one since we're
25 giving them that programming summary.

1 But, in general, that's not what we're
2 trying to accomplish here. We're trying to get
3 a response based on a dominant impression and
4 recognizing that signature programming is what
5 drives value in the cable programming
6 marketplace.

7 JUDGE STRICKLER: And because you're
8 concerned about or trying to elicit a dominant
9 impression, a misleading question you think
10 could lead a respondent astray?

11 THE WITNESS: I think so. So we'll
12 talk about some of these specific examples in a
13 minute and just the ways in which I think that
14 that could happen.

15 JUDGE STRICKLER: Thank you.

16 BY MR. LAANE:

17 Q. And, Mr. Trautman, could you tell us
18 first as a general matter of survey research,
19 what are some of the problems that can arise
20 through the use of examples?

21 A. Well, I think to begin with, just --
22 just even if they are done perfectly, I think
23 examples are problematic and not really a good
24 idea to use, particularly in a survey of this
25 type where you're looking for relative value,

1 because there's just a tendency among
2 respondents to -- they have no doubt listened
3 to what you've asked them to do throughout the
4 survey. And we, of course, expect that they do
5 that. But then when you introduce examples,
6 all of a sudden now they're thinking about
7 those examples.

8 And we find that there's -- or it's my
9 experience that there's a tendency to respond
10 based on the examples, rather than based on
11 sort of what they have otherwise been
12 instructed to do.

13 And so if the examples are perfectly
14 representative, you know, of the overall
15 category, then maybe that's not a problem, but
16 I think it still could create some issues. But
17 certainly then when you have problematic
18 examples, you can tend to get respondents
19 either confused, either wondering, well, I
20 thought they were asking about this, but now
21 maybe they're asking about this, and maybe
22 they're -- maybe they're really not concerned
23 with these signals that I thought they were,
24 because I know that this isn't on those
25 signals. There's all kinds of things that can

1 happen.

2 Or they are responding based on the
3 examples and not based on the -- the totality
4 of the programming or what they -- the opinion
5 that they had originally formed.

6 Q. Okay. So it sounds like at least part
7 of what you're saying is they could be misled
8 by an example that's inaccurate or they could
9 know that the example is inaccurate but it
10 might confuse them about what the question is
11 asking them to consider?

12 A. Yes, that was certainly what I was
13 attempting to express, yes.

14 Q. Okay. And we'll look at some specific
15 ones in just a second, but just generally, what
16 were some of the types of problems with the
17 examples in the Horowitz survey?

18 A. Well, there were a lot of them. A
19 number of the examples were not carried by the
20 distant signals that a respondent was being
21 asked about. So they were not on those
22 signals.

23 Some of the examples were placed in
24 the wrong category, which certainly would have
25 been confusing and misleading. And other

1 examples were of non-compensable programming or
2 programming that was only carried on a
3 non-compensable basis.

4 And, finally, there were examples that
5 might have led a respondent to believe that
6 there was a lot of something or at least quite
7 a bit of something when, in fact, there was
8 almost none of it.

9 JUDGE STRICKLER: So you just gave us
10 examples of misuses of examples?

11 (Laughter.)

12 THE WITNESS: Yes, but all of those
13 exist in Horowitz survey.

14 BY MR. LAANE:

15 Q. All right. Let's take a look at the
16 2013 Horowitz survey form for WGN-only systems.

17 And, Jeff, if you could bring up slide
18 24.

19 Is this the example that was given for
20 other sports on WGN-only systems?

21 A. Yes. So as I indicated, there was
22 only one horse race lasting one hour that
23 appeared on WGN America in that year. And so,
24 in my view, referring to that as an example is
25 misleading because it suggests that there was

1 something other than horse racing as well on
2 WGN America.

3 And, in addition to that, it suggests
4 that there was more than just one horse race.
5 It suggests that horse racing was sort of a
6 regular feature of WGN.

7 And, again, I understand we're talking
8 about knowledgeable respondents, but this is
9 not, you know, the most valuable programming, I
10 would say, on WGN in any case, and so certainly
11 this could be in the area where a respondent
12 would think to themselves: Well, maybe there
13 is something I'm missing here. Maybe I'm not
14 aware of other programming that might be on WGN
15 that I didn't realize was on there.

16 JUDGE STRICKLER: Counsel, looking on
17 the screen, where is that on these documents,
18 rebuttal statement?

19 MR. LAANE: It's discussed in the
20 rebuttal statement, Your Honor, yes.

21 JUDGE STRICKLER: But this is just a
22 demonstrative?

23 MR. LAANE: This is just a
24 demonstrative.

25 JUDGE STRICKLER: It's not a

1 reproduction?

2 MR. LAANE: Well, it is a reproduction
3 from -- from the surveys that were produced as
4 part of Mr. Horowitz's underlying documents and
5 reviewed by Mr. Trautman.

6 JUDGE STRICKLER: So it's somewhere in
7 Mr. Horowitz's documents, not in
8 Mr. Trautman's?

9 MR. LAANE: This specific question and
10 example is discussed in his report, but --

11 JUDGE STRICKLER: I just wanted to
12 stick a tab on the paper version if you have a
13 page for me. That's all I was asking. Yeah, I
14 guess the answer is no, there is no page; I'll
15 find it in Horowitz?

16 MR. LAANE: Or I can -- I can give you
17 a copy of the whole survey from production if
18 you would like.

19 JUDGE STRICKLER: Okay.

20 BY MR. LAANE:

21 Q. Mr. Trautman, you also mentioned that
22 sometimes there was an issue as to which
23 programming category was the owner of the
24 programming. Was that an issue with the horse
25 race on WGNA?

1 A. Yes. So the Horowitz survey
2 attributes the other sports category to program
3 suppliers in referring to its results, but
4 actually horse racing as it appeared here was a
5 CTV program.

6 And so this is -- there was actually
7 no compensable program suppliers, other sports
8 programming on WGN America in 2013 or in 2012
9 or 2011 for that matter.

10 Q. Now, in the Horowitz survey, if a
11 system's only distant signals were WGNA plus a
12 Public Television signal, would that system get
13 the WGN-only questionnaire we just looked at or
14 would it get a different survey in the Horowitz
15 survey?

16 A. No, it received what Horowitz referred
17 to as their non-network questionnaire.

18 Q. And, Jeff, if we could go to slide 25.

19 Is this the other sports example used
20 in that non-network questionnaire that would go
21 to systems that carried only WGN plus a Public
22 Television station?

23 A. Yes, it is. And again just to be
24 clear, so in these cases, the respondents
25 carried only WGN America as their only

1 commercial distant signal. And the examples
2 here, NASCAR auto races, were not -- have never
3 been carried on WGN America, but were not in
4 2010 to 2013.

5 Professional wrestling was not carried
6 on WGN America in 2013. Figure skating
7 broadcasts were not carried on WGN America in
8 any of the four years from 2010 to 2013.

9 So, again, very misleading examples
10 suggesting that something was there that wasn't
11 and at the very least potentially confusing
12 respondents as to what they are being asked
13 about.

14 Q. Going back to the 2013 Horowitz
15 WGN-only questionnaire, I would like to focus
16 in now on the syndicated programming question.

17 Do these examples present any issues?

18 A. Well, here I think really the
19 programming description, as well as the
20 examples, both present problems. Syndicated
21 series -- I think it's important to understand
22 that in terms of compensable programming on WGN
23 America, there were no compensable children's
24 shows, no compensable talk shows, no
25 compensable reality shows, or no compensable

1 game shows on WGN America in 2013.

2 And then when you get to the examples,
3 you have -- 30 Rock was actually on WGN America
4 in 2013, but only about a quarter of the 30
5 Rock episodes that aired on the station were
6 compensable. The other three-quarters were not
7 compensable.

8 Then two of the other examples,
9 Adelante Chicago and People to People, are
10 local Chicago public affairs programs that
11 belong in the CTV category, not in the
12 syndicated category. And finally Everybody
13 Loves Raymond, a sitcom, was not on WGN America
14 at all during 2013.

15 Q. Let's take a quick look now at the
16 movies example in the 2013 Horowitz WGN-only
17 questionnaire. Any issue with these examples?

18 A. Yes. Again -- well, there's -- again
19 in the program description there's an issue, in
20 my mind, related to specials being included as
21 part of movies. I don't necessarily associate
22 specials with movies, but in terms of the
23 examples, so in 2013 there were only four
24 compensable movies that appeared on WGN
25 America.

1 And these three that are listed, none
2 of the four were these three. These three did
3 not appear at all, even on a non-compensable
4 basis in that year on WGN America.

5 And I think it's important to note
6 that two of these three movies won the Academy
7 Award for best picture. One, the third one,
8 Home Alone 2, is among the top box office
9 grossing movies of all time. And I guess
10 suffice it to say the four compensable movies
11 that appeared on WGN America in 2013, to my
12 understanding, were not Academy Award winners.

13 Q. In addition to the ones we just went
14 over, are there additional problematic examples
15 discussed at pages 18 through 28 of your
16 rebuttal testimony?

17 A. Yes, there are.

18 Q. Going back to your slide on
19 differences between the two surveys --

20 JUDGE STRICKLER: Before we leave
21 examples, were there examples that were used in
22 the Horowitz survey that you thought were --
23 were appropriate examples?

24 THE WITNESS: Well, I guess not really
25 because I don't -- I don't believe that

1 examples are a good idea in the first place.

2 JUDGE STRICKLER: You did say that
3 before, but let's not go to that particular
4 position. Even though you don't like use of
5 examples in these surveys, were any of the
6 examples defect-free, other than the fact that
7 they were examples?

8 THE WITNESS: There were certainly
9 instances where an example was used that
10 appeared on the distant signal in question and,
11 therefore, at least did not -- you know, did
12 not conflict with the sort of stated purpose of
13 the survey.

14 JUDGE STRICKLER: Do you think most of
15 the Horowitz examples were misleading or were
16 not misleading?

17 THE WITNESS: Well, I would say in the
18 case of the 45 percent of the surveys that were
19 WGN-only or WGN plus PTV, I would say that most
20 were misleading.

21 Now, he did, in the WGN-only and PTV
22 surveys, isolate -- you know, certain
23 categories were better than others, but there
24 was also a major problem that ran throughout
25 every survey, where he didn't provide any

1 examples for the news category, which is, to
2 me, a huge problem because you've got examples
3 for every other category but no examples for
4 that category. So that infected every single
5 survey.

6 But I guess where I was going with the
7 first answer -- the first part of my answer was
8 that for almost half the surveys, I think that
9 the problematic examples far outweighed the
10 more accurate examples.

11 JUDGE STRICKLER: And if we wanted to
12 sort of make a template for ourselves as to all
13 the examples that you found misleading in the
14 -- in the survey and all those that were not,
15 we would look at the -- at the examples that
16 were put in the Horowitz survey, and then we
17 would compare it to the ones that you've
18 identified as misleading, and every one that
19 you didn't -- did not identify as misleading,
20 you didn't have a problem with; is that fair?

21 THE WITNESS: Well, I wouldn't exactly
22 say it that way. I devoted ten pages of my
23 rebuttal testimony to this issue. And I have a
24 table -- tables addressing specifically the
25 movies and syndicated series categories.

1 I focused less on the other categories
2 simply because I didn't think the problems,
3 besides the news one, now we're up to three
4 categories, and of course other sports that
5 we've already talked about, so now we're up to
6 four categories -- so I've talked about all of
7 those. I didn't spend a whole lot of time on
8 the remaining categories. So in terms of
9 what's in my written rebuttal, I think there
10 were some problems with those, but it's not in
11 my rebuttal.

12 JUDGE STRICKLER: And you mentioned
13 ten pages. Are those pages 18 to 28 of your
14 written rebuttal testimony?

15 THE WITNESS: Yes.

16 JUDGE STRICKLER: Thank you.

17 JUDGE FEDER: Excuse me. Horowitz
18 says that he included these examples to get at
19 what he viewed as a flaw in the Bortz survey,
20 which is that the categories don't map on to
21 categories that are commonly used in the
22 business, they're very specific to this kind of
23 proceeding, and that the survey respondents
24 were potentially confused by that.

25 Was there anything in your pre-testing

1 of the survey that would indicate one way or
2 another whether there was any confusion over
3 these categories?

4 THE WITNESS: Well, there was
5 certainly nothing in any of the surveys we've
6 conducted for 30 years now or in the
7 pre-testing for 2009 with the WGN programming
8 summary that would indicated any confusion
9 about the categories. And it's certainly my
10 experience as well that movies is sort of
11 generally self-explanatory, but very well
12 understood in the industry. Syndicated shows,
13 series, and specials, I think there's --
14 there's a good understanding of that as well.
15 You know, live team sports, I think we've tried
16 to be explanatory with that. And devotional
17 programming, again, pretty explanatory with
18 that.

19 So I don't really think that those
20 issues exist, except, you know, maybe at the
21 very fringes of the category definitions in
22 terms of small elements of the total
23 programming mix or pie that really don't have
24 much of an influence on the results.

25 JUDGE FEDER: Your pre-testing of the

1 WGN-only survey, was it just that version of
2 the questionnaire or did you pre-test the whole
3 questionnaire in its various versions?

4 THE WITNESS: We didn't test the other
5 versions because that was really the same
6 questionnaire that we've used since
7 approximately 1992.

8 JUDGE FEDER: Thank you.

9 BY MR. LAANE:

10 Q. Going back if we could, Jeff, to the
11 slide on differences, we have here Bortz
12 identification of compensable WGN programming.

13 Can you explain that difference for
14 us?

15 A. Well, that's the issue we talked about
16 earlier, where we made an improvement from
17 '04-'05 to 2010 to '13 by identifying the
18 compensable programming for respondents that
19 carried only WGN America.

20 Horowitz did not do that. There was
21 an instruction in there to not consider
22 programming that had been substituted and
23 blacked-out -- substituted for blacked-out
24 programming, but in my mind, that was a
25 meaningless instruction because respondents,

1 even though they're knowledgeable about
2 programming, they don't have any reason to
3 think about or look at the differences between
4 WGN Chicago and WGN America.

5 Q. So, well, how did you determine what
6 programming was compensable and non-compensable
7 on WGNA?

8 A. We obtained from TMS, or now
9 Gracenote, the -- actually in 2010, we got the
10 data from Nielsen, but we obtained essentially
11 the daily programming schedules, 24 hours a day
12 for 365 days a year for WGN America and WGN
13 Chicago, and we lined those up against each
14 other and identified the programming that was
15 carried simultaneously and identified that as
16 the compensable programming.

17 Q. Moving on to the next bullet in your
18 slide of comparisons, you say "Bortz
19 improvements to warm-up questions."

20 What does that refer to?

21 JUDGE BARNETT: Before we move on to
22 another bullet point, why don't we take our
23 morning recess. We'll be at recess for 15
24 minutes.

25 (A recess was taken at 10:37áa.m.,

1 after which the trial resumed at 10:59 a.m.)

2 JUDGE BARNETT: Please be seated. In
3 an abundance of caution, I will indicate that
4 yesterday I said a whole range of exhibits were
5 admitted. There is no Exhibit 1012.

6 MR. LAANE: That's correct, Your
7 Honor.

8 JUDGE BARNETT: So it is not admitted
9 because it doesn't exist.

10 Secondly, the temperature in the room,
11 please keep us advised. When it is cool enough
12 in here, it seems to be like a meat locker in
13 that little room over there, and when it is
14 pleasant there, it is like a steam bath here.

15 So let us know. We are always
16 adjusting from coming out of that place there
17 where it is irrational.

18 Mr. Laane?

19 MR. LAANE: Thank you, Your Honor.

20 BY MR. LAANE:

21 Q. Jeff, if you could bring back up slide
22 30, please, and the next one we were about to
23 turn to, Mr. Trautman?

24 JUDGE STRICKLER: Are you going to do
25 the warm-up questions now?

1 MR. LAANE: Yes, I need to warm up for
2 my questions.

3 JUDGE STRICKLER: What a segue.

4 (Laughter.)

5 BY MR. LAANE:

6 Q. What does that refer to?

7 A. Well, we talked a bit about those
8 warm-up questions. And really there we just
9 made a change in terms of in '04-'05 we had a
10 question about the use of distant signals in
11 advertising and promotion, but we eliminated
12 that question because we had found by that
13 point that essentially no cable system
14 operators were reporting using distant signals
15 in their advertising and promotional efforts.

16 So, you know, it was kind of a
17 throw-away question, so to speak. And then so
18 we modified to try to focus the respondents
19 more closely on relative value related issues.
20 So we made the -- we addressed importance and
21 relative cost. And so that is -- those were
22 the improvements.

23 And Horowitz did a little different
24 approach than what was used in the '04-'05
25 Bortz survey, but there was still an

1 advertising question in there and so it was a
2 bit different.

3 And then, finally, there is the issue
4 related to the signal limitation that we put
5 into place in the 2010 to 2013 surveys in
6 response to some questions that the Judges had
7 brought up in '04-'05 related to some cable
8 systems offering very large numbers of distant
9 signals.

10 Q. Now, before we get to the eight-signal
11 limit, just going back to the warm-up
12 questions, did you see Dr. Steckel's rebuttal
13 testimony where he is of the opinion that the
14 warm-up questions, in his words, attempt to
15 elicit the same information as the final
16 allocation question?

17 A. Yes. And I -- I disagree with that.
18 I think he was focused specifically on Question
19 3 related to expense. And I think that you
20 need -- my view is the warm-up questions need
21 to be considered together in context in terms
22 of they're each making a contribution toward
23 what the respondent is considering.

24 And so I don't think that that's
25 appropriate. And I think, even if it was --

1 and I think Mr. Horowitz actually agreed with
2 me on this -- that I don't think Question 3 is
3 asking the same thing as Question 4 in any
4 case.

5 Q. All right. You may have at least
6 partially answered it, but did you see Dr.
7 Steckel argued in his rebuttal testimony that
8 there should be a perfect 1.0 correlation
9 between the responses to Question 3 and
10 Question 4?

11 A. Yes. And I disagree with that. I --
12 I also note that if you look at Dr. Steckel's
13 underlying data, you will find that the
14 correlation -- he translated both into rank
15 order. The correlation was on the order of
16 90 percent in each year. So very high
17 correlation.

18 And, in addition to that, I think
19 because of the methodology he used it was
20 impossible to have a one-to-one correlation
21 from many systems because in the constant sum
22 question, ties occur, which is quite natural
23 when you are allocating percentages, and he
24 assigned a category .5.

25 So a 1.5 or a -- if categories were

1 tied for first, they each got a 1.5. So that
2 couldn't correlate perfectly with the
3 categories ranked 1 and 2 in Question 3.

4 So in many cases it was essentially
5 impossible to have a one-to-one correlation.

6 Q. Okay. And then, finally, you were --
7 you were just starting to describe, but if you
8 would just briefly tell us about the limit to
9 the eight most widely carried distant signals?

10 A. Yes, we found that that was a growing
11 issue with the consolidation of systems, and we
12 felt that it was important to have a manageable
13 number of distant signals to ask respondents
14 about.

15 We looked at the composition of the
16 signals carried by these types of systems. We
17 found that, I think it was 97 percent, of
18 signals 9 and above were carried to -- were
19 available to fewer than 10 percent of an
20 individual system's subscribers.

21 And close to 90 percent, it was fewer
22 than 2 percent of a system's subscribers that
23 were receiving them on a distant basis. And so
24 we -- we made the decision that we could limit
25 that number of distant signals.

1 And by comparison, Horowitz in some of
2 his surveys asked respondents about upwards of
3 80 distant signals.

4 Q. Was that issue of the number of
5 signals something that had been raised by the
6 Judges in the prior proceeding?

7 A. Yes, that's my recollection, yeah.

8 Q. Okay. I want to ask you a couple
9 questions now about the amended rebuttal
10 testimony of Dr. Stec.

11 At page 30 he asserts that "if the
12 Bortz survey is reliable, then there should be
13 little variation between the percentages given
14 by a CSO in one year's survey when compared to
15 other years' surveys."

16 Do you agree or disagree with that
17 statement?

18 A. I disagree. I think that's an
19 incorrect hypothesis. We find and have found
20 over the years in doing these surveys -- and I
21 certainly see it in my industry work -- that
22 there is changes that take place year-to-year
23 within the industry, there is changes at
24 individual systems, and there is changes in
25 management within those systems.

1 There is changes in the programming on
2 the distant signals that are carried. We see
3 that with the WGNA programming summaries
4 specifically where we have looked at it pretty
5 closely.

6 And really, most importantly, we see
7 that even in a year-to-year comparison of the
8 same systems, there's -- it is very frequent
9 that the distant signals that are carried by
10 that system from one year to the next are not
11 the same.

12 And so my expectation, actually, would
13 be that in a large majority of instances of
14 this point comparisons of year-over-year
15 instances, there wouldn't be a reason to expect
16 the responses to be particularly consistent,
17 especially from a statistical point of view.

18 Q. Okay. And did Dr. Stec control for
19 any of those factors in his analysis?

20 A. No, he didn't. I looked at his Table
21 1 in particular, and I did my own analysis of
22 single-year comparisons within our data set for
23 2010 to '13.

24 And I found the same number of data
25 points of -- just the absolute number of

1 year-to-year comparisons was, I think, 191 in
2 those, in that three-year period. And I found,
3 for example, that 47 percent of those 90 did
4 not carry the same distant signals in one year
5 to the next.

6 I think it is reasonable to conclude,
7 although I didn't look comprehensively at it,
8 that when you are looking at comparisons that
9 involve up to four years apart, so some of his
10 data points are comparisons of 2009 to 2013,
11 2010 to 2013, where you are spanning a two- or
12 three- or four-year period, I think the issues
13 of that nature would be even greater.

14 So, as I say, I think there's -- in
15 the majority of instances, you would not expect
16 necessarily a consistency of response for the
17 same system because, in terms of their distant
18 signal carriage, they are really a different
19 system.

20 Q. Dr. Stec says at page 29 of his
21 amended rebuttal testimony that in doing his
22 analysis, he "matched the survey respondents by
23 a CSO for each of the periods in which the same
24 survey methodology questionnaire and sampling
25 design were used."

1 Is that an accurate statement?

2 A. Well, we used the same broad
3 questionnaire and sampling design in all four
4 -- in 2009 through 2013.

5 So I guess technically it is correct,
6 but he clearly, I looked at his underlying
7 data, and he clearly didn't look at whether the
8 same version of the questionnaire was used or
9 anything of that nature because he has in there
10 comparisons where in one year there's an entry
11 for a Public Television system, a response for
12 a Public Television category, and then in the
13 next year there's not.

14 And he has instances where, you know,
15 there's -- where it's evident to me, you know,
16 that there were changes in the characteristics
17 and he hasn't accounted for those.

18 Plus, as I said, I just totalled up
19 that subset from '10 to '13 and found that he
20 just basically took all of the available data
21 points and didn't put any controls on them.

22 Q. Were there also instances where a
23 system was, say, WGN-only in one year and then
24 WGN and additional signals in another year?

25 A. A number of instances of that, yes.

1 Q. Okay. Is this analysis by Dr. Stec
2 something new or has a similar analysis been
3 presented in prior proceedings?

4 A. I believe Dr. Frankel conducted an
5 analysis very much like this one in the 1992 --
6 or provided testimony on an analysis like this
7 in the 1990 to '92 proceeding.

8 Q. Now, Dr. Stec also did a comparison of
9 systems' Bortz survey responses to their
10 Horowitz survey responses.

11 Was that an appropriate way to assess
12 reliability?

13 A. Well, again, I don't think so. As we
14 have talked about, you have got an additional
15 category in the Horowitz survey and, as I
16 indicated, I don't feel that the Horowitz
17 survey has produced reliable results.

18 So I wouldn't expect it to line up
19 with the results of the Bortz survey.

20 Q. Okay. Then I want to briefly ask you
21 about Dr. Erdem.

22 Did you see in his amended rebuttal
23 testimony he did an analysis that he says
24 indicates that the presence of non-compensable
25 programming on WGNA does not impact the

1 devotional survey allocations?

2 A. I did see that.

3 Q. And what's your assessment of that
4 analysis?

5 A. Well, I don't think it really analyzes
6 that issue to any degree. It compares WGN-only
7 systems to systems that carry WGN along with
8 other distant signals. And I don't see how you
9 can glean from that that there is no
10 compensability impact.

11 And I also looked at the table that he
12 has in the back that summarizes his findings,
13 and I see that the average value among the
14 WGN-plus systems, I'll call them, was
15 4.9 percent for devotional versus, I think it
16 is 3.5 percent for the WGN-only systems, which
17 he says it's not statistically significant, and
18 I don't have a reason to quibble with that, but
19 it is a 40 percent difference.

20 Q. Finally, Mr. Trautman, could you just
21 summarize your overall opinions on the utility
22 of the Bortz and Horowitz surveys in resolving
23 the issue of relative market value the Judges
24 will be deciding?

25 A. Sure. I think, as I have indicated,

1 that the Bortz survey is the -- it's the best
2 indicator and most reliable indicator of
3 relative market value. And I don't think that
4 you can rely on the Horowitz survey to any
5 degree, except maybe that it does confirm that
6 live team sports ranks the highest in terms of
7 relative value allocation.

8 MR. LAANE: Thank you, Mr. Trautman.
9 I have no further questions at this time.

10 JUDGE BARNETT: Mr. Olaniran, I see
11 you preparing. Are you going to be up next?

12 MR. OLANIRAN: Yes.

13 CROSS-EXAMINATION

14 BY MR. OLANIRAN:

15 Q. Good morning, Mr. Trautman. My name
16 is Greg Olaniran. I represent Program
17 Suppliers.

18 A. Good morning.

19 Q. Would you please turn to your
20 Exhibit 1000. This is your bio.

21 A. Yes.

22 Q. Are you there?

23 A. I am at the first page of it.

24 Q. Okay, the first page. I have a few
25 questions for you about the first page.

1 And in that first -- in the second,
2 second bullet, you identify your expertise as
3 including analysis of consumer behavior,
4 preferences and audience behavior.

5 Do you see that?

6 A. Yes, that's a component of it.

7 Q. And then the fourth line where you
8 make that reference, do you see it?

9 A. Yes.

10 Q. And what do you mean by "audience
11 behavior"?

12 A. Viewing.

13 Q. Viewing?

14 A. Primarily.

15 Q. And what was the -- and what's the
16 nature of your expertise with regard to
17 viewing?

18 A. We have analyzed viewing patterns and
19 ratings and projected ratings on behalf of
20 various clients.

21 Q. And what was the purpose of that
22 analysis, of those analyses?

23 A. Sometimes it is included in business
24 models, economic models. Other times it is for
25 purposes of estimating advertising prospects.

1 Q. And when you said business models or
2 economic models, for the purpose -- for what
3 particular purpose?

4 A. In some cases for the purpose of
5 estimating -- developing a model that could be
6 used in estimating the value of a programming
7 network or a particular programming.

8 Q. So you have used viewing methodology
9 to try to determine market value of individual
10 programs as well as programming networks?

11 A. No, I wouldn't say that. I have used
12 it to project advertising revenues that may
13 generate cash flow, that may feed into a value.

14 Q. And why would you need to use that to
15 project advertising revenues?

16 A. Well, I think they are a benchmark
17 that is used in contributing to pricing of
18 advertising in the marketplace, and --

19 Q. Can you be more specific about that?
20 Let's take a broadcaster, for example. Why
21 would you be looking -- why would you be
22 looking at viewing to determine advertising
23 prospects?

24 A. Well, as I said, viewing is a
25 benchmark that is used to help set advertising

1 prices in the marketplace for the sale of those
2 advertising spots, they're called, in the
3 industry to advertisers.

4 Q. And have you represented broadcasters
5 to do that, that type of analysis? Have you
6 ever represented broadcasters to do that type
7 of analysis?

8 A. Well, on occasion. Generally it would
9 be in conjunction with working with an
10 investment bank or something like that who
11 might be involved in an acquisition.

12 Q. And why would a broadcaster be
13 interested in advertising prices?

14 A. Because they generate revenue from the
15 sale of advertising.

16 Q. And how do they generate -- strike
17 that.

18 So is it the case that when a
19 broadcaster purchases a program, for example,
20 they look to see whether they can cover their
21 program costs with their advertising revenue
22 generated for that program; is that a fair way
23 to put it?

24 A. For a broadcaster, certainly, yes.

25 Q. Okay. Also still on that first page,

1 in the third bullet, you describe your
2 consulting experience and you identify cable
3 and broadcaster network clients such as A&E and
4 CBS, I think Disney, Public Broadcasting, and a
5 few others.

6 And did any of that consulting
7 experience include audience measurement?

8 A. We don't engage in audience
9 measurement.

10 Q. What about audience analysis or
11 behavior?

12 A. We may have occasionally looked at
13 that. And certainly, as I mentioned
14 previously, in terms of developing projections,
15 that would be part of that.

16 Q. And why would a cable network be
17 interested in audience behavior?

18 A. Well, again, cable networks, in
19 addition to securing license fees from cable
20 operators, sell advertising in the marketplace.

21 Q. And have you ever had -- have you done
22 -- have you ever done work for a cable
23 broadcaster with regard to audience analysis --
24 I'm sorry, a cable system, a cable system
25 operator with regard to audience behavior or

1 audience analysis?

2 A. Maybe in a very limited way. I have
3 done projections for cable systems in terms of
4 their overall revenue streams. And for cable
5 systems, advertising represents a very small
6 revenue stream.

7 But -- so I may have looked at a
8 future forecast of it, or something like that.
9 I don't know that I have developed estimates
10 myself.

11 Q. So you have never developed any
12 estimates for individual programs for a cable
13 system operator, have you?

14 A. No.

15 Q. Let's go to page 3, still in that same
16 exhibit. The second bullet on page 3, I want
17 to ask you a couple questions about that.

18 You talk -- in that bullet it talks
19 about your analysis of fair market value of
20 television, radio and Internet rights for
21 programming rightsholders.

22 Do you see that?

23 A. Yes.

24 Q. And what kind of television rights
25 were involved in the analysis that you engaged

1 in?

2 A. Those are generally -- those generally
3 involve sports rights.

4 Q. Okay. And in analyzing those sports
5 rights, what kinds of factors did you look at
6 with regard to the sports rights?

7 A. Well, again, we would develop a model
8 looking at, on behalf of the potential
9 acquiring network or distributor, what kind of
10 revenues could be generated from the
11 programming. And we would make projections of
12 that in order to estimate the value of the
13 rights.

14 Q. And what kind of factors would you
15 look at in making that determination?

16 A. Well, it depends on the outlet that
17 we're looking at, whether we're looking at
18 broadcast distribution or Internet distribution
19 or subscription television distribution.

20 Q. Let's look at -- let's talk about
21 broadcast distribution, for example.

22 Would one of the factors you looked at
23 have been audience levels of their particular
24 content?

25 A. Yes.

1 Q. And why would that be important?

2 A. Well, again, that revenue stream would
3 certainly be advertising revenue.

4 Q. Okay. Then were you talking about
5 programs that had already been developed or
6 programs that were going -- that were yet to be
7 developed in this instance?

8 A. Well, with sports rights it's
9 typically programming that is already out there
10 in the marketplace and rights are being renewed
11 or have come up for potential resale to a
12 third-party or something like that.

