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<p style="text-align: right;">2334</p> <p>1 where to put that in the folders I have. Which party 2 will you be asking for first? 3 MR. STEWART: Michael Topper. 4 CHIEF JUDGE SLEDGE: Which party? 5 MR. STEWART: Party was the Commercial 6 Television -- 7 CHIEF JUDGE SLEDGE: Commercial Television? 8 MR. STEWART: -- Claimants, part of the 9 Settling Parties group. 10 CHIEF JUDGE SLEDGE: All right, sir. 11 MR. STEWART: Your Honor, I've had marked as 12 SP Exhibit 49 the rebuttal testimony of Michael B. 13 Topper, and -- may I approach the bench? 14 CHIEF JUDGE SLEDGE: Yes, sir. 15 MR. STEWART: Your Honor, this rebuttal 16 testimony was the subject of the joint motion of the 17 phase 1 parties to permit admission of written 18 rebuttal testimony and exhibits of certain witnesses 19 without live appearances and to accept agreed time 20 allocation, which motion was granted by the judges' 21 order. And I would move at this time for the 22 admission of SP Exhibit 49.</p>	<p style="text-align: right;">2336</p> <p>1 stipulation, and we'd propose to move its admission. 2 May I approach? 3 Your Honor, I've had marked as SP Exhibit 51 4 the stipulation regarding undisputed facts between 5 Program Suppliers and Settling Parties that was the 6 subject of the joint motion that was -- of the motion 7 of the Settling Parties and Program Suppliers that was 8 granted by your order, and I would move at this time 9 for the admission of SP Exhibit 51. 10 CHIEF JUDGE SLEDGE: Any objection to 11 Exhibit 51? 12 Without objection, it's admitted. 13 (Settling Parties Exhibit Number 51 was 14 received into evidence.) 15 MR. STEWART: Thank you, Your Honor. At this 16 time, I would like to call -- 17 JUDGE WISNIEWSKI: Actually, before you 18 begin, just in the interest of full disclosure, it's 19 come to my attention, in reviewing the resumes of the 20 various witnesses we have scheduled before us this 21 week, that I do have a past acquaintance with one of 22 those witnesses. Some 20 years ago, Dr. Gary Ford was</p>
<p style="text-align: right;">2335</p> <p>1 CHIEF JUDGE SLEDGE: Any objection to 2 Exhibit 49? 3 Without objection, it's admitted. 4 (Settling Parties Exhibit Number 49 was 5 received into evidence.) 6 MR. STEWART: May I approach? 7 Your Honor, I've had marked as SP Exhibit 50 8 the rebuttal testimony of Greg Stone, which was also 9 the subject of the motion I identified earlier, and I 10 would move at this time for its admission into 11 evidence. 12 CHIEF JUDGE SLEDGE: Any objection to the 13 testimony of Greg Stone? More accurately phrased, any 14 objection to the acceptance of Exhibit 50? 15 Without objection, it's admitted. 16 (Settling Parties Exhibit Number 50 was 17 received into evidence.) 18 MR. STEWART: Your Honor, one further 19 preliminary. The parties filed a motion of the 20 Settling Parties and Program Suppliers to adopt a 21 joint stipulation, which was also granted by your 22 order, and I have marked as an exhibit this</p>	<p style="text-align: right;">2337</p> <p>1 teaching at the Kogod School of Business at American 2 University in the marketing department, and I was 3 teaching at the Kogod School of Business in the 4 management department. And, again, in the interest of 5 full disclosure, I thought you would like to have that 6 information. 7 MR. STEWART: Thank you, Your Honor. 8 Your Honor, at this time, I would call 9 Gregory Crawford to the stand. 10 WHEREUPON, 11 GREGORY CRAWFORD, 12 was called as a rebuttal witness and, having been 13 first duly sworn by the chief judge, was examined and 14 testified as follows: 15 DIRECT EXAMINATION 16 BY MR. STEWART: 17 Q. What is your name? 18 A. My name is Gregory S. Crawford. 19 Q. And on whose behalf are you appearing in this 20 case? 21 A. I'm appearing on behalf of the Commercial 22 Television Claimants.</p>

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2338	<p>1 Q. You'll have to make sure you speak up loudly</p> <p>2 enough for me to hear you way over here.</p> <p>3 A. Sure.</p> <p>4 JUDGE ROBERTS: Mr. Stewart, If you want to</p> <p>5 tip that, if it's more comfortable for you so you</p> <p>6 don't have to turn your head, by all means --</p> <p>7 MR. STEWART: I would like that. Thank you.</p> <p>8 BY MR. STEWART:</p> <p>9 Q. What's your current position?</p> <p>10 A. I'm a professor of economics at the</p> <p>11 University of Warwick in the UK.</p> <p>12 Q. What's your business address?</p> <p>13 A. It's the department of economics at the</p> <p>14 University of Warwick. The city is Coventry. Post</p> <p>15 code is CV4 7AL in the United Kingdom.</p> <p>16 Q. What is your educational background?</p> <p>17 A. I have a bachelor of arts in economics from</p> <p>18 the University of Pennsylvania, and I have a Ph.D. in</p> <p>19 economics from Stanford University.</p> <p>20 Q. When did you receive your Ph.D.?</p> <p>21 A. 1998.</p> <p>22 Q. Now, you teach at the University of Warwick?</p>	2340	<p>1 television industry, especially on the cable</p> <p>2 television industry. I've written a number of papers</p> <p>3 that have looked at the incentives and consequences of</p> <p>4 bundling in the cable television industry. And I've</p> <p>5 written several papers looking at the consequences of</p> <p>6 regulation in the industry.</p> <p>7 Q. Now, in addition to that research, do you</p> <p>8 have work experience that relates to the broadcast of</p> <p>9 cable television marketplaces?</p> <p>10 A. I do. So two years ago, in 2007/2008</p> <p>11 academic year, I was the chief economist at the</p> <p>12 Federal Communication Commission. I reported to the</p> <p>13 chairman of the FCC, who was Kevin Martin at the time,</p> <p>14 and advised him and his staff about the policy issues</p> <p>15 that they were facing during that year.</p> <p>16 Q. Did those policy issues include policy issues</p> <p>17 regarding the cable television industry?</p> <p>18 A. They did. We probably spent most of our time</p> <p>19 looking at the potential for a la carte offerings in</p> <p>20 cable television markets. That's the idea that the</p> <p>21 bundles that currently are offered in the industry</p> <p>22 might instead be offered on an individual basis.</p>
2339	<p>1 A. I do.</p> <p>2 Q. In what areas do you teach?</p> <p>3 A. I teach primarily in two areas. I teach in</p> <p>4 the area of industrial organization, which is the</p> <p>5 study of product markets. And I also teach in</p> <p>6 econometrics, which is the application of statistical</p> <p>7 tools to questions of interest.</p> <p>8 Q. Now, in addition to your teaching</p> <p>9 responsibilities, do you do independent research?</p> <p>10 A. I do.</p> <p>11 Q. In what areas do you do independent research?</p> <p>12 A. So my subfield within economics is called</p> <p>13 empirical industrial organization, so I will typically</p> <p>14 have data on a product market of interest, and I'll</p> <p>15 try to analyze policy questions or questions of</p> <p>16 strategy in that market, or questions of competition</p> <p>17 and regulation more generally.</p> <p>18 Q. Now, have you specialized in topics having to</p> <p>19 do with television and cable television markets?</p> <p>20 A. I have.</p> <p>21 Q. Could you explain?</p> <p>22 A. Sure. I've written quite a bit on the</p>	2341	<p>1 We also looked at trying to measure</p> <p>2 quality-adjusted cable television pricing, and we</p> <p>3 spent some time looking at designing rules for leased</p> <p>4 access to cable --</p> <p>5 Q. What was the last subject?</p> <p>6 A. Leased access.</p> <p>7 Q. What is that?</p> <p>8 A. That's where parties in local markets pay a</p> <p>9 fee to cable television systems in order to have</p> <p>10 access to the cable system to provide their own</p> <p>11 programming.</p> <p>12 Q. Now, what were you asked to do in this</p> <p>13 proceeding on behalf of the Commercial Television</p> <p>14 Claimants?</p> <p>15 A. So in this proceeding, I was asked to analyze</p> <p>16 the analytical approach of Dr. George Ford in his</p> <p>17 determination of the relative market values of the</p> <p>18 various types of programming carried on distant</p> <p>19 broadcast signals.</p> <p>20 Q. And did you provide a written statement</p> <p>21 reporting the results of your analysis?</p> <p>22 A. I did.</p>

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2342	<p>1 MR. STEWART: Your Honor, may I approach?</p> <p>2 CHIEF JUDGE SLEDGE: Yes, sir.</p> <p>3 MR. STEWART: I have had marked and have</p> <p>4 handed to the witness a document that's labeled SP</p> <p>5 Exhibit 52 entitled, "Rebuttal testimony of</p> <p>6 Gregory R. [sic] Crawford."</p> <p>7 BY MR. STEWART:</p> <p>8 Q. Would you take a look at that document,</p> <p>9 please.</p> <p>10 A. Yes.</p> <p>11 Q. Is this your written statement, Dr. Crawford?</p> <p>12 A. It is.</p> <p>13 Q. Do you have any corrections to SP Exhibit 52?</p> <p>14 A. I do not.</p> <p>15 Q. Please turn to appendix 1 of SP Exhibit 52.</p> <p>16 Do you see that?</p> <p>17 A. I do.</p> <p>18 Q. Is this your CV?</p> <p>19 A. It is.</p> <p>20 Q. And does it provide further details regarding</p> <p>21 your publications, qualifications and experience?</p> <p>22 A. Yes, it does.</p>	2344	<p>1 (Settling Parties Exhibit Number 52 was</p> <p>2 received into evidence.)</p> <p>3 BY MR. STEWART:</p> <p>4 Q. Now, Dr. Crawford, you said you were asked to</p> <p>5 evaluate the analytical approach of Dr. George Ford</p> <p>6 for distributing cable royalties in this proceeding;</p> <p>7 is that correct?</p> <p>8 A. That's correct.</p> <p>9 Q. Did you review Dr. Ford's written and oral</p> <p>10 testimony in this proceeding?</p> <p>11 A. I did.</p> <p>12 Q. Do you have an opinion, based on that review</p> <p>13 and on your experience and expertise, regarding the</p> <p>14 validity of Dr. Ford's proposed method for estimating</p> <p>15 the relative value of the program categories</p> <p>16 represented by claimant groups in this proceeding?</p> <p>17 A. I do.</p> <p>18 Q. What is that opinion?</p> <p>19 A. It's my opinion that Dr. Ford's analytical</p> <p>20 approach should not be used as a way to determine the</p> <p>21 relative market value in the various categories of</p> <p>22 programming carried on distant broadcast signals.</p>
2343	<p>1 MR. STEWART: Your Honor, at this time, I</p> <p>2 would like to proffer Dr. Crawford as an expert, and</p> <p>3 in particular as an expert economist with experience</p> <p>4 in the economic analysis of television programming</p> <p>5 markets, specifically including cable television</p> <p>6 programming markets.</p> <p>7 JUDGE ROBERTS: That's a mouthful,</p> <p>8 Mr. Stewart. Could you say that one again.</p> <p>9 MR. STEWART: Yes, indeed.</p> <p>10 An expert economist with experience in the</p> <p>11 economic analysis of television programming markets,</p> <p>12 specifically including cable television programming</p> <p>13 markets.</p> <p>14 CHIEF JUDGE SLEDGE: Any objection to the</p> <p>15 proffer?</p> <p>16 Without objection, the proffer is accepted.</p> <p>17 MR. STEWART: Your Honor, at this time, I</p> <p>18 would move for the admission of SP Exhibit 52 into</p> <p>19 evidence.</p> <p>20 CHIEF JUDGE SLEDGE: Any objection to</p> <p>21 Exhibit 52?</p> <p>22 Without objection, it's admitted.</p>	2345	<p>1 Q. Please keep your voice up.</p> <p>2 Briefly, why do you reach that conclusion?</p> <p>3 A. Well, fundamentally, Dr. Ford looks at the</p> <p>4 wrong market. So Dr. Ford's analytical approach is</p> <p>5 based exclusively on outcomes in the advertising</p> <p>6 market. Distant broadcast signals, however, are</p> <p>7 carried in order to generate subscriber payments to</p> <p>8 cable television systems. This difference between</p> <p>9 advertising-supported broadcasting and pay-supported</p> <p>10 cable has a material effect on the relative market</p> <p>11 values such that using Dr. Ford's approach would lead</p> <p>12 to incorrect results.</p> <p>13 Q. Well, in your opinion, are there differences</p> <p>14 in the types of programming that would be valued in</p> <p>15 the broadcast market and the cable operator market?</p> <p>16 A. Very much so.</p> <p>17 Q. Why is that?</p> <p>18 A. So in the broadcast television market, the</p> <p>19 goal of a broadcaster is to maximize the audience,</p> <p>20 because he's selling advertising. So if he can select</p> <p>21 programming that will generate a large audience, he'll</p> <p>22 have a large audience to sell to advertisers.</p>