13 Q. When you are selling to broadcasters,
14 certainly ratings or some form of viewing
15 analysis is a key component of the revenue
16 analysis, is it not?

17 A. It is. Increasingly retransmission
18 consent license fees are an important
19 consideration as well, but advertising is
20 definitely a big consideration.

21 Q. And then the advertising prices,
22 again, are tied to the levels of viewing?

23 A. Within certain contexts. I mean,
24 there is demographic factors. There is a
25 variety of other considerations that need to be

1 taken into account.

2 Q. And demographic factors, in fact, are
3 subsumed to some extent into viewing -- into
4 viewing, are they not?

5 A. Oh, well, yes. But certainly the rate
6 at which advertising is sold depends on the
7 demographics, as well as the sheer numbers.

8 Q. Fair enough.

9 A. It also depends on things like the
10 time period in which the programming is going
11 to air and things of that nature.

12 Q. You mean day part, is that what you
13 are referring to?

14 A. Yes.

15 Q. Thank you. And still in that second
16 bullet, later on in the same paragraph you
17 state that you analyzed entertainment and
18 sports content, to consider a few things.

19 And one of the things you mention is
20 the audience potential. What type of
21 entertainment content were you referring to in
22 that part?

23 A. That would have been some of the
24 things that are mentioned below, perhaps
25 programming libraries or certain potential

1 syndicated -- collections of syndicated
2 programming, that type of thing.

3 Q. When you said syndicated, what do you
4 mean by syndicated content?

5 A. Well, in the examples I am thinking of
6 here, it would be a collection of programs that
7 had been produced for resale to either
8 individual broadcasters or to, potentially to a
9 cable network.

10 Q. So would those be -- what kind of
11 genres of programming are you referring to?

12 A. Perhaps like a history-type
13 documentary or something along those lines. I
14 think that would be an example.

15 As I have said, most of the work we
16 have done in this area is concentrated in the
17 sports rights area.

18 Q. Understood. And when you are looking
19 at this audience potential or advertising
20 prospects, what factors are you looking -- are
21 you considering?

22 A. When we're -- I'm sorry, can you
23 repeat that?

24 Q. Let me rephrase that.

25 When you say that you're considering

1 the audience potential of a particular type of
2 product -- well, let me back up.

3 In this particular instance what was
4 your clients trying to do?

5 A. Well, they were trying to get their
6 product licensed.

7 Q. They were trying to license the
8 product. So my question is, when you look at
9 audience potential, what factors are you
10 looking at about the impact of audience
11 potential as it would ultimately impact the
12 licensing fee?

13 A. Well, usually there is a history of
14 performance of other similar programs or of
15 that program directly. If you are doing it
16 from scratch, it is sort of based on the
17 characteristics of the program.

18 Q. And when you are talking about
19 history, you are talking about the history of
20 performance in a particular distribution
21 channel; is that what you mean by that?

22 A. Yes.

23 Q. And so if you were to be -- if you
24 were trying to license, say, the Seinfeld
25 series, for example, you would look at the

1 performance -- if you were trying to license
2 the show Seinfeld to a broadcast station, where
3 would you go to look at the history?

4 A. Well, you would look at its
5 performance as a network series prior to having
6 entered into syndication.

7 Q. And by performance, what do you mean
8 by that?

9 A. I think you would -- you would
10 certainly look at audience results that it had
11 achieved.

12 Q. Okay. You would look to see if it did
13 well, how well it did when it was on the
14 network, correct?

15 A. Yes.

16 Q. And to the extent that it had been
17 syndicated prior to the deal you were
18 contemplating, you would look at that
19 performance also?

20 A. Yes.

21 Q. Okay. Now, you mentioned, still in
22 the same paragraphs, you talked about other
23 economic drivers, as well as cost factors with
24 regard to your analysis of this entertainment
25 content.

1 What do you mean by that?

2 A. Well, certainly in the cable
3 marketplace, and with respect to sports rights,
4 cable networks charge license fees. And when
5 we look at programming rights values for our
6 rightsholders, we attribute a share of those
7 license fees to the particular programming.

8 And that is usually the key driver of
9 value.

10 Q. Okay.

11 A. And when I say license fees, I should
12 clarify, that's not license fees like licensing
13 a syndicated program. That's the subscriber
14 fees that are paid by the cable system operator
15 to the cable network.

16 Q. And that would be to license the
17 bundle programming on a particular network; is
18 that right?

19 A. That's correct.

20 Q. Okay. Because cable operators
21 themselves don't buy individual programming; is
22 that right?

23 A. I mean, they do in limited instances,
24 perhaps, but you are correct, yes.

25 Q. Okay. Just a couple quick questions

1 about your survey experience.

2 You have mentioned that you have done,
3 I think you said 75 surveys. Is that right?

4 A. 75 survey assignments, yes.

5 Q. Survey assignments. I'm sorry.

6 And have you actually designed a
7 questionnaire by yourself or did you supervise
8 these surveys?

9 A. I think in every instance we have
10 designed the questionnaire.

11 Q. I meant you personally.

12 A. I have certainly been directly
13 involved in it, if I wasn't the sole individual
14 who developed the questionnaire.

15 Q. So the answer is yes, you have
16 designed a questionnaire by yourself before?

17 A. Yes.

18 Q. Okay.

19 JUDGE FEDER: Excuse me. What
20 distinction are you making between surveys and
21 survey assignments?

22 THE WITNESS: Well, there may be
23 instances where we have had an assignment that
24 involved more than one survey.

25 JUDGE FEDER: Thank you.

1 BY MR. OLANIRAN:

2 Q. And besides the Bortz surveys -- how
3 many of the 75 are Bortz surveys?

4 A. None of them.

5 Q. Okay.

6 A. Bortz surveys as referred -- referring
7 to these proceedings? Is that what you were
8 referring to?

9 Q. Yes, that's what I mean.

10 A. Yes, none of them.

11 Q. Okay. Now, when Mr. Laane was
12 questioning you this morning, I think you
13 opened with the statement that the Bortz survey
14 was designed to show how cable operators would
15 have valued programming in a free market,
16 absent a compulsory license. Is that correct?

17 A. Yes.

18 Q. Okay. And so --

19 A. Distant signal programming.

20 Q. Distant signal programming, correct.

21 And let's go to Exhibit 1001. And I
22 think Your Honors already have a hard copy
23 already.

24 JUDGE STRICKLER: We have one copy, I
25 think, up here.

1 MR. OLANIRAN: Do you need additional
2 copies?

3 JUDGE BARNETT: No, we're using the
4 electronic.

5 MR. OLANIRAN: I think Mr. Trautman
6 already has that exhibit in front of him.

7 THE WITNESS: Yes.

8 JUDGE BARNETT: Okay.

9 BY MR. OLANIRAN:

10 Q. Okay. And Exhibit 1001 is the
11 operator valuation report. And throughout the
12 report, I mean, you say rather glowing -- you
13 make glowing remarks about the abilities of the
14 Bortz survey respondents; is that correct?

15 A. I am not sure I characterized it that
16 way, but maybe you can point me to something.

17 Q. How would you characterize it?

18 A. Well, we attempt to survey and we
19 believe we do survey knowledgeable respondents
20 that are the most qualified for the task at
21 hand in that they are those responsible for
22 making decisions about the programming carried.

23 Q. Let's look at appendix -- the Appendix
24 A of that exhibit, particularly Appendix A-8,
25 the first full paragraph. Are you there?

1 A. Yes.

2 Q. If you look about halfway through the
3 paragraph you describe the respondents as, and
4 I quote, "not lay persons, cable industry
5 programming professionals."

6 Do you see that?

7 A. Yes.

8 Q. Okay.

9 JUDGE STRICKLER: What page are we on?

10 MR. OLANIRAN: I am on page --
11 Appendix A-8.

12 JUDGE STRICKLER: A-8.

13 MR. OLANIRAN: A-8.

14 BY MR. OLANIRAN:

15 Q. And let's go to -- I hate to do that
16 to you, Your Honor, since you just got there --
17 let's go to Appendix A-14, in paragraph --

18 A. Sorry, A-14?

19 Q. Yes. Are you there?

20 A. Yes.

21 Q. In paragraph -- the very first
22 paragraph on that page, paragraph 8, it talks
23 about survey length.

24 By the way, what is the average length
25 of the survey, of your survey?

1 A. It is ten minutes or so.

2 JUDGE STRICKLER: We got to a question
3 that I had in my mind. What's the average
4 length? Is there a range? Do some people do
5 it much -- some respondents respond much faster
6 and some respond longer? What is the variation
7 or variance around that average?

8 THE WITNESS: I would say it is 10 to
9 15 minutes, but it -- it depends in part, too,
10 on how many categories we have to go through.
11 And so that's probably the primary determinant,
12 more than how long a respondent takes.

13 BY MR. OLANIRAN:

14 Q. And if we look at Appendix A, page 14,
15 paragraph 8, again, towards the fourth line
16 from the bottom you describe the respondents as
17 "experienced and highly knowledgeable regarding
18 the cable industry, the programming that they
19 carry, and the interests of their subscribers."

20 Do you see that?

21 A. Yes.

22 Q. Okay.

23 JUDGE STRICKLER: Excuse me. How do
24 you know that?

25 THE WITNESS: Well, these are

1 individuals that we have gleaned through our
2 process to be those most responsible for making
3 programming carriage decisions.

4 We're getting senior executive titles
5 at either a regional or a local level in areas
6 that reflect a knowledge base regarding the
7 cable industry and the programming that their
8 system carries.

9 And, therefore, in turn, I guess it is
10 a little bit presumptive to say the interests
11 of their subscribers, but that's certainly part
12 of the job in terms of assessing the packages
13 of programming that they carry and the overall
14 practice of engaging in their job.

15 JUDGE STRICKLER: So I notice from the
16 start of the survey questions, you asked to
17 speak with the listed respondents. You already
18 have a name in mind.

19 And then only if that person is not
20 available or says that person is not the
21 appropriate person, do you then go to another
22 person?

23 THE WITNESS: Yes. And that's a
24 helpful thing to explain our process, that the
25 identified individual in our survey is always

1 the most senior executive at the system in
2 question.

3 So they might have the title of
4 general manager or president or something of
5 that type, but it is -- that's the industry
6 data that we have available. And so that's --
7 and it's, also, we want to reach the ultimate
8 decision-maker at that system.

9 And so then through the process of
10 contacting the system we reached that
11 individual and we ask them that qualifying
12 question about whether they are most
13 responsible for programming decisions or not.

14 In some cases, in a fair number of
15 cases, they say yes, and they complete the
16 survey. In other instances they say, you know,
17 I'm really not. It's so and so. And so they
18 direct us to someone sometimes at the regional
19 level or sometimes it is someone in their --
20 who heads their programming group, or sometimes
21 it is someone in their marketing group, and
22 that's the person then that we attempt to
23 survey.

24 And, of course, once we get to that
25 person, they also have to say that they are, in

1 fact, the most qualified person.

2 JUDGE STRICKLER: Do you tell them who
3 it was who referred you to them? In other
4 words, do you say to the regional person: The
5 president said you're the guy who would, or the
6 woman, who would know the most?

7 THE WITNESS: The survey -- well, we
8 don't necessarily say that to them. We say
9 that we will -- the survey research firm will
10 say that so and so referred us to speak to you
11 about this survey.

12 JUDGE STRICKLER: Thank you.

13 BY MR. OLANIRAN:

14 Q. I think still staying on Appendix A,
15 page 14, if you go down to the last paragraph
16 of that page, that's paragraph -- well, the
17 number 9, the way it discusses supply side.

18 Do you see that?

19 A. Yes.

20 Q. You also characterize the responses of
21 these respondents that it reflects an
22 understanding of marketplace prices of
23 different kinds of programming. Is that right?
24 Do you see that?

25 A. Yes.

1 Q. And then the very last sentence on
2 this page, which flows over to page 15, you
3 describe the respondents as active in the
4 marketplace for cable programming and are
5 familiar with rates charged by sellers of
6 various genres of cable network.

7 Do you see that?

8 A. Yes.

9 Q. So is it fair to say that after you
10 have screened the respondent and you have
11 gotten to the -- after the interviewer has
12 screened the respondent and gotten to the
13 person that is supposed to be most
14 knowledgeable, that this person is familiar --
15 is very knowledgeable about the system's
16 carriage decisions, correct?

17 A. Well, they have told us that they are,
18 yes.

19 Q. And they have also -- they would have
20 told you that they are also knowledgeable about
21 the content carried on the distant signals; is
22 that right?

23 A. They -- they would have told us that
24 they are the most knowledgeable about
25 programming carriage decisions.

1 Q. Including the content that is carried
2 on the distant signals, correct?

3 A. We don't specifically ask them about,
4 about the distant signals until we get to the
5 second question.

6 Q. But it is important to your process
7 that they know about the content they are
8 carrying on the distant signals, is it not?

9 A. Yes, it is.

10 Q. Okay.

11 A. And that's why we start at the local
12 level and do kind of a bottom-up approach
13 because we believe that, since most of these
14 signals, in fact all of them other than WGN,
15 are quasi-local in nature, they are distant for
16 purposes of these proceedings, but they are
17 carried within a region surrounding -- a region
18 that the system surrounds or is part of that we
19 feel it is important to, you know, start at the
20 local level and work our way up, if necessary,
21 to get individuals that are particularly
22 familiar with the local aspect of the distant
23 signal carriage decision.

24 Q. But implicit in the qualifying
25 question is the knowledge of carriage

1 decisions, correct?

2 A. Yes, and programming.

3 Q. Their knowledge of contents carried on
4 distant signals, correct?

5 A. Implicit, yes, I would say.

6 Q. Their knowledge of the cost of the
7 content that they are carrying, correct?

8 A. Certainly of costs as we express it
9 here, of the rates charged by sellers of genres
10 of cable networks. I have acknowledged that
11 they are not engaged in buying individual
12 programs.

13 But they are familiar with the
14 purchase of genres of programming and
15 collections of programming in the form of cable
16 networks.

17 Q. So let me ask this different. Is it
18 fair to say that the purpose of the qualifying
19 question is to determine that the person you
20 are speaking with is knowledgeable about
21 carriage decisions, knowledgeable about the
22 content carried on distant signals,
23 knowledgeable about the cost of the content; is
24 it fair to say that?

25 A. I would say it is fair to say that

1 they are knowledgeable about the programming
2 carried by their system and the factors that go
3 into carriage decisions related to that
4 programming. And that would include the
5 distant signals.

6 Q. Are you -- once they tell you that
7 they are, that's what qualifies them, correct?

8 A. Yes.

9 Q. And you have no other -- you don't
10 independently verify whether they, in fact, are
11 knowledgeable about those things, do you?

12 A. No, there is not an independent
13 verification process, other than, other than
14 certainly looking at the title of the
15 respondent.

16 Q. Would you expect the respondent also
17 to know about the volume of the various types
18 of content carried on the distant signals?

19 A. Well, here we get into that signature
20 programming and dominant impression issue that
21 I brought up earlier.

22 I think that certainly they are very
23 knowledgeable or very familiar with the
24 characteristics of the different programming
25 that they carry, including the programming on

1 the distant signals.

2 And that includes knowledge about
3 volume and about the key programming on those
4 signals, in my opinion. Does it include
5 precise knowledge about the volume of
6 particular programming or programming at the
7 edges on a particular signal? Not necessarily.

8 And I'm not sure that's how decisions
9 are made within the cable industry in terms of
10 programming carriage. In fact, I don't believe
11 that it is, as I have expressed earlier.

12 Q. So the answer to my question is no,
13 they don't?

14 A. No, the answer is yes, they do know
15 about volume. But the volume knowledge I would
16 characterize as broadly speaking.

17 Q. The volume knowledge, though, if I
18 understand your answer correctly, is limited to
19 the dominant impressions or signature
20 programming?

21 A. No, I wouldn't say that. I would say
22 that they -- they certainly have the greatest
23 familiarity with the signature programming, but
24 they have broad knowledge about the volumes of
25 programming on those signals, would be my

1 estimation.

2 Q. What do you mean by "broad knowledge"?
3 They know 70 percent of what they carry,
4 20 percent? What do you mean by broad
5 knowledge?

6 A. I think they know what the primary mix
7 of programming is on those signals that they
8 carry.

9 Q. And how do you know that, that they
10 know?

11 A. That's -- that's my estimation and
12 opinion based on my familiarity with the
13 responsibilities of these individuals.

14 I have consulted over the years with
15 many individual cable systems, many multiple
16 system operators. I have visited many systems.
17 I have talked to many of these people, you
18 know, not in this capacity, of course.

19 But -- so I have a great deal of
20 understanding as to the things that they know
21 and how they look at programming and how they
22 evaluate it.

23 Q. And when you refer -- when you use the
24 phrase cable industry programming
25 professionals, what do you mean by "cable

1 industry programming"? Are you referring to
2 cable network programming or are you referring
3 to broadcast signal programming?

4 A. Well, I would say I'm referring
5 comprehensively to the package of programs that
6 they offer to their subscribers, the package of
7 -- sorry, program networks, including broadcast
8 stations that they offer to their subscribers.

9 JUDGE STRICKLER: Is that why you said
10 before that's implicit in the screening
11 question, that they also have knowledge about
12 the retransmitted distant signals?

13 THE WITNESS: Yes, if they are
14 responsible for programming carriage decisions,
15 they are making decisions about, in my
16 experience, all of the programming that they
17 carry, including the broadcast signals that are
18 -- that are chosen to be retransmitted or are
19 retained for retransmission.

20 JUDGE STRICKLER: Why isn't your
21 initial screening question in that regard
22 asking to speak to the person who is most
23 responsible for making carriage decisions as it
24 relates to distantly-retransmitted signals, and
25 if it turns out that you are right, it's the

1 same person for that and other carriage
2 decisions, you will get that person, but if
3 there is a different person who has more
4 responsibility or more knowledge with regard to
5 the distantly-retransmitted stations, you can
6 get to that person, because at that point in
7 time when you are asking the screening
8 question, the person who is responding doesn't
9 know what you are going to be asking about yet;
10 isn't that correct?

11 THE WITNESS: That's correct. And so
12 we are looking for the person with broad
13 programming knowledge at the system. And part
14 of that is because, you know, we are talking
15 about a hypothetical marketplace here.

16 And so we're looking to obtain a
17 relative value allocation. And we feel it is
18 important for them to have a broad
19 understanding of value decisions that enter
20 into choosing all of the programming that they
21 carry and an understanding of the license fees
22 for that programming and the relative cost of
23 that programming, and those types of factors.

24 JUDGE STRICKLER: So there is an
25 actual business decision that somebody or some

1 group of people have to make as to which
2 distantly-retransmitted signals they'll put
3 into their cable packages, but you want to know
4 more broadly what people -- you want people
5 with more broad knowledge as to what they would
6 do in a hypothetical market separate and apart
7 from or in addition to that particular
8 determination?

9 THE WITNESS: Yes, in order to make a
10 value allocation for various types of
11 programming, rather than specific to, say, a
12 distant broadcast station, as a station we feel
13 that that's important.

14 BY MR. OLANIRAN:

15 Q. So with regard to -- just to follow up
16 on the Judge's question -- with regard to the
17 value allocation that you are intending for
18 them to make, is that value allocation limited
19 to distant signals or is it limited to -- or is
20 it a broader allocation as to programming that
21 they are carrying on the system?

22 A. No, we're asking them to focus on the
23 distant signal programming and to make a value
24 allocation for that programming or those
25 collections of programming as they fit into the

1 types that we're talking about.

2 Q. But you are asking for a professional
3 that has a broad acknowledge of programming.
4 And how are you ensuring that this person has
5 not been influenced by the other types of
6 programming that they are carrying that are not
7 on broadcast signals?

8 A. Well, I think they -- I think they
9 should be influenced by that. I think that
10 their overall, as a cable operator, their
11 overall packaging decisions and decisions with
12 respect to cable networks and all of that
13 should factor into their consideration of the
14 relative value of the types of programming on
15 these distant signals.

16 We're asking them to think about the
17 programming that's on those distant signals,
18 but we want them to be knowledgeable about how
19 a relative value allocation can be made among
20 those different programming types that may
21 appear on a lot of the different cable networks
22 that they carry.

23 And so we want someone who is familiar
24 and senior enough and in a position to make a
25 value judgment with respect to that.

1 Q. So then the relative value allocation
2 that you are looking for them to make should be
3 influenced by programming that are not on
4 broadcast signals; is that what you are saying?

5 A. No. It should be informed -- it
6 should be informed by their knowledge about the
7 value of programming in the marketplace
8 considered broadly.

9 Q. So if a respondent is making an
10 allocation for live team sports, they should be
11 thinking about what's on ESPN and what's on
12 network programs?

13 A. No, that's not what I'm saying.

14 Q. What are you saying?

15 A. There's -- there's not a distant
16 signal programming marketplace. So we are
17 looking for people who can draw from their
18 experience within the cable industry as a cable
19 system operator in making value judgments about
20 programming, collections of programming, in
21 order to translate that value judgment to a
22 distant signal -- to the types of programming
23 on distant signals.

24 JUDGE STRICKLER: You say there is not
25 a distant signal marketplace. Correct me if I

1 am wrong, but the person who you are speaking
2 with or somebody else at the cable system has
3 to make a decision as to which
4 distantly-transmitted station, WGNA, WPIX or
5 what have you, they'll decide to put into
6 their -- into their cable packages, right?

7 THE WITNESS: That's correct.

8 JUDGE STRICKLER: So they are -- and
9 they are free to do -- that's a free
10 marketplace, right? Nobody is twisting
11 anybody's arm. There is no government
12 regulation that says you must, you must
13 retransmit WGNA or WPIX; that's a business
14 decision?

15 THE WITNESS: Yes. And in making that
16 decision, you know, we believe that they have
17 made a value judgment about the programming
18 that's on that signal, just like they made
19 value judgments about the collection of
20 programming that's on all of the other signals
21 that they carry.

22 JUDGE STRICKLER: And then they have
23 to pay WGNA for the right to carry that
24 retransmitted station?

25 THE WITNESS: Yes.

1 JUDGE STRICKLER: And that's a
2 marketplace negotiation, right?

3 THE WITNESS: Well, it is a -- it is a
4 set price, but yes. It is the result of a --
5 sort of indirectly the result of a marketplace
6 negotiation.

7 JUDGE STRICKLER: Help me out. Maybe
8 this is my ignorance, but how is that price
9 determined?

10 THE WITNESS: Well, in terms -- so
11 there is the royalty fee.

12 JUDGE STRICKLER: Right. That's the
13 royalty fee which is set by the government, and
14 then it is allocated and distributed here.

15 But how about, other than that, the
16 right to carry, is there a --

17 THE WITNESS: No, there is not a
18 separate negotiation there.

19 JUDGE STRICKLER: So if -- if --

20 THE WITNESS: They have -- they have
21 the right to carry it.

22 JUDGE STRICKLER: But with no
23 additional, no additional payment, other than
24 the royalties?

25 THE WITNESS: Well, what I'm wrestling

1 with is I'm not sure if there is still an
2 intermediary payment that is made for WGN. I
3 don't believe that there is. There used to be.

4 But for any of the other distant
5 signals, there is not. So it is just -- it is
6 just the royalty.

7 JUDGE STRICKLER: Thank you.

8 BY MR. OLANIRAN:

9 Q. And in that last quote, you talk about
10 a cable network marketplace. And I want to
11 make sure I understand what you mean by that.

12 Are you talking about a marketplace
13 where only cable networks are being licensed to
14 cable systems or are you talking about a cable
15 network programming marketplace?

16 A. I am, in terms of a cable operator and
17 their knowledge, I am focusing primarily on
18 their knowledge of cable networks and the
19 prices that they pay to carry those networks,
20 which are collections of programming.

21 Q. Okay. And just to wrap up the line of
22 questioning with the Judges, if I understand
23 your -- with the Judge -- if I understand your
24 responses correctly, you want someone with
25 broad experience, to have cable network

1 programming experience, you want them to draw
2 from that experience, but you don't want them
3 to be influenced by that experience. Is that a
4 fair summary of your testimony?

5 A. No, that's not a fair summary. The
6 first two things you said were correct. But we
7 want them to be influenced by that experience
8 in terms of making relative value allocations
9 for the programming types that appear on
10 distant signals, since they don't have to make
11 those allocations in order to obtain those
12 signals.

13 Q. So you want them, if you are making an
14 allocation for joint team -- for live
15 professional team sports, you want them to
16 think about a network program such as the NFL
17 or NCAA Tournament, but somehow -- and be
18 influenced by that, but not to the extent that
19 it affects their allocation, or that it does?
20 I am not sure I understand.

21 A. Well, I think I answered your
22 question, but I want them to be influenced by
23 their broad knowledge of the marketplace in
24 making the relative value allocation.

25 And when I am talking about the broad

1 marketplace, I'm talking primarily about the
2 cable network marketplace.

3 Q. You are certain that when they make
4 that allocation, based on your expectation of
5 how they should think about the process, it
6 doesn't lead to overvaluation of, say, sports
7 programming?

8 A. I don't see any reason why it would
9 bias their valuation of any category of
10 programming. They carry all types of
11 programming.

12 Q. So they wouldn't, for example, be
13 influenced by, say, their knowledge of live
14 sports on ESPN, given that it is the most,
15 probably the most highly-carried cable network
16 program?

17 A. No more than they would be influenced
18 by their knowledge of Game of Thrones on HBO or
19 Walking Dead on AMC.

20 JUDGE STRICKLER: I think you said
21 before, in response to one of the questions,
22 that you want the respondents to be thinking in
23 terms of a hypothetical marketplace. Is that
24 right?

25 THE WITNESS: I am not sure I said

1 that directly. I think the reality is that
2 it's a hypothetical marketplace because they
3 are not asked to do this specific to distant
4 signals.

5 JUDGE STRICKLER: Do you understand
6 the respondents to be deciding, say, to stay
7 with the team sports analogy -- or not analogy,
8 but example -- that if they are deciding on
9 whether or not they should distantly -- they
10 should retransmit a distant signal that has
11 team sports, heavily weighted towards team
12 sports, they should do that keeping in mind the
13 other team sports that are already on the cable
14 system, such as on ESPN or, you know, any of
15 the broadcast stations, and make their
16 determination that way, or are you just simply
17 saying this is why we screen for people with
18 broad knowledge so they can make those
19 decisions themselves?

20 THE WITNESS: Well, I think that
21 absolutely enters into our desire to get
22 someone with broad knowledge, because we want
23 someone who understands the programming that is
24 already on their system and what was -- and can
25 factor in what was the basis for the carriage

1 of the distant broadcast signal and the
2 programming on that signal, as opposed to just
3 considering it in a vacuum.

4 So I think, to your point, I think it
5 is important that they are aware, for example,
6 that there are other sports on their system.
7 And this goes into what a programming or
8 marketing, senior marketing or programming
9 person does within the cable industry, is to
10 build a package or a collection of programming
11 networks based on consideration of, okay, we
12 already have these networks, now we need to add
13 this one to fill out either something that's
14 missing or to supplement something, and so
15 there are particular reasons that different
16 types of networks get carried.

17 And the same kind of thinking, I
18 think, should be factored in when thinking
19 about the programming on distant signals, and
20 is as part of the overall packaging decision.

21 So if we're going to carry that, if
22 we're going to carry WGN, do we need any more
23 sports? Well, if we don't need any more
24 sports, maybe we don't carry WGN.

25 But if we think that additional sports

1 programming is valuable to our subscribers, we
2 will, we will carry WGN.

3 If we think that the news programming
4 on WGN is of interest to our subscribers, maybe
5 we're in an area not too far from the Chicago
6 market, we will want to carry WGN.

7 So I think absolutely those factors
8 should be considered. And that enters into the
9 idea of getting someone with broad knowledge.

10 JUDGE STRICKLER: Thank you.

11 JUDGE BARNETT: Are we at a breaking
12 point here?

13 MR. OLANIRAN: Actually, yes.

14 JUDGE BARNETT: Okay. We will be at
15 recess then until 1:05.

16 (Whereupon, at 12:04 p.m., a lunch recess
17 was taken.)

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1 AFTERNOON SESSION

2 (1:12 p.m.)

3 JUDGE BARNETT: Please be seated and
4 accept my apologies. The late start is all on
5 me.

6 Mr. Olaniran?

7 MR. OLANIRAN: Yes, Your Honor. May I
8 proceed?

9 JUDGE BARNETT: Yes, please.

10 MR. OLANIRAN: Thank you.

11 BY MR. OLANIRAN:

12 Q. Once again, Mr. Trautman, my name is
13 Greg Olaniran from Program Suppliers. And I
14 want to talk to you about -- a little bit about
15 the questionnaire design. And what was your
16 role in the design of the questionnaire
17 that's -- that's -- the questionnaires for 2010
18 through '13 that's been presented in this
19 proceeding?

20 A. I had primary responsibility for the
21 design.

22 Q. You had primary responsibility for
23 revising from the '04-'05 version of it to the
24 current version; is that correct?

25 A. Yes. And as I indicated, we worked

1 with a number of other experts in consultation
2 with them to come up particularly with the
3 WGNA-only questionnaire version.

4 Q. Okay. And you mentioned some experts
5 earlier on in your direct testimony.
6 Specifically which experts did you work on --
7 did you work with on the most current versions
8 of the Bortz survey?

9 A. Dr. Li and Dr. Duncan.

10 Q. And --

11 A. Primarily.

12 Q. I'm sorry.

13 A. Primarily.

14 Q. Okay. And what was the role of each
15 expert? What is Dr. Li -- what was her
16 expertise?

17 A. Well, she was the former head of
18 market research at Cox Communications.

19 Q. Was she a survey research expert?

20 A. Yes, absolutely. That's her primary
21 expertise.

22 Q. Again, what about Dr. Duncan?

23 A. He is an econometrician but also a
24 survey research expert.

25 Q. And was the revised -- were the

1 revised questionnaires or any of the revised
2 questionnaires pilot-tested?

3 A. Yes, in 2009.

4 Q. In 2009.

5 A. Yes.

6 Q. And -- and did you run the pilot in
7 one market or in several different markets?

8 A. We -- we executed a number of pilot
9 questionnaires. We took the 2008 sample and
10 identified the WGN-only systems that had
11 appeared in that sample. And we -- we ran a
12 pilot test against those systems trying to
13 reach those systems. And then when we felt we
14 had sufficient information -- I think we
15 completed about 35 interviews.

16 And when we completed -- when we
17 reached that point, we felt like we had enough
18 information that we could go forward --

19 Q. And what was this --

20 A. -- with the questionnaire.

21 Q. I'm sorry. Did I interrupt you?

22 A. No.

23 Q. Okay. Did you -- what was the sample
24 size for the pilot?

25 A. Well, it was -- I don't recall the

1 initial sample size, but it was all of the
2 WGN-only systems from the 2008 questionnaire.
3 And we didn't attempt to reach a particular
4 response rate. We were simply trying to
5 determine whether the survey was -- was a
6 workable questionnaire design.

7 And so when we had completed about 35
8 of them, listening in on them, et cetera, we
9 felt comfortable that it was very workable.

10 Q. And did you provide any discovery
11 material about the pilot test?

12 A. Yes, we provided the results from the
13 pilot test and -- I can't recall specifically
14 what other information we provided. Certain of
15 the pilot questionnaires ended up being
16 included in the 2009 final survey as well.

17 Q. But you didn't provide the
18 questionnaire you used for the pilot, did you?

19 A. It was in the questionnaire that ended
20 up in the 2009 survey.

21 Q. And so you made some changes from the
22 question -- from the questionnaire you used in
23 the pilot test to the 2010 and beyond. Did you
24 make any changes after the pilot test?

25 A. No.

1 Q. No changes?

2 A. No.

3 Q. You discussed earlier in your direct
4 testimony in your exchange with Mr. Laane about
5 the criticism that Dr. Frankel made of your
6 sample selection process. And his criticism
7 was that you should have -- the universe of
8 systems should have been Form 3 systems that
9 carried distant signals.

10 Do you recall that exchange?

11 A. Yes, I do recall the exchange.

12 Q. And you disagreed with Dr. Frankel on
13 that -- on that point, did you not?

14 A. Yes.

15 Q. And did you -- do you know whether the
16 process that you undertook versus what
17 Dr. Frankel thought you should have -- created
18 any sample bias?

19 A. I don't believe it did. I don't
20 really think changing approach in that regard
21 would have any effect on the sample -- any
22 meaningful effect on the sample design or
23 introduce any bias.

24 Q. Is there a way to test for that?

25 A. I have not tested for that. It's just

1 my judgment because we ultimately end up at
2 essentially the same place in terms of the no
3 distant signals systems.

4 And our approach to exclude the
5 PTV-only and the Canadian-only, he made some
6 adjustments for that, but as I've indicated, I
7 believe he made some errors in calculating
8 that.

9 Q. Well, aside from -- from that issue,
10 my question is focusing on whether or not the
11 process you undertook by starting out with the
12 universe of all Form 3 distant signals as
13 opposed to the distant signals that -- I'm
14 sorry, all Form 3 systems with -- with -- as
15 opposed to starting out with Form 3 systems
16 with distant signals?

17 A. Yes, because ultimately our eligible
18 sample includes only systems with distant
19 signals.

20 MR. OLANIRAN: Your Honor, I am going
21 to be getting into an exhibit that's
22 restricted.

23 JUDGE BARNETT: Okay.

24 MR. OLANIRAN: And it's a JSC -- an
25 exhibit that JSC produced to us in discovery.

1 We also reached agreement with Mr. Laane that
2 Exhibits 6020 through 6029 -- JSC has agreed to
3 stipulate to admission of the exhibits, and
4 unless anyone else has an objection to that, we
5 would move to have those exhibits admitted.

6 JUDGE BARNETT: The numbers again?

7 MR. OLANIRAN: 6020 through 6029
8 included.

9 JUDGE BARNETT: Hearing no other
10 objection then, 6020 through 6029 inclusive are
11 admitted.

12 (Exhibit Numbers 6020 through 6029
13 were marked and received into evidence.)

14 JUDGE BARNETT: If there's anyone in
15 the hearing room who is not permitted to hear
16 restricted information, has not signed an
17 appropriate nondisclosure agreement, and is not
18 here as part of the JSC team, will you please
19 wait outside until we finish with this portion
20 of the hearing.

21 (Whereupon, the trial proceeded in
22 confidential session.)

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1 O P E N S E S S I O N

2 JUDGE BARNETT: Sorry, I interrupted
3 your question, Mr. Olaniran. Go ahead.

4 BY MR. OLANIRAN:

5 Q. If I can remember the question. But I
6 was asking, so the long and the short of it is
7 that your dominant impression signature
8 programming concept applies only to when you're
9 trying to acquire a signal or a channel; is
10 that right? Or a bundle of programs?

11 A. A signal, a channel, a bundle of
12 programs.

13 Q. Okay.

14 A. A smaller bundle of programs, a larger
15 bundle of programs, yes.

16 Q. So if I as a copyright owner wanted to
17 know how your -- your methodology would produce
18 a market value for my program, I have -- that
19 -- that concept is of no use to me; is that
20 fair?

21 A. Well, I have sought here, yes, to seek
22 value with respect to a collection of programs
23 that fall within defined categories and that
24 correspond to the agreed categories in these
25 proceedings. So that's the goal. It's not --

1 it's not to assign value to an individual
2 program.

3 Q. Do you think that's the goal of this
4 proceeding?

5 MR. LAANE: Objection, Your Honor,
6 asking for a legal conclusion.

7 THE WITNESS: That's -- I
8 understand my goal.

9 JUDGE BARNETT: There's an objection
10 pending.

11 THE WITNESS: Sorry.

12 JUDGE BARNETT: To the extent
13 Mr. Trautman is offering a legal opinion, your
14 objection is sustained, but we're not taking
15 his response as legal analysis. He's not an
16 attorney, and he's not a legal expert on the
17 stand. But he has experience in the field. So
18 -- can you ask the question again?

19 BY MR. OLANIRAN:

20 Q. My question is whether or not your
21 understanding of this proceeding is to allocate
22 royalties among individual programs or bundles,
23 collections of programs?

24 A. Well, I understand that my task in
25 helping to find how royalties are allocated in

1 Phase I, so to speak, through my survey is to
2 define relative value in the context of
3 collections of programming that fit within the
4 agreed categories.

5 Q. And how does one test for dominant
6 impression, whether it's accurate or not
7 accurate, whether it's reliable or not?

8 A. Well, I think that in terms of
9 testing, I think what we're -- what we're
10 looking for here is individuals with the
11 experience and knowledge base to have an
12 understanding of the marketplace and to be able
13 to make these allocations as they would be
14 making in the event that they were required to
15 acquire collections of programming of these
16 types.

17 Q. And how are you making the distinction
18 -- when you speak of dominant impression, the
19 cable system respondents are human beings. And
20 I assume they come to the questionnaire with
21 both their personal experiences and their
22 professional experiences.

23 Can we agree on that?

24 A. I think that's fair, although we're
25 clearly instructing them to respond in their

1 capacity as senior executive of the -- of the
2 cable system.

3 Q. So if they are predisposed to a
4 particular type of programming, what you're
5 asking them to respond in a professional
6 capacity, how are you distinguishing between --
7 how do you know when they're doing one or the
8 other with respect to dominant impression?

9 A. Well, we don't know what's in a
10 respondent's mind.

11 Q. Okay.

12 A. In market research, you don't know
13 that. But we are instructing them to respond
14 as to how their system valued, not how they
15 personally would value.

16 Q. Now, I'm going to stay away -- I'm
17 going to try as much as I can to stay away from
18 the -- from restricted material as much as I
19 can. And I want to ask you in general about
20 Questions 2, 3, and 4, without being specific
21 about the questions, at least not yet.

22 So Questions 2 and 3 ask the
23 respondent to conduct ranking exercises,
24 correct?

25 A. Yes.

1 Q. And Question 4 is a valuation
2 exercise; is that right?

3 A. It's a constant sum allocation
4 exercise.

5 Q. Right. And then for -- for this task,
6 the interviewers expected the respondent to
7 have the same market environment in mind when
8 the respondent is responding to these
9 questions; is that fair?

10 A. Yeah. Well, we're asking them to be
11 considering the distant signals that their
12 system carries.

13 Q. No, I'm --

14 A. In the context of their cable system's
15 environment.

16 Q. And it's the same environment for all
17 three questions? That's my question.

18 A. That would be correct, yes.

19 Q. Okay. And the environment you're
20 asking them to consider is the cable network
21 environment; is that right?

22 A. The -- the cable programming
23 environment.

24 Q. The cable programming environment.

25 A. Yes, which includes the cable networks

1 that they carry, as well as the broadcast
2 signals that they carry.

3 Q. You're asking them to -- to -- the
4 interviewer is envisioning that the respondents
5 are thinking about the cable programming
6 environment?

7 A. Well, the interviewer is reading the
8 questionnaire.

9 Q. I understand that. What did the
10 designers of the questionnaire contemplate that
11 the respondents would be thinking about in
12 terms of the market environment?

13 A. Well, we looked to -- we anticipate
14 that the respondents will consider factors that
15 they use in their ordinary course of
16 decision-making regarding collections of
17 programming which we've been talking about at
18 length to make allocations with regard to the
19 collections of programming that are on these
20 distant signals.

21 I don't know how else to answer it.

22 Q. Okay. Let's move on.

23 So in this -- in this hypothetical
24 market, who is the buyer?

25 A. The cable system operator.

1 Q. And what's the cable system buying?

2 A. The cable system is buying collections
3 of programming.

4 Q. So --

5 A. That appeared on the distant signals
6 they carried in the year in question.

7 Q. Okay. As it currently exists, and
8 correct me if I'm wrong, the cable system
9 programming structure consists of broadcast
10 signals, correct?

11 A. Correct.

12 Q. Cable networks?

13 A. Correct.

14 Q. And then some premium channels and up?

15 A. Yes.

16 Q. Okay. And in the universe of cable
17 networks, how many cable networks are out there
18 that you can tell within the U.S.?

19 A. Well, there's several hundred. On the
20 typical cable system, maybe 3- to 400.

21 Q. And so in this hypothetical
22 marketplace when the cable system acquires
23 programming, are they acquiring bundles of
24 programming or are they channels of programming
25 or bundles of programming in some other format?

1 A. Well, channels of programming are
2 bundles of programming.

3 Q. I understand that. So there's
4 collections of programming. Is it -- is the --
5 what is the -- what is the cable system's
6 intention of what to do with the programming
7 once they acquired the bundle in this
8 hypothetical marketplace?

9 A. To use it primarily to attract and
10 retain subscribers.

11 Q. So are they acquiring it in the form
12 of a channel or are they acquiring it to build
13 a channel or exploit it in some other fashion?

14 A. They're acquiring it in the form of a
15 channel to build a package of channels.

16 Q. So --

17 A. That meet the interests of their
18 subscribers -- meet the subscription desires of
19 their existing and potential subscribers.

20 Q. So when you look at this allocation of
21 royalties and you see live professional team
22 sports, you envision that the cable system
23 operator is saying -- is responding to your
24 questionnaire that I would build a channel of
25 professional live team sports; is that -- is

1 that what you're saying?

2 A. No.

3 Q. What are you saying?

4 A. I'm saying -- well, what I'm saying is
5 that they are allocating value to that category
6 of programming which represents a collection of
7 programs, just as they consider in the
8 marketplace the value of the 3- or 400 channels
9 that they have to make decisions about and that
10 they are aware of the license fees that are
11 charged for those channels and they make value
12 judgments about, which are often collections of
13 programming, often collections of programming
14 that are focused in a particular area that is
15 similar to these categories.

16 Q. So who is the seller in this
17 hypothetical marketplace?

18 A. Well, I haven't really defined it. I
19 haven't -- I haven't attempted to define the
20 exact structure of the marketplace, but --

21 Q. Who are they buying the programs from?

22 A. Ultimately, ultimately, the owners of
23 the programs are the sellers.

24 Q. Is that the Copyright Owners?

25 A. There could be an intermediary. There

1 could be a lot of ways the market could be
2 structured.

3 Q. And you haven't thought about that,
4 the seller's side of this?

5 A. Well, the way the question is
6 structured in the context of the agreed
7 categories, it's structured such that the
8 categories represent bundles of programming.

9 Q. I understand that part of it.

10 A. So an aggregated set of programs.

11 Q. My question, though, is if you are
12 hypothesizing that the cable system operators
13 are buying bundles of programming -- I'm at a
14 loss for your response that you haven't
15 contemplated who they would be buying it from?

16 MR. LAANE: Objection, argumentative.

17 THE WITNESS: I don't think that's
18 what I said.

19 MR. GARRETT: Hold on.

20 JUDGE BARNETT: Sustained. Can you
21 rephrase? Or move on.

22 BY MR. OLANIRAN:

23 Q. Does your hypothetical market
24 contemplate at all that the cable system will
25 be buying programs from -- directly from the

1 copyright owner?

2 A. I -- again, I'm asking them to
3 allocate relative value among categories that
4 consist of bundles of programming. That's as
5 far as I've gone in attempting to define the
6 hypothetical market.

7 JUDGE STRICKLER: Excuse me. When you
8 say ask about value they would put on it
9 without identifying a particular seller, are
10 you equating -- to your understanding, is the
11 answer that you're eliciting, eliciting
12 willingness to pay as opposed to any price that
13 a seller might accept?

14 THE WITNESS: Well, I believe that
15 these respondents have an understanding based
16 on their experience in making decisions about
17 all of the different bundles of programming
18 that are on their cable system about the
19 various -- the costs of the various types of
20 programming that comprise those channels. So
21 there is some understanding of the cost
22 framework that exists within the industry
23 certainly, but it is -- it is primarily focused
24 on the buyer's perspective.

25 JUDGE STRICKLER: So you're asking the

1 buyer in essence to sort of make the market --
2 say what -- this is the price I expect the
3 market value to be, not myself as a buyer, but
4 my willingness to pay or what economists would
5 say is my reservation price?

6 THE WITNESS: Yes, but also as we
7 indicate by the warm-up question, Question 3,
8 in the context of what their perception is as
9 to the relative costs that they would -- they
10 would incur.

11 MR. OLANIRAN: May I continue?

12 JUDGE STRICKLER: Sure.

13 BY MR. OLANIRAN:

14 Q. So think about question -- Question 2
15 asks for respondents to rank program categories
16 in order of importance to the system, correct?

17 A. To offer to the -- how important is it
18 to offer to their subscribers.

19 Q. Okay. And Question 3 asks -- is
20 question about how expensive the program -- to
21 rank in order of how expensive the programming
22 is. Is that correct?

23 A. How expensive they believe the
24 programming on those distant signals would be.

25 Q. Okay. And Question 4, as we talked

1 about, is the relative valuation task with
2 regard to the allocation -- allocation of fixed
3 -- amount of fixed dollar of programming among
4 various program categories, right?

5 A. Correct.

6 Q. Okay. And in order for --

7 JUDGE BARNETT: Excuse me.

8 Mr. Trautman, let me just make sure. We are
9 asking these respondents what they think the
10 cost of this category of programming would be
11 in this hypothetical market, but they don't
12 really purchase by category, right? They
13 purchase by channel or station?

14 THE WITNESS: Well -- so I would look
15 at that two ways. In the distant signal
16 market, they purchase or those -- those come --

17 JUDGE BARNETT: As a package.

18 THE WITNESS: As a package.

19 JUDGE BARNETT: Okay.

20 THE WITNESS: In the cable market,
21 they come as a channel, but they often
22 concentrate on a particular genre or type of
23 programming.

24 So are they purchasing a channel?

25 Yes. But are they purchasing a bundle of a

1 particular type of programming? Also yes.

2 JUDGE BARNETT: Okay, thank you.

3 BY MR. OLANIRAN:

4 Q. But in order to perform the tasks that
5 you're asking the respondent to perform in
6 Questions 2, 3, and 4, the following things
7 have to occur: First, they have to listen to
8 the list of signals read by the interviewer as
9 -- as carried by the system. Is that correct?

10 A. Correct.

11 Q. And in the -- in the cable system that
12 we discussed in Exhibit 6020, that channel
13 carried eight signals, did it not?

14 A. That -- that system did, yes.

15 Q. So if we --

16 A. Well, it may have carried more, but
17 that -- we -- we asked them to evaluate
18 signals.

19 Q. Fair enough. And then they have to
20 listen to the number of the signals that were
21 carried. They have to listen to a list of
22 program categories that they are asked to rank.
23 Is that correct?

24 A. That's correct.

25 Q. Okay. And so the interviewer would

1 read the list of program categories to the
2 respondent, and the list of program categories
3 is the list of program categories that the
4 lawyers in this proceeding have agreed to as
5 the categories to be -- to be used, correct?

6 A. Well, we've attempted to conform the
7 categories to be -- generally to be consistent
8 with the agreed categories, but there are also
9 categories that are, in my experience, very
10 familiar in the industry.

11 JUDGE STRICKLER: May I interrupt
12 again?

13 MR. OLANIRAN: Sure.

14 JUDGE STRICKLER: Thank you. I have a
15 question, because I'm not sure of the meaning
16 to certain words in the context of the
17 question. So in Question 2b -- I guess it's
18 the same numbering. I happen to be looking at
19 the one counsel is showing you, the Charter
20 Cable.

21 MR. OLANIRAN: I guess we're getting
22 into restricted the territory.

23 JUDGE STRICKLER: Well, I'm not asking
24 about the answer.

25 MR. OLANIRAN: Oh.

1 JUDGE STRICKLER: I was just asking
2 about the question, not the answers.

3 Question 2b says, "Now I'd like to ask
4 you how important it was for your system to
5 offer certain categories of programming."

6 And then the question, picking up a
7 little bit later, says, "I will read these six
8 categories to you to give you a chance to think
9 about their relative importance." Relative
10 importance.

11 THE WITNESS: Yes.

12 JUDGE STRICKLER: And then Question 4a
13 says, "Now, I would like you to estimate the
14 relative value to your cable system of each
15 category of programming." And then they get a
16 chance to.

17 What is the difference to a -- to a
18 respondent between the relative importance of a
19 particular category and the relative value?

20 THE WITNESS: Well, so that's part of
21 the reason for two warm-up questions and it's
22 also -- so we want them to be thinking in terms
23 of relative importance, which to offer their
24 subscribers and also be thinking on some level
25 about the relative cost of acquiring that

1 programming. So we have --

2 JUDGE STRICKLER: But that's a
3 separate question. That's Question 3, right?

4 THE WITNESS: It is. And I think both
5 of those feed in ultimately to relative value.

6 JUDGE STRICKLER: How do they feed
7 into -- how do those two feed into relative
8 value? I don't understand.

9 THE WITNESS: Well, in terms of
10 getting the respondent thinking about a couple
11 of different aspects that contribute to
12 relative value.

13 JUDGE STRICKLER: But value is a
14 demand concept. I value something, a buyer
15 values something because it has an importance,
16 it's a -- there's something positive about it
17 that makes it important to value. The cost
18 becomes something you weigh against it.

19 But Question 4, again, asks for
20 relative value.

21 THE WITNESS: That's correct, in the
22 context of a programming budget, so --

23 JUDGE STRICKLER: Which is why I asked
24 -- well, relative to the number of points, to
25 the 100 points that you have --

1 THE WITNESS: Yes.

2 JUDGE STRICKLER: -- to allocate in
3 the survey. But -- but -- maybe you answered
4 it and maybe I just don't get it, but what's
5 the difference between the meaning of the word
6 "important" in Question 2b and the question of
7 value in Question 4a?

8 A. Well, I think both are getting at
9 similar things. And both, in terms of
10 relative, are relative -- relative attribution
11 questions. One is a ranking question, and one
12 is we're seeking to get a percentage
13 allocation.

14 But they are getting at similar
15 concepts, I agree with you.

16 JUDGE STRICKLER: So one is sort of --
17 question -- it doesn't seem like it addresses
18 cost at all. It's saying -- it's just
19 addressing -- Question 4 is addressing how much
20 value to put on it, and Question 2b is just
21 ranking it compared to others without putting a
22 price on it, like do I -- do I prefer chicken
23 or fish or beef and I can rank them, but
24 Question 4b says: If I had \$100 to spend on
25 them or 100 points to spend on them, how many

1 -- how much money would I spend on each?

2 THE WITNESS: That's correct, yes.

3 JUDGE STRICKLER: Okay, thank you.

4 Please, go ahead.

5 BY MR. OLANIRAN:

6 Q. I was going through the list of steps
7 that a respondent had to take to respond to
8 Questions 2, 3, and 4. And like I say, the
9 first was the -- understanding the list of
10 program categories to rank -- I'm sorry,
11 they're listening to the list of signals, which
12 in the case of Exhibit 6020, there were eight
13 signals. And then listening to the list of
14 program categories to rank.

15 And then the ultimate ranking task
16 itself, you have to recall all of the content
17 on the eight signals, in the case of
18 Exhibit 6020, and then you had to exclude from
19 consideration from all of the content network
20 programming; ABC, CBS, and NBC, correct?

21 A. Well, I think you're mischaracterizing
22 the process to a certain degree. There are
23 steps involved, certainly, but as I've
24 indicated, we're focusing on a dominant
25 impression concept and recognizing that

1 signature programming drives value.

2 So I think you're making it sound a
3 bit more complicated than it is. And it's --
4 it's also a process that is, you know,
5 something that these folks are considering in
6 terms of value decisions about programming in
7 their everyday -- in their everyday business.

8 Q. Did they not have to know the number
9 of signals that you're asking them to consider
10 to -- to conduct a particular task?

11 A. Sure. We're actually -- we're helping
12 them, I think, to focus their decision-making
13 process by giving them specific signals and --
14 and instructing them to focus only on the
15 programming on those signals.

16 Q. Okay. So we're in agreement that they
17 have to consider those signals. They also --

18 A. Well, we're not -- we're not in
19 agreement that they have to consider. I would
20 argue that we're helping them by giving them
21 information as to what they should consider.

22 Q. Do they have any interest in
23 understanding the signals that they carry for
24 the purpose of conducting the task that you're
25 asking them to conduct?

1 A. I'm not sure I understand your
2 question.

3 Q. Do you or do you not want them to
4 consider the list of signals that you just read
5 to -- that the interviewer just read to them in
6 order to perform the task that you're asking
7 them to?

8 A. Yes. I'm giving them the list of
9 signals so that they can consider the
10 programming that's on those signals and only
11 that programming.

12 Q. Okay. You're also asking them to
13 extricate from the aggregate content network
14 programming from ABC, CBS, and NBC, correct?

15 A. In the instances where network signals
16 are carried.

17 Q. Okay. And then, once they do that in
18 this mentor process, then I will have to
19 organize the programming into these program
20 categories, correct?

21 A. Well I'm not sure they have to
22 organize it. We provide the categories to them
23 and ask for relative rankings based on those
24 categories through the course of the first two
25 questions to get them thinking about the

1 programming that is on those stations and the
2 categories that are on those stations.

3 Q. I understand that part.

4 A. So, again, we're assisting them.
5 We're not requiring something of them, I would
6 argue. We're assisting them in their efforts
7 to consider that programming.

8 Q. Well, if they're not organizing --
9 reorganizing the content that they receive on a
10 station-by-station basis into the program
11 categories that you've just laid out to them,
12 how do they know -- how do they know what to do
13 to perform the task that you're asking them to
14 perform?

15 A. No, I understand what you're saying.
16 I think these are familiar categories. And I
17 think, ultimately, yes, I would agree that they
18 are organizing them into those categories.

19 Q. Okay. And they do --

20 A. At the --

21 Q. I'm sorry.

22 A. At the signature programming dominant
23 impression level.

24 Q. And they are performing this task
25 within the span of an average ten minutes?

1 A. Well, they're performing this task 365
2 days a year in terms of evaluating programming
3 that falls within categories and consists --
4 and comes in bundles.

5 But in terms of the survey, they are
6 considering the specific questions we've posed
7 to them in a span of about ten minutes.

8 Q. Okay. And this respondent in
9 Exhibit 6020, the vast majority of the
10 respondents in 2010 are doing this exercise
11 within ten minutes, in 2012?

12 A. In -- in -- in the year -- for the
13 year 2010 survey, that's accurate.

14 Q. Okay. Can we talk about Question 2b?
15 And again I'm going to try to stay within the
16 question itself, as opposed to specific
17 restricted information.

18 So in Question 2b, this is the
19 importance ranking, correct, of the program
20 categories?

21 A. Correct.

22 Q. And this is the first time -- this is
23 the first time for this question with the Bortz
24 survey, correct?

25 A. We had this question in 2009.

1 Q. Okay. And the purpose of this is --
2 of this question is to have the respondent tell
3 the interviewer how important it was for the
4 system to offer certain categories of
5 programming they carried in 2010, right?

6 A. Yes.

7 Q. And to do so, the respondent had to go
8 through the exercise we just -- we just talk
9 about, which is knowing the signals, excluding
10 network programming, and then organizing the
11 programming in a manner -- in a ranking order;
12 is that correct?

13 A. Ultimately, yes.

14 Q. Okay. And for Question 2b, this is
15 the first time that the respondent is hearing
16 the list of program categories, right?

17 A. Yes, it is.

18 Q. And no definitions of the programming
19 are provided to the respondent, are they?

20 A. The category description constitutes
21 the definition.

22 Q. I see. Let's look at Question 3.
23 This also is a new question for the Bortz
24 survey, at least as presented to -- for the
25 royalty distribution proceedings; is that

1 right?

2 A. Correct.

3 Q. Okay. And so in Question 3, the
4 interviewer seeks to know how expensive it
5 would have been for respondent's system to
6 acquire non-network programming on the
7 broadcast stations identified by the
8 interviewer, if respondent's system had to
9 purchase that programming in the marketplace.

10 I think I read that verbatim from the
11 question.

12 A. Yes.

13 Q. And, again, in order to get to this
14 ranking task, the respondent again had to go
15 through the steps that we talked about for --
16 excuse me -- for Question 2b; is that right?

17 A. Yes, which they just went through.

18 Q. So the question asks the respondent to
19 determine how expensive it would have been for
20 the system to acquire non-network programming,
21 and by that tense, is it fair to say that the
22 interviewer is asking the respondent about how
23 expensive the programming would have been in
24 2010?

25 A. Yes. And we're not asking them to

1 determine that. We're asking them to rank the
2 categories.

3 Q. I'm sorry, rank the categories. Okay.

4 And you are not -- you have read them,
5 the list of programming, the list of signals
6 that are at issue and asked them to organize a
7 rank, how expensive in order -- rank the
8 programming categories in order of how
9 expensive, right?

10 A. Yes.

11 Q. So do you know whether or not, in
12 responding to this particular question or
13 actually in Question 2, the respondents are
14 aware of distant signal retransmission or not?

15 A. We -- we actually specifically do not
16 want to alert them to the fact that this is
17 concerning copyright issues or copyright
18 royalties.

19 Q. Even though the signals that you are
20 asking them to talk to you about were carried
21 subject to the compulsory license statute?

22 A. Well, they were carried subject to
23 that, but we don't want them to be thinking
24 about the royalties that they pay when -- or we
25 don't want them necessarily to be thinking

1 about the royalties that they pay or that
2 structure when they're responding to this
3 question.

4 Q. Do you know whether they're not
5 thinking about it?

6 A. We can't say for sure, but we don't --
7 we don't do what Horowitz did and alert them to
8 the fact that these are distant signals and use
9 terms that would suggest to them that it's part
10 of the process.

11 Q. And what would be wrong with using
12 terms that would suggest it would be part of
13 the process?

14 A. Well, because I think we want them to
15 be thinking about a marketplace transaction.

16 Q. Well, that would have been -- the
17 process -- the marketplace that exists for
18 them -- that existed for them in 2010 was a
19 marketplace that regulated distant
20 retransmissions, is it not?

21 A. Right. We're trying to get at
22 relative value in a free marketplace.

23 Q. And if -- if they are as knowledgeable
24 as you said they are, wouldn't they understand
25 -- how are they making a distinction between

1 retransmission of distant signals subject to
2 the compulsion license versus non-regulated
3 retransmission of -- of signals or channels?

4 A. We're not asking them to make that
5 distinction.

6 Q. So you don't -- it doesn't matter to
7 your survey that they are thinking about one or
8 the other or both?

9 A. Again, we're not asking them to make a
10 distinction specific to the regulatory
11 framework.

12 Q. I know you're not asking them. My
13 question is whether or not it matters to the
14 results of your survey whether they were
15 thinking about one or the other or both?

16 A. I haven't assessed whether it matters.

17 JUDGE STRICKLER: I have a question,
18 still sticking with Question 2b for you,
19 Mr. Trautman.

20 The question, again, begins: "Now,
21 I'd like to ask you how important it was for
22 your system to offer certain categories of
23 programming that are carried by these
24 stations."

25 Now, it doesn't indicate whether they

1 should be thinking that they already carry
2 stations or air programs on other channels,
3 including network channels that are in these
4 categories as well, which of course exist.
5 Those are the programs, movies sitcoms, live
6 sports, what have you.

7 And I think you answered this morning,
8 you said that they -- that you -- perhaps you
9 said, correct me if I'm wrong, that you
10 anticipate that the respondents would figure
11 out which were the best types of programs among
12 these seven categories to round out their
13 schedules, sort of which ones complement what
14 they already have.

15 But the question doesn't ask that one
16 way or the other. So am I right that the
17 respondent, therefore -- we just don't know --
18 as I think you also said this afternoon, we
19 don't know what's in the respondent's head,
20 whether they are figuring out whether these
21 program types, these categories that are on the
22 retransmitted stations are rounding out what
23 they already have or they're just thinking of
24 what would happen if you were starting out
25 programming, whether it pays to begin with live

1 -- and pay more for live sports or for sitcoms
2 or what have you. They're free to -- to
3 approach the problem from either of those
4 perspectives; is that your understanding?

5 THE WITNESS: We don't instruct them
6 on that issue. I think that it's -- it's -- it
7 would be my expectation that they would respond
8 at least typically in the context of the
9 factors that led them to carry these distant
10 signals, which would include consideration of
11 those broader issues.

12 JUDGE STRICKLER: So there's no way of
13 knowing, when they respond, whether they're
14 thinking in terms of, well, we already have
15 network TV on our cable system, we already have
16 CNN, we already have ESPN, we already have HBO
17 as a premium offer, we have all these other
18 things; how valuable are these other types of
19 programs given what we already have, what's
20 already arrived on our programming?

21 You don't know if they're thinking of
22 it that way or whether or not they're thinking
23 about it in terms of, hey, let's -- let's start
24 a cable system and let's begin with what's the
25 best type of programming, and then they answer

1 the question with that in mind?

2 THE WITNESS: Well, we can't in that
3 context know what's in the respondent's mind
4 for certain, but I -- again, I anticipate that
5 they are thinking about it in the context of
6 their cable system and how these signals and
7 how the programming on these signals is or is
8 not important to offer to their subscribers.

9 JUDGE STRICKLER: Given what they
10 already have in the system?

11 THE WITNESS: Given what they already
12 have.

13 JUDGE STRICKLER: Well, if that's the
14 case, wouldn't the question better be asked,
15 the question that I quoted before -- "Now, I'd
16 like to ask you how important it was for your
17 system to offer" -- and instead shouldn't it
18 have said something like: How important it was
19 for your system to offer these stations because
20 they offer certain categories of programs?
21 Rather than asking them to -- how important it
22 was for their system to offer certain
23 categories of programs that are carried by
24 these stations?

25 Because if, as you're saying, you

1 anticipate they were thinking, all right, I
2 already have the architecture of a system that
3 has all these various programming, now what
4 stations would I like to retransmit distantly
5 because they have various bundles, you would
6 want to be looking at the stations and the
7 bundles they have, rather than just the types
8 of programs, wouldn't you?

9 THE WITNESS: Well, I mean, I could
10 certainly give some thought to the possibility
11 of how the -- the question could be rephrased,
12 but what we're trying to elicit from here, from
13 here is a response from the respondent as to
14 how the types of programming on those signals
15 played in to important -- how the types of
16 programming on those signals was important or
17 not in terms of offering to their subscribers
18 and specific to the programming that was
19 actually on those signals.