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2346	<p>1 It's very different, however, in the cable</p> <p>2 programming market, the pay-supported cable market.</p> <p>3 There, two things matter. One is the willingness to</p> <p>4 pay of subscribers -- potential subscribers -- to the</p> <p>5 programming that the cable television system offers.</p> <p>6 And the second is the extent to which the cable system</p> <p>7 can actually extract the willingness to pay that</p> <p>8 consumers value for that programming.</p> <p>9 Q. This is what you discuss at pages 4 and 5 of</p> <p>10 SP Exhibit 52; is that correct?</p> <p>11 A. Yes.</p> <p>12 Q. Do you have an example of that might help</p> <p>13 illustrate your point?</p> <p>14 A. Sure. So suppose there were just two very</p> <p>15 simple channels that were on the shelf and available</p> <p>16 to a broadcaster or a cable system. Channel A has the</p> <p>17 type of programming that one person values at \$10 a</p> <p>18 month -- is willing to pay \$10 per month. Channel B</p> <p>19 offers program that five people are willing to pay,</p> <p>20 say, \$1 per month.</p> <p>21 Take, first, a broadcaster. Would he choose</p> <p>22 to offer to carry channel A or B? Well, if he's</p>	2348	<p>1 of programming are provided in what is called an</p> <p>2 advertising-supported environment, like broadcasting,</p> <p>3 and a pay-supported environment like cable television.</p> <p>4 And one of the principal themes of this</p> <p>5 literature is that, in advertising-supported</p> <p>6 environments, broadcasters are looking to maximize</p> <p>7 their audiences. And it make sense. They're selling</p> <p>8 advertising, so they generally select general interest</p> <p>9 programming that's going to appeal to as broad an</p> <p>10 audience as possible.</p> <p>11 On the other hand, in the cable marketplace</p> <p>12 or a pay-supported environment, one doesn't</p> <p>13 necessarily need to attract a broad audience if one</p> <p>14 could attract a narrow audience that's actually</p> <p>15 willing to pay for the programming. So in a</p> <p>16 pay-supported environment, a cable operator is able to</p> <p>17 profitably offer what I would call special interest</p> <p>18 programming, programming that doesn't appeal</p> <p>19 necessarily to a mass, but to a smaller audience.</p> <p>20 Q. Now, this literature -- you cite several</p> <p>21 articles at footnote 13 on page 6.</p> <p>22 A. Yes, that's correct.</p>
2347	<p>1 looking to maximize advertising revenue, he wants as</p> <p>2 many viewers as possible: Channel B, with the five</p> <p>3 viewers who would be willing to watch this channel,</p> <p>4 and, therefore, he would be able to sell an audience</p> <p>5 of five.</p> <p>6 A cable operator would look at it very</p> <p>7 differently. A cable operator is looking at how much</p> <p>8 is the willingness to pay of the actual individuals</p> <p>9 and from which of those two channels could they</p> <p>10 extract the most willingness to pay?</p> <p>11 From channel B, the total willingness to pay</p> <p>12 of the five individuals is \$5. From channel A, the</p> <p>13 total willingness to pay of the one individual is 10.</p> <p>14 And so the cable operator would prefer to select</p> <p>15 channel A, the one with the greater willingness to</p> <p>16 pay.</p> <p>17 Q. Now, is there a difference in the sort of</p> <p>18 general nature of the programming that falls into one</p> <p>19 category or the other based on what you just</p> <p>20 described?</p> <p>21 A. Yeah. So there's a long academic literature</p> <p>22 that's looked at this distinction between what types</p>	2349	<p>1 Q. Is that the literature you were just</p> <p>2 referring to?</p> <p>3 A. That is exactly the literature.</p> <p>4 Q. Is there more than those three?</p> <p>5 A. Oh, there are many more papers. This is a --</p> <p>6 a broad and deep literature.</p> <p>7 Q. Now, at the bottom of page 6, you discuss a</p> <p>8 different feature of the cable marketplace regarding</p> <p>9 the selling of multiple program channels and bundles;</p> <p>10 that's right?</p> <p>11 A. That's correct.</p> <p>12 Q. What effect, if any, does this bundling have</p> <p>13 on cable operators' profit maximization or economic</p> <p>14 incentives in picking programming?</p> <p>15 A. Well -- so I mentioned that there's two</p> <p>16 differences between a pay-supported environment and an</p> <p>17 ad-supported environment. The first was how much</p> <p>18 people are willing to pay, but the second is how much</p> <p>19 a cable operator can extract of that willingness to</p> <p>20 pay. And bundling helps in the extraction problem.</p> <p>21 Q. Now, turning to the chart you have at the top</p> <p>22 of page 8, first, would you tell us what's in this</p>

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2350	<p>1 chart.</p> <p>2 A. Sure. So I talk about willingness to pay.</p> <p>3 So this is a table that represents willingness to pay</p> <p>4 of two types of subscribers for two types of channels.</p> <p>5 So the way to read the table is, if you look at the</p> <p>6 first row, which is for one of the channels, a news</p> <p>7 channel, a type 1 subscriber is willing to pay \$4 a</p> <p>8 month for that channel, and a type 2 subscriber is</p> <p>9 willing to pay \$7 a month for that channel.</p> <p>10 For the weather channel, it's just the</p> <p>11 opposite: A type 1 subscriber would be willing to pay</p> <p>12 \$7 for that channel and a type 2 subscriber would be</p> <p>13 willing to pay 4.</p> <p>14 Q. Okay. And these are hypothetical numbers?</p> <p>15 A. Yes, these are just as an example.</p> <p>16 Q. All right. But given the subscriber</p> <p>17 willingness to pay as you've depicted it here, how</p> <p>18 would a cable operator go about maximizing profits if</p> <p>19 it did not bundle channels?</p> <p>20 A. So if it doesn't bundle channels, then it</p> <p>21 basically selects the price optimally for each</p> <p>22 channel. So if you look just at the news channel, he</p>	2352	<p>1 news and 4 for weather. And, again, you just add them</p> <p>2 up and you get a willingness to pay of 11.</p> <p>3 So for both subscribers, they both the value</p> <p>4 the bundle at 11 -- and that's an easy problem for the</p> <p>5 cable operator; they'll just set a price of 11 and</p> <p>6 make a total profit of 22.</p> <p>7 Before, they were making a profit of 8 for</p> <p>8 each channel, for a total profit of 16. With</p> <p>9 bundling, they make a profit of 22.</p> <p>10 Q. Now, is there economic literature that</p> <p>11 recognizes this bundling effect on profitability in</p> <p>12 the cabling industry?</p> <p>13 A. Yes. There's a long literature that goes</p> <p>14 back to the block booking of movies back in the '60s</p> <p>15 that analyzed this effect of bundling.</p> <p>16 Q. Now, is the profitability analysis affected</p> <p>17 by the particular numbers you put into a chart like</p> <p>18 this?</p> <p>19 A. No. I mean, the general point that I've</p> <p>20 described is true. I mean, the numbers were selected</p> <p>21 to make the point very clearly. And the numbers were</p> <p>22 selected in that they exhibit negative correlation,</p>
2351	<p>1 really has two choices. He could set a high price, a</p> <p>2 price of 7, and sell just to the type 2 subscriber and</p> <p>3 make a profit of 7. Alternatively, he could select a</p> <p>4 lower price, a price of 4, and sell to both</p> <p>5 subscribers for a total profit of 8.</p> <p>6 In this case, he would be better off selling</p> <p>7 to both for a total profit of 8. But note, when he</p> <p>8 does that, the type 2 subscriber still has a little</p> <p>9 surplus. The type 2 subscriber would have been</p> <p>10 willing to pay 7, but only had to pay 4.</p> <p>11 Q. So let's stick with these same numbers here.</p> <p>12 And how would a cable operator go about seeking to</p> <p>13 maximize profit if it could bundle or if it did bundle</p> <p>14 channels of programming?</p> <p>15 A. Well, for a bundle, first you have to decide</p> <p>16 what is the willingness to pay for the bundle? And --</p> <p>17 so the way you do that is you just add up the</p> <p>18 willingness to pay for each of the channels in the</p> <p>19 bundle. For a type 1 subscriber, they're willing to</p> <p>20 pay 4 for news and 7 for weather, and so their</p> <p>21 willingness to pay is just 4 plus 7, or 11. For a</p> <p>22 type 2 subscriber, their willingness to pay is 7 for</p>	2353	<p>1 and this negative correlation is an important feature</p> <p>2 in bundling.</p> <p>3 Q. What do you mean by negative correlation?</p> <p>4 A. So negative correlation is -- discusses the</p> <p>5 pattern of consumer tastes across channels. So the</p> <p>6 easiest way to see it is -- just in context of this</p> <p>7 example, is to consider each -- the pattern of each</p> <p>8 subscriber's tastes compared to the average tastes per</p> <p>9 network. Let me sort of go step by step.</p> <p>10 If you look at the news network, the average</p> <p>11 willingness to pay for news is just the average of 4</p> <p>12 plus 7. So the average willingness to pay for news is</p> <p>13 \$5.50. Similarly, the average willingness to pay for</p> <p>14 weather is just the average of 7 plus 4, also \$5.50.</p> <p>15 Q. And one could ascertain the average</p> <p>16 willingness to pay by surveying subscribers and asking</p> <p>17 them how much they're willing to pay and then just</p> <p>18 getting an average across all subscribers?</p> <p>19 A. Absolutely. Yes.</p> <p>20 Now, negative correlation, or correlation in</p> <p>21 general, reflects the nature of a subscriber's</p> <p>22 willingness to pay compared to the average. So take a</p>

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2354	<p>1 type 1 subscriber. They are willing to pay 4 for 2 news, but that's below the average for news; it's 3 below the average of 5.50. Whereas, for weather, 4 they're willing to pay 7, which is above the average. 5 So the fact that they're willing to pay something 6 below the average for news but above the average for 7 weather says that tastes for those are negatively 8 correlated. 9 Q. Does negative correlation such as this affect 10 profitability for cable operators? 11 A. Absolutely. It affects profitability because 12 of the bundling. Basically, what it does is it says 13 someone who has -- like someone like a type 1 14 subscriber that has relatively high willingness to pay 15 for weather and relatively low willingness to pay for 16 news, if there's a negative correlation, there's 17 another guy out there that has just the opposite 18 pattern, like the type 2 subscriber that has 19 relatively high willingness to pay for news and 20 relatively low willingness to pay for weather. 21 That way, when you add up, we're adding up 22 something low plus high for type 1 and something high</p>
2355	<p>1 plus low for type 2. But the -- since it's high plus 2 low and low plus high, you get to roughly the same 3 number, and the cable operator can make more profit 4 charging a single price. And that's what's going on 5 in the example. 6 Q. Now, you have got another chart at the bottom 7 of page 8; is that right? 8 A. That's right. 9 Q. What does that chart illustrate? 10 A. So that chart shows a slightly different 11 setting, but it also demonstrates the power of 12 negative correlation for the profitability. In this 13 case, we suppose that the cable operator already has 14 decided to offer one channel. So suppose, in this 15 chart, they've already decided to offer a sports 16 channel, and they only have room for one more channel. 17 Which should they choose, news or weather? 18 Well, if you look just at the average 19 willingness to pay, we said earlier that both news and 20 weather had the same average willingness to pay of 21 \$5.50. You wouldn't think there was much to choose 22 between them. But it turns out this negative</p>
2356	<p>1 correlation means there's a very big difference in the 2 profitability between a bundle of sports and news 3 versus sports and weather. 4 Q. How does that -- how can you illustrate 5 that -- 6 A. Sure. 7 Q. -- by this chart? 8 A. So let's start with a bundle of sports and 9 weather. So for a type 1 subscriber, the willingness 10 to pay for a bundle of sports and weather is just the 11 sum of their willingness to pay of 14 for sports and 7 12 for weather, for a total of 21. For a type 2 13 subscriber, it's the bundle -- the sum of 8 for sports 14 and 4 for weather, for a total of 12. 15 So the cable operator could either charge a 16 price of 21 and sell to the type 1 subscriber or 17 charge a price of 12 and sell to both. And so the 18 total profit is higher if he charges the price of 12 19 and sells to both; he makes a profit of 24. 20 Now, look what happens when he does sports 21 and news, though. The willingness to pay for a bundle 22 of sports and news is 14 plus 4, or 18, for a type 1</p>
2357	<p>1 subscriber. For a type 2 subscriber, the willingness 2 to pay for a bundle of sports and news is 8 plus 7, or 3 15. And, again, it earns the most profit by selling 4 to both at a price of 15 and earns a profit of 30. 5 And the profit of 30 is greater than the profit of 24 6 he could have earned by bundling sports and weather. 7 Q. So what makes the difference between 8 profitability? 9 A. Again, it's the same negative correlation 10 point I was talking about earlier. If you look at the 11 type 1 subscriber again and compare his willingness to 12 pay for each network compared to the average for that 13 network, then his willingness to pay 14 for sports is 14 above the average of 11. So he has greater than 15 average willingness to pay for sports. And for 16 weather, he also has greater than average willingness 17 to pay of 7, greater than 5.50. So we would 18 say sports and weather are positively -- tastes for 19 sports and weather are positively correlated. 20 On the other hand, sports and news, he has 21 greater than average willingness to pay for sports, 22 lower than average willingness to pay for weather. So</p>

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2358	<p>1 there's negative correlation in consumer tastes for 2 sports and news, and that's why the sports and news 3 bundle was more profitable. 4 Q. So these examples you've given here 5 illustrate the economic theory of bundling and 6 negative correlation? 7 A. That's correct. 8 Q. Is there any evidence that this negative 9 correlation actually affects a cable operator's 10 profitability? 11 A. Yes. So this is something I've been working 12 on for a very long time. And I -- so I published a 13 paper a few years ago that tried to test this 14 hypothesis that bundling channels that are more likely 15 to be negatively correlated with other channels in a 16 bundle increased operator profitability. 17 Q. And how did you identify negative correlation 18 for -- 19 A. Well, it turns out it's very difficult to 20 identify -- to measure negative correlation directly. 21 So, instead, what I did is I made an argument that 22 certain types of channels are more likely to be</p>	2360	<p>1 different. For special interest channels, the bundle 2 is still a mix of sort of all these different kinds of 3 programming, but for a special interest channel, it 4 might offer programming that is different from 5 programming that's already on the bundle. 6 And so particularly if a cable operator is 7 interested in those that have relatively low 8 willingness to pay for the bundle, it sort of wants to 9 get those guys to sign up, it will -- a special 10 interest channel might look quite attractive if they 11 can find someone who doesn't like the existing bundle 12 but may have very strong tastes for some other type of 13 programming that's not currently on the bundle. 14 And -- so they'll have an incentive to find those 15 channels. And if they can add those channels, that's 16 why such channels are more profitable. 17 Q. This study, by the way, is -- 18 JUDGE WISNIEWSKI: Well, when you say more 19 profitable, you're assuming costs are everywhere 20 equal. 21 THE WITNESS: Yeah. So when -- for distant 22 broadcast signals of the same DSE, we're safe there.</p>
2359	<p>1 negatively correlated with -- tastes for certain types 2 of channels are more likely to be negatively 3 correlated than tastes for the bundle. 4 Q. And what types of programs or channels were 5 negatively correlated? 6 A. Well -- so if you remember earlier in 7 previous literature I was talking about special 8 interest and general interest channels. Again, I look 9 at those two kinds of channels. And it's easier to 10 start maybe with general interest channels. So 11 general interest channels typically include 12 programming that appeals to a relatively broad 13 audience. They have a range of programming on them. 14 Similarly, bundles of channels also have a wide 15 variety of programming. 16 So if you think that someone has relatively 17 high willingness to pay for a general interest 18 channel, they're likely to have relatively high 19 willingness to pay for the bundle as well because 20 they're both combinations of multiple kinds of 21 programming. 22 For special interest channels, it's</p>	2361	<p>1 But in the real world, you have to factor in the sort 2 of willingness to pay relative to cost. 3 BY MR. STEWART: 4 Q. And the paper you've been describing is 5 identified on page 10, is that right, the first full 6 paragraph? 7 A. Yes, that's right. 8 Q. Now, what did that study show about cable 9 operator profitability? 10 A. Well -- so what I did was I collected data on 11 cable television systems, and I estimated the demand 12 curve, and I tested what happened to that demand curve 13 if you bundled each of many different kinds of 14 channels. 15 I looked at the top 15 channels in the 16 marketplace at that time. And what turned out to 17 happen was -- what I found was that if you bundle one 18 of these -- a special interest channel, that had an 19 impact on the bundle demand curve that was consistent 20 with an average increase of profitability of around 21 4.7 percent, whereas if you bundled a general interest 22 channel, that was estimated not to have any effect on</p>

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2362	<p>1 the profitability.</p> <p>2 Q. Now, would this analysis that you've just</p> <p>3 described apply equally to individual programs as</p> <p>4 opposed to channels of programs?</p> <p>5 A. It would. It's more complicated in that</p> <p>6 setting because you have multiple sort of types of</p> <p>7 programs within a channel. But the economic logic</p> <p>8 underlying the decision process is still the same.</p> <p>9 Q. So you've discussed the pay-support -- the</p> <p>10 subscriber fee base for cable operators' services and</p> <p>11 the bundling dynamic for cable operators. How do</p> <p>12 those two economic principles affect your opinion</p> <p>13 about the utility of Dr. Ford's approach for</p> <p>14 determining relative value for distant signal</p> <p>15 programming?</p> <p>16 A. Well, fundamentally, because distant signals</p> <p>17 are supported in a pay-support environment, and these</p> <p>18 effects are the effects that matter, that you're more</p> <p>19 likely to see special interest programming,</p> <p>20 particularly if there's greater willingness to pay, in</p> <p>21 a pay-supported environment as compared to an</p> <p>22 advertising-supported environment, and that effect is</p>	2364	<p>1 just described regarding Dr. Ford's principal</p> <p>2 approach, why isn't Dr. Gruen's subscriber survey,</p> <p>3 which -- why doesn't that provide us with useful</p> <p>4 information to determine relative value of distant</p> <p>5 signal programming?</p> <p>6 A. Well, as I said, in a pay-supported market,</p> <p>7 the two things that matter are what consumers are</p> <p>8 willing to pay for the programming and the extent to</p> <p>9 which cable operators can extract that, especially</p> <p>10 extract it through the bundling.</p> <p>11 So, unfortunately, Dr. Gruen's survey asked</p> <p>12 people what they were willing -- what their relative</p> <p>13 willingness to pay was for different categories of</p> <p>14 broadcast programming, but didn't ask them what their</p> <p>15 overall willingness to pay for the programming was</p> <p>16 directly.</p> <p>17 So -- and that's not just useful for a cable</p> <p>18 operator. A cable operator needs to know what they</p> <p>19 are actually willing to pay. So if Gruen asked a</p> <p>20 subscriber that had no value whatsoever for distant</p> <p>21 signals about their relative willingness to pay for</p> <p>22 the programming on that signal, that's not actually</p>
2363	<p>1 reinforced with this potential bundling effect.</p> <p>2 If these same special interest programs are</p> <p>3 more likely to have negative correlation with tastes</p> <p>4 for bundles, then what you're going to get is you're</p> <p>5 going to get cable operators that are selecting</p> <p>6 programming based on these characteristics that</p> <p>7 enhance their profitability.</p> <p>8 But these programmings often, if they're more</p> <p>9 special interest programmings, may have less viewing</p> <p>10 than the kinds of programmings that might be selected</p> <p>11 in the advertising-supported environment. So if you</p> <p>12 try to measure the relative market value based on</p> <p>13 advertising outcomes, you're just going to get the</p> <p>14 wrong answer.</p> <p>15 Q. And Dr. Crawford, turning to the bottom of</p> <p>16 page 14 of your testimony, you discuss there</p> <p>17 Dr. Ford's alternative approach -- he calls it a</p> <p>18 hybrid approach or analysis -- in which he</p> <p>19 incorporates a subscriber survey that was presented by</p> <p>20 Dr. Gruen in this proceeding; is that right?</p> <p>21 A. That's right.</p> <p>22 Q. Okay. Now, within the framework that you've</p>	2365	<p>1 useful for what a cable operator needs to know in</p> <p>2 terms of valuing the content there.</p> <p>3 It also, unfortunately, only asked about the</p> <p>4 distant broadcast signal. And in the examples I gave,</p> <p>5 and in my research, I emphasize the importance of this</p> <p>6 bundling aspect. So to get an understanding of the</p> <p>7 value to a cable operator of subscriber preferences,</p> <p>8 you would need to not only ask about the programming</p> <p>9 on distant signals, but also about their willingness</p> <p>10 to pay for the other programming that might be on the</p> <p>11 bundle. And without that, without both those pieces</p> <p>12 of information, then it's impossible to construct what</p> <p>13 a cable operator would value that programming at.</p> <p>14 Q. Thank you, Dr. Crawford. I have no further</p> <p>15 questions at this time.</p> <p>16 JUDGE ROBERTS: One quick question for you,</p> <p>17 Dr. Crawford. In your experience, what is the</p> <p>18 approach used by cable operators to determine what</p> <p>19 their subscribers' willingness to pay is for</p> <p>20 particular types of programming?</p> <p>21 THE WITNESS: So that is a very difficult</p> <p>22 question, and I don't have firsthand knowledge about</p>