20 JUDGE STRICKLER: Well, the way the
21 sentence reads -- again, I don't want to
22 belabor this -- this might be the last time I
23 repeat the same quote from the question, to be:
24 "Now, I'd like to ask you" -- as the quote
25 goes, "Now, I'd like to ask you how important

1 it was for your system to offer certain
2 categories of programming that are carried by
3 these stations."

4 Don't you find that a little ambiguous
5 in the sense that you're asking them how
6 important it was for your system to offer
7 certain categories of programming? Let's just
8 stop right there. So it has got to be
9 categories of programming, and which categories
10 are we talking about? The ones that are
11 carried by these stations.

12 So the -- that last phrase -- clause,
13 that clause in the sentence just tells you
14 where to find the categories. It doesn't tell
15 you that they are important because they are in
16 the stations. It just tells you, when you look
17 at these stations, you'll find the categories.
18 And now we want to know how important they are
19 to you. And that's not really the task at hand
20 now, is it?

21 THE WITNESS: Well, I take your point,
22 but subsequent to that, in the question we do
23 focus them in on it being the programming
24 that's on those broadcast stations.

25 JUDGE STRICKLER: Well, you ask them

1 to -- you specifically say exclude the
2 broadcast stations. But you don't say
3 specifically exclude other cable stations. So
4 you don't say specifically exclude ESPN or
5 exclude CNN or anything like that?

6 THE WITNESS: That's -- well, so there
7 is ABC, CBS, and NBC network programming on
8 some of these stations. It's a -- it's a
9 sub-component of the programming on some of
10 these stations.

11 So that's what we're asking them to
12 exclude.

13 JUDGE STRICKLER: Thank you.

14 BY MR. OLANIRAN:

15 Q. So continuing with 2b -- or not to
16 be --

17 (Laughter.)

18 JUDGE STRICKLER: You know anybody was
19 thinking that, bit you're the only one who said
20 it out loud.

21 MR. OLANIRAN: It was low-hanging
22 fruit. I'm sorry.

23 (Laughter.)

24 BY MR. OLANIRAN:

25 Q. Mr. Trautman, I want to go back to

1 Question 3. And you start the question -- and
2 if you'll please look at the language so you
3 can follow my question. You start the question
4 by telling the respondent that the question
5 would be about how expensive purchasing the
6 programming directly in the marketplace would
7 have been. And then in the next sentence, the
8 question then refers to relative costs of seven
9 programming categories.

10 Do you see that?

11 A. Yes.

12 Q. And then in the next sentence, you go
13 back to ranking the program categories in order
14 of how expensive. And then in the following
15 sentence, you refer to a cost ranking exercise
16 that was about to happen.

17 So my question is are you equating all
18 these terms to mean the same thing?

19 A. In terms of this question, I believe
20 those are interchangeable terms, yes.

21 Q. And -- and you believe that the
22 respondent somehow understands four -- three
23 different terms to mean the same thing?

24 MR. LAANE: Objection, argumentative.

25 JUDGE BARNETT: Overruled.

1 MR. OLANIRAN: Thank you.

2 THE WITNESS: Well, I believe it's two
3 different terms, but yes.

4 BY MR. OLANIRAN:

5 Q. What are you -- are you asking them
6 about how expensive or are you asking them
7 about relative cost in terms of are you asking
8 them to rank the programming categories?

9 A. Well, I think we're asking them about
10 both, and I think the terms are interchangeable
11 and we're asking them to rank relative expense
12 or cost.

13 Q. So expense and cost mean the same
14 thing to you?

15 A. In the context of this question, yes.

16 Q. And you don't -- you don't think that
17 the word "cost," which is used there as a noun,
18 and the adjective "expensive" are two different
19 concepts?

20 A. Not in the context of this question,
21 no.

22 Q. Okay.

23 MR. OLANIRAN: Your Honor, I know we
24 usually have an afternoon break. I don't know
25 if this is a good time because this is a --

1 this would be a good clean break for me. I can
2 continue.

3 JUDGE BARNETT: Go ahead. I was
4 thinking of about 2:45 we would take our break.

5 MR. OLANIRAN: That's fine. Thank
6 you.

7 BY MR. OLANIRAN:

8 Q. Mr. Trautman, let's move to the
9 constant sum questions, which is Question 4a.

10 A. All right. I'm there.

11 Q. And the respondent in this question
12 was tasked with making relative valuation of
13 the same program categories that you had
14 mentioned in Questions 2 and 3, correct?

15 A. Correct.

16 Q. And it's the -- the aggregate -- the
17 relative valuation results in this constant sum
18 question, subject to some modifications that
19 you do later on, serves as the basis for the
20 proposal by Joint Sports Claimants, correct?

21 A. Correct.

22 Q. And, again, for this exercise, you
23 required -- the respondent was required to go
24 through the steps that we talked about earlier,
25 remembering the signals, taking out ABC, CBS,

1 and NBC, and then reorganizing the programming
2 into the program categories that they have to
3 -- that the allocation would have to be based
4 on, right?

5 A. Correct.

6 Q. Okay. And the question opens with the
7 statement that you would like the respondent to
8 estimate the relative value to the respondent's
9 system of programming broadcasts by the signals
10 identified, that you had been identifying all
11 along that were carried in 2010.

12 Now, in the opening statement, you
13 used the phrase "relative value," not "relative
14 marketplace value." Is it fair to say that you
15 intended for the respondent to contemplate a
16 particular marketplace?

17 A. I intended them to allocate relative
18 value among the programming categories.

19 Q. Did you have -- did you want them to
20 be thinking of a particular type of marketplace
21 in making that allocation?

22 A. No, I wanted them to respond based on
23 their experience and judgment --

24 Q. Did you --

25 A. -- as to the marketplace.

1 Q. Okay, I'm sorry. I'm sorry I
2 interrupted you. Please finish.

3 A. As to the marketplace.

4 Q. Okay. And it didn't matter to you --
5 strike that.

6 The marketplace that they had in mind
7 in making their allocations to the program
8 category, did that matter to you as an
9 interviewer?

10 A. I'm -- I'm trying to get them to
11 allocate relative value based on their
12 experience and judgment as to the programming
13 on these stations.

14 Q. Do you know --

15 A. So I don't -- I'm allowing them the
16 free will, so to speak, to think about that
17 relative value allocation as they see fit in
18 terms of how it is appropriate for their cable
19 system.

20 Q. As a questionnaire designer, do you --
21 the ultimate objective of your survey is to
22 have an allocation that reflected marketplace
23 value of the program categories; is that fair
24 to say?

25 A. Yes. I'm not sure that you could

1 really allocate relative value not in a
2 marketplace, so I think that's kind of
3 implicit.

4 Q. So my question is when they were
5 allocating value to these different program
6 categories, was it important to you, the
7 designer of the question who intended to use
8 this as -- who intended to use the results as
9 reflective of marketplace value, was it
10 important to you --

11 A. Yes, it was.

12 Q. -- that -- I didn't finish my
13 question. Was it important to you that the
14 respondents be thinking about a particular type
15 of market?

16 A. Not a particular type of market, but
17 relative value.

18 JUDGE STRICKLER: Did you also think
19 that they should be contemplating market price
20 as well, how much it would cost to get live
21 sports programming, how much it would cost to
22 be able to acquire movies, et cetera?

23 THE WITNESS: Well, that was the -- we
24 -- we wanted them to go beyond the mere
25 consideration of attracting and retaining

1 subscribers to consider broader issues related
2 to relative market value and -- and so one of
3 the reasons for introducing the third question
4 was to think -- get them to also be thinking
5 about such factors as -- as cost, yes.

6 JUDGE STRICKLER: So in that sense,
7 it's sort of a net value to them, right?
8 Because there's the positive value of, although
9 you say you weren't testing for this, how to
10 increase their subscribers, perhaps how they
11 will increase their viewers, but subscribers is
12 the point of the realm for a cable company, but
13 that's only, you know, one of the -- to mix
14 metaphors, that's only one blade of the
15 scissors because the other is the cost too.

16 So you wanted them to think both in
17 terms of how much revenue they could get in
18 because it was -- had value in that regard
19 because you get more subscribers if it was a
20 popular type of program category, but if it's a
21 very expensive one, I mean, you might want --
22 you might want the Rose Bowl, I know that's a
23 network game, it's a bad example, but maybe --

24 THE WITNESS: Sure.

25 JUDGE STRICKLER: Do they still do the

1 Astro-Bluebonnet Bowl? I don't know. That one
2 sounds syndicated to me.

3 THE WITNESS: I think you're a little
4 behind the curve on that one.

5 JUDGE STRICKLER: I'm way behind the
6 curve. I'm sure of that.

7 (Laughter.)

8 JUDGE STRICKLER: But the -- but it's
9 all well and good that you say, well, we can
10 get X thousands of dollars in new subscriptions
11 because we're carrying these lesser bowl games
12 that aren't anywhere else, but if it costs you
13 more than you're going to gain, it really has
14 no -- it really has no value to you at all,
15 now, does it?

16 THE WITNESS: Well, we were thinking
17 about costs more in the context of how it would
18 affect your sort of budget allocation in terms
19 of this Question 4a, so not in terms of
20 necessarily trying to turn the relative value
21 question into a relative profitability
22 question.

23 JUDGE STRICKLER: But that is -- well,
24 because you're not turning it into a
25 profitability question, I understand that, and

1 appreciate it, it's not a market value question
2 any longer, right? If it ever was supposed to
3 be, which was counsel's question that started
4 this particular line of questioning, the
5 difference between market value and relative
6 value.

7 THE WITNESS: No, no --

8 JUDGE STRICKLER: If you're not
9 considering profit, you're not considering
10 market, because what does a market exist for
11 sellers and for buyers but to try to gain
12 profit?

13 THE WITNESS: Well, no. Let me
14 rephrase that.

15 I understood you to be saying a
16 different thing in terms of cost, but, yes,
17 you're actually correct, and I misstated, that
18 we are -- we are thinking in terms of the
19 relative value to their cable system on a broad
20 level and, therefore, we are encouraging them
21 to think about what you just said.

22 So, I'm sorry, I misstated.

23 JUDGE STRICKLER: I appreciate that.
24 The questions are hard off the top of your head
25 so it's probably a confusing question so thank

1 you for trying to work through it.

2 But there's no prices, there's no
3 explicit pricing or implicit pricing in --
4 given in the instructions in Question 4a, so
5 there's a ranking, for example, someone could
6 rank live sports Number 1, but we don't know
7 what that respondent thinks in terms of the
8 pricing of the sports. So it's -- it has value
9 because you think people want to watch or
10 people are going to subscribe, more
11 importantly, to a -- to a cable system, right?
12 And that's the value, but you don't want
13 subscribers to add revenue to you if the costs
14 are going to be greater than the revenue. So I
15 don't understand how -- how this could even be
16 remotely be considered to have market value.

17 It's -- when I go back to that
18 demand/supply difference, it just seems like
19 it's how much would you be willing to pay, how
20 much value it gives you on the demand side. It
21 doesn't tell you anything about whether you
22 would actually go ahead and do it.

23 THE WITNESS: I -- I agree that it's
24 primarily a demand judgment.

25 JUDGE STRICKLER: Thank you.

1 BY MR. OLANIRAN:

2 Q. I just wanted to clarify something
3 else. Did you -- I took it you intended for
4 the respondents to consider the same program
5 categories you used in Question 2 and 3 for
6 Question 4; is that right?

7 A. Yes.

8 Q. So if we took the syndicated shows
9 program category, if you look at Question 2,
10 which is the first time they're hearing about
11 this, they hear the label syndicated category
12 -- syndicated show, it's labeled syndicated
13 shows, series, and specials.

14 Do you see that?

15 A. Yes.

16 Q. And then you go to Question 3, it's
17 labeled the same thing, syndicated shows,
18 series, and specials. Do you see that?

19 A. Correct.

20 Q. And then in Question 4 you have
21 syndicated shows, series, and special. And for
22 the first time you elaborate on that to say
23 "distributed to more than one television
24 station and broadcast during 2010 by the
25 commercial stations I listed." Wouldn't that

1 be confusing to the respondent?

2 A. I don't believe so. We've told them
3 previously on a number of occasions that we're
4 talking about the programming that was carried
5 by these stations during 2010 and that we were
6 talking about specific commercial stations, so
7 I don't think that that's an issue and I think
8 that the "distributed to more than one
9 television station" is just a clarification
10 with respect to syndicated shows, series, and
11 specials.

12 Q. And why wouldn't that clarification
13 have occurred earlier, in the beginning -- at
14 the beginning of the question?

15 A. In Questions 2 and 3?

16 Q. Yes.

17 A. It could have.

18 Q. It would have been better, would it
19 not have?

20 A. It would have been more descriptive, I
21 would agree.

22 Q. It would have been better? Right?

23 A. I think it's -- again, I don't
24 necessarily think better in the context of a
25 rank order question. I don't think it was

1 necessary.

2 Q. But the rank order question would
3 actually warm up to the ultimate question that
4 you were going to ask the respondents, correct?

5 A. Yes, they were.

6 Q. So you used the same phrase in the
7 first two questions, and then when you get to
8 the last question -- the most important
9 question, I think you would say, correct?

10 A. Yes.

11 JUDGE STRICKLER: You're referring to
12 4a now?

13 MR. OLANIRAN: Yes.

14 JUDGE STRICKLER: Thank you.

15 BY MR. OLANIRAN:

16 Q. And you're at the phrase "produced by
17 or for any commercial stations." Right?

18 A. Well, not in the syndicated category.

19 Q. I'm sorry. Distributed to more than
20 one television station.

21 A. Yes.

22 Q. You don't think a respondent, for
23 example, could have looked -- heard that phrase
24 and said, wow, maybe there's some other type of
25 distribution that did not involve the questions

1 that are asked in 2 and 3?

2 A. I -- I don't see that happening.

3 Q. And that's based on what?

4 A. My experience.

5 Q. What specific experience?

6 A. I just -- I don't think that's a
7 meaningful alteration in terms of the question.

8 Q. How do you test whether there's
9 confusion in responding to Question 4a versus
10 Questions 2 and 3 in terms of how the
11 respondent is -- understood that category?

12 A. I haven't tested for that.

13 Q. Let's look at the news --

14 JUDGE STRICKLER: Just before you go
15 there, I want to stick with that question, that
16 description, Mr. Olaniran, about syndicated
17 shows, series, and specials that counsel was
18 asking you about. It says, the phrase that he
19 was looking at, "distributed to more than one
20 television station and" -- "and broadcast
21 during 2012 by the commercial stations I
22 listed."

23 Let's take that conjunctive one
24 portion at a time. "Distributed to more than
25 one television station."

1 THE WITNESS: Yes.

2 JUDGE STRICKLER: Was that intended to
3 mean more than just -- if the respondent had
4 retransmitted six stations on the cable system,
5 is that making reference to one of those six or
6 distributed to just more than one -- in other
7 words, it could have been one of the ones the
8 -- the respondent retransmitted and some other
9 station?

10 A. Well, consistent with the agreed
11 categories, it's intended to reflect
12 distributed more broadly than just the station
13 on which it appeared.

14 JUDGE STRICKLER: Okay. So if there
15 were stations 1 through 6 that were
16 retransmitted by this particular respondent's
17 company, but it was -- but this particular
18 syndicated show was retransmitted on -- on --
19 retransmitted station number 3 and that was the
20 only one and also retransmitted on station
21 number 46, that was not retransmitted by this
22 company, would that qualify as falling within
23 that definition? Or no?

24 THE WITNESS: Well, again, this is
25 intended to be a clarification that the

1 syndicated shows, series, and specials includes
2 programming that was distributed to multiple
3 television stations.

4 JUDGE STRICKLER: Multiple television
5 stations that this respondent's company
6 retransmitted or just multiple stations?

7 THE WITNESS: Just multiple stations.

8 JUDGE STRICKLER: How would the
9 respondent know that?

10 THE WITNESS: I think in my experience
11 the respondents are familiar with the concept
12 of syndicated programming and understand the
13 difference between that and what I'll refer to
14 as local programming consistent with news and
15 public affairs as -- as defined below in the
16 other category.

17 JUDGE STRICKLER: But the question
18 itself suggests that there are certain
19 syndicated shows that are not distributed to
20 more than one television station or you
21 wouldn't have to give them that extra
22 information, would you?

23 THE WITNESS: Well, I'm not sure that
24 the extra information was necessary. I'm -- I
25 believe, you know, extra information was

1 provided to be as consistent with the agreed
2 categories as possible.

3 JUDGE STRICKLER: Thank you.

4 BY MR. OLANIRAN:

5 Q. Mr. Trautman, isn't it generally
6 accepted survey practice to use consistent
7 language throughout a survey questionnaire when
8 you intend for that language to mean the same
9 thing across the questionnaire?

10 A. Yes. And I think this survey meets
11 that standard.

12 Q. Okay. Let's look at the news
13 category, if you will. If you go to question
14 -- if you go to Question 2a, you labeled what I
15 would call the news category in Question 2b as
16 "news and other station-produced programs."

17 Do you see that?

18 A. Yes.

19 Q. Then in Question 3, you call it "news
20 and other station-produced program." Which is
21 the same thing as Question 2.

22 And then when you get to Question 4a,
23 you call it "news and public affairs programs."
24 You meant for all three questions to -- to
25 refer to what I call the news program, correct?

1 A. Yes, to the news -- news and public
2 affairs programs produced by or for any of the
3 commercial stations listed.

4 Q. And you still considered this labeling
5 consistent with generally accepted survey
6 practice?

7 A. I consider the first two question
8 references to be a shorthand version of the
9 expression in Question 4.

10 Q. So your respondents would know that
11 when you say "news and public affairs program"
12 you intended to say "news and other
13 station-produced programs," right?

14 A. I don't think that this expression
15 would change the perception in the respondent's
16 mind of what we were talking about.

17 Q. You also added in that last question,
18 after "news and public affairs program,"
19 "produced by or for any of the commercial
20 stations," which description is not part of the
21 first two questions.

22 A. Well, it is, other station-produced
23 programs.

24 Q. You don't think that the label in 4a
25 is more descriptive than the earlier labels?

1 A. It is more descriptive. I indicated
2 that the first two were a shorthand version.

3 Q. The language is not -- the language of
4 4 is not consistent on its face with 2 and 3?

5 A. I think a shorthand version is not
6 identical, I agree.

7 Q. Okay.

8 JUDGE STRICKLER: So why the
9 difference? Why the difference in verbiage?

10 THE WITNESS: Well, again, we're
11 trying as much as we can to keep the
12 definitions simple and straightforward in the
13 minds of respondents.

14 And in the ranking questions, again,
15 we're -- those are warm-up questions. We're
16 trying to get more general perceptions. And we
17 want to -- our determination was to add a bit
18 more clarity or just some reminders in the key
19 relative -- in the key constant sum question.

20 JUDGE STRICKLER: Thank you.

21 JUDGE BARNETT: Is this a good place?

22 MR. OLANIRAN: Just as good as any.

23 JUDGE BARNETT: Okay. We'll be at
24 recess for 15 minutes.

25 MR. GARRETT: Your Honor, I'm sorry,

1 before we break, we have another witness who is
2 prepared to go on today back at our offices.

3 In canvassing folks on the amount of
4 cross-examination, I don't think there will be
5 time to put him on today, but I wanted to
6 confirm that because I can send him back to
7 Colorado for the long weekend otherwise.

8 JUDGE BARNETT: Messrs. Satterfield,
9 Cosentino, will you have cross-examination for
10 Mr. Trautman?

11 MR. SATTERFIELD: Probably not very
12 much at all, if at all.

13 JUDGE BARNETT: Mr. Stewart?

14 MR. STEWART: Just a minute.

15 JUDGE BARNETT: A minute? Come on.

16 MR. STEWART: Two.

17 (Laughter.)

18 JUDGE BARNETT: Messrs. Lutzker,
19 MacLean?

20 MR. LUTZKER: Yes, we will have at
21 least probably 20 minutes.

22 JUDGE BARNETT: Okay. And Mr. Dove?

23 MR. DOVE: We're thinking maybe an
24 hour and a half.

25 JUDGE BARNETT: And in that case,

1 Mr. Garrett, I would say get that fellow to the
2 airport.

3 (Laughter.)

4 MR. GARRETT: He may already be there,
5 Your Honor.

6 JUDGE BARNETT: Okay. Thank you. 15
7 minutes.

8 (A recess was taken at 2:50á.p.m.,
9 after which the trial resumed at 3:10 p.m.)

10 JUDGE BARNETT: Please be seated.

11 BY MR. OLANIRAN:

12 Q. Mr. Trautman, let's continue with our
13 discussion about question 4a. In the -- in the
14 middle paragraph on question 4a, do you have
15 that in front of you, by the way?

16 A. I do, yes.

17 Q. Okay. In the middle paragraph you ask
18 the respondent to assume that his or her system
19 spent a fixed dollar amount in 2010 to acquire
20 all of the non-network programming actually
21 broadcast in 2010. Right?

22 A. Yes.

23 Q. Okay. And then you ask what
24 percentage, if any, of the fixed dollar amount
25 would your system have spent for each category

1 of programming. Right?

2 A. Yes.

3 Q. In the case of -- and you said earlier
4 that your respondents, after qualification, you
5 expect them to have knowledge about the content
6 they carry, correct?

7 A. Yes.

8 Q. They understand prices, correct?

9 A. Yes.

10 Q. And they understand the cable
11 programming market, correct?

12 A. Correct.

13 Q. And that they understand expenditures,
14 correct?

15 A. Expenditures as in --

16 Q. Programming expenditures, I'm sorry.

17 A. Yes, to the extent that is different
18 from pricing.

19 Q. Well, you expect them to be
20 knowledgeable about the system's programming
21 expenditures, right?

22 A. Oh, yes.

23 Q. Okay. So by the time that -- in the
24 case of the 2010 survey, which began in 2011
25 and went into 2012, by the time that you are

1 asking these respondents -- the interviewers
2 interviewing the respondents about 2010, the
3 respondents already know what they actually
4 spent on programming in 2010, don't they?

5 A. Yes.

6 Q. So when you are asking them, when you
7 are asking the respondents about how much he or
8 she, the system -- how much would your system
9 have spent when the respondent already, the
10 knowledgeable respondent already knows what the
11 system spent with regard to programming, how
12 was the respondent making that distinction?

13 A. I'm not asking them to make that
14 distinction. This paragraph is sort of the
15 constant sum -- it establishes the constant sum
16 parameter that we're looking for a fixed dollar
17 amount and we're looking to allocate that
18 amount in -- in fixed percentages.

19 So I'm not asking them to think in
20 context of a particular number, just -- just a
21 fixed amount.

22 Q. But you do agree, though, that by the
23 time you asked them the constant sum question,
24 they already have data on how much they
25 actually spent on programming, correct?

1 A. Yes.

2 Q. Okay. And you said earlier you are
3 not asking them to distinguish between when you
4 qualified them, you haven't asked them to
5 distinguish between broadcast programming or
6 cable network programming, that sort of thing,
7 right? You -- is that right?

8 A. Correct.

9 Q. Okay. And you wanted someone with a
10 broad knowledge of programming?

11 A. Correct.

12 Q. Okay. So when they are answering this
13 question, does it matter -- did it matter to
14 the survey results that they were thinking
15 about the programming that they actually -- the
16 programming expenditures they actually incurred
17 versus an imaginary expenditure to allocate
18 among the program categories?

19 A. I don't think it does. It matters to
20 me that they are thinking of a fixed amount.

21 Q. Okay. And did it matter as to volume
22 of the programming?

23 A. I'm not sure I understand your
24 question.

25 Q. If you are asking them to think about

1 a fixed amount, in that fixed amount should
2 they also be thinking about the volume of the
3 programming that would constitute the fixed
4 amount?

5 A. Well, I am asking them about acquiring
6 the programming that was actually broadcast by
7 these stations, so, yes, I'm asking them to
8 think about the mix of that programming and
9 what it consisted of.

10 JUDGE STRICKLER: Is there any
11 assumption in there as to what the value is of
12 any minute of programming across the
13 categories, in terms of how much the cost is,
14 the price is to acquire that programming?

15 THE WITNESS: No.

16 JUDGE STRICKLER: So does that mean de
17 facto it is the same price or it is just --
18 well, zero, it is the same price, zero, right?

19 THE WITNESS: Well, again, we're --
20 we're asking them to express their conception
21 of relative value in the context of allocating
22 this fixed dollar amount. So to your point, I
23 think it is primarily a demand-oriented
24 question, the point you made earlier, you know,
25 it may be taking into account their thoughts

1 about cost to a degree.

2 JUDGE STRICKLER: Thank you.

3 BY MR. OLANIRAN:

4 Q. I think earlier in your direct
5 testimony you said that nothing in the surveys
6 that would have indicated confusion about any
7 of the programming categories with respect to
8 the question there, is that a fair statement,
9 that you saw nothing in the surveys that would
10 have indicated that?

11 A. Well, in my experience in implementing
12 and managing and listening to the conduct of
13 the surveys, I haven't seen any evidence of
14 confusion on the part of the respondents.

15 Q. Did you engage in any particular
16 testing to see whether there is confusion?

17 A. Well, again, we -- we listened to many
18 of the interviews. We conducted a pilot test
19 and listened to those interviews with the WGN
20 questionnaire. I would consider that testing.

21 I'm not sure what other testing you
22 might kind of be -- you might be referring to,
23 but we -- we conducted that testing and
24 monitoring.

25 Q. In the movie category, for example,

1 did you consider whether or not a movie on a
2 commercial station is confused with a movie on
3 a Public Television station?

4 A. Well, certainly in question 4a, we ask
5 for an allocation to movies broadcast by the
6 commercial stations I listed.

7 Q. In question 4a you certainly do that,
8 but in questions 2 and 3, you just have movies.

9 A. That's accurate, yes.

10 Q. Then do you know, for example, whether
11 respondents are confusing, you know, Downton
12 Abbey with any -- which is on Public
13 Television, with any dramatic series on a
14 commercial station?

15 A. Well, when we read the categories, we
16 identified PBS and all other programming
17 broadcast by non-commercial stations, by the
18 non-commercial stations that are included.

19 So that category is specifically
20 delineated and described to encompass all of
21 the programming on that station.

22 Q. And you assume that when you list the
23 eight signals that are respondent systems
24 carrying, that they can automatically discern
25 whether, you know, whether a signal is a PBS

1 station, is a PBS signal, Public Television
2 signal or a commercial station signal?

3 A. No, we don't assume that at all. We
4 actually inform them of the affiliation of the
5 signals and that the signals listed are either
6 commercial or non-commercial, educational,
7 network, independent, et cetera.

8 Q. And you assume based on that
9 identification that they can distinguish the
10 programming, right?

11 A. Well, I assume they are familiar with
12 these stations to begin with as part of their
13 ordinary course of business, and I assume that
14 with that additional information that we
15 provide to them, that that would be consistent
16 with their preexisting understanding.

17 JUDGE STRICKLER: I just want to ask
18 you a question about question 3. Am I right
19 that you included question 3 because it was in
20 response to something that some of our
21 predecessors had ruled on, that you needed a
22 cost basis type of question in there? Was that
23 the motivating force for question 3?

24 THE WITNESS: Not precisely. It was
25 really -- the motivating force was that we had

1 an advertising -- a use in advertising and
2 promotion question in the previous version of
3 the survey that had essentially become useless
4 because these signals weren't being used in
5 advertising and promotion, so that needed to be
6 replaced.

7 So the cost question was the question
8 that we came up with to replace it.

9 JUDGE STRICKLER: And what was the
10 benefit of having that question, the new
11 question in there, new question 3?

12 THE WITNESS: Well, the intention was
13 to, to a certain extent, to get at the supply
14 side issue, but, you know, the primary intent
15 was just to have, again, two questions that
16 would -- that would get the respondents
17 starting to think about relative value and have
18 one that was better for that purpose than the
19 advertising question which had essentially just
20 become a no response.

21 JUDGE STRICKLER: I think you started
22 your answer to me by saying "not precisely."
23 So was question 3 added in part in response to
24 what our predecessors had said there not being
25 a supply-side type question in there?

1 THE WITNESS: There have been issues
2 raised about supply-side in the past, but I
3 don't recall them being specifically raised in
4 the last proceeding by -- by the Judges.

5 JUDGE STRICKLER: So adding question 3
6 was not in response to anything that the Judges
7 previously had said?

8 THE WITNESS: Well, as I indicated, I
9 think, it was a response to the -- on some
10 level to the supply-side issue. I'm not sure
11 of the specific context in which that issue was
12 raised.

13 JUDGE STRICKLER: So it was raised by
14 the Judges?

15 THE WITNESS: At one point or another,
16 yes.

17 JUDGE STRICKLER: I see. And the
18 responses to question 3 played no role in the
19 demand side answers in question 4; is that
20 correct?

21 THE WITNESS: Well, they were intended
22 to be a consideration in the relative value
23 judgment. That was our -- our hope, but I
24 think as I indicated to you, that that -- I
25 think that is -- I acknowledge that that's

1 principally a demand judgment.

2 JUDGE STRICKLER: Thank you.

3 BY MR. OLANIRAN:

4 Q. And also in response to questions from
5 Mr. Laane earlier today, you were responding to
6 a criticism that Dr. Stec, who is a witness for
7 Program Suppliers, had made of the Bortz survey
8 results.

9 And he thought, I think he criticized
10 the Bortz survey results for having variations
11 in terms of responses by the same system and
12 variation in response -- by the same system
13 across the four years, as well as variation in
14 responses by the same system when compared to
15 Horowitz.

16 Do you remember that criticism?

17 A. I do remember that criticism, yeah.

18 Q. And I think you disagreed with him,
19 correct?

20 A. Yes.

21 Q. And why do you disagree with him?

22 A. Well, because I -- my -- my point was
23 that his data set that he used to conduct his
24 analysis included literally every instance of
25 year-to-year comparison, including probably --

1 well, well over half the instances where there
2 were recognizable changes that -- that would
3 have not suggested that responses should
4 necessarily have been consistent.

5 Q. Now, when you talk about recognizable
6 changes, were they changes between 2010 and
7 2011, for example, that would affect a drastic
8 change in allocation from -- from one year to
9 the next?

10 A. Well, I don't know that I would
11 necessarily equate it to a drastic change, but
12 it would effect a change, yes, or could be
13 anticipated to effect a change.

14 Q. And what would that have been, for
15 example, if there was such a variation, a
16 significant variation?

17 A. Well, the principal and the most
18 easily identifiable one would be changes in
19 signal carriage.

20 Q. Okay. But if there was no change in
21 signal carriage, what else would change --
22 would cause there to be a significant variation
23 between those two years, let's say?

24 A. Well, there is many factors that could
25 effect change. There could be changes in the

1 programming on the distant signals in question.
2 There could be changes in management at the
3 cable system. There could be changes in the --
4 in this era, there was a number of
5 circumstances where the size of the cable
6 system changed substantially, reflecting that
7 it had consolidated for reporting certain
8 purposes, so it wasn't really, even though it
9 had the same name, it wasn't really the same
10 system as it had been the previous year.

11 And so there were a variety of factors
12 of that nature. And, in addition, there could
13 be factors unrelated to the specific distant
14 signal considerations, but related to other
15 programming that the system was carrying or
16 other decision-making frameworks that the
17 system has put into effect.

18 Q. Now, did you talk about these changes
19 that would affect -- these changes in your
20 testimony with regard to when there are
21 variations from year to year by the same system
22 -- with regard to survey results or survey
23 allocations by the same system, did you talk
24 about that in your testimony at all?

25 A. I -- in my testimony, no. That was in

1 response to Dr. Stec's analysis.

2 Q. I would like for you to take a look at
3 Exhibit 6021. This is a restricted exhibit.

4 MR. LAANE: This is a restricted
5 exhibit, Your Honor.

6 JUDGE BARNETT: Is there an echo in
7 here?

8 (Laughter.)

9 JUDGE BARNETT: Are you going to be
10 inquiring about the specifics of the exhibit?

11 MR. OLANIRAN: Yes.

12 JUDGE BARNETT: It looks like our
13 guest is automatically leaving the room. Thank
14 you very much.

15 (Whereupon, the trial proceeded in
16 confidential session.)

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1 O P E N S E S S I O N

2 MR. LUTZKER: Your Honor, I will add,
3 the guest is actually an intern in our office.
4 He is from the Washington Center, and he is a
5 lawyer from Mexico. And if it is -- if the
6 group requires, I can have him execute a
7 nondisclosure agreement, since he is working in
8 our office.

9 JUDGE BARNETT: In your office.

10 MR. LUTZKER: We can address that
11 issue.

12 JUDGE BARNETT: Why don't you discuss
13 that with the other participants. However that
14 comes out is really up to you all.

15 MR. LUTZKER: Thank you.

16 JUDGE BARNETT: Welcome back, sir.

17 BY MR. OLANIRAN:

18 Q. The 2010 WGN-only survey also started
19 in December of 2011; is that correct?

20 A. Well, yes, it's all the same survey,
21 so yes.

22 Q. So they commenced at the same time?

23 A. Generally, yes.

24 Q. Okay. And roughly the same portion of
25 the WGNA-only survey would have been completed

1 in 2012; is that right?

2 A. Yes.

3 Q. Roughly the same as the regular Bortz
4 survey?

5 A. Yes. I haven't really broken it out
6 that way, but I would assume so.

7 Q. And you've said that WGN is the most
8 highly retransmitted broadcast signal during
9 2010, right?

10 A. Yes.

11 Q. And you had -- you -- you testified, I
12 think, in the '04-'05 proceeding to the same
13 thing; is that right?

14 A. Yes.

15 Q. Okay. And I think you testified that
16 the reason for such a high retransmission of
17 WGN was the JSC sports that's available on WGN?

18 A. Well, I may have expressed that
19 opinion. You'd have to point me to it. That's
20 -- that's certainly what our survey results
21 would suggest.

22 Q. With regard to the 2010 through 2013
23 period, WGN continues to be the most highly
24 retransmitted programming; is that right?

25 A. That's correct.

1 Q. And do you still believe that the
2 reason it is is because of the sports
3 programming, like, I mean, JSC programming that
4 is under WGN?

5 A. Well, I do believe that. And I
6 believe also that our survey suggests that it
7 is the most valuable programming on WGN.

8 JUDGE STRICKLER: And just so it is
9 clear, I think you may have said this before,
10 or someone else did, the sports programming
11 we're talking about at WGN are the White Sox,
12 the Cubs, and the Bulls?

13 THE WITNESS: Correct.

14 JUDGE STRICKLER: Those are the ones
15 you are referring to when you say it is the
16 most valuable program?

17 THE WITNESS: It is the most -- yes,
18 in terms, that comprises the JSC programming --

19 JUDGE STRICKLER: Thank you.

20 THE WITNESS: -- on WGN America.

21 JUDGE STRICKLER: Not the Blackhawks,
22 just those three? That doesn't include hockey?

23 THE WITNESS: Well, the Blackhawks are
24 carried on WGN Chicago but not on WGN America.
25 So they are not compensable.

1 JUDGE STRICKLER: Thank you.

2 BY MR. OLANIRAN:

3 Q. Is there soccer on WGN?

4 A. Pardon?

5 Q. Is there soccer on WGN?

6 A. On WGN America?

7 Q. WGNA. Yes.

8 A. No.

9 Q. Like you, when I refer to WGN, I mean
10 WGNA.

11 So you created this special process
12 for WGN where you contacted the respondent in
13 advance at a WGNA-only system and you provided
14 him or her with a copy of what you referred to
15 as a program summary; is that correct?

16 A. Yes.

17 Q. Okay. And then after you gave them
18 some time to review the program summaries, you
19 conducted the interview; is that correct?

20 A. Yes.

21 Q. Okay. And as I understand your
22 testimony, the purpose of this special process
23 was so that the WGNA-only system, could
24 consider only compensable programs?

25 A. Correct.

1 Q. And you didn't think that without the
2 special assistance, if you will, that they
3 could accurately reflect -- make allocations
4 among the program -- different program
5 categories that had compensable programming on
6 WGNA?

7 A. Well, we thought that naturally if we
8 just asked them about WGN, they would be making
9 allocations based on all of the programming on
10 WGN and not just the compensable programming.

11 Q. You described the respondents as very
12 knowledgeable about the content the systems are
13 carrying, did you not?

14 A. Yes.

15 Q. And if you were to simply put a
16 statement in the questionnaire that asked them
17 to not consider substituted programming, you
18 didn't think they would have understood that
19 statement?

20 A. I don't think they would have any
21 reason to consider what programming on WGN is
22 substituted versus not.

23 Q. Not even if you told them they are not
24 to consider substituted programming?

25 A. No, to consider in the course of their

1 evaluation or analysis of programming, to
2 consider whether programming on WGN included
3 substituted programming or not and which
4 programming specifically was or wasn't
5 substituted, there is no reason for them to
6 think about that.

7 Q. Maybe I wasn't clear about my
8 question.

9 You had this new process that you
10 never had in any -- in the prior survey
11 results, which is you had -- you provided the
12 respondents in advance summary of programming
13 that is compensable on WGN, correct?

14 A. Correct.

15 Q. So my question to you is this: If you
16 had simply included in your questionnaire a
17 statement that directed the respondents not to
18 consider substituted programming, is it your
19 testimony that the respondents would not have
20 understood what that meant?

21 A. They might have understood the notion
22 of substituted programming, but they have no
23 reason to evaluate -- to do what I did, to go
24 through WGN Chicago's log day by day and WGN
25 America's log and compare the programs to see

1 which have been substituted and which haven't.

2 So they would have -- they are looking
3 -- they are thinking about WGN America in their
4 broader decision-making process. And so the
5 substitution instruction is meaningless.

6 Q. Well, that's really no different from
7 asking the respondents in a regular survey to
8 not consider national programming on ABC, CBS,
9 and NBC, isn't it?

10 A. No, it is entirely different.

11 Q. And why is that?

12 A. Because respondents understand
13 certainly in general terms, and many to a very
14 specific level, what the national network
15 programming is on network affiliated stations
16 and what constitutes non-network programming in
17 my experience.

18 Q. And how are you determining what they
19 understand in one instance versus the other?

20 A. Well, again, there is a familiarity
21 with and an understanding of national network
22 programming from the major broadcast networks.
23 There is no context within the industry whether
24 -- where there is any interest in or need to
25 understand which programming on WGN is

1 substituted and which isn't, for someone who is
2 engaged in making program carriage decisions.

3 Q. So you don't think your respondents
4 understand what substituted programming is?

5 A. Well, they -- they understand the
6 concept of substituted programming. I don't
7 believe they have any reason to understand
8 which programming is substituted and which
9 isn't.

10 Q. With regard to WGNA-plus systems, how
11 are they making that distinction?

12 A. I am not asking them to make that
13 distinction.

14 Q. So they are not?

15 A. No, I don't believe so.

16 Q. So what are the Judges to make of the
17 allocations involving WGNA on WGNA-plus
18 systems? And here is why I asked you that
19 question.

20 You didn't provide a program summary
21 to those WGNA-plus systems, did you?

22 A. No.

23 Q. And no information about the number of
24 programs, right?

25 A. No.

1 Q. And no information about the date
2 part?

3 A. No.

4 Q. And no summary of any kind?

5 MR. LUTZKER: Objection, Your Honor.
6 The phraseology of the questions, what are the
7 Judges to make, which raises questions in terms
8 of the phraseology of the question.

9 I understand where Mr. Olaniran may
10 wish to go, but I believe the question is posed
11 improperly.

12 JUDGE BARNETT: The objection is
13 sustained.

14 BY MR. OLANIRAN:

15 Q. But with respect to the WGNA-plus
16 systems, with regard to the WGNA signal in
17 those systems, you didn't provide any program
18 examples, correct?

19 A. No. We treated WGN like the other
20 distant signals that we asked the respondents
21 about.

22 Q. Okay. You didn't add a statement
23 indicating that they should -- the respondents
24 should only consider substituted programming on
25 WGNA?

1 A. No, because that would have been a
2 meaningless statement.

3 Q. And why is that?

4 A. Because of what I said about --

5 MR. LAANE: Asked and answered.

6 THE WITNESS: -- two minutes ago.

7 MR. LAANE: I would object as asked
8 and answered, but he already started to answer.

9 JUDGE BARNETT: Go ahead, Mr.
10 Trautman.

11 THE WITNESS: Well, I was going to say
12 because of what I said two minutes ago.

13 (Laughter.)

14 BY MR. OLANIRAN:

15 Q. That's good. And with regard to the
16 compensable programming on WGNA, as a
17 proportion of all compensable programming
18 across all distant signals in your -- in your
19 sample, what is that proportion? In other
20 words, what percentage of compensable
21 programming is programming on WGNA?

22 A. I am not really sure I understand your
23 question.

24 Q. What proportion of the total volume of
25 programming in your sample is volume of

1 compensable programming on WGNA? Strike that.

2 I may have mixed up that question.

3 I am trying to understand of the total
4 compensable programming on the distant signals,
5 compensable programming, the total compensable
6 programming, what fraction of that is
7 compensable programming on WGNA?

8 MR. LAANE: I would object if the
9 question is incomprehensible.

10 JUDGE BARNETT: Well, he can answer if
11 he can answer.

12 BY MR. OLANIRAN:

13 Q. Do you understand the question?

14 JUDGE BARNETT: He may answer if he
15 can.

16 THE WITNESS: I am -- I am not sure I
17 understand the question, but in the context of
18 the entire sample, I don't believe I have
19 analyzed that. And I think there is many
20 different ways to analyze that, but I -- I have
21 not looked at that.

22 BY MR. OLANIRAN:

23 Q. So you don't -- you don't know what
24 fraction of total compensable programming is
25 compensable programming on WGNA?

1 A. No, I haven't analyzed that.

2 Q. Do you have any idea at all?

3 A. I would have to look at some of the
4 subscriber minutes analysis that I have seen in
5 these proceedings, but it is certainly not
6 something I have done directly.

7 JUDGE STRICKLER: Having not done it
8 directly, do you recall what that fraction is
9 of the volume?

10 THE WITNESS: I don't. I recall
11 seeing some analyses of weighted subscriber
12 minutes, but I don't recall that specific to
13 the aggregate volume of compensable programming
14 on WGN.

15 BY MR. OLANIRAN:

16 Q. Would it have -- if you knew, would it
17 have mattered whether it was -- WGNA
18 compensable programming was 1 percent of total
19 compensable programming versus 20 percent of
20 the total compensable programming?

21 MR. LAANE: Objection, Your Honor. We
22 have no understanding here, percent of what?
23 Percent of subscriber minutes? Percent of some
24 other metric?

25 JUDGE BARNETT: Sustained.

1 BY MR. OLANIRAN:

2 Q. Percent of volume of compensable
3 programming.

4 MR. LAANE: Objection. Volume is
5 undefined.

6 JUDGE BARNETT: Sustained.

7 BY MR. OLANIRAN:

8 Q. If you knew the total volume of
9 compensable programming -- are you with me?

10 MR. LAANE: Same objection.

11 JUDGE BARNETT: Sustained.

12 BY MR. OLANIRAN:

13 Q. Are you familiar with Dr. Israel's
14 testimony?

15 A. Broadly, yes.

16 Q. Broadly. And where he calculated
17 total compensable minutes?

18 A. That's not a part of what he is -- of
19 what he did that I have focused on.

20 Q. What -- you didn't focus on his
21 calculation of the volume of compensable
22 minutes?

23 A. No, I did not.

24 Q. Let me ask you the question this way.
25 Would it matter -- would it have mattered to

1 you, to how you treat WGN, if WGN was 1 percent
2 of total compensable programming, whatever that
3 fixed volume is, or 20 percent of the total
4 compensable programming?

5 MR. LAANE: Objection, Your Honor, it
6 is still undefined. Percent of what measure?

7 JUDGE BARNETT: Overruled. I think he
8 is talking about the universe at this point.

9 THE WITNESS: Well, now I am going to
10 say I don't understand. I don't understand
11 what -- what do you mean about how I would have
12 treated WGN. I am not sure what you -- what
13 you are getting at.

14 BY MR. OLANIRAN:

15 Q. Would you have undertaken the special
16 process for WGN-only systems that you did if
17 you knew that the universe of compensable --
18 all of the universe of compensable programs,
19 WGN's compensable programming was only
20 1 percent versus 20 percent, let's say?

21 A. Well, I am still not sure what you are
22 getting at, but let me do the best I can here.
23 We undertook it with systems that represented
24 about 30 percent of the systems that we
25 surveyed. Okay? So we undertook that

1 analysis.

2 WGN is carried by roughly 45 --
3 another 45 percent or roughly 75 percent to
4 80 percent of all of the systems, so another 45
5 to 50 percent along with other distant signals.
6 We did not do it with that for reasons
7 completely unrelated to volume of programming.

8 Q. I think I will skip that for now. Can
9 we take a look at the program summary for 2010
10 in Exhibit 6020. Oh, I'm sorry, Exhibit 1001.

11 Look at the template for WGNA.

12 JUDGE STRICKLER: Which exhibit again?

13 MR. OLANIRAN: 1001.

14 JUDGE STRICKLER: Thank you.

15 MR. OLANIRAN: The WGNA-only system.

16 THE WITNESS: There is actually four.

17 Which page?

18 BY MR. OLANIRAN:

19 Q. I'm sorry, C-1. Does that get you
20 there?

21 A. Not to a programming summary.

22 Q. That's the C-1, page C-1 is the
23 beginning of the 2010 WGN-only survey.

24 A. Yes. So it is C-5 you are referring
25 to?

1 Q. That's correct. But before we get to
2 C-5, let's go back to page 2 of the survey
3 itself if that's okay. Are you there?

4 A. Yes.

5 Q. Okay. So before you -- before you get
6 to any questions about ranking or evaluation or
7 any detail, you provide a detailed explanation
8 of what you want the respondent to do, right?

9 A. Yes.

10 Q. In paragraph 1, you talk about the
11 nature of the programming transmitted on WGNA,
12 right?

13 A. Yes.

14 Q. And the second paragraph talks,
15 touches on focusing the respondent about --
16 focusing the respondent on programming about --
17 on WGNA, right?

18 A. Yes.

19 Q. And then paragraph 3 reiterates the
20 programming of interest to the interviewer,
21 right?

22 A. Um-hum.

23 Q. So this -- these first three
24 paragraphs are clearly geared to elicit
25 information about compensable programs, right?

1 A. Well, they are geared to elicit
2 information about programming that's on the
3 programming summary that I'm going to send
4 them.

5 Q. Which presumably are compensable
6 programming, right?

7 A. Yes.

8 Q. And also more detailed than the
9 instructions in the regular, what I consider
10 the regular Bortz questionnaires; is that
11 right?

12 A. Well, I'm not sure they are more
13 detailed. They are explaining what we would
14 like the respondent to do.

15 Q. And you don't think these -- at least
16 these paragraphs are much more pointed than the
17 regular Bortz questionnaire?

18 A. Well, they are different. They are
19 explaining a process of providing information
20 to them.

21 Q. Okay. And you didn't think with this
22 -- these four paragraphs, that your
23 knowledgeable respondent would understand
24 enough about what you were looking for without
25 the program summary?

1 A. No. Again, as I indicated,
2 respondents have no need to or interest in the
3 ordinary course of their business to
4 distinguish between the programming that is on
5 WGN America that is also in Chicago -- also on
6 in Chicago versus the programming that is not
7 carried in Chicago.

8 Q. And now let's -- let's turn to the
9 program summaries for 2010.

10 A. I'm there. It is C-5?

11 Q. That's C-5. Thank you. And this
12 would be the document you provided to the
13 respondent in advance of the interview, right?

14 A. Correct.

15 Q. And you have the program organized
16 based on you have program examples, total
17 number of programs, total hours for each
18 program, and the date part for each program; is
19 that right?

20 A. Yes, I would fairly characterize these
21 as program examples. These are the programs
22 that were compensable on WGNA with minor
23 exceptions for programs that might have only
24 appeared once or didn't -- or, you know, were
25 relatively inconsequential.

1 Q. And the total hours, are they actual
2 hours of compensable programs, correct?

3 A. Yes.

4 Q. Okay. And do you know how that
5 compares to the universe of compensable
6 programs on all the systems?

7 A. Well, again, you have to give me some
8 context. Are you talking subscriber weighted
9 or -- or are you talking -- obviously for these
10 systems, among all of the subscribers on these
11 systems, this is the only compensable
12 programming that any of their subscribers
13 receive. And these constitute about 30 percent
14 of the systems.

15 Q. And let's look at some of the
16 categories. For the category of news and other
17 station-produced programs, you have very
18 specific shows such as prime news, mid-day
19 news, and pre- and post-game shows. Do you see
20 that?

21 A. I see the descriptions, yes.

22 Q. Yes. Are these descriptions actual
23 titles of the shows?

24 A. These are titles from the Nielsen
25 database that we used in 2010.

1 Q. But they are news programs, right?

2 A. Yes, they are -- yes, they are prime
3 news -- a prime time news program and a mid-day
4 news program.

5 Q. And then for the category of live team
6 sports, you actually mention the actual
7 franchises, you mention the Cubs, Cubs
8 baseball, White Sox baseball, and Bulls
9 basketball?

10 A. Yes, we use the title that Nielsen
11 provided.

12 Q. And this is an identification pattern
13 that you repeat for those two categories over
14 the four years of the questionnaires, right?

15 A. Yes.

16 Q. And with respect to the movie
17 category, however, you only label the programs
18 as, you know, featured presentation or movie,
19 the word movie, in the four years, correct?

20 A. Correct.

21 Q. Okay. In fact, aside from the generic
22 label "movie" that you assign, you don't
23 identify a single movie, do you?

24 A. No, I don't identify a single baseball
25 game telecast either.

1 Q. But I think you will agree with me
2 that if you say "Cubs baseball," I think that
3 is much more specific than just the word
4 "movie," don't you think?

5 A. No, I really don't think so.

6 JUDGE STRICKLER: You do have half the
7 teams listed, right?

8 THE WITNESS: Pardon?

9 JUDGE STRICKLER: You have half the
10 teams listed when you say "Cubs baseball." You
11 know the Cubs are playing somebody.

12 THE WITNESS: Well, I suppose that's
13 true.

14 JUDGE STRICKLER: I'm pretty sure it
15 is.

16 (Laughter.)

17 THE WITNESS: Well, yes. It is true,
18 all right. I take your point. But I'm not
19 sure I understand the distinction.

20 BY MR. OLANIRAN:

21 Q. Mr. Trautman, I am certain there are
22 people in the Washington, D.C. metro area that
23 are offended that you can't tell the difference
24 between a generic movie label and a Cubs
25 baseball.

1 A. Well, I certainly can tell the
2 difference between the two programming
3 designations, but I am not sure I understand
4 the distinction.

5 JUDGE STRICKLER: You could have done
6 it with movies too. I mean, Cubs baseball, we
7 know the Cubs are playing somebody. Movies, it
8 would be When Harry Met -- we know Harry met
9 somebody. We don't know it is Sally.

10 (Laughter.)

11 THE WITNESS: Well, Yes, but then we
12 would have had to list, in years there were
13 many movies --

14 JUDGE STRICKLER: That was more of a
15 rhetorical question.

16 THE WITNESS: We would have had to
17 list many. And in years were there were few,
18 we would have been, you know, creating sort of
19 four lines of data for, you know, infrequent
20 appearances of programming.

21 Cubs baseball is a collection of
22 programming, like WGN Prime News, that
23 constituted, you know, a large volume of
24 programming and programs and was a major
25 feature, just as feature presentation was in

1 2010, which was a -- a relatively consistent
2 presentation or branding for a consistently
3 aired movie on WGN.

4 JUDGE STRICKLER: Thank you.

5 BY MR. OLANIRAN:

6 Q. But in all seriousness, I mean, saying
7 "Cubs baseball" evokes intrinsic a branding
8 that saying "feature presentation" or "movies"
9 does not; isn't that true?

10 A. I don't believe that. I believe it is
11 an accurate description, and I believe the
12 movies description is accurate as well.

13 Q. And earlier you indicated that JSC
14 Sports for the duration of the 2010 to 2013
15 years was the primary driver of the popularity
16 of WGNA; is that true?

17 A. Well, again, that would be my
18 experience.

19 Q. Now, what is your -- what evidence do
20 you have, other than the carriage itself, that
21 JSC programming drives WGN as carriage?

22 A. 30 years of experience in the
23 business.

24 Q. What does that mean?

25 A. Just evaluating programming,

1 evaluating programming networks, understanding
2 what drives carriage of programming networks
3 and what the operator clients that I work with
4 consider when they are distributing
5 programming.

6 Q. So Comcast in D.C. would carry WGN
7 because it believes the Cubs, the Bulls, and
8 the White Sox are playing and that's the reason
9 Comcast would carry WGN in D.C.?

10 A. Well, I would say it is a principal
11 reason, yes.

12 Q. Really?

13 JUDGE STRICKLER: When you say it is
14 your experience that tells you that, what in
15 your experience leads you to that conclusion?
16 Talking to people? Reading something? Fill
17 that in, if you would.

18 THE WITNESS: Well, in -- in working
19 with cable operators and understanding the
20 history of super-stations being pulled that
21 virtually always featured live professional or
22 college team sports and those stations being
23 far more widely distributed than any other
24 types of distant signals for essentially the
25 entire history of these -- that I have been

1 involved with these proceedings, so that
2 experience.

3 JUDGE STRICKLER: So you see the
4 correlation between distant retransmission of
5 stations and stations that are predominant with
6 regard to their -- their retransmission of
7 professional and college sports?

8 THE WITNESS: That's -- that's my
9 experience, yes.

10 JUDGE STRICKLER: That's an anecdotal
11 over many years of experience?

12 THE WITNESS: Yes, yes, it is an
13 anecdotal judgment to be sure.

14 JUDGE STRICKLER: Thank you.

15 BY MR. OLANIRAN:

16 Q. And so let's take the New York market,
17 for example. New York has their Giants, the
18 Mets, the Jets, the Knicks, the Yankees, right?

19 A. Yes.

20 Q. And they won the Superbowl in 2012, I
21 think, right?

22 A. Yes.

23 Q. Okay. You have Boston which has the
24 Patriots, the Celtics, and the Red Sox, and Red
25 Sox won the series in 2013, right?

1 A. Yes.

2 Q. And now I have lost count of how many
3 Superbowls the Patriots won, but I'm sure they
4 won Superbowls in that time frame too, right?

5 JUDGE STRICKLER: A few.

6 BY MR. OLANIRAN:

7 Q. And then you have the LA market which
8 has Lakers, Clippers, Dodgers, and Angels,
9 right? Right?

10 A. Sure.

11 Q. And they won the NBA Championship in
12 2010, right?

13 A. Um-hum.

14 Q. So why hasn't -- and your testimony is
15 that this Chicago Cubs, the Bulls franchise is
16 what's driving -- strike that.

17 If the sports franchise that we talked
18 about in Chicago is driving the WGNA carriage
19 throughout the nation, why is it that that
20 pattern has not been replicated for the
21 flagship stations in those major cities that I
22 just -- that I just mentioned?

23 A. Well, to begin with, it was replicated
24 at one time for super-stations that originated
25 from those cities that featured live

1 professional and college team sports, but
2 you're actually -- well, in my opinion, you're
3 making my point because when you examine WGN's
4 carriage on distant signals, you find that it
5 is less likely to be carried in the northeast,
6 at least to 100 percent of subscribers on a
7 distant basis than it is in the midwest, where
8 the draw of -- of the professional sports teams
9 is likely to be greater.

10 And you see, for example, a WPIX that
11 gets some distant signal distribution, is one
12 of the more widely distributed distant signals,
13 and that is predominantly in the northeast. So
14 I think you are making my point. At least
15 that's how I take it.

16 Q. My question is why hasn't that pattern
17 been replicated for KCAL, which as the L.A.
18 market, has successful sports franchises?

19 A. Well, certainly WGN is the entity that
20 has continued to pursue the super-station
21 designation, so to speak, but, you know, I
22 think it has been replicated in terms of when
23 you look at distant signal carriage. It is on
24 a much smaller station, but it has been
25 replicated.

1 Q. Why --

2 JUDGE STRICKLER: Excuse me. When you
3 say WGN has pursued the super-station model,
4 what does that mean? How do you pursue a
5 super-station model?

6 THE WITNESS: Well, they have gone
7 through the process of the programming
8 substitution as was mentioned and created sort
9 of a version of themselves, WGN America, for
10 national distribution.

11 JUDGE STRICKLER: Thank you.

12 THE WITNESS: None of the other
13 stations have done that.

14 JUDGE STRICKLER: Is that what TBS did
15 before it became a cable station?

16 THE WITNESS: I am not sure what the
17 substituted programming situation was prior to
18 it becoming a cable network on WTBS.

19 JUDGE STRICKLER: Thank you.

20 BY MR. OLANIRAN:

21 Q. Why isn't that carriage simply legacy
22 carriage?

23 A. Well, I think to some extent it may be
24 legacy carriage.

25 Q. Okay.

1 A. But legacy carriage is about retaining
2 subscribers and retaining subscribers is as or
3 more important to a cable operator, especially
4 these days, than attracting new subscribers.

5 Q. That's a fair point, but retaining
6 subscribers could also mean retaining small
7 amounts of subscribers by simply carrying WGNA?

8 A. Well, small amounts of subscribers are
9 very valuable.

10 Q. I don't -- I don't disagree with you
11 at all, but my point simply is is isn't it the
12 case that what's the carriage of WGNA is
13 attributable to the legacy -- to legacy
14 carriage for subscribers, however small?

15 A. I'm sorry, I didn't quite get your
16 question there.

17 Q. I am saying the -- the retransmission
18 of the -- the frequent retransmission of WGNA
19 could be attributable to the interest of -- to
20 satisfying the interest of a small number of
21 subscribers?

22 A. Well, I think you could say that about
23 many, many, many cable networks that are
24 carried for purposes of attracting and
25 retaining subscribers. So I don't think that's

1 really a distinction because the whole -- one
2 of the primary bases of cable television and
3 offering 3- to 400 channels is to offer broad
4 packages that satisfy the interest and needs of
5 relatively small groups of subscribers.

6 Q. Okay. So the answer to my question is
7 yes?

8 A. Well, the answer to your question is
9 WGN is similar in that respect to other cable
10 networks.

11 Q. Okay. And WGNA converted to a cable
12 network, I think, beginning in 2014, I think
13 concluded in 2015, correct?

14 A. That's correct, yes.

15 Q. Is there any sports on WGN
16 post-conversion?

17 A. No, there is not.

18 MR. OLANIRAN: That's all I have, Your
19 Honor.

20 JUDGE BARNETT: Thank you, Mr.
21 Olaniran.

22 Mr. Stewart, do you have four minutes
23 or less? You said a minute.

24 CROSS-EXAMINATION

25 BY MR. STEWART:

1 Q. Mr. Trautman, my name is John Stewart,
2 and I'm here representing the Commercial
3 Television Claimants in this proceeding.

4 I just had one question for you.
5 After responding to a question from Judge Feder
6 about whether you had seen any evidence in your
7 survey responses of a failure of your
8 respondents to understand the categories, you
9 went on to then talk about how in your
10 experience these respondents are well able to
11 understand the categories that you used.

12 And you named the movies category, the
13 syndicated programs category, the live sports
14 category, and the devotional category. Did you
15 omit the news and public affairs category
16 because you believe that your respondents would
17 have difficulty in understanding that category?

18 A. No, that was just an omission on my
19 part.

20 Q. Another example of the problem of
21 using examples. And that's all for me. Thank
22 you. Less than one minute, I would say.

23 JUDGE BARNETT: Huzzah, Mr. Stewart.
24 I think we have done enough today. At the risk
25 of beating this dead horse, please recall that

1 we will have a power outage from 6 p.m.
2 tomorrow until Tuesday morning. We have been
3 pursuing this all around the Library, and it
4 appears that the CRB website will not be active
5 because of the power outage.

6 But the electronic filing system,
7 which is hosted on a cloud, will be accessible.
8 You can't get to it through the Library,
9 through clicking through somehow -- I am not
10 sure you can even do that before -- but you can
11 either Google and scroll down or put in your
12 browser <https://app-crb.gov> and that should get
13 you, if should you need to do any filing during
14 the shutdown period.

15 We will be having a President's Day
16 holiday on Monday. We will reconvene on
17 Tuesday morning at 9:00 o'clock. Anything else
18 for the good of the order of this afternoon?
19 Mr. MacLean?

20 MR. MacLEAN: Your Honor, I just
21 wanted to raise a point about time. In our --
22 the parties' joint notice of allocation phase,
23 parties witness list and allocation of time, we
24 have -- we have agreed amongst ourselves on an
25 allocation. You haven't mentioned it yet, so I

1 just thought I would raise it to your
2 attention.

3 JUDGE BARNETT: Thank you.

4 MR. MacLEAN: I may not be the only
5 one in the room doing this, but I have been
6 recording time. And, you know, if anybody
7 wants to rebut me, that would be fine, but I
8 thought it would be useful so we can all stay
9 focused on hitting our -- keeping our
10 presentations directed and focused, if we -- if
11 we just keep track as we go.

12 JUDGE BARNETT: Thank you. I
13 appreciate that.

14 MR. MacLEAN: So my own estimate or my
15 own record here shows that JSC is currently at
16 153 minutes; CTV is currently at 37 minutes, up
17 from yesterday of 36 minutes.

18 (Laughter.)

19 MR. MacLEAN: PTV at 30 minutes; CCG
20 at 26 minutes; SDC at 34 minutes; my colleague
21 Arnie Lutzker having been the only person to
22 exceed his time on his opening statement
23 yesterday.

24 MR. GARRETT: Move to dismiss.

25 (Laughter.)

1 MR. MacLEAN: And Program Suppliers
2 are at 275 minutes.

3 JUDGE BARNETT: Thank you. We will
4 take that as your proffer, Mr. MacLean. I
5 don't want any written motions about correcting
6 that record, but I presume that you
7 professionals will all consult with one another
8 and make sure that you are in the ballpark as
9 far as your time allocations and that you will
10 continue to be so.