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2366	<p>1 cable operators' operations. So -- and I understand</p> <p>2 that the theory I've presented is fairly, you know,</p> <p>3 complicated and requires detailed information about</p> <p>4 sort of understanding consumers' willingness to pay</p> <p>5 and correlations.</p> <p>6 But what I can say is that just in the</p> <p>7 practice of making their decisions, they're likely to</p> <p>8 get to the right answer in that -- for example, if</p> <p>9 they already reached 70 percent of the market and</p> <p>10 they're trying to get some of the subscribers in</p> <p>11 30 percent, they may well say, okay, well, that 30</p> <p>12 percent of the market that isn't buying our service,</p> <p>13 why aren't they? They obviously must not like what we</p> <p>14 currently offer. Can we try to find other channels to</p> <p>15 offer into the bundle that might get them to</p> <p>16 subscribe?</p> <p>17 And even if they're not doing the economic</p> <p>18 sort of calculations that I've described, they're</p> <p>19 effectively doing that. They're trying to identify</p> <p>20 channels for which there's going to be negative</p> <p>21 correlation and the willingness to pay for those</p> <p>22 potential subscribers for bundles.</p>	2368
2367	<p>1 JUDGE ROBERTS: Are you aware if cable</p> <p>2 operators typically are surveying people within their</p> <p>3 service area in an effort to make a determination as</p> <p>4 to what their willingness is to pay for certain types</p> <p>5 of programming? Obviously, wouldn't be surveying</p> <p>6 their subscribers, I guess, necessarily because they</p> <p>7 already have those --</p> <p>8 THE WITNESS: Right.</p> <p>9 JUDGE ROBERTS: -- subscribers, unless they</p> <p>10 were wishing to sell higher tiers of programming. But</p> <p>11 what might be the efforts in your example to reach out</p> <p>12 and try to figure out that 30 percent -- what their</p> <p>13 preferences are?</p> <p>14 THE WITNESS: So having not ever been part of</p> <p>15 a cable organization, I can't directly answer. I can</p> <p>16 speculate that I imagine, as does any firm in any</p> <p>17 business, they do a fair amount of market research.</p> <p>18 And so they would certainly -- I can say they would</p> <p>19 certainly have the incentive to try to find out what</p> <p>20 those subscribers might be interested in.</p> <p>21 They certainly -- what they also do is they</p> <p>22 certainly -- especially with fairly new channels,</p>	2369

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<p style="text-align: right;">2370</p> <p>1 you would be speculating as to how cable operators 2 determine the willingness to pay of subscribers. So 3 are you changing your response? 4 A. No. That's -- that's fine. 5 Q. So you don't -- you would only speculate -- 6 but you're sure that it's not the way that Dr. Gruen 7 did it? 8 A. I don't believe I've said I'm sure that it's 9 not the way that Dr. Gruen did it. 10 Q. So it could be, in fact, that what Dr. Gruen 11 did is very similar to what cable operators do in 12 terms of trying to figure out the willingness to pay 13 of subscribers? 14 A. It could be, but I would doubt it. 15 Q. Now, turn to page 15 of your testimony. 16 A. Uh-huh. 17 Q. Now, you concede, do you not, that a 18 subscriber willingness to pay would be more relevant 19 than a purported advertising -- an analysis of 20 advertising revenues; is that correct? 21 A. To which portion are you referring? 22 Q. I'm sorry. The first full paragraph on that</p>	<p style="text-align: right;">2372</p> <p>1 A. I say that the survey fails to establish 2 respondents' familiarity with or whether they place 3 any value on the distant signal programming at all. 4 Q. So you're saying that you don't know whether 5 or not the respondents had familiarity with the 6 program or not? 7 A. That's right. 8 Q. Are you a survey design expert, by any 9 chance? 10 A. No. 11 Q. Let me ask you -- let's get some agreement on 12 a couple of things. You agree, do you not, that cable 13 systems aren't in the business of choosing channels 14 and not negotiating rights with individual copyright 15 owners, correct? 16 A. For the types of channels that often are 17 offered in bundles, I would agree with that, correct. 18 Q. Will you please turn to page 13 of your 19 testimony. 20 A. Uh-huh. 21 Q. And then look at the second paragraph. And 22 look at the sentence -- the second sentence in that</p>
<p style="text-align: right;">2371</p> <p>1 page, it's about the third sentence. You say, "Even 2 though subscriber willingness to pay would be more 3 relevant than the purported advertising revenues" -- 4 do you see that? 5 A. Yes, I do. 6 Q. Okay. So a survey that's a proper survey of 7 willingness to pay of subscribers would have some 8 relevance in the proceeding? 9 A. Yes, because when I mentioned in my 10 discussion of the difference between 11 advertising-support and pay-support, one of the things 12 that matters is the amount that subscribers are 13 willing to pay. So to the extent a subscriber survey 14 could elicit information about the nature of 15 subscriber willingness to pay, that would be one part 16 of what a cable operator would need, but it would not 17 be the only part. 18 Q. And -- and you mention two things, two issues 19 you had with Dr. Gruen's survey. The first was that 20 the subscribers -- you said that the respondents of 21 his survey did not have familiarity with the programs; 22 is that right?</p>	<p style="text-align: right;">2373</p> <p>1 paragraph. 2 A. Uh-huh. I see that. 3 Q. You don't have the qualification you just 4 gave me in there, do you? 5 A. I do not. 6 Q. Okay. And you would also agree that cable 7 systems are unlikely to have the skills for or 8 interest in negotiating with individual copyright 9 owners, correct? 10 A. I do say that they are unlikely to have the 11 skills for it or interest in doing so, correct. 12 Q. And broadcast stations, on the other hand, 13 are very skilled at negotiating directly with 14 copyright owners; this is what they do every day, 15 correct? 16 A. Correct. 17 Q. And broadcast stations do select the content 18 that they put on their signals, right? 19 A. Yes. 20 Q. Okay. And you would agree that the issue in 21 this proceeding is the allocation of individual 22 content within each channel, correct?</p>

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2374	<p>1 A. It's -- the purpose of this proceeding is to</p> <p>2 establish the relative market value of the content</p> <p>3 carried on distant broadcast signals.</p> <p>4 Q. Is the purpose of this proceeding to -- to</p> <p>5 figure out the relative market value of entire signals</p> <p>6 or individual content within those signals?</p> <p>7 A. Correct, the individual -- the purpose is to</p> <p>8 evaluate the relative market value of the content</p> <p>9 within distant broadcast signals.</p> <p>10 Q. In particular, broadcast signals, correct,</p> <p>11 not cable networks?</p> <p>12 A. Well, within distant broadcast signals which</p> <p>13 are carried on cable systems in part to attract</p> <p>14 subscribers to the cable system. So in that respect,</p> <p>15 they are more like cable networks than broadcast</p> <p>16 signals.</p> <p>17 Q. The purpose of this proceeding is to</p> <p>18 determine the relative market value of individual</p> <p>19 content within broadcast signals that are</p> <p>20 retransmitted on a distant basis.</p> <p>21 A. Correct.</p> <p>22 Q. Okay. Now, in your testimony -- from about</p>	2376	<p>1 85 percent of cable operator revenues are from</p> <p>2 subscription fees, right?</p> <p>3 A. That's correct.</p> <p>4 Q. And that means about 15 percent from</p> <p>5 advertising revenues?</p> <p>6 A. Yes. Uh-huh.</p> <p>7 Q. Okay. And what are local avails, which you</p> <p>8 make a reference to in your testimony?</p> <p>9 A. So a local avail is time on a local cable</p> <p>10 channel -- a cable channel that is made available to</p> <p>11 the cable system to offer local advertising in their</p> <p>12 market.</p> <p>13 Q. And under the compulsory license, those local</p> <p>14 avails are available to cable operators, right?</p> <p>15 A. Under the current compulsory license?</p> <p>16 Q. Yes.</p> <p>17 A. No.</p> <p>18 Q. I'm sorry. I didn't mean under the current</p> <p>19 compulsory license. But local avails are available to</p> <p>20 cable upgraders currently; is that right?</p> <p>21 A. For cable -- for certain cable television</p> <p>22 channels --</p>
2375	<p>1 page 3 to page 6 of your testimony is where you</p> <p>2 discuss the economic motivation of cable systems and</p> <p>3 broadcast signals with regard to program choices; is</p> <p>4 that correct?</p> <p>5 A. That's correct.</p> <p>6 Q. Do you see that?</p> <p>7 A. Uh-huh.</p> <p>8 Q. And beginning on about page 3 and ending on</p> <p>9 page 4, you discuss the economic motivation of the</p> <p>10 broadcaster with regard to what programs to carry on</p> <p>11 that signal, right?</p> <p>12 A. Correct.</p> <p>13 Q. And that discussion pertains to selection of</p> <p>14 particular programs on -- for that particular signal,</p> <p>15 right?</p> <p>16 A. Uh-huh.</p> <p>17 Q. Okay. And then on page 4, going on to</p> <p>18 page 5, you discuss all of the various decisions</p> <p>19 facing -- the issues facing the cable system with</p> <p>20 regard to what signals to carry, right?</p> <p>21 A. That's correct.</p> <p>22 Q. You do note in your testimony, though, that</p>	2377	<p>1 Q. Yes, that's --</p> <p>2 A. -- but not all cable television channels.</p> <p>3 Q. Understood. Understood. Now, under the</p> <p>4 current compulsory license, there's no opportunity for</p> <p>5 the cable operator to advertise on -- to insert</p> <p>6 advertisement when they're importing distant signals;</p> <p>7 is that correct?</p> <p>8 A. That's correct.</p> <p>9 Q. And that prohibition is an artifact of the</p> <p>10 current regulatory scheme; is that right?</p> <p>11 A. That's right.</p> <p>12 Q. Okay. And is there any reason to believe</p> <p>13 that that prohibition would exist absent a compulsory</p> <p>14 license?</p> <p>15 A. Well -- whether the prohibition would exist</p> <p>16 absent the compulsory license? It's hard for me to</p> <p>17 forecast what the market would look like absent the</p> <p>18 compulsory license. But if it were not there, I could</p> <p>19 imagine that some local advertising could be inserted</p> <p>20 into distant broadcast signal.</p> <p>21 Q. Now, are you familiar with television ratings</p> <p>22 in general?</p>

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2378	2380
<p>1 A. Uh-huh.</p> <p>2 Q. And would you say between 1998 and 2005 that</p> <p>3 ratings for cable networks in general have been on the</p> <p>4 rise or have they been declining?</p> <p>5 A. Well, it's tricky. For individual -- the</p> <p>6 aggregate of ratings for cable television network have</p> <p>7 been rising.</p> <p>8 Q. Okay.</p> <p>9 A. But because there are more and more cable</p> <p>10 television networks out there, it's possible that</p> <p>11 ratings for individual networks could be falling.</p> <p>12 Q. But on the aggregate, they have been going</p> <p>13 up?</p> <p>14 A. Yeah, in the aggregate, ratings have been</p> <p>15 going up, correct.</p> <p>16 Q. And would you also say that the advertising</p> <p>17 revenues for cable operators in general has been on</p> <p>18 the decline or on the rise over that same period?</p> <p>19 A. For the cable operators themselves, I'm not</p> <p>20 sure. For the cable channels, yes. But for the cable</p> <p>21 operators, I'm not sure.</p> <p>22 Q. And now going back to the discussion that you</p>	<p>1 discussion that starts on page 4 that ends on page 5.</p> <p>2 You don't talk about cable operators' analysis of</p> <p>3 individual content, do you?</p> <p>4 A. I say, "The primary goal of cable systems</p> <p>5 regarding distant signals is, therefore, to select</p> <p>6 broadcast signals that maximize their profits from</p> <p>7 household subscriptions. They do so by selecting the</p> <p>8 channels that appeal to households in their market."</p> <p>9 So in the process of making that decision,</p> <p>10 they would have to consider what other various kinds</p> <p>11 of programming are offered on that channel.</p> <p>12 Q. You haven't answered my question.</p> <p>13 A. Would you repeat your question.</p> <p>14 Q. The question was, on the discussion that</p> <p>15 starts on page 4 and ends on page 5, you do not</p> <p>16 discuss cable operators' selection -- cable operators'</p> <p>17 selection of specific content on the signal, not the</p> <p>18 entire signal -- specific content on those signals, do</p> <p>19 you?</p> <p>20 CHIEF JUDGE SLEDGE: If your answer is any</p> <p>21 different than your last answer.</p> <p>22 THE WITNESS: No.</p>
2379	2381
<p>1 have where you discuss -- on page 4, where you begin</p> <p>2 on page 4 about cable system channel carriage, and</p> <p>3 falling over to -- carrying over to page 5, now, that</p> <p>4 discussion again pertains entirely to cable system</p> <p>5 selection of entire signals, right?</p> <p>6 A. Yes. The entire distant broadcast signals.</p> <p>7 Q. And it doesn't have anything to do with the</p> <p>8 selection of specific programs on those channels,</p> <p>9 right?</p> <p>10 A. No. I would disagree with that. I mean, the</p> <p>11 decision to carry a signal depends on the programming</p> <p>12 carried on the signal. So if a cable operator is</p> <p>13 faced with, you know, two choices of distant signals</p> <p>14 to carry, they would look at the types of programming</p> <p>15 on each. And it's not as clean as, you know, looking</p> <p>16 at a channel that only had one type and comparing that</p> <p>17 to another channel that only had a second type.</p> <p>18 But it's still -- since the types of</p> <p>19 programming are going to influence their</p> <p>20 profitability, they'll look at how much programming of</p> <p>21 each type is on each distant signal.</p> <p>22 Q. Now, I asked you about page -- your</p>	<p>1 BY MR. OLANIRAN:</p> <p>2 Q. Still on page 5, in the second full</p> <p>3 paragraph, the one that starts with "While the</p> <p>4 specific choices," you talk about -- well, actually in</p> <p>5 the paragraph before that, you make a reference to the</p> <p>6 incremental revenue that arises from carrying a bundle</p> <p>7 of signals to attract new subscribers or avoid the</p> <p>8 loss of subscribers, right?</p> <p>9 A. Uh-huh.</p> <p>10 Q. And then, in the following paragraph, you</p> <p>11 talk about the relative tastes for programming among</p> <p>12 their subscribers and potential subscribers, right?</p> <p>13 A. That's correct.</p> <p>14 Q. And again, you're still really referring to</p> <p>15 the carriage of the overall signal, are you not?</p> <p>16 A. Yes.</p> <p>17 Q. And on page 6 of your testimony, you begin</p> <p>18 the discussion of factors that influence cable</p> <p>19 carriage decisions. Do you see that?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. And going over to page 7, you identify</p> <p>22 a couple of factors which I think you spoke of</p>

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2382	<p>1 earlier, basically the average demand and negative</p> <p>2 correlation, right?</p> <p>3 A. Uh-huh.</p> <p>4 Q. And you're very clear in that discussion,</p> <p>5 though, which goes on through page 9, that, again,</p> <p>6 you're talking about cable operators' carriage of</p> <p>7 entire signals, right?</p> <p>8 A. (Nods head affirmatively.)</p> <p>9 Q. And, in fact, when you turn to page 8 of your</p> <p>10 testimony, you have two charts, right?</p> <p>11 A. Uh-huh.</p> <p>12 Q. And it's in those charts you're trying to</p> <p>13 illustrate the impact of negative correlation as it</p> <p>14 affects the cable operators' decisions, right?</p> <p>15 A. Correct.</p> <p>16 Q. Now, in the first chart on page 8, you use</p> <p>17 the example of a news channel and a weather channel,</p> <p>18 right?</p> <p>19 A. That's correct.</p> <p>20 Q. And I take it, in those two examples, you're</p> <p>21 referring to a channel that consists entirely of news</p> <p>22 and also a channel that consists entirely of weather,</p>	2384
2383	<p>1 correct?</p> <p>2 A. That's correct.</p> <p>3 Q. On the second chart at the bottom of page 8,</p> <p>4 you add a sports channel, if you will --</p> <p>5 A. Uh-huh.</p> <p>6 Q. -- to the mix, and so you have three</p> <p>7 channels, each consisting entirely of news, sports and</p> <p>8 weather.</p> <p>9 A. That's correct.</p> <p>10 Q. Okay. And -- by the way, are you aware of</p> <p>11 any distant signal that's entirely sports?</p> <p>12 A. No.</p> <p>13 Q. Any distant signal that's entirely weather?</p> <p>14 A. No.</p> <p>15 Q. What about news?</p> <p>16 A. No, I don't believe so.</p> <p>17 Q. Now, on page 9 of your testimony is where you</p> <p>18 begin the discussion of which signals are most likely</p> <p>19 to be selected by the cable operator.</p> <p>20 A. Uh-huh.</p> <p>21 Q. And following that discussion to page 10 --</p> <p>22 JUDGE ROBERTS: Mr. Crawford, if you could</p>	2385

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2386	<p>1 mean, is your question about a general interest 2 network with respect to this paper? 3 Q. Yes. With respect to your testimony. 4 A. Okay. Well, I looked at the question of 5 general interest networks fairly closely when I wrote 6 that paper. And the -- at the time when I was 7 deciding on the allocation of different channels to 8 genres like that, I went to the National Cable 9 Television Association website, and they have a list 10 of channels that are offered on cable systems, and 11 there were two things on that website that was useful. 12 One was just -- they listed a genre, which 13 had information like general entertainment or sports 14 or news, and they also then had links to the 15 individual channel. And the individual channel itself 16 described the kind of programming it offered. And so 17 I sort of used both those pieces of information to 18 make the allocation that I did. 19 Q. You state that, as between two signals with 20 the same average demand, that the distant signal with 21 niche programming is the one that's more likely to be 22 carried by the cable operator. And you're speaking in</p>	2388	<p>1 A. Well -- so, for example, on distant -- some 2 distant signals carry news programming from a market 3 that isn't local to the cable system carrying the 4 signal. So if I can use an example, in Mr. Fritz's 5 testimony, he talks about the ABC station in Little 6 Rock, KATV, that offers news programming to the Little 7 Rock DMA. 8 Well, for someone living outside the Little 9 Rock DMA, that same news programming about Little 10 Rock 11 may be considered special interest if you're living in 12 the Springfield DMA where the majority of 13 information -- of news coming from -- on your 14 broadcast station is about Springfield. 15 Q. Now, in Mr. Fritz's example, did he testify 16 that the dominant programming on that station is news 17 programming, or is it just one of the programs that 18 may be of interest to someone else in the market? 19 A. Right. That's just one -- that's, I believe, 20 one example of the programming that's on KATV. 21 Q. You're talking about one piece of programming 22 on KATV, and my question to you is, can you think of a 23 distant signal that you would describe as having niche</p>
2387	<p>1 terms of niche programming consisting of the entire 2 panoply of programs on that particular channel -- on 3 the channels that you're comparing, right? 4 A. No. So I would -- so when -- this is how I 5 would think about it. When a cable operator is 6 selecting a distant broadcast signal, it looks at a 7 mix of programming on that broadcast signal. Some of 8 that programming may be relatively more special 9 interest programming and some of it may be relatively 10 more general interest programming. 11 That is going to complicate his decision as 12 compared to a situation where it was all, say, special 13 interest or it was all general interest. But the 14 logic is that -- and you can think, again, of a 15 continuum -- if there's relatively more special 16 interest programming, then the tastes for that channel 17 will likely be more like tastes for channels that have 18 exclusively special interest programming, and then 19 there will be, like, tastes for channels that have 20 exclusively general interest programming. 21 Q. Now, what would be an example of a distant 22 signal that's special interest programming?</p>	2389	<p>1 programming? 2 A. Oh. Well, I mean, I thought -- 3 Q. Let me rephrase. 4 A. Yeah. Yeah. I thought that's what I did. 5 Q. Can you think of a distant signal that 6 consists principally of niche -- 7 A. Principally of niche programming? 8 Q. Niche programming. 9 A. I can say I don't have sufficient information 10 about the full range of programming on specific 11 distant signals to be able to answer that question. 12 Q. Now, one of the examples of niche -- 13 JUDGE WISNIEWSKI: Dr. Crawford, doesn't that 14 sort of depend on the eye of the beholder and the 15 ultimate consumer as to which channel might be 16 considered a general interest channel and which might 17 be considered a niche programming channel, depending 18 on the content, assuming, for example, the particular 19 consumer is only interested in one particular piece of 20 content on that channel? 21 THE WITNESS: So I think what I'm shooting 22 for, when I talk about special interest or niche --</p>

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2390	<p>1 thinking of those as the same thing, general</p> <p>2 interest -- it's not for any one consumer, but sort of</p> <p>3 across all consumers. How many -- you know, so the</p> <p>4 idea is that a general interest channel would</p> <p>5 presumably appeal to a larger body of consumers,</p> <p>6 whereas a special interest channel would appeal to a</p> <p>7 smaller body of consumers.</p> <p>8 CHIEF JUDGE SLEDGE: This has been very</p> <p>9 enlightening in your testimony, so I want to make sure</p> <p>10 I understand. When I read your testimony, it appeared</p> <p>11 that you were talking about niche programming on</p> <p>12 sports channels, food channels, fishing channels,</p> <p>13 travel channels, golf channels, but as we're hearing</p> <p>14 your answers to cross-examination, none of that is</p> <p>15 what you are referring to because all of those are</p> <p>16 cable networks and not distant signals.</p> <p>17 THE WITNESS: So what I would say is most of</p> <p>18 my research looked at individual cable channels,</p> <p>19 because I was looking at the cable marketplace and</p> <p>20 that was a natural thing to do. In this setting where</p> <p>21 you have distant broadcast signals, the same</p> <p>22 underlying economic forces that are at play in the</p>	2392	<p>1 sports.</p> <p>2 Q. So the data you relied on for that was from</p> <p>3 1995?</p> <p>4 A. That's correct.</p> <p>5 Q. Do you have any sense whether ESPN's</p> <p>6 programming has changed over the years, say, from --</p> <p>7 between 1995 and 2005?</p> <p>8 A. I do.</p> <p>9 Q. And how would you characterize the nature of</p> <p>10 the change?</p> <p>11 A. I would say over time -- well, I suspect that</p> <p>12 it's become relatively more general interest over time</p> <p>13 in part because, as -- as it became more popular, it</p> <p>14 would have ever-greater audiences to sell and,</p> <p>15 therefore, it would respond to those incentives from</p> <p>16 an ad-supported environment to try to sort of earn</p> <p>17 revenue from both subscriber payments and advertising</p> <p>18 revenue.</p> <p>19 Q. And the reference to CNN as a niche program</p> <p>20 network, and CSPAN, is that data from 1995 also?</p> <p>21 A. All the data is from 1995.</p> <p>22 Q. And in terms of the nature of the</p>
2391	<p>1 selection of channels are also at play in the</p> <p>2 selection of distant broadcast signals.</p> <p>3 Unfortunately, those distant broadcast</p> <p>4 signals are blends of different kinds of programming.</p> <p>5 So that makes it more complicated. But the argument I</p> <p>6 would try to make is that the same economic</p> <p>7 fundamentals apply in both cases.</p> <p>8 CHIEF JUDGE SLEDGE: But you can give no</p> <p>9 example of a distant signal that qualifies as niche</p> <p>10 programming?</p> <p>11 THE WITNESS: Not exclusively as niche</p> <p>12 programming.</p> <p>13 BY MR. OLANIRAN:</p> <p>14 Q. One of the examples of niche programming that</p> <p>15 you used was ESPN. Do you remember that?</p> <p>16 A. I do.</p> <p>17 Q. And why is ESPN a niche networks?</p> <p>18 A. So in my opinion, especially at the time --</p> <p>19 this was using data from 1995 -- they were -- they</p> <p>20 were and continue to broadcast -- or, not broadcast,</p> <p>21 but provide programming of and related to sports, you</p> <p>22 know, the actual sporting event, sports commentary,</p>	2393	<p>1 programming, when you said it's trying to appeal to, I</p> <p>2 guess, a broader audience -- now, do you know</p> <p>3 specifically the types of programming that have been</p> <p>4 introduced to try to appeal to a broader audience?</p> <p>5 A. I mean, they've had -- as an example -- I</p> <p>6 mean, I don't mean to claim full knowledge of the full</p> <p>7 range of programming that they offer, but they've sort</p> <p>8 of done, I think, you know, relative -- like, if I can</p> <p>9 imagine, a human interest story about a former athlete</p> <p>10 would be the kind of programming that -- you know,</p> <p>11 it's sports, because it relates to the athlete, but</p> <p>12 it's more of a human interest kind of story that</p> <p>13 typically one would think of as general interest</p> <p>14 programming.</p> <p>15 Q. More talk shows?</p> <p>16 A. If it's a talk show about sports, is that</p> <p>17 special interest or general interest? That's a</p> <p>18 judgment call.</p> <p>19 Q. I'm not asking you to classify the shows</p> <p>20 between special and general. I'm just asking the type</p> <p>21 of shows.</p> <p>22 A. Oh. So do they do more talk shows now? I</p>