11 This is probably not the appropriate
12 time, and maybe I won't say anything about it,
13 but I will anyway, and that is in our statute,
14 there was -- there is a negotiated provision
15 regarding discovery in distribution
16 proceedings.

17 And I think maybe, in my litigation
18 experience, at least, even in multi-party
19 litigation, when there was a deposition one or
20 two lawyers at most were there for each party,
21 not four or five. And the deposition prepared
22 the examination and cross-examination for a
23 much more efficient presentation. Just saying.

24 If the issue should ever come up
25 again, you might want to consider discussing

1 the issue with your congressional committee and
2 reconsidering whether discovery might be --
3 deposition discovery might be appropriate in
4 distribution proceedings.

5 We understand why it was eliminated,
6 the goal being efficiency, but, you know, there
7 is efficiency; and there is efficiency. And
8 when you have five lawyers for each party in
9 the room as opposed to two at a deposition, you
10 know, there is a balance to be made.

11 So overstepping my bounds, no more, I
12 will say we are at recess until 9:00 o'clock on
13 Tuesday morning.

14 (Whereupon, at 4:31 p.m., the trial
15 recessed, to reconvene at 9:00 a.m. on Tuesday,
16 February 20, 2018.)

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1 C O N T E N T S

2 WITNESS: DIRECT CROSS REDIRECT RECROSS

3 JAMES TRAUTMAN

4 By Mr. Laane 233

5 By Mr. Olaniran 310

6 By Mr. Stewart 484

7

8 AFTERNOON SESSION: 350

9

10 CONFIDENTIAL SESSIONS: 357-373, 442-454

11

12 E X H I B I T S

13 EXHIBIT NO: MARKED/RECEIVED REJECTED

14 6020 through 6029 356

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CERTIFICATE

I certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

2-14-18

Date



Signature of the Court Reporter

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IN THE MATTER OF:)

) Docket No.

DETERMINATION OF CABLE) 14-CRB-0010-CD

ROYALTY FUNDS) (2010-2013)

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4 IN THE MATTER OF:)

5) Docket No.

6 DETERMINATION OF CABLE) 14-CRB-0010-CD

7 ROYALTY FUNDS) (2010-2013)

8 -----X

9 BEFORE: THE HONORABLE SUZANNE BARNETT

10 THE HONORABLE JESSE M. FEDER

11 THE HONORABLE DAVID R. STRICKLER

12

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

2 (9:05 a.m.)

3 JUDGE BARNETT: I will speak up a bit.

4 If you have not introduced yourselves, our
5 court reporter for the next few days is Joe
6 Strickland, and he is with the same outfit as
7 Ms. Brynteson. And I have been assured that he
8 is equally good, so we are in good hands.

9 (Laughter.)

10 JUDGE BARNETT: And I think we are
11 continuing with Mr. Trautman; is that right?

12 MR. DOVE: Yes, your Honor.

13 Whereupon--

14 JAMES TRAUTMAN,
15 a witness, called for examination, having previously
16 been duly sworn, was examined and testified further as
17 follows:

18 JUDGE BARNETT: Mr. Dove? We may want
19 to wait until we get some sound. I forgot to
20 mention that earlier.

21 (Pause.)

22 JUDGE BARNETT: We will step down for
23 a minute or two while we get our AV folks in to
24 take care of this. Sorry for the delay.

25 (A recess was taken at 9:07 a.m.,

1 after which the trial resumed at 9:51 a.m.)

2 JUDGE BARNETT: We will try very much
3 to speak up. I am a prime offender. I always
4 tend to swallow my voice. Please let me know
5 if you cannot hear me. Your patience, I hope,
6 will be rewarded.

7 In the past I have been a tyrant about
8 beverages in the hearing room, saying "water
9 only, closed tops." You might have noticed
10 last week we were bringing coffee out and I am
11 going to loosen that rule, as long as whatever
12 you have has a top on it, so if there is an
13 accident, we can minimize the damage. I will
14 not limit you to water only.

15 JUDGE STRICKLER: Still no alcoholic
16 beverages?

17 JUDGE BARNETT: No alcoholic
18 beverages. Only Judge Strickler has that.

19 JUDGE STRICKLER: I think it is in the
20 last period of the session. That's basically
21 it.

22 JUDGE BARNETT: I think we have
23 working microphones at the witness stand and
24 for the questioner. If you have an objection,
25 usually I'm focused on my screen, so stand up

1 and speak loudly so that we know you are there
2 and that the court reporter can pick up on it
3 as well.

4 Thank you, again, for your patience.
5 Mr. Dove.

6 CROSS-EXAMINATION

7 BY MR. DOVE:

8 Q. Good morning, Mr. Trautman. My name
9 is Ron Dove and I represent the Public
10 Television Claimants. And as I'm sure you may
11 guess, most of my questions will relate to how
12 the Bortz survey handles Public Television.

13 So to start things off, I want to ask
14 you about how Public Television's results in
15 2010 to '13 compare to those from 2004 and '05.
16 Did you make that comparison in your report?

17 A. I did. The results averaged
18 approximately 5.1 percent over the four-year
19 period from 2010 to 2013, and that compares
20 with 3.6 percent in 2004-'05.

21 Q. And so according to your Bortz
22 surveys, Public Television's relative
23 marketplace value has increased since the last
24 proceeding?

25 A. That would be correct, yes.

1 Q. In fact, if you did a map, according
2 to your report the Bortz survey shows on
3 average 40 percent increase in the relative
4 value of Public Television from 2004-'05 to
5 2010 to '13, correct?

6 A. Correct.

7 Q. And now I want to ask you about some
8 choices you made when selecting the Bortz
9 survey's sample. The Bortz survey uses a
10 stratified random sample; is that correct?

11 A. Yes, it is.

12 Q. But really the Bortz survey has two
13 samples: What you call an original sample and
14 what you call a final eligible sample; is that
15 correct?

16 A. Yes.

17 Q. And the original sample is the
18 stratified random sample; correct?

19 A. Yes, that is the starting point for
20 the stratified random sample, yes.

21 Q. And then the final eligible sample are
22 the cable systems you actually tried to survey;
23 correct?

24 A. Correct.

25 Q. But there is a difference between the

1 original sample and the final eligible sample;
2 right?

3 A. Yes, there is.

4 Q. Your final eligible sample excludes
5 some of the cable systems that were in the
6 original sample; correct?

7 A. Yes, it excludes those that carry no
8 distant signals as well as those that carry
9 only Public Television or only Canadian
10 signals.

11 Q. So just to be clear, there were cable
12 systems in your random sample that chose to
13 carry only Public Television signals on a
14 distant basis; correct?

15 A. Correct.

16 Q. And you deleted those systems from
17 your survey; correct?

18 A. Yes, we -- I'm sorry, I shouldn't say
19 deleted. We excluded them from our eligible
20 sample.

21 Q. What's the -- I think you may have
22 used the word "discarded" in your report. What
23 is the difference between deleted, discarded,
24 excluded?

25 A. Well, maybe there is not a difference,

1 but I just used the term "excluded," because we
2 selected them and then excluded them on the
3 basis that as a single category, it was not
4 appropriate to apply the constant sum survey
5 methodology in the context of those types of
6 systems.

7 Q. I'm going to talk in a moment about
8 sort of why you decided to exclude those
9 systems, but I wanted to get some numbers into
10 the record. So if you could turn to, I guess,
11 your written Exhibit 1001, page 13. There is a
12 footnote in table Roman II-1, and I want to
13 focus in on that and the numbers in that
14 footnote.

15 Mr. Trautman, in 2010, there were 15
16 systems in your original sample that had chosen
17 to carry only Public Television distant
18 signals; correct?

19 A. That's correct.

20 Q. And you discarded them all; correct?

21 A. That is correct.

22 Q. In 2011, there were 17 systems in your
23 original sample that had chosen to carry only
24 Public Television distant signals; correct?

25 A. Yes.

1 Q. And you discarded them all; right?

2 A. Correct.

3 Q. Also in 2011, there were another four
4 systems in your original sample that carried
5 both Public Television and Canadian distant
6 signals and no other distant signals, and you
7 discarded them as well; correct?

8 A. Yes.

9 Q. In 2012, there were nine systems in
10 your original sample that had chosen to carry
11 only Public Television distant signals and you
12 discarded all of those; correct?

13 A. Correct.

14 Q. And in 2012, there were also two
15 systems in your original sample carrying both
16 Public Television and Canadian distant signals,
17 both of which you discarded; correct?

18 A. Correct.

19 Q. In 2013, there were 11 systems in your
20 original sample that chose to carry only Public
21 Television distant signals and you discarded
22 those; correct?

23 A. Correct.

24 Q. In 2013, there were two systems in
25 your original sample that carried both Public

1 Television and Canadian distant signals and you
2 discarded both of those; correct?

3 A. Yes, that's correct.

4 Q. Did Bortz call or try to survey any of
5 those 60 systems we just talked about that were
6 discarded from the Bortz survey?

7 A. We did not.

8 Q. Did you attempt to make any adjustment
9 at all in your written Direct Testimony that
10 would give any value to those discarded distant
11 carriage instances of Public Television?

12 A. I'm sorry; could you repeat that --
13 repeat that?

14 Q. Sure, did you attempt to make any
15 adjustment in your written Direct Testimony
16 that would give any value to that discarded
17 distant carriage of Public Television?

18 A. No, we acknowledged the need to make
19 an adjustment relative to those systems, but we
20 did not attempt to make one.

21 Q. So in your opinion, it is appropriate
22 -- strike that.

23 In your opinion, it is appropriate to
24 adjust the Bortz survey estimates in your
25 report to account for the fact that you

1 discarded these systems that carry Public
2 Television on a distant basis?

3 A. Yes, it is.

4 Q. While we are on this topic, I would
5 like to direct your attention to Table
6 Roman IV-8 of your written Direct Testimony,
7 which I -- wait for it. Okay -- which as I
8 understand it is a ranking of categories in
9 order of importance based on Bortz warmup
10 question Number 2. Is that your understanding
11 of this table?

12 A. Yes, it is.

13 Q. And I believe you testified earlier
14 that Public Television's average ranking was
15 between 4 and 5. Do you recall that?

16 A. I'm not sure of the specifics, but
17 that appears to be accurate.

18 Q. But that didn't include any responses
19 -- strike that.

20 But the numbers here in this table did
21 not include any responses from cable systems
22 that only carried Public Television distant
23 signals; correct?

24 A. No, it did not.

25 Q. Those systems, by definition, would

1 have given Public Television a Number 1
2 ranking; isn't that right? Because it was the
3 only distant programming being carried?

4 A. Well, if -- again, that's the problem
5 with attempting to conduct a survey where only
6 one category is available when you are trying
7 to make comparative judgments. There is
8 nothing to compare it to.

9 Q. I understand that that is your
10 rationale. But if -- if those Public
11 Television-only distant signals had been
12 included and the cable systems that had carried
13 only Public Television had been included and
14 followed the instructions under this question,
15 by definition, they would have had to have
16 received a Number 1 ranking; correct?

17 A. That would -- would be correct. There
18 would be one ranking possibility and that would
19 be the Number 1.

20 Q. And that would have improved Public
21 Television's position on this table of
22 averages; correct?

23 A. Presumably, it could have, yes. I
24 haven't thought about it that way, but.

25 Q. But it would have; correct? Just

1 simple math. If 60 systems, or whatever the
2 number is of systems, gave Public Television a
3 Number 1 ranking in this questionnaire, it
4 would improve Public Television's ranking in
5 this table; correct?

6 A. Yeah, that's really not a correct
7 comparison, because we don't complete
8 interviews with all of the systems. So it
9 would be actually a pretty small number in each
10 year and so it would modestly affect the rank,
11 yes.

12 Q. Let's talk now about why you deleted
13 from the Bortz survey all of the cable systems
14 that distantly carried only Public Television.
15 Isn't the purpose of the Bortz survey to
16 determine cable operators' relative valuations
17 of the different categories of programming on
18 the distant signals they carry?

19 A. Yes, it is.

20 Q. So in other words, a cable operator
21 who follows the Bortz survey instructions
22 should assign no value to any category of
23 programming that the cable system did not
24 carry; correct?

25 A. That is correct.

1 Q. So if a respondent cable operator did
2 not carry Sports or Public Television, the
3 respondent is not supposed to assign any value
4 to Sports or Public Television; correct?

5 A. That's correct. They're not given
6 that option.

7 Q. If a respondent carried only five of
8 the seven categories of distant programming,
9 would that respondent have been told about all
10 of the possible categories of programming or
11 just the five?

12 A. Just the five.

13 Q. Now, my understanding is that Bortz
14 specifically identified to each respondent the
15 specific signals that their cable system
16 carried; correct?

17 A. That's correct.

18 Q. Why did you do that?

19 A. We sought to have them respond based
20 on the distant signals that they actually
21 carried and the programming on those signals.

22 Q. So, in fact, Bortz, as I understand
23 it, specifically identified the particular
24 distant signals to each respondent not once,
25 but twice; correct?

1 A. That's correct, yes. And in the case
2 of Public Television, more than twice. As well
3 as Canadian.

4 Q. And the Bortz interview only told
5 these respondents about the particular
6 categories that the respondent's system
7 actually carried; correct?

8 A. That's correct, yes.

9 Q. And when asking the key valuation
10 question, the interviewer asked each respondent
11 to assume that his or her system spent a
12 fixed-dollar amount to acquire programming
13 actually broadcast during the relevant year by
14 the stations the interviewer listed; correct?

15 A. That's correct.

16 Q. And the interviewer then stated,
17 "Please write down your estimates and make sure
18 they add to 100 percent"; correct?

19 A. That's correct.

20 Q. And Bortz interviewers were instructed
21 specifically that percentages must add to
22 100 percent; correct?

23 A. That's correct.

24 Q. What happened if a respondent's
25 percentages added up to only, let's say,

1 60 percent?

2 A. I don't believe that happened, but in
3 the event, let's say, that the respondent's
4 percentages added up to 95 percent or
5 105 percent, the responses -- the respondents
6 were prompted such that their responses should
7 be adjusted to add up to 100 percent.

8 Q. So just to be clear, the Bortz
9 interviewers were told that they must prompt
10 the respondent if their valuations did not add
11 to 100 percent?

12 A. That's correct.

13 Q. And, in fact, the Bortz interviewers
14 kept prompting their respondents until their
15 valuations added up to 100 percent exactly;
16 correct?

17 A. Yes. I can't recall any instance
18 where there had to be more than one prompt.
19 But that would be the case if there was.

20 Q. Why did you have the Bortz
21 interviewers make sure that the respondent's
22 valuations add up to 100 percent exactly?

23 A. That's the basis of the constant sum
24 methodology, is that we are attempting to
25 allocate value across a fixed constant sum. In

1 this case, 100 percent.

2 Q. So if a respondent followed the Bortz
3 survey instructions and the respondent's cable
4 system only carried distant programming in one
5 category, then that respondent would have to
6 assign 100 percent of its fixed-dollar budget
7 to only that one category of programming as a
8 matter of methodology; correct?

9 A. Well, you're expressing it as a matter
10 of methodology. The constant sum technique is
11 intended to be a comparative value methodology.
12 So that is its primary use and primary purpose.
13 So I don't believe that a single category is an
14 appropriate use of the methodology.

15 But if it were applied and they were
16 prompted to reach 100 percent, it certainly --
17 I think it would be a very confusing process
18 and question and I wouldn't advise doing it.
19 And I believe it's inappropriate; that's why we
20 didn't do it. But it is likely that they would
21 at some point get to 100 percent.

22 JUDGE STRICKLER: Excuse me. Can I
23 ask a question?

24 JUDGE BARNETT: Sure.

25 JUDGE STRICKLER: I understand your

1 answer with regard to how difficult or
2 impossible you think it might be to determine
3 relative value if you only had Public
4 Television as the only distantly retransmitted
5 programming. But going to the footnote on page
6 13, Table 2-1, that was shown to you
7 previously -- page 13 of the Bortz report --
8 you also point out that you discarded stations
9 that carried PBS and Canadian signals. You
10 could certainly get a relative value there,
11 because you have more than one; right?

12 THE WITNESS: You're correct about
13 that. That could be considered. That's
14 obviously a very small number of signals. I
15 believe that the Horowitz survey attempted to
16 do that and found one such signal across
17 four years. But it conceivably could be
18 considered in those instances.

19 JUDGE STRICKLER: Because it could be
20 conceivably considered in those instances, why
21 was it discarded?

22 THE WITNESS: That was the practice
23 that we have pursued, based on the distinction
24 of the PBS-only and the Canadian-only signals.
25 And as I indicated, the PBS and Canadian

1 combination is rare. I could acknowledge that
2 we could consider doing that.

3 JUDGE STRICKLER: Did you have any
4 other instances where you had just two of the
5 categories within the distantly retransmitted
6 stations, but you did decide to include those
7 stations in your survey?

8 THE WITNESS: No, the minimum
9 otherwise was four categories.

10 JUDGE STRICKLER: Thank you.

11 BY MR. DOVE:

12 Q. Just following up on Judge Strickler's
13 question, it wouldn't take you that much time
14 to call those cable systems that carried both
15 Canadian and a Public Television distant
16 signals; correct?

17 A. No, it would not. I mean, certainly
18 there is effort required to reach them, but in
19 the context of the broader survey, it would not
20 be substantial.

21 Q. Have you ever run across an instance
22 where -- let's take an independent station, for
23 example, being carried by a cable system. Has
24 there ever been an instance where that
25 independent station only carried one type of

1 programs? For example, no sports on it and no
2 devotional, so all that is left is Program
3 Suppliers' programming during the years that
4 you worked on these surveys?

5 A. We do not obtain programming
6 information for each and every signal, so it's
7 difficult to determine that. We've attempted
8 to ensure in instances where we are going to
9 ask the sports category whether there was
10 sports programming. The other categories, it's
11 been our experience -- I believe there was a
12 requirement by the FCC that stations have local
13 programming, locally-produced programming. So
14 there has got to be at least that category.

15 Certainly, we expect that there would
16 be some Program Supplier programming on nearly
17 all stations. So I think really the only one
18 that could conceivably be an issue in most
19 instances where an independent in the example
20 that you gave could be Devotional programming.
21 Although, we are certainly aware that the vast
22 majority of stations have some Devotional
23 programming as well, to my knowledge.

24 Q. Unlike with the sports programming,
25 you don't make an effort to sort of exclude

1 that category if you know there is no
2 devotional being carried?

3 A. Well, what I would say is that it
4 would be cost-prohibitive for us to evaluate
5 the programming -- in the time frame that we're
6 trying to get the survey completed to evaluate
7 the programming on each and every -- each of
8 however many hundred signals we are dealing
9 with.

10 Q. Turning back for a moment to those
11 situations where there is only, you know, one
12 type of programming being carried, either
13 Canadian programming or Public Television
14 programming. Under those circumstances, there
15 would be no reason to actually call the cable
16 operators who carry only one category of
17 distant programming; correct?

18 A. Well, I mean --

19 Q. You already know what they are
20 required to say under your methodology to do
21 it, so there is no reason to do it; right?

22 A. I think that if you're going to do it
23 in the context of a survey, you probably should
24 call them. But, again, I don't -- I don't
25 support that methodology with a comparative

1 value judgment.

2 I've certainly acknowledged that
3 that's, in effect, what the McLaughlin
4 adjustment -- that I'm sure we will talk about
5 at some point -- does is make a presumption
6 about how individuals would respond to the
7 survey, if asked.

8 Q. Now, let's turn to a slightly
9 different topic about the methodological
10 changes you've made over the years to the Bortz
11 surveys. You had -- in reading your report, I
12 understand that you have made a number of
13 methodological changes to the Bortz surveys; is
14 that correct?

15 A. That's correct.

16 Q. And you made methodological changes
17 to, quote, "Ensure the survey results provide
18 the best possible estimates of relative market
19 value"; correct?

20 A. Correct.

21 Q. And some of your methodological
22 changes to the Bortz surveys were made in
23 response to issues raised in prior Cable
24 Royalty Distribution Proceedings; correct?

25 A. That's correct.

1 Q. And, in fact, following the Judges'
2 Phase One determination in the 2004-'05
3 distribution proceeding, you made at least five
4 methodological changes to the Bortz survey;
5 correct? We can turn to Exhibit 1001, page 2.
6 I think you list those changes. Do you see
7 that?

8 A. Yes. That's correct.

9 Q. Have you read the Judges' Phase One
10 determination in the 2004-'05 distribution
11 proceeding?

12 A. Yes, I have.

13 Q. And do you recall what the Judges
14 concluded about the Public Television Bortz
15 survey shares?

16 A. You will have to point me to something
17 specific.

18 Q. All right. We will do that. I'm
19 going to read two sentences from the Judges'
20 2004-'05 final determination dated July 21st,
21 2010, and ask you a few questions. If we could
22 pull up Slide 18.

23 JUDGE BARNETT: Mr. Lutzker?

24 MR. LUTZKER: Your Honor, I have an
25 objection. He is asking the witness to

1 essentially interpret the Judges' prior
2 Opinion.

3 JUDGE BARNETT: Well, I haven't heard
4 a question yet. I don't know what he is asking
5 the witness to do. Mr. Dove?

6 MR. DOVE: I'm not going to ask him to
7 interpret the Opinion. I am going to ask him
8 the impact of the Opinion on whether he decided
9 to make a methodological change or not.

10 JUDGE BARNETT: That is permissible.
11 Thank you, Mr. Lutzker.

12 BY MR. DOVE:

13 Q. Mr. Trautman, I would like to direct
14 your attention to two sentences from this
15 Opinion which I have highlighted on the slide
16 which reads, "Because the Bortz methodology
17 calls for surveying cable systems that contain
18 at least one U.S. independent or network
19 signal, cable systems which carry PTV-only or
20 Canadian-only distant signals are excluded from
21 the survey sample. The exclusion of such cable
22 systems clearly biases the Bortz estimates
23 downward for PTV and Canadian programming." Do
24 you see that?

25 A. I see that.

1 Q. When you were making changes to the
2 Bortz survey for the years 2010 to 2013, were
3 you aware that the Judges had made the
4 statement I just read in the 2004-'05 final
5 determination?

6 A. Yes, I was.

7 Q. When you were making changes to the
8 Bortz survey for the years 2010 to 2013, were
9 you aware that the Judges' 2004-'05 final
10 determination also stated that this bias
11 against Public Television and the Canadian
12 Claimants is troubling and that the Bortz
13 survey may well be improved in this regard?

14 A. I believe I do recall some language to
15 that effect, as I've explained. It's been our
16 determination that that is not an appropriate
17 application of the constant sum survey
18 technique. We have acknowledged the need to
19 make an adjustment based on that fact.

20 Q. And you acknowledge the need to make
21 the adjustment, but my understanding is that
22 you did not actually attempt to make such an
23 adjustment yourself in your written Direct
24 Testimony; correct?

25 A. I provided something in my written

1 Rebuttal Testimony --

2 Q. That is not my question. My question
3 is when you actually prepared your testimony
4 for submission to this Panel, you did not make
5 an adjustment for Public Television or Canadian
6 Claimants distance; is that correct?

7 A. No, we acknowledged the need to make
8 an adjustment, but we did not present such an
9 adjustment in my written Direct Testimony.

10 Q. Were you aware at the time you made
11 changes to the Bortz survey for 2010 to 2013,
12 that the Judges' 2004-'05 Final Basic Funds
13 Awards to Public Television were roughly double
14 the 2004-'05 Bortz survey results for Public
15 Television?

16 A. I'm just thinking about what the
17 awards were compared to the Bortz survey.

18 Q. Why don't we go to page 6, table Roman
19 I-2.

20 A. Yes, I see that that's correct. I
21 believe that has to do with the Syndex Fund
22 adjustment, as well as an adjustment to the
23 Bortz survey results. But I am aware of that.

24 Q. But at the end of the day, the Final
25 Basic Fund Awards percentage for Public

1 Television were roughly double what the Bortz
2 survey results were for Public Television;
3 correct?

4 A. In these two years, yes.

5 Q. But, again, your methodological
6 changes to the Bortz survey for the year 2010
7 to 2013 did not address this bias that the
8 Judges referred to in their opinion; correct?

9 MR. LAANE: Asked and answered, your
10 Honor.

11 JUDGE BARNETT: Sustained.

12 BY MR. DOVE:

13 Q. You addressed at least five other
14 problems, but not this one; correct?

15 A. We did not address this issue.

16 Q. But you did address five other
17 problems; correct?

18 A. We attempted to address other
19 problems; in some cases partially and in some
20 cases, hopefully fully.

21 Q. So as I understand it, the Bortz
22 survey shares for the years 2010 to '13, are
23 not the amounts you think the Judges should
24 directly award in this proceeding; correct?

25 A. I've acknowledged that an adjustment

1 needs to be made to the Public Television
2 shares as compared with the Bortz survey
3 results.

4 JUDGE FEDER: Excuse me.
5 Mr. Trautman, acknowledging that, why didn't
6 you propose an adjustment?

7 THE WITNESS: Well, I think that, as I
8 indicated, we have suggested an adjusted amount
9 in my Rebuttal Testimony. But our survey is
10 our survey. It generates the survey results.
11 And it was my determination to not report an
12 adjustment directly in summarizing the survey's
13 results, because the survey does not evaluate
14 those circumstances -- those PTV-only and
15 Canadian-only systems.

16 JUDGE FEDER: Okay.

17 BY MR. DOVE:

18 Q. While we are on this, Mr. Trautman, at
19 this point I would like to correct the record
20 on something. I think Mr. Laane put up
21 Table 10 from your Rebuttal Testimony last week
22 and asked you whether that was the same
23 adjustment that the Judges used in the 2004-'05
24 proceeding, and I believe you said it was. And
25 so I want to look at that now.

1 So, again, this is Table 10 from your
2 Rebuttal Testimony, Exhibit 1002. And again, I
3 believe you testified that this adjustment that
4 you made -- and indeed you just talked about --
5 was the same adjustment that the Judges used in
6 the 2004-'05 proceeding, but that is not true,
7 is it?

8 A. Well, it's the -- it's the same
9 methodology. It adjusts based on the PTV-only
10 systems, it assigns a value to those systems,
11 and then adjusts further for the Syndex Fund
12 issues.

13 Q. But there is a big difference, isn't
14 there, from the way the Bortz survey was
15 adjusted under the McLaughlin-Blackburn -- the
16 McLaughlin approach in 2004-'05 and the way
17 that you've adjusted the Bortz survey results
18 here; is that correct?

19 A. This approach -- the
20 McLaughlin-Blackburn approach assumes a
21 100 percent response to Public Television.
22 This adjustment is based on the actual survey
23 responses for PTV-only systems obtained in the
24 Horowitz survey.

25 Q. So I thought you testified last week

1 that you can't really rely on the Horowitz
2 survey to any degree, except maybe to confirm
3 that Sports is the most valuable programming.
4 Didn't you testify to that effect?

5 A. I did testify to that effect.

6 Q. But it seems here that you are relying
7 on that Horowitz survey for an additional
8 purpose, as well?

9 A. I wouldn't say I'm relying on it; I'm
10 using it as an indicator to consider the
11 possibility -- let me back up a minute.

12 To understand the McLaughlin
13 methodology, while it is performed in the
14 context of Bortz survey responses, what it
15 ultimately does is simply takes -- because the
16 surveys ultimately project to royalties, what
17 it does really is simply just ultimately take
18 the total royalties paid by systems that carry
19 only PTV and add those to the estimated
20 royalties for the PTV category obtained from
21 the Bortz survey. It goes through a process in
22 order to get there that links it to Bortz
23 survey responses and that type of thing, but
24 that's ultimately what it does.

25 And this is an effort to consider a

1 possibility in which, due to the nature of
2 those systems, perhaps the full royalty amount
3 should not be attributed to Public Television.

4 Q. We are going to go into more detail on
5 sort of your use of the Horowitz information in
6 that fashion. But just to be clear, in
7 reality, these numbers here in Table 10 are
8 not, you know, the same thing as the numbers in
9 from -- strike that.

10 In reality, these revised
11 McLaughlin-Blackburn augmented Bortz basic fund
12 shares that you have here in Table 10 are not
13 the same -- I believe you said at the hearing,
14 it's not the same adjustment as was made by
15 McLaughlin and accepted by the Panel in the
16 2004-'05 proceeding; correct?

17 A. Well, I would say it is the same
18 adjustment method; it just doesn't
19 automatically presume a 100 percent or full
20 royalty allocation for those systems.

21 Q. And McLaughlin's methodology does
22 assume 100 percent; correct?

23 A. That's correct.

24 Q. And so and Mr. Horowitz' methodology
25 assumes 100 percent, as well, as he applies it

1 in his report?

2 A. Yes, he changes the answers he got
3 from his respondents, which I have never seen
4 in survey research, and presumes that they
5 responded differently.

6 Q. And he presumes that because they were
7 the only -- that Public Television was the only
8 type of programming that was carried, that
9 they, by definition, would get 100 percent;
10 correct?

11 A. Well, he didn't ask a constant sum
12 question for these respondents, because he
13 didn't instruct them that the response needed
14 to equal 100 percent. So it was a different
15 methodology than he used for all of the other
16 systems he interviewed.

17 He obtained responses that were, in
18 three-fourths of the cases, less than
19 100 percent; sometimes as low as 5 percent. He
20 checked that with the respondents on multiple
21 occasions and they stayed with those responses.
22 And then in reporting -- in calculating the
23 weighted results to his survey, he presumed
24 that they had instead answered 100 percent.

25 Q. But you thought he did a good job with

1 regards to the survey of Public Television --
2 for the Public Television category, but not a
3 good job in how they surveyed, for example,
4 other categories; correct?

5 A. No, I wouldn't say he did a good job
6 in surveying for the Public Television category
7 at all.

8 Q. While we're on the topic of the
9 Judges' 2004-'05 adjustment of the Bortz
10 survey, I want to show you a graph from your
11 written Direct Testimony. It's figure Roman
12 I-2. My question is: Is the graph in your
13 testimony incorrect as to Public Television?
14 It's on page 6.

15 A. Sorry; I was just confused by the
16 labeling and making sure that I was looking at
17 the correct thing.

18 I believe -- I believe that the graph
19 is correct.

20 Q. Well, your figure -- this Figure I-2
21 mistakenly shows Public Television receiving an
22 award of roughly half of their Bortz survey
23 results for 2004, doesn't it? And that's not
24 true. Public Television?

25 A. No, you are correct. That is not

1 true. For the PTV category, it should be
2 reversed.

3 Q. How about the Devotionals category?

4 A. Yes, that should be reversed, as well.

5 Q. So, in fact, for 2004, the Judges
6 awarded Public Television roughly double their
7 Bortz survey results; correct?

8 A. Yes, as we've already discussed.

9 Q. And, in fact, for 2004 the Judges
10 awarded Devotionals roughly half of their Bortz
11 survey results; correct?

12 A. That's correct.

13 Q. Just so the record is clear, would you
14 be willing to prepare a corrected graph and ask
15 Counsel to file that as an exhibit for the
16 record?