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2394	<p>1 don't know.</p> <p>2 Q. Now, I saw that in your testimony you</p> <p>3 identify joint sports programs as an example of niche</p> <p>4 programming, correct?</p> <p>5 A. (Nods head affirmatively.)</p> <p>6 Q. Are you influenced -- is that conclusion</p> <p>7 influenced in any way by your understanding of the</p> <p>8 type of programming that's on ESPN?</p> <p>9 A. That's a complicated question. Is that</p> <p>10 conclusion influenced in any way by the type of</p> <p>11 programming that's on ESPN? I would say -- in any</p> <p>12 way, yes. But if I may elaborate --</p> <p>13 Q. Sure.</p> <p>14 A. -- I can make it a little more clear. I</p> <p>15 think of ESPN as providing national -- it's a national</p> <p>16 network, so it provides, you know, sports programming</p> <p>17 of national interest, whereas I think sports</p> <p>18 programming carried on distant broadcast signals,</p> <p>19 while it may be of -- going back to the KATV example,</p> <p>20 while University of Arkansas football might be of</p> <p>21 general interest within the Little Rock DMA, it might</p> <p>22 not be of general interest within the Springfield DMA,</p>	2396	<p>1 then, how would you classify golf?</p> <p>2 A. Well, again, it --</p> <p>3 CHIEF JUDGE SLEDGE: Are you referring to</p> <p>4 golf what?</p> <p>5 MR. OLANIRAN: Golf programming.</p> <p>6 CHIEF JUDGE SLEDGE: Golf programming.</p> <p>7 BY MR. OLANIRAN:</p> <p>8 Q. Golf programs. Which box would you put it in</p> <p>9 for the purpose of this proceeding? Would it be part</p> <p>10 of sports or something else?</p> <p>11 A. Well, it's not a team sport, so I wouldn't</p> <p>12 put it with the sports. So golf programming -- I</p> <p>13 don't know where it would go.</p> <p>14 Q. What about NASCAR?</p> <p>15 A. I'll have to -- see, I don't know where</p> <p>16 NASCAR would go either.</p> <p>17 Q. Tennis?</p> <p>18 A. I suspect that they're all going to the same</p> <p>19 place, but I don't know where they're going.</p> <p>20 Q. What about wrestling?</p> <p>21 A. Well, is wrestling a sport? Or is wrestling</p> <p>22 entertainment? I think -- I mean, without getting</p>
2395	<p>1 but it could be of special interest to certain people</p> <p>2 within the Springfield DMA.</p> <p>3 Q. Now, when you refer to sports programming --</p> <p>4 I want to be sure -- are you referring to the Joint</p> <p>5 Sports Claimants' programs --</p> <p>6 A. Right.</p> <p>7 Q. -- or are you referring to the broader --</p> <p>8 A. No, I'm specifically referring to what I</p> <p>9 understand to be the joint sports program claimants --</p> <p>10 Joint Sports Claimants' programs.</p> <p>11 Q. And what do you understand that to be?</p> <p>12 A. I understand that to be the live team sports,</p> <p>13 broadcast of live team sporting events.</p> <p>14 Q. And how much of that would you say is part</p> <p>15 of -- was part of ESPN's programming, say, within '04</p> <p>16 and '05?</p> <p>17 A. I'm sure -- there is -- you know, ESPN</p> <p>18 definitely does show live team sporting events. But</p> <p>19 as a share of their total programming, I don't know.</p> <p>20 Q. You don't know?</p> <p>21 A. No.</p> <p>22 Q. And so for the purpose of this proceeding,</p>	2397	<p>1 into the detailed definition of -- I would consider</p> <p>2 sport events without predetermined outcomes, and I'm</p> <p>3 not sure that wrestling qualifies under that</p> <p>4 definition.</p> <p>5 CHIEF JUDGE SLEDGE: Given that answer,</p> <p>6 where</p> <p>7 would you qualify NCAA division 1?</p> <p>8 THE WITNESS: They do a better job</p> <p>9 pretending.</p> <p>10 CHIEF JUDGE SLEDGE: That depends on who's</p> <p>11 looking.</p> <p>12 MR. OLANIRAN: I would conclude my cross at</p> <p>13 this point, but...</p> <p>14 BY MR. OLANIRAN:</p> <p>15 Q. Now, you testified that joint sports programs</p> <p>16 is a category that's more like this niche programming.</p> <p>17 I think that's what started this discussion. And when</p> <p>18 you say that, do you have in mind joint sports</p> <p>19 programming as an entire -- constituting an entire</p> <p>20 channel or part of a channel that has all kinds of</p> <p>21 other programming?</p> <p>22 A. Exactly. I mean, my understanding of distant</p> <p>23 broadcast signal -- and that's why we're here -- is</p>

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<p>1 that they encompass many different kinds of programs.</p> <p>2 Q. But when it becomes part of a panoply of</p> <p>3 other programs, right, you would still consider the</p> <p>4 channel niche programming -- niche programming</p> <p>5 channel?</p> <p>6 CHIEF JUDGE SLEDGE: I don't understand the</p> <p>7 question.</p> <p>8 BY MR. OLANIRAN:</p> <p>9 Q. Well -- okay. Once it becomes part of a host</p> <p>10 of other programs on a particular channel, how would</p> <p>11 you characterize that channel? Is that still a</p> <p>12 general interest channel or is it a niche programming</p> <p>13 channel?</p> <p>14 And let me preface that for you. Because all</p> <p>15 of your discussion has been about entire channels</p> <p>16 consisting of niche programming. And then you -- you</p> <p>17 discuss joint sports programs and commercial TV</p> <p>18 programs and public TV programs as niche programming.</p> <p>19 So what I'm trying to understand is this: When you</p> <p>20 conclude that they're considered niche programming,</p> <p>21 are you viewing them as a part of an entire channel or</p> <p>22 are you viewing them as mixed up with other</p>	<p>1 specific content within a particular signal?</p> <p>2 A. No.</p> <p>3 Q. Now, you testified the relative market value</p> <p>4 is the appropriate standard for allocation of</p> <p>5 royalties to copyright owners that are represented in</p> <p>6 this proceeding, correct?</p> <p>7 A. That's correct.</p> <p>8 Q. And you state that no explicit market exists,</p> <p>9 so we have to simulate an appropriate one, correct?</p> <p>10 A. (Nods head affirmatively.)</p> <p>11 Q. And I want to start by asking you about your</p> <p>12 understanding of the current regulatory market. All</p> <p>13 right?</p> <p>14 A. Uh-huh.</p> <p>15 Q. And let's start first about how the copyright</p> <p>16 owners' content is acquired and used under the</p> <p>17 compulsory license.</p> <p>18 A. All right.</p> <p>19 Q. And several individual copyright owners sell</p> <p>20 their content to broadcast signal, right?</p> <p>21 A. Okay. Yes.</p> <p>22 Q. And then -- there's no limitations on the</p>
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<p>1 programming?</p> <p>2 A. I'm viewing them as mixed up with other</p> <p>3 programming.</p> <p>4 Q. So when you mix them with all other</p> <p>5 programming, don't they become general interest</p> <p>6 programming? Doesn't that become a general interest</p> <p>7 network in a way?</p> <p>8 A. Again, there's a -- you know, if niche</p> <p>9 programming is sufficiently narrow and you put three</p> <p>10 of them together, that may not qualify as a full</p> <p>11 general interest channel, whereas if you put, you</p> <p>12 know, specific niches with other more general</p> <p>13 interests, it might qualify as a general interest</p> <p>14 channel.</p> <p>15 But the important thing isn't to necessarily</p> <p>16 qualify specific channels, but rather to understand</p> <p>17 the relative nature of the specific programming. And</p> <p>18 then, presumably the cable operators themselves will</p> <p>19 make the decision about the relative value of the</p> <p>20 various programming on the distant signal.</p> <p>21 Q. Is there somewhere in your testimony where</p> <p>22 you actually talk about cable operators analyzing</p>	<p>1 price or the quantity. It's whatever the parties</p> <p>2 agree to. The broadcaster negotiates directly with</p> <p>3 copyright owners -- and that's how it works, right?</p> <p>4 A. That's correct, to my understanding.</p> <p>5 Q. And then the broadcaster packages this</p> <p>6 content to make up the programming for its signal,</p> <p>7 correct?</p> <p>8 A. Correct.</p> <p>9 Q. And then, assuming the cable operator has</p> <p>10 complied with the laws, the cable operator has the</p> <p>11 right to retransmit that signal outside -- and import</p> <p>12 it into a distant market, right?</p> <p>13 A. That's correct, in my understanding.</p> <p>14 Q. And he does so without any alteration to the</p> <p>15 signal because the law doesn't allow it, right?</p> <p>16 A. Correct.</p> <p>17 Q. Now, let's look at the manner in which</p> <p>18 copyright owners receive compensation still under the</p> <p>19 current compulsory licensing scheme, right?</p> <p>20 A. Okay.</p> <p>21 Q. In that initial transaction between a</p> <p>22 broadcaster and the copyright owner, the copyright</p>

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<p style="text-align: right;">2402</p> <p>1 owner receives compensation, right?</p> <p>2 A. Correct.</p> <p>3 Q. And the broadcaster negotiates individually</p> <p>4 with all of them, and they pay based on whatever they</p> <p>5 negotiate individually, right?</p> <p>6 A. That's correct.</p> <p>7 Q. And that -- that compensation exchange is</p> <p>8 based on -- principally on advertising, is it not?</p> <p>9 A. Yes. I mean, the broadcaster is selecting</p> <p>10 programming to maximize advertising revenue. So that</p> <p>11 would be the motivation for choosing programming.</p> <p>12 Q. And would you characterize that change as a</p> <p>13 market transaction?</p> <p>14 A. Yes.</p> <p>15 Q. Now, in the second transaction where the</p> <p>16 cable operator retransmits, right, the entire signal,</p> <p>17 that's done under the compulsory licensing scheme,</p> <p>18 right?</p> <p>19 A. That's correct.</p> <p>20 Q. And -- now, how does the copyright owner</p> <p>21 receive compensation under that -- for that</p> <p>22 transaction?</p>	<p style="text-align: right;">2404</p> <p>1 the statutory license fee, that's not a market</p> <p>2 transaction, right?</p> <p>3 A. Correct.</p> <p>4 Q. So to summarize the current regulatory</p> <p>5 regime, the copyright owner sells a variety of stuff</p> <p>6 to the broadcaster who packages, and the cable</p> <p>7 operator can avail itself of it. And the signal is</p> <p>8 picked up by the cable system. The cable system</p> <p>9 delivers it to wherever so long as it complies with</p> <p>10 the law, right?</p> <p>11 A. That's my understanding, yes.</p> <p>12 Q. Now -- and under the current scheme, there</p> <p>13 are two compensation streams. One is when the</p> <p>14 copyright owner sells to the broadcaster and then</p> <p>15 waits years later to be compensated for the cable</p> <p>16 operator's ability to retransmit. And once the</p> <p>17 distribution takes place, the copyright owner gets</p> <p>18 compensated. That's the second compensation stream,</p> <p>19 right?</p> <p>20 A. Yes.</p> <p>21 Q. And one which is regulated -- the other</p> <p>22 one -- the first one is not regulated and the second</p>
<p style="text-align: right;">2403</p> <p>1 A. From my understanding, the copyright act sets</p> <p>2 out a schedule of fees that the cable system must pay</p> <p>3 into a pool. And the magnitude of the fees depends on</p> <p>4 the size of the system as well as the type of the</p> <p>5 distant broadcast signal. And then the -- then, in</p> <p>6 proceedings like this one, that pool is allocated to</p> <p>7 the original content holders as compensation for the</p> <p>8 additional exposure to their programming via the cable</p> <p>9 system.</p> <p>10 Q. Is that a nice way of saying they hire</p> <p>11 lawyers and the lawyers fight among each other in a</p> <p>12 distribution proceeding?</p> <p>13 So the government set up a scheme, basically,</p> <p>14 and that's what brings us all here, and the idea is</p> <p>15 the cable operator can retransmit so long as it</p> <p>16 complies, and one of the requirements is to pay this</p> <p>17 statutory fee --</p> <p>18 A. That's my understanding.</p> <p>19 Q. -- to figure out how to divide up, right?</p> <p>20 A. (Nods head affirmatively.)</p> <p>21 Q. And that's not -- the ability of the cable</p> <p>22 operator to retransmit the signal and the payment of</p>	<p style="text-align: right;">2405</p> <p>1 one is regulated, right?</p> <p>2 A. Correct.</p> <p>3 Q. So now -- let's talk about the hypothetical</p> <p>4 market that you envision. And this is the market that</p> <p>5 you envision in your testimony. And -- now, would you</p> <p>6 agree that the transaction of interest for the purpose</p> <p>7 of this proceeding is the one where we can determine</p> <p>8 the relative market value of the individual content on</p> <p>9 these signals?</p> <p>10 A. On the second --</p> <p>11 Q. On the broadcast signals.</p> <p>12 A. I don't understand the question. Can you say</p> <p>13 that again.</p> <p>14 Q. The transaction -- that the transaction of</p> <p>15 interest is a transaction which allows us to determine</p> <p>16 the relative market value of the individual content</p> <p>17 within each signal.</p> <p>18 A. To the cable operator in the secondary</p> <p>19 market, yes. So I would qualify my answer. I</p> <p>20 understand the purpose of this proceeding is to</p> <p>21 understand the value of -- the relative market value</p> <p>22 of the different kinds of programming offered on</p>

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<p style="text-align: right;">2406</p> <p>1 distant broadcast signals that are carried by a cable 2 operator. 3 Q. Right. 4 A. And so, therefore, the -- the relative market 5 value of interest is the market value to the cable 6 operator when it decides to add it and attracts 7 subscribers in that way. 8 Q. Is the cable operator valuing -- in the 9 exchange between the cable operator and the broadcast 10 signal, exchange meaning the acquisition of a signal 11 and the compensation for acquisition of that signal -- 12 is the cable operator in that exchange paying for the 13 entire signal or is the cable operator paying for 14 individual content? 15 A. Well, the structure of the law says they pay 16 for the entire signal. 17 Q. We're talking about your hypothetical. 18 A. Okay. In the hypothetical market -- well, as 19 I say in my testimony, I anticipate -- I would 20 anticipate that, in the hypothetical market, there 21 would be an intermediary that would aggregate the 22 programming that are currently offered on distant</p>	<p style="text-align: right;">2408</p> <p>1 A. In that description I would characterize the 2 market as organized as the way it is now. 3 Q. And you stated earlier that the cable 4 operators have no interest in negotiating directly 5 with copyright owners, right? 6 A. I speculate that I -- you know, that cable 7 operators would not have an interest in negotiating 8 directly with -- 9 Q. Okay. So in your hypothetical market, the 10 intermediary would be the broadcast signal -- the 11 broadcaster of the broadcast signal, you would still 12 have copyright owners selling to broadcasters and 13 broadcasters packaging and selling the signal to cable 14 operators, right? 15 A. Yes, that's correct. 16 Q. Okay. And there would be -- you don't 17 anticipate a change in program content, correct? 18 A. That's correct. 19 Q. And you also don't anticipate any changes in 20 the relative value of the content that's being 21 retransmitted; is that correct? 22 A. Yes, that's correct.</p>
<p style="text-align: right;">2407</p> <p>1 signals, and I argue that that intermediary is likely 2 to be the current broadcast station that is selecting 3 the programming for its broadcast market. 4 Q. Okay. Let's -- let's run through your idea 5 of the market. 6 A. Okay. 7 Q. Your testimony is that the market would stay 8 the same way it is now, correct? 9 A. Well, I think -- like, the bottom line in my 10 vision of the hypothetical market is that it would 11 look very similar to the way it looks now, except that 12 a cable system would negotiate -- so just to make it 13 concrete, the cable system in Mountain Home, Arkansas 14 would negotiate with the broadcast station, KATV, over 15 the rights to carry that programming. 16 So whereas instead of, now, they pay the 17 statutory fee, instead they would negotiate. 18 But otherwise, the -- and, of course, some of 19 that fee would then filter back to the content rights 20 holder. 21 Q. Don't you say in your testimony that the 22 market would remain organized the way it is now?</p>	<p style="text-align: right;">2409</p> <p>1 Q. Now, in that hypothetical market, in lieu of 2 paying the statutory fee, the cable operator would be 3 paying the broadcaster or the copyright owner? 4 A. No, the -- as it works currently in the 5 carriage of most cable television channels, they would 6 pay the -- in this case, they would pay the nominal 7 channel, cable channel, which happens to be a 8 broadcaster, and then the broadcaster would, you know, 9 pass along some of that money to the original 10 copyright holder. 11 Q. So just to be clear, the cable operator would 12 pay the broadcaster for retransmission? 13 A. That's correct. 14 Q. In your hypothetical market, they would pay 15 the broadcaster for the right to carry and retransmit 16 that particular broadcast signal? 17 A. That's right. 18 Q. Now, in the discussion a moment ago, we 19 talked about the two different compensation streams 20 where one -- to the copyright owner, one which is in 21 the -- when the copyright owner initially sells its 22 content to the broadcaster, the other being the money</p>

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2410	<p>1 that comes a few years from the compulsory licensing 2 scheme; is that right? 3 A. That's correct. 4 Q. And that second compensation stream would go 5 away if the compulsory license no longer exists, 6 right? 7 A. Well, it would be -- it would go -- it would 8 be replaced by this negotiation between the 9 broadcaster and the distant cable system. 10 Q. So the transaction between the copyright 11 owner and the broadcast signal, does that take place 12 before the transaction between -- strike that. We'll 13 start over again. 14 In your hypothetical market -- I want to be 15 sure that we're talking about -- 16 A. Sure. 17 Q. -- your hypothetical market -- there's a 18 transaction between the copyright owner and the 19 broadcaster. Does that take place before the 20 transaction between the cable operator and the 21 broadcaster? 22 A. I mean, they could happen simultaneously. It</p>	2412	<p>1 Q. And is that -- is that something that they're 2 likely to take into account when negotiating with the 3 broadcaster? 4 A. Oh, absolutely. Absolutely, I would think 5 so. 6 MR. OLANIRAN: That's all I have, Your Honor. 7 CHIEF JUDGE SLEDGE: We'll take a ten-minute 8 recess. 9 (Whereupon, a short recess was taken.) 10 CHIEF JUDGE SLEDGE: Thank you. We'll come 11 to order. Any additional cross-examination? 12 Any redirect? 13 MR. STEWART: Yes, Your Honor. 14 REDIRECT EXAMINATION 15 BY MR. STEWART: 16 Q. Dr. Crawford, Mr. Olaniran talked with you 17 about cable operators selecting distant signal under 18 the compulsory license. Do you remember that? 19 A. I do. 20 Q. Now, in your understanding of the compulsory 21 license, are cable operators required to carry distant 22 signals?</p>
2411	<p>1 could -- I don't have any particular opinion one way 2 or the other on the timing issue. 3 Q. And in terms of the copyright owner receiving 4 compensation, is it your testimony that the copyright 5 owner would receive compensation once or twice? 6 A. Well, it's hard to know exactly how these 7 contract -- I mean, these are sort of details of the 8 contracting process in a hypothetical market. And, 9 you know, it's -- I don't know exactly how they would 10 play out. 11 I mean, the important thing is that what 12 cable operators now pay a statutory fee in this 13 hypothetical market, they would pay a negotiated fee. 14 The specifics of exactly how and when that gets paid, 15 I'm not necessarily so clear about. But the overall 16 picture is that that's how the market would work. 17 Q. And in -- in the transaction between a 18 broadcast signal -- broadcaster and the copyright 19 owner, is the copyright owner aware of the possibility 20 of retransmission beyond the local area? 21 A. Sure. Presumably he would be aware of that, 22 yes.</p>	2413	<p>1 A. No. No. This is a choice that they make. 2 Q. In making that choice and based on your 3 experience in the economics of the cable industry, do 4 they consider programming on distant signals when they 5 make their choice? 6 A. Yes. Absolutely. 7 Q. The studies that you've done involved cable 8 networks; is that correct? 9 A. That's correct. 10 Q. Now, do cable operators sell those cable 11 networks on an individual basis to their subscribers? 12 A. For the most part, no. 13 Q. They sell them in bundles? 14 A. That's correct. 15 Q. How did you determine the relative 16 contribution of different cable channels to the value 17 of the bundle to a cable operator? 18 A. How do I, as a researcher? 19 Q. Yes. 20 A. Well, that's a very difficult exercise, and 21 effectively what you try to do is look across markets 22 and try to measure how profit -- demand and,</p>

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2414	<p>1 therefore, profit vary according to what channels they</p> <p>2 have in the bundle.</p> <p>3 Q. And that was what you did in the study that</p> <p>4 you've presented in your testimony?</p> <p>5 A. Yes. On the demand side, yes.</p> <p>6 Q. By the way, is it your understanding that --</p> <p>7 CHIEF JUDGE SLEDGE: I want to make sure I</p> <p>8 understood your last question and the answer. You</p> <p>9 said cable networks.</p> <p>10 MR. STEWART: Yes.</p> <p>11 CHIEF JUDGE SLEDGE: And you're referring</p> <p>12 there to the distinction of non-distant signal cable</p> <p>13 networks; is that correct?</p> <p>14 MR. STEWART: Yes.</p> <p>15 CHIEF JUDGE SLEDGE: And your answer is your</p> <p>16 study is based on non-distant signal cable networks?</p> <p>17 THE WITNESS: That's correct.</p> <p>18 CHIEF JUDGE SLEDGE: Thank you.</p> <p>19 BY MR. STEWART:</p> <p>20 Q. And in that study, you used data about the</p> <p>21 top 15 cable networks, I believe you said?</p> <p>22 A. That's correct.</p>	2416	<p>1 Q. And distant signals, as you discussed with</p> <p>2 Mr. Olaniran, are themselves bundles of programs of</p> <p>3 different types, correct?</p> <p>4 A. That's correct.</p> <p>5 Q. So how does your knowledge and experience</p> <p>6 about the economics of the cable industry and your</p> <p>7 prior research done outside the scope of this</p> <p>8 proceeding relate to or how is it relevant to the job</p> <p>9 before the judges to allocate royalties among programs</p> <p>10 within distant signals?</p> <p>11 A. Well, I mean, effectively, all programs</p> <p>12 contain -- all channels contain mixes of programming</p> <p>13 of different types. And the extent to which they</p> <p>14 would be considered special or general interest could</p> <p>15 be articulated by the extent to which the volume of</p> <p>16 programming might be one or the other type. And so</p> <p>17 this is exactly the same whether you're thinking about</p> <p>18 it in terms of a cable channel or whether you're</p> <p>19 thinking about it in terms of a distant signal.</p> <p>20 So in that sense, they should -- the insights</p> <p>21 of my previous research looking at cable channels</p> <p>22 should be relevant for the decision -- the relative</p>
2415	<p>1 Q. And you identified some as special interest</p> <p>2 and some as general interest?</p> <p>3 A. That's correct.</p> <p>4 Q. Now, Discovery Channel is one of the ones you</p> <p>5 listed as a special interest channel?</p> <p>6 A. I believe so, yes.</p> <p>7 Q. Is it your understanding that programming on</p> <p>8 Discovery Channel -- that every single program, every</p> <p>9 single minute of programming on Discovery falls into</p> <p>10 the category that you would consider special interest</p> <p>11 or niche programming?</p> <p>12 A. I would be surprised if every single minute</p> <p>13 did. So the answer is no.</p> <p>14 Q. So Discovery Channel would be a bundle that</p> <p>15 mixed -- it was a mix of special interest and general</p> <p>16 interest programming?</p> <p>17 A. Quite probably, yes.</p> <p>18 Q. Now, you -- Dr. Ford, of course, presented</p> <p>19 testimony that was designed to allow the judges to</p> <p>20 allocate the royalties among the program categories on</p> <p>21 the distant signals, correct?</p> <p>22 A. That's correct.</p>	2417	<p>1 values of alternative program types on distant signal.</p> <p>2 Q. So the example that you cited based on</p> <p>3 Mr. Fritz's testimony of KATV -- do you recall that?</p> <p>4 A. I do.</p> <p>5 Q. Do you know whether that station, that</p> <p>6 distant signal, has a mix of general interest and</p> <p>7 special interest programming?</p> <p>8 A. I don't know, but I suspect that it does.</p> <p>9 Q. Well, you called that an ABC affiliate?</p> <p>10 A. Yes. But some -- but the network programming</p> <p>11 I understand to be noncompensable. So -- but I would</p> <p>12 imagine it has a mix.</p> <p>13 Q. Do you have any information, based on</p> <p>14 Mr. Fritz's testimony --</p> <p>15 A. Yeah, so he listed -- yeah, he listed the</p> <p>16 types of programming in the appendix to his testimony.</p> <p>17 It was news programming, but there was a variety of</p> <p>18 other types of programming there as well.</p> <p>19 Q. Do cable operators, when they're confronted</p> <p>20 with a whole channel's worth of programming that</p> <p>21 bundles all different types, are they likely to value</p> <p>22 one particular type of program or some of the programs</p>