17 A. Yes, I would.

18 Q. Thank you. Okay. Mr. Trautman, I now
19 want to shift gears and ask a few questions
20 about WGN. WGN was the most widely carried
21 distant signal during the 2010-'13 period;
22 correct?

23 A. Correct.

24 Q. And two of the next four most widely
25 carried signals were Public Television signals;

1 correct?

2 A. That is correct, yes.

3 Q. But WGN was available on a distant
4 basis to 41 million, or more, of the 53 to 57
5 million cable subscribers during 2010 to '13;
6 correct? And I'm going to page 25, is where I
7 got those numbers from your written Direct
8 Testimony.

9 A. Yes, that's -- I'm aware that is
10 correct, yes.

11 Q. In 2010 to 2013, only about 15 percent
12 of the programming hours on WGNA were
13 compensable; correct?

14 A. I've looked at it in the context of
15 category-by-category.

16 Q. If you could pull up page 28, Table
17 Roman III-2.

18 A. Yes, on average, that's correct.

19 Q. And by contrast, back in 2004-'05 more
20 than 30 percent of the programming hours on
21 WGNA were compensable; correct?

22 A. That's correct.

23 Q. So the total amount of compensable
24 programming on WGNA is half of what it was in
25 2004-'05; correct? About half?

1 A. Approximately half, yes.

2 Q. In other words, in what was by far the
3 most widely carried distant signal, the amount
4 of compensable programming fell by half, since
5 2004-05, down to 15 percent?

6 A. That is correct, yes.

7 Q. Now the Judges observed in the last
8 proceeding that respondents to the 2004-'05
9 Bortz surveys may have attributed value to
10 programming on WGN that was not compensable;
11 correct?

12 A. Yes, they did.

13 Q. And so one of your methodological
14 changes, as I understand it, in the Bortz
15 survey for 2010 to '13 was intended to reduce
16 the impact of the 85 percent of programming on
17 WGNA that is not compensable; correct?

18 A. Yes, we sought with WGN-only systems
19 to ask them only about the compensable
20 programming.

21 Q. So you did that by providing specific
22 information about the compensable programming
23 on WGN to certain respondents; right?

24 A. That's correct.

25 Q. But you didn't provide that

1 information about compensable programming to
2 all of the respondents, did you?

3 A. No, we did not.

4 Q. In fact, Bortz did not provide that
5 information about compensable programming to a
6 single respondent who was asked to value Public
7 Television programming; correct?

8 A. That's correct. It was limited only
9 to systems that carried only WGN as a distant
10 signal.

11 Q. But most cable systems that carry WGN
12 also carry other distant signals, as well, and
13 not just WGN; correct?

14 A. That is correct.

15 Q. So for example, the Bortz survey did
16 not inform any respondent who carried both WGN
17 and Public Television on a distant basis that
18 85 percent of the WGN programming was not
19 compensable and should be disregarded; correct?

20 A. We did not inform them that, no.

21 Q. Now, it's your testimony, right, that
22 the Bortz survey values for Joint Sports
23 Claimants and the Commercial Television
24 Claimants are likely to be understated because
25 of the noncompensable WGN programming in the

1 Program Suppliers and Devotional categories;
2 correct?

3 A. Yes, because all of the programming on
4 WGN for the JSC and Commercial Television
5 categories that is on WGN America is, in fact,
6 compensable.

7 Q. Is it fair to say that the Bortz
8 survey values for Public Television are also
9 understated because of the noncompensable WGN
10 programming in the Program Suppliers and
11 Devotional Categories?

12 A. Well, I don't really think so, because
13 there is a counterbalancing issue at work here,
14 which is that WGN is available on distant basis
15 to all of a cable television system's
16 subscribers, in most instances. Whereas, many,
17 if not most -- in fact, I think probably a
18 large majority of Public Television signals are
19 only available to a relatively small percentage
20 of the system's subscribers. So there is a
21 counterbalancing issue at work there with
22 respect to Public Television.

23 Q. So you don't think this compensability
24 issue on WGN has any bearing on Public
25 Television's share?

1 A. I think it has a bearing, but I think
2 the other issue has a bearing, as well. I
3 think Public Television -- we treat, in our
4 survey, signals equally in terms of their
5 presentation to the respondent. And as you
6 indicated, there is a compensability issue with
7 respect to WGN and there is a reach issue with
8 respect to many of the Public Television
9 stations. And those are, I would say,
10 counterbalancing factors to a degree.

11 Q. But I'm not asking you about that
12 other factor. We can talk about that later.
13 But right now I'm asking about the
14 compensability issue on WGN. And is it fair to
15 say that the Bortz survey values for Public
16 Television are also understated because of the
17 noncompensable WGN programming in the Program
18 Suppliers and Devotional categories?

19 A. I can't really say that one way or the
20 other.

21 Q. If I could direct your attention now
22 to your Rebuttal Testimony, page 48. If you
23 could pull up lines 2 to 4. And I want to read
24 your response there that is on the screen.

25 "Further, it is important to note that

1 the results of both surveys overstate the
2 Program Suppliers and Devotional shares at the
3 expense of JSC, CTV and PTV, due to the WGNA
4 compensability issue, which is not fully
5 accounted for in either survey." Do you see
6 that?

7 A. Yes.

8 Q. So would you wish to change your
9 testimony on this point?

10 A. Well, certainly there I'm
11 acknowledging that it likely -- that the
12 Program Suppliers and Devotional noncompensable
13 programming issue likely does affect PTV. I
14 would say it affects primarily JSC and CTV,
15 because of the direct comparison on WGN.
16 But --

17 Q. But as a matter of mathematics, it
18 affects Public Television, as well; right?

19 A. It could, yes.

20 Q. Let's now turn to the Horowitz survey.
21 I think we've already touched on this a little
22 bit, but -- well, actually not. I want to talk
23 about how Horowitz deals with the WGN issue.

24 How did the Horowitz survey handle the
25 issue of noncompensable programming on WGN?

1 A. They provided a general instruction
2 about -- and I'm not going to get the quote
3 exactly right -- but about substituted or
4 blacked-out programming.

5 Q. In your opinion, is that a design flaw
6 of the Horowitz survey that inflates the shares
7 of Program Suppliers and Devotional Claimants
8 at the expense of the other parties?

9 A. Well, I think it's a meaningless
10 instruction. I think that respondents, as I've
11 testified previously, don't have any reason to
12 think about and compare the programming on WGN
13 America as opposed to that on WGN Chicago and,
14 therefore, the instruction -- while they might
15 be aware that there is some blacked-out
16 programming and substituted programming on WGN
17 America, they have no reason to be aware of
18 which programming that is.

19 Q. And do you believe it's a design flaw
20 of the Horowitz survey that they do it that
21 way, as opposed to some other way?

22 A. Well, I believe it's no different from
23 the Bortz survey in the case of systems that
24 carry WGN and other distant signals. I believe
25 it is a difference and a flaw relative to the

1 way in which we treated WGN-only systems.

2 Q. Mr. Trautman, would you please turn to
3 the Table of Contents of your written Rebuttal
4 Testimony. The heading for Section 3-C is
5 quote, "The higher valuations accorded Program
6 Suppliers and PTV by the Horowitz surveys are
7 attributable to design flaws in the Horowitz
8 surveys." Do you see that?

9 A. I do.

10 Q. And then in that Section 3-C you make
11 three criticisms of the Horowitz surveys;
12 correct?

13 A. Correct.

14 Q. The first criticism is failure to
15 account for compensable programming on WGNA.
16 Do you see that?

17 A. Yes.

18 Q. And we've already talked about that
19 one; right?

20 A. Yes.

21 Q. Did that design flaw in the Horowitz
22 survey give Public Television a higher
23 valuation?

24 A. No. We actually consider the design
25 flaws with respect to PTV later in the report.

1 Q. So is it fair to say that this heading
2 for Section C is inaccurate?

3 A. No, I think it's -- it's accurate.
4 It's just that the discussion about the
5 PTV-specific design flaws takes place later in
6 the testimony.

7 Q. But it certainly doesn't -- I just
8 want to make sure I understand. I understand
9 you have additional criticisms later in your
10 report, but right now I want to focus on this
11 section of the Horowitz -- the Horowitz report
12 and your criticisms.

13 So first, you know, let's go back.
14 The criticism of failure to account for
15 compensable programming on WGNA, that is a
16 design flaw, but you say it did not give Public
17 Television a higher valuation?

18 A. That's correct. Section 3-C does not
19 deal directly with PTV design flaws, as I think
20 I've indicated.

21 Q. Well, if Section 3-C does not deal
22 directly with PTV -- with design flaws relating
23 to PTV, why are the words "and PTV" in that
24 heading?

25 A. Well, I think the statement in 3-C is

1 correct. I think that the specific design
2 flaws related to PTV, the discussion of those
3 is deferred until Section 5 of the Rebuttal
4 Testimony.

5 Q. So just so I am clear, none of the
6 design flaws that are actually referenced in
7 3-C -- 3-C Number 1, 3-C Number 2 or 3-C
8 Number 3, none of those have an impact, a
9 negative impact on Public Television's share;
10 correct?

11 A. I think that's what I just said, but
12 yes.

13 Q. Hold on a second.

14 My colleague tells me the record may
15 be a little confused, so I want to walk through
16 this one more time to get it right.

17 The first criticism under 3-C-1 is,
18 "Failure to account for compensable programming
19 on WGNA." And we've already talked about that
20 one; correct?

21 A. Correct.

22 Q. Did that design flaw in the Horowitz
23 survey give Public Television a higher
24 valuation?

25 A. It did not.

1 Q. In fact, isn't that a design flaw that
2 biased the study against Public Television?

3 A. Again, I believe it biased it against
4 other categories to a greater degree, but
5 perhaps some effect on Public Television, as
6 well.

7 Q. Your second criticism in this section
8 is, "Improper addition of the other sports
9 category"; correct?

10 A. Correct.

11 Q. Did that design flaw in the Horowitz
12 survey give Public Television a higher
13 valuation?

14 A. No, it did not.

15 Q. In fact, isn't that a design flaw that
16 biased the study against Public Television?

17 A. That -- that design flaw biases the
18 study against all of the other categories.

19 Q. Including Public Television; correct?

20 A. Yes.

21 Q. Your third criticism of the Horowitz
22 survey is, "Misleading examples and
23 descriptions of Program Suppliers'
24 programming"; right?

25 A. Correct.

1 Q. Did that design flaw in the Horowitz
2 survey give Public Television a higher
3 valuation?

4 A. I've focused my analysis of examples
5 primarily on the Program Suppliers categories,
6 and certain other categories. But I would not
7 say that I would believe that it gave Public
8 Television a higher value, no.

9 Q. In fact, isn't that a design flaw that
10 biased the study against Public Television?

11 A. I haven't really specifically
12 evaluated that. There were counterbalancing
13 effects in terms of the examples and lack of
14 examples for other categories, and et cetera.
15 It made the study very unreliable.

16 Q. Now, you mentioned you have some
17 additional criticisms in Section 5-C of your
18 report and I will go to that in a minute. But
19 just to be clear, the three criticisms of the
20 Horowitz survey in Section 3-C of your Rebuttal
21 report actually are reasons why the Horowitz
22 survey is biased against Public Television and
23 not reasons why Public Television has a higher
24 valuation than the Bortz survey; correct?

25 A. Well, certain of them may have had

1 some impact on PTV in the manner that you
2 suggest.

3 Q. So that the record is clear,
4 Mr. Trautman, would you be willing to prepare
5 and file corrected pages of your written
6 Rebuttal Testimony removing the reference to
7 Public Television in Section 3-C on page 12 and
8 the Table of Contents?

9 MR. LAANE: Objection, your Honor.
10 There is nothing to correct. There is a
11 cross-reference in that section to a later
12 discussion of PTV.

13 JUDGE BARNETT: I think the record is
14 clear. Mr. Dove, we don't need to refile
15 written papers. The testimony is part of the
16 record.

17 MR. DOVE: Fair enough. I just wanted
18 to make it clear -- I wanted to give
19 Mr. Trautman the opportunity to correct this
20 Section 3-C if he felt, based on his testimony
21 here, that he should do so. The Public
22 Television criticisms come later in the report.

23 JUDGE BARNETT: Well, I think his
24 testimony -- and I could be wrong, correct me
25 if I am wrong -- his testimony was he didn't

1 actually value it. He could see how there
2 might be an effect, but he did not value that
3 effect and there is no way he could now do
4 that.

5 We can't correct testimony at this
6 point. There is oral testimony and there is
7 written testimony for the record.

8 MR. DOVE: Fair enough. I just -- so
9 you don't desire to make a correction of
10 Section 3-C?

11 MR. LAANE: Objection, your Honor.

12 JUDGE BARNETT: Sustained.

13 JUDGE STRICKLER: Counsel, you
14 referred to a cross-reference before. Are you
15 referring to Footnote 5 on page 13?

16 MR. LAANE: Yes, your Honor.

17 JUDGE STRICKLER: The footnote that
18 begins with the phrase, "Additional
19 methodological problems..."?

20 MR. LAANE: Yes, your Honor.

21 JUDGE STRICKLER: Okay.

22 BY MR. DOVE:

23 Q. Let's turn then to Section 5-C of your
24 report, of your Rebuttal report.

25 JUDGE BARNETT: Do you have a page

1 reference?

2 MR. DOVE: Sure. 39, your Honor.

3 JUDGE BARNETT: Thank you.

4 BY MR. DOVE:

5 Q. Now, in Section 5-C of your Rebuttal
6 report you offer a different set of criticisms
7 of the Horowitz surveys; correct?

8 A. I'm not sure I would say different.

9 Q. Additional?

10 A. I offered criticisms related
11 specifically to PTV's valuation.

12 Q. Your first criticism there is your
13 contention that the Horowitz survey
14 overrepresented systems that carried only
15 Public Television on a distant basis; correct?

16 A. Correct.

17 Q. And you described what you called
18 overrepresentation of PTV-only systems as a
19 design flaw; correct?

20 A. Yes.

21 Q. Now, your Bortz survey
22 underrepresented systems that carried only
23 Public Television on a distant basis; correct?

24 A. No, it excluded them and acknowledged
25 the need for an adjustment.

1 Q. In fact, you --

2 A. The Bortz survey did not consider
3 those systems.

4 Q. In fact, you gave zero representation
5 to systems that carried only Public Television
6 on a distant basis; correct?

7 A. Correct. And acknowledged the need
8 for an adjustment.

9 Q. So is it your opinion that that is a
10 design flaw in the Bortz survey, giving zero
11 representation to Public Television?

12 A. I don't believe it's a design flaw in
13 the survey, because I believe the methodology
14 does not -- that's used for the survey does not
15 support including those systems. And I believe
16 that Horowitz' execution in that regard
17 demonstrates that it would be a design flaw to
18 include them. And it also demonstrates that
19 you -- that his choice was to modify the design
20 such that it was no longer a constant sum
21 question in order to accomplish the goal of
22 including those systems. We wanted to maintain
23 the consistency of a constant sum survey.

24 Q. Like your Bortz survey, the Horowitz
25 survey did not assign zero value to Public

1 Television systems on systems that chose to
2 carry Public Television only on a distant
3 basis; right?

4 A. I'm sorry; could you repeat that?

5 Q. Sure, sure. Unlike your Bortz survey,
6 the Horowitz survey did not assign zero value
7 to Public Television on systems that chose to
8 carry only Public Television on a distant
9 basis; correct?

10 A. Well, again, the Bortz survey did not
11 attempt to survey those systems.

12 Q. I understand, Mr. Trautman. But the
13 Bortz survey assigned a zero value. A zero
14 value was assigned to distant Public Television
15 stations -- to systems that carried only
16 distant Public Television stations; correct?
17 In the Bortz survey?

18 A. Well, I'm going to have to rephrase,
19 again, the way you are trying to characterize
20 this. We did not assign a value to those
21 systems in determining the results of our
22 survey and we acknowledged the need to make an
23 adjustment for that fact.

24 Q. Unlike the way you treated Public
25 Television systems in the Bortz survey, in the

1 Horowitz survey they actually called and
2 surveyed cable operators who had chosen to
3 carry only Public Television stations on a
4 distant basis; correct?

5 A. Correct.

6 Q. Now, when you conduct a survey like
7 the Bortz or the Horowitz survey, not everyone
8 you try to call responds to the survey;
9 correct?

10 A. That's correct.

11 Q. For example, maybe they tell you they
12 don't want to participate in your survey;
13 correct?

14 A. Yes, that's correct.

15 Q. And when you are conducting a survey,
16 you are hoping that nonparticipation or those
17 nonresponses are randomly and evenly
18 distributed across the sample; correct?

19 A. Yes, you are.

20 Q. And sometimes, for whatever reasons,
21 the nonresponses to a survey are not randomly
22 and evenly distributed across the survey
23 sample; correct?

24 A. That's correct.

25 Q. For example, in the public opinion

1 polling contact, isn't it true that certain
2 segments of the population, such as younger
3 voters, have a lower response rate than the
4 rest of the population, as an example?

5 A. That's commonly referenced, yes.

6 Q. And in your Rebuttal Testimony you
7 note that the Horowitz surveys relied on the
8 actual response rates achieved by Horowitz for
9 systems that carried only Public Television
10 systems on a distant basis; correct?

11 A. Correct.

12 Q. In your opinion, was it a reasonable
13 methodological approach for the Horowitz survey
14 to rely on actual response rates?

15 A. Well, you should rely on actual
16 response rates, but also actual responses. And
17 what the Horowitz survey chose to do was, in
18 essence, create their own McLaughlin
19 adjustment. And when they created -- by
20 artificially changing the answers that the
21 respondents actually gave to the question. And
22 so once they did that, in my opinion they were
23 doing nothing more than a McLaughlin
24 adjustment.

25 Q. Mr. Trautman, we will get to that. My

1 question was much more straightforward though;
2 right?

3 A. No, it was not.

4 Q. In your opinion, was it a reasonable
5 methodological approach for the Horowitz survey
6 to rely on actual response rates?

7 A. Not in the context of adjusting the
8 actual responses. And so if you are going to
9 adjust the responses and make the results for
10 that group of respondents not their actual
11 responses or their actual results, but some
12 sort of artificial construct that you have
13 created, then you are doing the same thing as
14 the McLaughlin adjustment and you should do
15 what McLaughlin does, which is to ensure that
16 the -- those respondents are proportionally
17 represented consistent with the royalties that
18 they pay.

19 So I would say that in combination,
20 what Horowitz did was not methodologically
21 correct. And you can't look at it
22 individually. You have to look at it, in my
23 view, in combination. That you are looking for
24 a response rate and also responses. And when
25 you treat the responses a certain way, that

1 affects whether you need to also control for
2 the proper weighting.

3 Q. Well, as I understand it, it's your
4 testimony that the actual response rate in the
5 Horowitz surveys for systems that carried only
6 Public Television signals was higher than the
7 response rate for the rest of the Horowitz
8 sample; is that right?

9 A. That's correct. It was about
10 76 percent as compared with about 60 percent on
11 average.

12 Q. So in your opinion the higher response
13 rate in the Horowitz survey for systems that
14 carried only Public Television resulted in a
15 bias that increased Public Television's
16 Horowitz survey share by approximately
17 1 percentage point; correct?

18 A. That's correct, yes.

19 Q. So if you reduced Public Television's
20 Horowitz survey share by approximately
21 1 percentage point, that response bias issue
22 will be eliminated in the survey; correct?

23 A. That particular flaw would be
24 appropriately adjusted for with about a
25 1 percentage point adjustment, yes.

1 Q. But that change would not fix the
2 other biases in the Horowitz survey in the
3 other direction against Public Television that
4 we talked about earlier, the noncompensable
5 programming on WGN or the other Sports
6 category; correct?

7 A. As I indicated, I think those biases
8 are relatively small. It would also not fix
9 the other flaws that inflated Public
10 Television's share.

11 MR. DOVE: I will keep going, but I am
12 at a stopping point, if it is convenient.

13 JUDGE BARNETT: You might have read my
14 mind. I was thinking, even though we started
15 late, we probably should take our morning
16 recess to give everybody an opportunity to do
17 what they need to do. We will be at recess for
18 15 minutes.

19 (A recess was taken at 10:56 a.m.,
20 after which the trial resumed at 11:15 a.m.)

21 JUDGE BARNETT: Mr. Dove?

22 BY MR. DOVE:

23 Q. Mr. Trautman, before the break we were
24 just talking about the issue of participation
25 bias in the Horowitz survey. And now I want to

1 turn to the issue of participation bias as it
2 relates to the Bortz survey. I want to try to
3 understand your views in that regard.

4 Of course, the systems that we were
5 just talking about, or we have been talking
6 about this morning, cable systems that carry
7 only Public Television on a distant basis were
8 specifically excluded from the Bortz survey.
9 But in your view, as I understand it, the
10 McLaughlin-Blackburn augmentation of the Bortz
11 survey assures that an appropriate weight is
12 applied to the PTV-only systems; correct.

13 A. Yes, it considers the systems in the
14 context of the royalties, the total royalties
15 that they pay.

16 Q. Have you ever looked at whether there
17 is any participation bias with respect to the
18 Bortz survey, even after it is augmented?

19 A. I have. I believe as I've indicated
20 in Table A-5 of my Rebuttal Testimony, that in
21 terms of royalties attributable to systems that
22 carry one or more public TV signals, that our
23 survey is representative.

24 Q. Let's take a look at that Table A-5
25 that you referenced, Mr. Trautman. As I

1 understand, this table only shows the total
2 royalties for cable systems that carry any
3 Public Television, regardless of the extent of
4 Public Television's carriage; correct?

5 A. That's correct, yes.

6 Q. So let's -- this will be my only
7 hypothetical of the morning. Let's say
8 hypothetically there are two cable systems, A
9 and B, of equal size, the same royalty
10 payments. Are you with me?

11 A. I'm with you.

12 Q. Okay. And both carry a Public
13 Television signal on a distant basis. But
14 System A carries one Public Television signal
15 to only 10 percent of its subscribers and
16 System B carries two Public Television signals
17 to 90 percent of its subscribers. And let's
18 say only System A completed the Bortz survey.
19 Are you with me on that?

20 A. I'm with you.

21 Q. Under that hypothetical, the Bortz
22 survey would have captured only about 5 percent
23 of the Public Television distant subscriber
24 instances; correct?

25 A. Just making sure the math works, but I

1 think that's essentially correct, yes.

2 Q. Yet on this Table A-5, you say you
3 surveyed 50 percent of the royalties for
4 systems carrying a Public Television signal;
5 correct?

6 A. Correct.

7 Q. At this point I want to hand to you a
8 copy of the written Rebuttal Testimony of Linda
9 McLaughlin and David Blackburn, which is
10 Exhibit 3002.

11 MR. DOVE: May I approach the witness?

12 JUDGE BARNETT: You may.

13 BY MR. DOVE:

14 Q. Mr. Trautman, if I could ask you to
15 please take a look at Table 1?

16 MR. LUTZKER: Your Honor, if we could
17 just have a second to go over this. Do you
18 have the document?

19 MR. DOVE: I have an extra here. We
20 will be putting it up on the screen.

21 MR. LUTZKER: Thank you.

22 JUDGE BARNETT: The large monitors are
23 not working; right? Just the individual
24 monitors? Okay.

25 BY MR. DOVE:

1 Q. Mr. Trautman, could you please take a
2 look at Table 1 of this testimony.

3 JUDGE BARNETT: I'm sorry; could you
4 give me the exhibit number one more time?

5 MR. DOVE: Sure. It's Exhibit 3002,
6 and Table 1 is to be found on page 3.

7 JUDGE BARNETT: Thank you.

8 THE WITNESS: I see Table 1.

9 BY MR. DOVE:

10 Q. Mr. Trautman, do you have any reason
11 to disagree with Ms. McLaughlin's and
12 Dr. Blackburn's calculation on the bottom row
13 that Public Television's share of distant
14 subscriber instances in 2010 to 2013 was
15 15.8 percent?

16 A. With that universe calculation --

17 Q. Correct.

18 A. -- in Column 1?

19 Q. Yes.

20 A. No, I do not.

21 Q. Do you have any reason to disagree
22 with Ms. McLaughlin and Dr. Blackburn's
23 calculation at the bottom of the third column
24 that among the respondents to even the
25 augmented Bortz survey, Public Television's

1 share of distant subscriber instances was only
2 12.4 percent?

3 A. Yes, I do.

4 Q. And what is that reason?

5 A. They did not weight their
6 calculations. So these numbers are incorrect
7 in terms of comparing our augmented respondent
8 pool to the universe.

9 Q. When you say they did not weight that
10 appropriately, could you explain that further?

11 A. Yes, they treated -- they simply added
12 up the respondents in terms of distant
13 subscriber instances, rather than weighting
14 based on the strata within which the individual
15 respondent fell. And as a result of that, this
16 does not paint an accurate picture of distant
17 subscriber instances among the Bortz
18 respondents. And in particular, it
19 substantially understates them, since the
20 smallest strata, Strata 1 that has the smallest
21 systems, has by far the highest percentage of
22 PTV distant subscriber instances and is sampled
23 at only a fraction -- it varies from year to
24 year, but upon the order of one in ten. So you
25 are counting, in effect, 10 percent of those

1 systems, rather than 100 percent of those
2 systems, when you fail to weight. And you are
3 doing the same thing with the other strata as
4 well. So you are substantially understating
5 the Bortz respondent pool in these
6 calculations.

7 Q. Now, I understand that you and
8 Ms. McLaughlin and Dr. Blackburn are going to
9 have a disagreement on this slide and what it
10 means, but I want you to assume with me that
11 these percentages are correct -- the 15.8
12 percent and the 12.4 percent are correct.

13 Would you agree with Ms. McLaughlin
14 and Dr. Blackburn in that instance that Public
15 Television's share of distant subscriber
16 instances among the augmented respondents to
17 the Bortz survey was 22 percent less than the
18 universe of those -- than the universe those
19 respondents are intended to represent?

20 MR. LAANE: Objection. The question
21 essentially asks him to assume the conclusion.

22 JUDGE BARNETT: It's
23 cross-examination. He has a little leeway.
24 Overruled.

25 THE WITNESS: Well, I'm sorry, but I

1 can't assume that these calculations are
2 correct, when I know them to be not correct.
3 So I just can't make the comparison.

4 BY MR. DOVE:

5 Q. Let's look, Mr. Trautman, at your next
6 criticism of the Horowitz survey in your
7 Rebuttal report. This deals with the outlier
8 issue.

9 If we could visit Exhibit 1002. And
10 on page 43 of your testimony you say that one
11 capable operator valued Public Television much
12 more highly than other cable operators; right?

13 A. Well, I think the totality of the
14 issue is much more significant than that would
15 characterize it, but --

16 Q. I'm using your own language,
17 Mr. Trautman. The section heading is Inflation
18 of PTV Share from a Single Outlier Response.

19 A. Yes, that accounted for close to
20 20 percent of all of the Horowitz survey
21 responses.

22 Q. Right. And, in fact, you called that
23 cable operators valuation of Public Television
24 programming an "outlier"; correct?

25 A. Yes.

1 Q. And just to clarify, it's not a single
2 instance, is it? It's all four years' worth of
3 responses for that cable operator; correct?

4 A. It's 129 responses out of 733
5 responses that Horowitz obtained in his entire
6 survey.

7 Q. In fact, weren't the responses from
8 that single cable operator remarkably
9 consistent over time as to Public Television?

10 A. Actually, no. They were substantially
11 different in 2011 to 2013, versus 2010. But,
12 certainly, because the respondent appears to
13 have assigned identical value to the large
14 groups of systems in his responses, they were
15 consistent.

16 Q. As I understand it, it is 20 percent
17 for Public Television in 2010 and 50 percent in
18 2011, 2012, and 2013. Is that roughly
19 accurate?

20 A. Those are the numbers. That's right.
21 About four and-a-half times the median PTV
22 response for all of the other Horowitz
23 responses, as well as the median PTV response
24 in the Bortz survey.

25 Q. I'm a little puzzled, Mr. Trautman,

1 about your use of the word "outlier." Could
2 you please define outlier as you use it here in
3 your report? What do you mean by that term?

4 A. Well, in this context I would think
5 about an outlier in the context of a normal
6 distribution for the category. So a little bit
7 of statistics here, but you generally expect
8 when you are conducting a survey that you will
9 get -- most of the responses will occur around
10 a mean or point value sort of in the center of
11 the distribution. And then you will go out
12 toward the tails and you will find a small
13 number of responses out at the tails that,
14 depending on how far out at the tails they are,
15 could be considered outliers.

16 In this instance, you've basically got
17 something that's way out of the tail of the
18 distribution, but it's so many responses that
19 it's creating a non-normal distribution in the
20 category, which is very unusual and something I
21 think to be concerned about, based both on the
22 fact that one respondent accounted for so much
23 value in the survey in general. But I think
24 it's 36 or 37 percent of the total allocation
25 to PTV is attributable to this one respondent.

1 And so I think it's a concern. It was
2 an unusual response by someone that had an
3 inordinate influence on the totality of the
4 survey.

5 Q. I mean, just so I understand, you
6 mentioned a distribution. Does the data in
7 Bortz survey reassemble a normal distribution?

8 A. For individual categories, I'm quite
9 sure that it does, yes.

10 JUDGE STRICKLER: When you say you're
11 quite sure that it does, have you determined
12 that it does or is that an assumption on your
13 part, sitting here testifying?

14 THE WITNESS: I would say that's an
15 assumption, but it's based on looking over many
16 years at the response patterns across the
17 survey.

18 JUDGE STRICKLER: So you have noticed
19 a normal distribution in the past,
20 specifically?

21 THE WITNESS: What I would
22 characterize as normal distribution. I haven't
23 plotted it on a graph to make sure. But
24 certainly we have small numbers of responses at
25 the tails and large numbers of responses

1 clustered around particular values. For --
2 certainly, at least for the categories that
3 obtain larger values on average.

4 JUDGE STRICKLER: Thank you.

5 BY MR. DOVE:

6 Q. So are you saying that you would
7 always throw out the highest share awarded to
8 Public Television, even if other respondents
9 were given shares that were within 5 percent or
10 10 percent of that share?

11 A. No. And I'm just pointing out the
12 unusual nature of this response and that it's a
13 particular concern in light of how significant
14 this single respondent's influence is on the
15 entire Horowitz survey result.

16 Q. Are you saying that this particular --

17 A. And --

18 Q. -- cable operator gave the highest
19 valuation to Public Television of any
20 respondent in the Horowitz survey?

21 A. I don't believe -- I believe in at
22 least one year, that was true. But perhaps not
23 in every year. And, of course, that would not
24 include the, necessarily, the PTV-only
25 responses.

1 Q. Maybe you can clarify this for me, but
2 didn't you testify on Friday that there is
3 something about part of this would be the
4 function of the industry? I mean, the industry
5 has consolidated many cable systems since 2004
6 to 2010 to '13, and that respondents in the
7 2010 to '13 Bortz surveys were more likely to
8 hold regional management positions, compared
9 with the past? Do you think that might have
10 had some impact here?

11 A. I don't think a regional manager would
12 account for 20 percent of all of the survey
13 responses that Horowitz obtained.

14 Q. Isn't it true, Mr. Trautman, that in
15 three of the four years there were multiple
16 Horowitz survey respondents who carried both
17 Public Television and non-Public Television
18 stations on a distant basis and awarded the
19 same or higher valuations to Public Television
20 than the cable operator you've called an
21 outlier?

22 A. Yes, and as I indicated, there may
23 have been single responses at the tails which
24 occurs in the Bortz survey, as well. And that
25 is sort of part of surveying. But when you run

1 into a situation where a single respondent
2 contributes in such large measure to not only
3 the overall survey results, but to the results
4 for a particular category, as I've noted here,
5 if you were to look at the Horowitz survey
6 results without this respondent excluded, not
7 changing this respondent's results but simply
8 evaluate the responses without this respondent
9 involved -- one respondent -- you would reduce
10 the PTV average allocation by more than
11 35 percent. See if I did my math right here.
12 Sorry; it's by 25 percent.

13 Q. Isn't it true, Mr. Trautman, that many
14 cable operators -- as we talked about this
15 morning -- carried only Public Television on a
16 distant basis?

17 A. There are some cable operators that
18 carry only Public Television signals. Is that
19 what you're asking?

20 Q. That is the question, yes.

21 A. Yes.

22 Q. And if a cable operator carried only
23 Public Television on a distant basis and gave a
24 valuation of 100 percent to Public Television,
25 is it your opinion that that is an outlier and

1 should be excluded?

2 A. No.

3 Q. I guess I don't understand. And maybe
4 you have explained it and can explain it one
5 more time, but why you are calling -- strike
6 that.

7 Let's turn actually to the next
8 criticism that you have regarding exempt
9 signals in your Rebuttal report.

10 A. Sure.

11 Q. And that can be found starting at the
12 bottom of page 43. And in your testimony you
13 say that for two of the years, 2012 and 2013,
14 it is possible that the Horowitz interviewers
15 asked respondents to value certain Public
16 Television distant signals that were exempt
17 from Section 111 royalties; is that right?

18 A. Yes.

19 Q. And you identified three systems, all
20 in 2012, that you believe carried only exempt
21 Public Television signals on a distant basis
22 and yet were asked by the Horowitz interviewer
23 to assign value to those Public Television
24 signals; correct?

25 A. Well, I think I need to clarify that.

1 We identified many, many systems that we
2 believe were asked to value exempt Public
3 Television signals. We provided in Appendix C,
4 I believe, examples where the response set
5 produced by Horowitz appears to confirm that.

6 The issue we have is that Horowitz did
7 not produce hardcopy questionnaires of any
8 kind, or any basis for actually verifying what
9 signals were read to individual respondents,
10 other than sort of a description of the process
11 that they followed.

12 Based on the description of the
13 process that was provided, it would seem clear
14 that they asked about these exempt signals.
15 But, again, not having the hardcopy
16 information, that could only be verified in a
17 hardcopy form by looking at situations where
18 they responded in a way or were asked about
19 categories that were not consistent with the
20 nonexempt signals.

21 Q. This is an issue that doesn't just
22 apply to noncommercial signals; right? It also
23 applies to Commercial exempt signals; correct?

24 A. But it applies -- it's an overwhelming
25 factor related to the Public Television exempt

1 signals in particular.

2 Q. I think you did note in your report it
3 also can apply to Commercial signals as well;
4 correct?

5 A. Yes, it did in certain instances and
6 for a small number of systems potentially
7 applied to Commercial signals as well.

8 Q. Let's look at the three responses that
9 you feature in your Appendix D to Rebuttal
10 Testimony on page D-2. If we could bring that
11 slide up, please. This is a hard one to read.
12 It says Restricted Files Under Seal, so is this
13 something we should --

14 JUDGE BARNETT: I don't think there is
15 anyone in the hearing room who is not allowed
16 to see restricted material, other than our
17 guests at the back. But you don't have
18 monitors in front of you. They have no
19 connection with any of the parties in this
20 case. They are relatives, so --

21 (Laughter.)

22 MR. DOVE: Certainly no objection
23 here.

24 JUDGE BARNETT: If anyone asks, I'll
25 ask them to --

1 MR. GARRETT: We are fine, your Honor.

2 JUDGE BARNETT: Okay. Anyone else? I
3 can swear them in and make them swear to
4 secrecy after the hearing.

5 Go ahead, Mr. Dove.

6 (Whereupon, the trial proceeded in confidential
7 session.)

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1 O P E N S E S S I O N

2 AFTERNOON SESSION

3 (1:22 p.m.)

4 JUDGE BARNETT: Good afternoon.

5 Please be seated.

6 Mr. Trautman, before we go to a
7 different party, I have a question for you
8 about Canadian Claimants. And maybe it's just
9 my inability to grasp the concepts, but with
10 regard to all of the other programming
11 categories, they can be retransmitted anywhere
12 in the United States, correct?

13 THE WITNESS: Yes.

14 JUDGE BARNETT: And they can be valued
15 on a country-wide basis?

16 THE WITNESS: Yes.

17 JUDGE BARNETT: But there is a
18 territorial limit for Canadian rebroadcasts --
19 retransmissions?

20 THE WITNESS: Yes.

21 JUDGE BARNETT: When you're
22 calculating the percentage for Canadian
23 claimants, are you considering it as a
24 percentage of the whole country or are you
25 segregating it according to that geographical

1 limit and some -- doing some calculus to get to
2 what the value is vis-à-vis other programs?

3 THE WITNESS: No. We are considering
4 it in the context of the entire country.

5 JUDGE BARNETT: The entire country,
6 okay.

7 THE WITNESS: Yes.

8 JUDGE BARNETT: Thank you.

9 Mr. -- go ahead.

10 JUDGE FEDER: I was going to say
11 Mr. Lutzker is rising to his feet.

12 JUDGE BARNETT: Mr. Lutzker?

13 MR. LUTZKER: Yes, Your Honor, before
14 -- before I begin, I had a preliminary point
15 which related to the admission of the exhibit
16 that we filed. And I believe I have most, but
17 I'm not sure if I have all consent. I just
18 wanted to clear that up because I'm going to
19 refer to that exhibit during the course of
20 examination.

21 We had filed, and action on it was
22 deferred, Exhibit 5008, which was Dr. Erdem's
23 amended Rebuttal Testimony. After the Judges
24 struck the MPAA third errata, we submitted
25 Exhibit 5009, which is identical to 5008,

1 except that the entire portion that addresses
2 the errata of MPAA was redacted.

3 So all that remains is the Rebuttal
4 Testimony that refers to the supplemental
5 discovery provided by JSC, again, pursuant to
6 your order.

7 So I don't believe 5009 has yet been
8 admitted, but I would ask that it be admitted
9 prior to my examination of Mr. Trautman.

10 JUDGE BARNETT: Okay. Thank you. Any
11 objections to 5009?

12 MR. GARRETT: Your Honor, I believe
13 that there are a few issues remaining here as a
14 result of Your Honor's ruling last Thursday,
15 concerning Dr. Gray here. And I think they
16 affect all -- they affect all of the parties,
17 and I think that they also affect us in the
18 short term here because of witness scheduling.

19 It was my intent to raise those issues
20 after Mr. Trautman's testimony today or I can
21 address them now, if Your Honors would prefer,
22 or at the end of the day, but there are a few
23 other issues.

24 As far as Mr. Lutzker goes, we have no
25 objection to his referring to that exhibit

1 during his cross-examination of Mr. Trautman,
2 but I think that all of these exhibits that are
3 kind of in limbo out there because of the
4 Judges' ruling should be considered together as
5 a package, and I think this is part of that
6 package.

7 JUDGE BARNETT: I anticipated that you
8 would put your heads together and come up with
9 a list, but we can do it exhibit by exhibit, if
10 necessary.

11 So do you have a specific objection to
12 5009 or is it just that you would prefer to
13 have them all done together?

14 MR. GARRETT: I prefer the latter,
15 but, Your Honor, I'm also prepared to say I
16 have no objection to this Exhibit 5009.

17 JUDGE BARNETT: Thank you. Anyone
18 else have an objection to 5009?

19 THE CLERK: I would like to point out
20 there are two versions of 5009. There are two
21 5009 in ECRB. So...

22 MR. MacLEAN: If I may address that,
23 it's a very simple issue. I believe we filed
24 one and then realized that an exhibit label had
25 been stripped out from our metadata filter, I

1 think was the problem, and so we refiled it.
2 So it's only the second one that we intended.
3 The only difference, as I understand, is the --
4 is the exhibit label. That's all.

5 THE CLERK: Thank you.

6 JUDGE BARNETT: So the one with the
7 earlier date, we could ask our administrators
8 at the cloud to take the first one out of the
9 record?

10 MR. MacLEAN: That's correct, Your
11 Honor.

12 JUDGE BARNETT: Okay.

13 MR. Maclean: Sorry about that, but we
14 wanted to make sure it was labeled correctly.

15 JUDGE BARNETT: I appreciate that.

16 Then 5008 is withdrawn. And 5009 is
17 admitted.

18 (Exhibit Number 5008 was withdrawn.)

19 (Exhibit Number 5009 was marked and
20 received into evidence.)

21 JUDGE BARNETT: And, Mr. Garrett, you
22 said you had some other concerns about witness
23 scheduling. Is that something that is critical
24 like do we have plane schedules or anything
25 that we need to deal with now or will it be

1 okay if we deal with it at the end of
2 Mr. Trautman's testimony?

3 MR. GARRETT: At the end of
4 Mr. Trautman's testimony would be fine, Your
5 Honor.

6 JUDGE BARNETT: Let's do that then.
7 Mr. Lutzker?

8 CROSS-EXAMINATION

9 BY MR. LUTZKER:

10 Q. And I assume we're still dealing with
11 the microphone issue, so this is --

12 JUDGE BARNETT: Oh, we are, and I
13 think we will be maybe for the rest of this
14 hearing. We're having to go into that
15 never-never land of Library of Congress
16 contracting.

17 MR. LUTZKER: I'm sorry to hear it.

18 JUDGE FEDER: Under a CR.

19 JUDGE BARNETT: Yeah, without any
20 budget.

21 BY MR. LUTZKER:

22 Q. Good afternoon, Mr. Trautman.

23 A. Good afternoon.

24 Q. My name is Arnie Lutzker and I
25 represent the Devotional Claimants or Settling

1 Devotional Claimants in this proceeding.

2 In your testimony last Thursday, you
3 said that the Bortz survey should be deemed the
4 ceiling on the Devotional Claimants' share
5 because you were not able to present a list of
6 compensable programming to the cable system
7 operators whose systems had WGN and other
8 signals; is that correct?

9 A. Yes, that's correct.

10 Q. Isn't it true that the attributed
11 value to devotional programs by CSOs on those
12 systems, the ones that carry WGN along with
13 other signals, could primarily, if not
14 entirely, be attributed to the devotional
15 programming in terms of the devotional share on
16 those responses?

17 A. I'm not sure I understand your
18 question.

19 Q. You received responses from the CSOs
20 which carried WGNA along with other signals,
21 but you didn't identify the compensable
22 programming on WGN for those respondents.

23 A. Correct.

24 Q. You received answers and it is your
25 assessment that those answers may be biased in

1 favor of Devotional Claimants and, therefore,
2 there should be some -- that the total
3 devotional share in your survey should be
4 viewed as a ceiling because you were not able
5 to make that judgment about the value of
6 non-compensable programming on WGN as far as
7 Devotional Claimants were concerned.

8 A. That's correct.

9 Q. Okay. Did you do any tests, or what
10 tests did you do, to confirm that your
11 statement that the Bortz survey results in
12 effect overstates the devotional share on those
13 stations because you weren't able to test
14 non-compensability?

15 A. We did not test that.

16 Q. In your testimony on Thursday, you
17 were asked by Mr. Laane about the analysis that
18 Dr. Erdem had conducted on the Bortz data that
19 appeared in his amended rebuttal report.

20 Do you recall that?

21 A. Correct, yes.

22 Q. And the tests that Dr. Erdem ran were
23 to disaggregate the CSO responses for systems
24 carrying WGN-only, WGNA-only, from responses of
25 CSOs that were carrying WGN and other signals;

1 is that correct?

2 A. That's correct.

3 Q. And then to the extent that you think
4 Dr. Erdem's analysis to any degree did not
5 adequately address this issue -- and I believe
6 that was functionally your testimony -- did you
7 take any steps to establish that opinion or
8 what steps did you take to establish that
9 opinion?

10 A. Well, simply that I -- I don't think
11 that -- we don't have -- the information isn't
12 there to assess the WGN compensability impact
13 on the -- on half of the comparison set. We --
14 we understand that we're considering
15 compensable programming on WGN in the -- in the
16 WGN-only group and that we're not considering
17 just that programming in the other group, but
18 we also have programming presumably including
19 devotional programming from other signals as
20 well, so the comparison between those two
21 groups doesn't really tell us anything, in my
22 view, about the potential impact of
23 compensability on that second group.

24 Q. But you did receive Dr. Erdem's
25 underlying code files, by the way, which sort

1 of operate on the Bortz CSO responses; isn't
2 that correct?

3 A. I believe I did receive those, yes.

4 Q. But you didn't conduct any additional
5 tests of Dr. Erdem's analysis after receiving
6 those code files, did you?

7 A. No, I did not. I'm not -- I'm not
8 sure what I would have done, given that I don't
9 think the data groups themselves allow for such
10 a comparison, but I -- I did not perform the
11 tests.

12 Q. Okay, well, now, if we could put up on
13 the screen -- I'll ask my associate. We're
14 going to put up on the screen a table which is
15 an exhibit to Dr. Erdem's Rebuttal Testimony,
16 and I believe this is part of what your
17 testimony was addressing. This is Exhibit AR-1
18 to the now admitted Exhibit 900 -- 5009.

19 A. I'm familiar with this.

20 Q. Okay. And you said you looked at this
21 table that summarized Dr. Erdem's findings, and
22 you testified that you had no reason to quibble
23 with his conclusions that the differences
24 between the WGNA-only and the WGNA with other
25 signals under the devotional column, which is

1 the fourth column over, as you looked at those,
2 you were -- you had no basis to quibble with
3 his professional conclusion that there was no
4 statistically significant difference for the
5 Devotional Claimants, except in calendar year
6 2011?

7 A. Well, I -- I didn't examine his
8 approach to testing statistical significance in
9 detail, so I -- I did not -- I did not make an
10 effort to do that.

11 Q. So you have no professional basis on
12 which to say that his -- his conclusions are
13 not correct?

14 A. No, but as I indicated, I -- I'm not
15 sure how the comparison has meaning in terms of
16 the WGN compensability impact. It -- it
17 doesn't seem to, to me, but I -- I cannot
18 comment on the statistical significance tests.

19 Q. But, in other words, it -- again, you
20 are not quibbling or challenging in any
21 professional way his conclusion that there is
22 no statistical difference in 2010, '12, and '13
23 between the results that you obtained in the
24 survey for WGNA-only respondents who viewed the
25 entire compensability list and those in WGNA

1 with other signals that did not review the
2 list?

3 A. I -- I am not challenging the
4 statistical significance test, that's correct.

5 Q. Thank you. In your Rebuttal Testimony
6 at page 11, Table 2, you indicate that the --
7 in the unweighted survey responses for WGNA
8 only, the survey responses where you did
9 provide respondents with the listing of the
10 compensable devotional programs has a 2010 to
11 2013 average for Devotional Claimants of
12 3.9 percent. Is that correct?

13 A. Yes.

14 Q. Accepting that the devotionals' annual
15 share in your survey is 4.6, which you
16 characterize as a ceiling, is it reasonable to
17 say that 3.9 should be the floor for the
18 Devotional Claimants?

19 A. No, I don't think you can conclude
20 that because I -- I believe that, again, we
21 can't compare the WGN-only group to the -- to
22 the remaining systems because those are
23 different systems with different devotional
24 carriage patterns. And including all other
25 programming as well.

1 So I just don't think we can isolate
2 the WGN-only group and we can say, yes, there
3 we assess the -- we only consider the
4 devotional -- the compensable devotional
5 programming, but we can't really say what that
6 means for the remaining systems.

7 Q. And why is that?

8 A. Because we haven't evaluated it with
9 respect to the remaining systems.

10 Q. Who was it not evaluated with?

11 A. The systems that carried WGN along
12 with other distant signals.

13 Q. Well, in terms of the content on the
14 signals, the categories, this is what we're
15 really ultimately trying to make the
16 determination, what categories, if any, are not
17 addressed by this WGNA-only resolution? And,
18 again, I'm looking at a floor, not a ceiling,
19 but the floor.

20 A. I understand, but I don't think for
21 the overall WGN -- for the overall devotional
22 result in the survey, to me we cannot assess
23 what is a floor based solely on what happened
24 with just a subset of that group, the WGN-only
25 group.

1 Q. Are you -- are you concerned that it's
2 missing Canadian signals?

3 A. No. I'm concerned that we have
4 systems in the sample that have different
5 characteristics than the WGN-only group, and,
6 therefore, to draw a conclusion about the
7 entirety of the sample from just the WGN-only
8 group would be improper in terms of its
9 implications for the overall survey.

10 Q. I understand that, but when you do
11 measure the entirety of the group, the share
12 for Devotional Claimants is 4.6 percent.

13 A. Correct.

14 Q. So, in other words, when you take the
15 entirety, it goes up?

16 A. Yes. And so I would say that in -- in
17 the 4.6 percent number, we are partially
18 addressing the WGN compensability issue. If we
19 were to address it throughout the entire group,
20 I don't know what the effect would be on the
21 remaining systems.

22 So I can't draw a conclusion about
23 where the floor would be.

24 Q. But the -- but the issue is could it
25 be lower? Is there any way that you

1 understand, based on your data, based on your
2 data, is there any way you could understand
3 that the devotional share would be lower than
4 3.9 percent?

5 A. Well, again, I'm not drawing
6 conclusions, but mathematically there are
7 plenty of ways because it could drop the share
8 among other groups of systems by a relatively
9 large degree as it did if you compare '04-'05
10 to '10 to '13 with just WGN-only. We had a
11 fairly large drop. The same kind of fairly
12 large drop could occur within other groups as
13 well.

14 I'm not saying it would, because I'm
15 not able to evaluate that, but, I mean, it's
16 mathematically possible. So I can't reach a
17 conclusion.

18 Q. But I'm not addressing other groups.
19 I am just addressing the devotionals?

20 A. No, I am not talking about other
21 groups -- other -- other program types. I'm
22 talking about other types of systems, besides
23 the WGN-only systems. I don't know how the --
24 I don't know how the devotional share within
25 those types of systems would be affected by the

1 compensability issues, so I can't say that the
2 WGN-only number is a floor.

3 Q. But, again, Dr. Erdem did an economic
4 analysis of your data for the WGN and other
5 signal systems and found there was no
6 statistically significant difference in the
7 results between the WGNA-only and the WGN and
8 other signals?

9 JUDGE STRICKLER: In only three years,
10 right?

11 MR. LUTZKER: In three of the four
12 years, correct.

13 THE WITNESS: Well, that --
14 notwithstanding that, as I've indicated, I
15 believe he was sort of comparing apples and
16 oranges in making that comparison.

17 So, while, again, I'm not arguing the
18 statistical significance test, I'm -- I don't
19 attribute much meaning to it in terms of it
20 assessing the impact of the compensability
21 issue.

22 BY MR. LUTZKER:

23 Q. But in -- with respect, you're saying
24 that without having actually done any analysis
25 on that, Dr. Erdem's material?

1 A. Well, that's correct, but you're
2 asking me to draw a conclusion about a floor
3 and what I've been explaining to you is I don't
4 believe I have the information sufficient to
5 draw a conclusion about a floor.

6 Q. You have no information to conclude
7 that it's not the floor then; is that what
8 you're saying?

9 A. I'm saying that outside of the
10 WGN-only systems, I don't have information as
11 to the quantitative impact of the
12 compensability issue. So to the extent -- in
13 -- in that respect, what you just said is
14 correct.

15 Q. Thank you. Let me turn to another
16 area where you raise a dispute with Dr. Erdem,
17 and that deals with the issue of whether all
18 newscasts and live sports programming on WGN
19 is, in fact, compensable.

20 In your testimony, as I understand it,
21 you say 100 percent of the retransmitted
22 programming of WGNA, of sports, live sports,
23 team sports programming and newscasts is
24 compensable; is that correct?

25 A. That -- that appears on WGNA, yes.

1 Q. Okay. I'd like to understand how you
2 reached that conclusion, so if you can help me
3 out. I'm going to put up on the screen
4 Exhibit Number 6 to Exhibit 2002 -- 5002, which
5 is Dr. Erdem's original testimony.

6 And in his testimony, he cited a
7 couple of examples that underscored his -- his
8 conclusions that not 100 percent of newscasts
9 or sports programming was compensable.

10 And in using this material, he was
11 relying upon documents produced in discovery by
12 JSC relating to your -- to your study. Let's
13 just take the first example which was in his
14 testimony, and it's from a May 20th, 2011 WGN
15 and WGNA telecast of a News at Nine program.
16 Under WGN, the program ran 35 minutes. Under
17 WGNA, the program ran 5 minutes with a
18 30-minute Scrubs program continuing thereafter.

19 Now, how -- help me understand how you
20 analyzed that entry in your data to indicate
21 that there is 100 percent news programming
22 retransmission?

23 A. Well, to begin with, you have to look
24 at the entirety of the program schedule
25 surrounding that program to really evaluate it

1 fully, but based on the limited amount of
2 information you have provided me, our approach
3 would typically be, with respect to that, to
4 presume that 5 minutes of WGN News at Nine was
5 compensable, the 5 minutes that appeared on
6 WGNA, given that it had the same start time as
7 the 35-minute program identified on WGN.

8 Q. And are you then saying that 5 minutes
9 is the news program?

10 A. Would consist of the compensable
11 portion of the news program.

12 Q. I understand the compensable portion,
13 but, I'm -- first, I'm asking is the WGNA
14 5-minute entry -- in your definition of
15 100 percent newscasts being compensable, is
16 that 5 minutes a program?

17 A. Well, again, would require more
18 context. As I'm sure you are well aware,
19 most -- it's very atypical for a new program to
20 begin at 9:55, so presumably something happened
21 prior to that, maybe a baseball game that ran
22 long or something of that nature. It could
23 have been -- or possibly this could have been a
24 special report of some kind. I'm not certain.

25 But what I'm telling you is that

1 generally in instances like this, we would have
2 counted 5 minutes of WGN News at Nine as
3 compensable, and if it was isolated on a
4 stand-alone basis, that would have counted as
5 one program in our data set.

6 Q. And how did you make -- how did you
7 confirm those facts?

8 A. Through comparison of the TMS data
9 sets for both WGN and WGN America and, as I
10 said, looking at the context of the programs
11 surrounding those time periods to see what was
12 going on that caused that unusual situation to
13 exist.

14 Q. And, in fairness, Dr. Erdem did the
15 same thing. He had your data, the full list of
16 WGN programming, WGNA programming. He made a
17 comparison and found multiple situations, many
18 situations, in which they did not match. And
19 that's what he reported in his testimony.

20 And in your rebuttal to his testimony,
21 you say, oh, no, you don't understand the
22 Gracenote or the Obit or Orbit or TMS, whatever
23 the source of the data -- you don't understand
24 the data, I understand that better?

25 Now, that's what I want to understand.

1 What do you understand about the data better
2 than the data that has been presented in
3 discovery?

4 A. Well, I'm -- I'm just saying that
5 there are situations of this nature that occur
6 within the data based on our long experience
7 with using this data and conversations we've
8 had with people at Gracenote, TMS, et cetera,
9 about the way in which their data is reported.

10 And we make our interpretation based
11 on that, focusing on the idea which is, I
12 think, distinct from how Dr. Erdem treated it,
13 that programming that airs -- the same program
14 airing simultaneously on the two stations is a
15 compensable program.

16 Q. And --

17 A. And that -- that includes
18 circumstances where a program may have, for
19 example -- I think I gave some examples in my
20 testimony as well. You might have a situation
21 where a baseball game in one of the data sets
22 was listed as starting at 1:05 and in the other
23 data set was listed as starting at 1:00
24 o'clock, with a -- and in the 1:05 listing,
25 there was a 5-minute pregame show.

1 In that instance, we would count the
2 baseball game as a compensable baseball
3 telecast, but we would attribute the 5-minute
4 pregame show to CTV. So -- because that was a
5 simultaneous airing of a live baseball
6 telecast, with a different characterization of
7 a portion of the telecast at the beginning of
8 it.

9 Q. Well -- and after receiving
10 Dr. Erdem's testimony, you -- you or your
11 colleagues at Bortz went through and produced
12 certain exhibits to -- to the parties,
13 including Devotional Claimants. And I'd like
14 to put one of them up now. I believe you did
15 analysis each year which would undergird your
16 assertion that 100 percent of the sports and
17 newscasts are compensable.

18 MR. LUTZKER: I believe we have
19 submitted this as Exhibit Number 5021. It's an
20 electronic file, Your Honor. We have it
21 submitted electronically. I would ask
22 Mr. Trautman if this looks familiar to him.

23 It was designated in discovery as
24 JSC -- there are four zeros, and then 8233 is
25 the document number. And I understand it's

1 marked as restricted.

2 JUDGE BARNETT: I beg your pardon?

3 MR. LAANE: The document is marked as
4 restricted.

5 MR. LUTZKER: The document is marked
6 as restricted.

7 JUDGE BARNETT: Thank you. Is there
8 anyone in the hearing room who is not privy to
9 restricted material? Okay. Well, just in an
10 abundance of caution, if you would close the
11 door so no one wanders in.

12 Thank you.

13 (Whereupon, the trial proceeded in
14 confidential session.)

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1 O P E N S E S S I O N

2 JUDGE FEDER: Did you say FORTRAN?

3 THE WITNESS: Pardon?

4 JUDGE FEDER: Did you say FORTRAN?

5 THE WITNESS: Yes.

6 MR. LAANE: Dr. Frankel has been
7 around a long time, Your Honor. I think I took
8 my FORTRAN programming class in 1982.

9 THE WITNESS: I needed some assistance
10 with that.

11 (Laughter.)

12 BY MR. LAANE:

13 Q. With respect to the outlier respondent
14 that you mentioned in the Horowitz survey when
15 discussing the PTV systems, and I think you
16 said it was an influential respondent, were
17 there any respondents to the Bortz survey that
18 had that level of influence over the results?

19 A. Not anywhere near that level.

20 MR. LAANE: Thank you, Mr. Trautman.
21 I don't have anything else.

22 JUDGE BARNETT: Thank you, Mr. Laane.

23 Mr. Garrett?

24 MR. GARRETT: Your Honor, as I
25 indicated earlier --

1 JUDGE BARNETT: Oh, I'm sorry.

2 Mr. Trautman -- any questions from the bench?

3 Okay. Thank you. You may be excused.

4 THE WITNESS: Thank you.

5 (The witness stood down.)

6 MR. GARRETT: As I indicated earlier,
7 Your Honor, there are a number of exhibits that
8 are in limbo here and I think we need to meet
9 with the other parties to work that out.

10 But there's a threshold issue that I
11 think requires your attention, and that is that
12 our understanding of your ruling last Thursday
13 was to grant the Settling Devotional Claimants'
14 motion to strike the errata to Dr. Gray's
15 written Direct Testimony and written Rebuttal
16 Testimony. And so that was struck and there
17 was no longer Dr. Gray's study in the record.

18 Yesterday afternoon, the Program
19 Suppliers filed the original Dr. Gray study.
20 That study obviously contains errors. It's
21 based upon incorrect data. The Program
22 Suppliers' counsel had acknowledged, I think
23 everyone knows, that it has incorrect data,
24 basically the failure to include the proper
25 data for WGNA.

JOINT SPORTS CLAIMANTS' REDACTION LOG FOR VOLUME III OF WRITTEN DIRECT TESTIMONY

In re Distribution of Satellite Royalty Funds, No. 14-CRB-0011-SD (2010-13)

| Document | Page Number(s) | Basis For Redaction | Description of Redacted Information |
|--|-----------------------------------|--|---|
| Oral testimony of Daniel Hartman, Docket No. 14-CRB-0010 (2010-13) (March 12-13, 2018) | 3204:9-24; 3245:24- 3247:18 | Contains testimony that Settling Devotional Claimants designated as RESTRICTED | Testimony regarding former colleague |
| Oral testimony of Dr. Mark Israel, Docket No. 14-CRB-0010 (2010-13) (March 12, 2018) | 2916:1- 2933:13 | Transcript of testimony during closed session of the Copyright Royalty Board | Testimony describing data underlying the Bortz Survey |
| Oral testimony of Allan Singer, Docket No. 14-CRB-0010 (2010-13) (February 22, 2018) | 1086:1- 1106:18 | Transcript of testimony during closed session of the Copyright Royalty Board | Testimony describing data underlying the Bortz Survey |

| Document | Page Number(s) | Basis For Redaction | Description of Redacted Information |
|--|---|--|--|
| Oral testimony of James Trautman, Docket No. 14-CRB-0010 (2010-13) (February 15, 2018 and February 20, 2018) | 357:1-373:20; 442:1-454:10; 622:1-635:1 | Transcript of testimony during closed session of the Copyright Royalty Board | Testimony describing data underlying the witness's testimony and/or Bortz Survey |

Proof of Delivery

I hereby certify that on Friday, March 22, 2019 I provided a true and correct copy of the Written Direct Statement of the Joint Sports Claimants - Vol. III of III [Public] to the following:

Broadcast Music, Inc., represented by Hope Lloyd served via Email

Motion Picture Association of America (MPAA)-Represented Program Suppliers, represented by Lucy Plovnick served via Email

Spanish Language Producers, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

MPAA-represented Program Suppliers, represented by Gregory O Olaniran served via Electronic Service at goo@msk.com

Multigroup Claimants, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

Devotional Claimants, represented by Clifford M Harrington served via Electronic Service at clifford.harrington@pillsburylaw.com

American Society of Composers, Authors and Publishers (ASCAP), represented by Sam Mosenkis served via Electronic Service at smosenkis@yahoo.com

Spanish Language Producers (SLP), represented by Brian Boydston served via Email

Settling Devotional Claimants, represented by Arnold Lutzker served via Email

SESAC, Inc., represented by John C. Beiter served via Electronic Service at jbeiter@lsglegal.com

Joint Sports Claimants (JSC), represented by Bryan L. Adkins served via Email

Major League Soccer, LLC, represented by Edward S. Hammerman served via Electronic Service at ted@copyrightroyalties.com

American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music,

Inc. (BMI), represented by Brian Coleman served via Email

Broadcast Music, Inc. (BMI), represented by Jennifer T. Criss served via Electronic Service at jennifer.criss@dbr.com

National Public Radio, Inc. (NPR) (submitted comment), represented by Gregory A Lewis served via Electronic Service at glewis@npr.org

Broadcaster Claimants Group, represented by John Stewart served via Electronic Service at jstewart@crowell.com

American Society of Composers, Authors and Publishers, represented by Samuel Mosenkis served via Email

Signed: /s/ Michael E Kientzle