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<p style="text-align: right;">2418</p> <p>1 more than others on the distant signal?</p> <p>2 A. Absolutely, right.</p> <p>3 MR. STEWART: I have no further questions.</p> <p>4 CHIEF JUDGE SLEDGE: Any further cross?</p> <p>5 MR. OLANIRAN: No, Your Honor.</p> <p>6 CHIEF JUDGE SLEDGE: Questions from the</p> <p>7 panel?</p> <p>8 JUDGE WISNIEWSKI: Yes, one or two.</p> <p>9 Dr. Crawford, on page 6, I believe, of your testimony,</p> <p>10 looking at the fifth line down, the sentence beginning</p> <p>11 "Reliance."</p> <p>12 THE WITNESS: Yes.</p> <p>13 JUDGE WISNIEWSKI: You talk about the</p> <p>14 perceived intensity of subscriber tastes.</p> <p>15 THE WITNESS: Yes.</p> <p>16 JUDGE WISNIEWSKI: Is that just another way</p> <p>17 of saying that consumer demand for the channels in</p> <p>18 question are more inelastic?</p> <p>19 THE WITNESS: Well, what I'm trying to say</p> <p>20 there is that what matters in a pay-supported</p> <p>21 environment is someone's willingness to pay, right?</p> <p>22 And what -- the economic literature that's looked at</p>	<p style="text-align: right;">2420</p> <p>1 of the negative correlation aspect of this?</p> <p>2 THE WITNESS: Yes.</p> <p>3 JUDGE WISNIEWSKI: We're not to assume that</p> <p>4 profitability could be expanded beyond that --</p> <p>5 THE WITNESS: That's correct. That's</p> <p>6 correct.</p> <p>7 JUDGE WISNIEWSKI: Thank you.</p> <p>8 CHIEF JUDGE SLEDGE: To follow Mr. Stewart's</p> <p>9 redirect, your studies have been addressing channels</p> <p>10 that provide niche programming when combined with</p> <p>11 channels that provide general interest programming?</p> <p>12 THE WITNESS: (Nods head affirmatively.)</p> <p>13 CHIEF JUDGE SLEDGE: And the fact that</p> <p>14 distant signals are general interest programming or,</p> <p>15 as you have said, you know of no examples of distant</p> <p>16 signals that are special interest programming, still</p> <p>17 permits you to apply the combination of special</p> <p>18 interest programming with general interest programming</p> <p>19 in your analysis?</p> <p>20 THE WITNESS: I believe, if I followed all</p> <p>21 that, yes, correct.</p> <p>22 CHIEF JUDGE SLEDGE: It's not critical in</p>
<p style="text-align: right;">2419</p> <p>1 the different kinds of channels that are supported in</p> <p>2 a pay-supported environment find that they're more</p> <p>3 able to support channels with inelastic demand.</p> <p>4 That's one of the findings. Right there I was talking</p> <p>5 sort of in general terms about willingness to pay.</p> <p>6 But the academic literature supports the idea</p> <p>7 that a pay-supported environment using inelastic</p> <p>8 channels are more readily supported.</p> <p>9 JUDGE WISNIEWSKI: And i.</p> <p>10 N your conclusion on page 10, bottom of</p> <p>11 page 10, the last paragraph, you see the sentence</p> <p>12 beginning "My research shows."</p> <p>13 THE WITNESS: Uh-huh. Yes.</p> <p>14 BY MR. STEWART:</p> <p>15 Q. You point to Commercial Television Claimants,</p> <p>16 Joint Sports Claimants, those categories as being</p> <p>17 considered niche programming, and negatively</p> <p>18 correlated, as you had talked about before in your</p> <p>19 testimony. And then you say, "and thus more</p> <p>20 profitable to cable systems and programs, akin to</p> <p>21 those included in the Program Suppliers category."</p> <p>22 Are you simply talking in the single context</p>	<p style="text-align: right;">2421</p> <p>1 your analysis that distant signals be general interest</p> <p>2 or special interest?</p> <p>3 THE WITNESS: That's correct.</p> <p>4 CHIEF JUDGE SLEDGE: It's just the mix of the</p> <p>5 whole package?</p> <p>6 THE WITNESS: I could give you an example</p> <p>7 that may help, if you'd like. So early on I mentioned</p> <p>8 when just discussing advertiser versus pay-supported,</p> <p>9 sort of a channel A where one person valued it at 10</p> <p>10 and a channel B where five people valued each at 1 --</p> <p>11 and at that time I was talking about separate</p> <p>12 channels.</p> <p>13 But let's suppose we put those two channels</p> <p>14 together, or put the two kinds of programming together</p> <p>15 in a single channel, and consider the value to a cable</p> <p>16 operator of carrying that programming. So there would</p> <p>17 be, in some sense, two types of channels. If, for</p> <p>18 convenience, we're able to call the type A programming</p> <p>19 special interest, because it appeals to a narrow set</p> <p>20 of -- appeals to only one subscriber who is willing to</p> <p>21 pay quite a bit, whereas the other B channel, or B</p> <p>22 programming, appeals more broadly -- if we think about</p>

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2422	<p>1 putting them together and then considering the value</p> <p>2 to the cable operator of carrying that combined</p> <p>3 channel, then in -- if the cable operator was able to</p> <p>4 extract all the value of that channel, which isn't a</p> <p>5 guarantee -- but if he was able to extract all that</p> <p>6 value, the 10 from the one subscriber and the 5 from</p> <p>7 each of the five others, then the total value for --</p> <p>8 of his carrying that channel would be 15.</p> <p>9 But you can see how a relative market value,</p> <p>10 based on viewing, would not give a -- would not give</p> <p>11 the same relative valuation five-sixths of -- and</p> <p>12 assuming everyone watched the same amount of</p> <p>13 television, five-sixths of the viewing would be to the</p> <p>14 type B channel, the general interest channel, and only</p> <p>15 one-sixth of the viewing would be to the special</p> <p>16 interest channel, but two-thirds of the value to the</p> <p>17 cable operator would come from the special interest</p> <p>18 channel -- would come from the special interest</p> <p>19 channel.</p> <p>20 So that's an example of how a cable operator</p> <p>21 might trade these things off and how a viewing metric</p> <p>22 would mismeasure the operators' value from carrying</p>	2424	<p>1 general interest in each one.</p> <p>2 I doubt any single one of them would be</p> <p>3 exclusively general interest or exclusively special</p> <p>4 interest.</p> <p>5 CHIEF JUDGE SLEDGE: All right.</p> <p>6 Mr. Olaniran, does that cause you to ask any</p> <p>7 additional questions?</p> <p>8 MR. OLANIRAN: No, Your Honor.</p> <p>9 CHIEF JUDGE SLEDGE: Thank you. You're</p> <p>10 excused.</p> <p>11 JUDGE WISNIEWSKI: Or, actually, just before</p> <p>12 you go, I do have one more question. Coming back to</p> <p>13 the issue of the markets themselves and the supplier</p> <p>14 of the broadcast programming being the broadcaster,</p> <p>15 and the opposite side of the market being the cable</p> <p>16 system, in that hypothetical market, isn't the</p> <p>17 ultimate price that's settled on somewhat</p> <p>18 indeterminant inasmuch as what you have is a</p> <p>19 monopolist on the one side facing someone with</p> <p>20 monopsony power on the other side?</p> <p>21 THE WITNESS: So we -- I don't mean to</p> <p>22 interrupt. Are you -- shall I?</p>
2423	<p>1 the channel.</p> <p>2 CHIEF JUDGE SLEDGE: All right. But the fact</p> <p>3 that your application of your study to this set of</p> <p>4 facts where the distant signal is a general interest</p> <p>5 channel reduces the impact of your conclusions that</p> <p>6 the size of the audience is not important; is that</p> <p>7 correct?</p> <p>8 THE WITNESS: Well, see, I don't want to</p> <p>9 dispute with you, but I don't -- the premise that the</p> <p>10 distant signal, which is a combination of different</p> <p>11 types of programming, is necessarily a general</p> <p>12 interest channel is one that I wouldn't necessarily</p> <p>13 agree with. It really depends on the specific</p> <p>14 programming involved.</p> <p>15 CHIEF JUDGE SLEDGE: But you can't give any</p> <p>16 example of anything else?</p> <p>17 THE WITNESS: Well, I would imagine most</p> <p>18 distant signals are combinations of some special</p> <p>19 interest programming and some general interest</p> <p>20 programming. And the cable operator, when faced with</p> <p>21 an array of different choices for distant signals,</p> <p>22 trades off sort of the amount of special versus</p>	2425	<p>1 JUDGE WISNIEWSKI: Uh-huh.</p> <p>2 THE WITNESS: So I would call that a</p> <p>3 situation of bilateral monopoly, and therefore we</p> <p>4 would think about it terms of bargaining. And I think</p> <p>5 these kinds of settings are quite common in television</p> <p>6 markets. You know, Comcast and Disney fight over the</p> <p>7 prices for ESPN, and they both have some degree of</p> <p>8 market power in each of their respective markets.</p> <p>9 JUDGE WISNIEWSKI: Thank you.</p> <p>10 CHIEF JUDGE SLEDGE: Thank you, sir. You're</p> <p>11 excused.</p> <p>12 THE WITNESS: Thank you.</p> <p>13 (Witness excused.)</p> <p>14 MR. MARSH: Good morning, Your Honor. Steven</p> <p>15 Marsh for Joint Sports Claimants. Our next witness</p> <p>16 will be Jeffrey Berman.</p> <p>17 WHEREUPON,</p> <p>18 JEFFREY BERMAN,</p> <p>19 was called as a rebuttal witness and, having been</p> <p>20 first duly sworn by the chief judge, was examined and</p> <p>21 testified as follows:</p> <p>22 CHIEF JUDGE SLEDGE: All right, Mr. Marsh.</p>