IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CV No. 17-2511
	)	
	)	Washington, D.C.
vs.	)	April 30, 2018
	)	11:09 a.m.
AT&T, INC., ET AL.,	)	
	)	Morning Session
Defendants.	)	
	)	Day 21

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES SENIOR DISTRICT JUDGE

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P R O C E E D I N G S

DEPUTY CLERK: All rise. The United States District Court for the District of Columbia is now in session, the Honorable Richard J. Leon presiding. God save the United States and this Honorable Court. Please be seated and come to order.

Good morning, Your Honor. This morning we have Civil Action No. 17-2511, the United States of America v. AT&T United States of America v. AT&T, Inc., et al.

Would counsel please approach the lectern and identify yourselves for the record.

MR. CONRATH: Good morning, Your Honor. Craig Conrath for the United States.

THE COURT: Welcome back.

MR. CONRATH: Thank you.

MR. WELSH: Good morning, Your Honor. Eric Welsh for the United States.

THE COURT: Welcome back.

MR. WELSH: Thank you.

MR. HUGHES: Good morning, Your Honor. Jared Hughes for the United States.

THE COURT: Welcome.

MR. STRONG: Good morning, Your Honor. Curtis Strong for the United States.

THE COURT: Welcome back.

MR. FINCH: Good morning, Your Honor. Andrew Finch for the United States.

THE COURT: Welcome back.

MR. KEMPF: Good morning, Your Honor. Don Kempf for the United States.

THE COURT: Welcome back.

MR. PETROCELLI: Good morning, Your Honor. Daniel Petrocelli for defendants.

THE COURT: Welcome back.

MR. ROBSON: Good morning, Your Honor. Katrina Robson for defendants.

THE COURT: Welcome back.

MR. OPPENHEIMER: Good morning, Your Honor. Randy Oppenheimer for the defendants.

THE COURT: Welcome back.

MR. WALTERS: Good morning, Your Honor. Rob Walters here on behalf of AT&T and DirecTV.

THE COURT: Welcome back.

MR. BARBUR: Good morning, Your Honor. Peter Barbur for Time Warner.

THE COURT: Welcome back.

MR. ORSINI: Good morning, Your Honor. Kevin Orsini for Time Warner.

THE COURT: Welcome back.

MR. RAIFF: Good morning, Your Honor. Mike Raiff for AT&T and DirecTV.

THE COURT: Welcome back.

All right, Counsel. We'll start off with a ruling on the government's request.

On Thursday, April 26th, the government asked that I take judicial notice of nine public filings made by AT&T and DirecTV with the U.S. Federal Communications Commission.

The Federal Rules provide that, in Federal Rule 201, that I may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot be questioned.

Today, I will take judicial notice of the fact that ten particular statements, the ten particular statements quoted on pages 3 and 4 of the government's memorandum in support of its oral motion for judicial notice of public filings were indeed contained in filings made by AT&T and DirecTV with the U.S. Federal Communications Commission. These statements are excerpted from PX0001, 0002 0441, 0442, 0443, 0444, 0449, 0450, and 0467.

However, let me be clear. I am not taking notice of these exhibits themselves. I'm taking notice only of these particular statements contained in the government's brief.

The government has not established that any of the content from these exhibits is relevant to this case.

Moreover, I am not taking judicial notice of these statements for the truth of the matter asserted; only for the fact that the statements were made.

It's black-letter law that judicial notice does not extend to the truth of the matters that were asserted in other proceedings.

And at the risk of belaboring the point and stating the obvious, consistent with the government's motion, I'm relying only on FRE, Federal Rule of Evidence 201, to take judicial notice of these statements.

I am not relying on 801 or 804 of the Federal Rules of Evidence or any other non-hearsay or hearsay exception.

It goes without saying that these statements were made in a different factual and legal context and, thus, are not admissions as to the legality of this proposed merger, nor are they being admitted as admissions of a party opponent. That's the Court's ruling with regard to these statements.

Now, Mr. Conrath, are you ready to do your closing argument?

MR. CONRATH: Yes, Your Honor, I am.

THE COURT: You may proceed when you're ready.

MR. CONRATH: All right. Thank you.

THE COURT: And am I correct in assuming you're going to reserve 15 minutes for rebuttal later today?

MR. CONRATH: Yes, Your Honor. With your permission, I will reserve 15 minutes for rebuttal.

THE COURT: That's your prerogative. You have the burden of proof.

MR. CONRATH: So if I'm calculating this right, Your Honor, I will go till about --

THE COURT: 12:30.

MR. CONRATH: -- 12:30. And then reserve the remaining 15 minutes.

THE COURT: Yes.

MR. CONRATH: I just want to make sure I'm planning appropriately as I get started.

And with the Court's permission, my colleague, Ms. Roschen, will put up some demonstratives. And I have paper copies for the Court.

THE COURT: Have they been seen by your opposing counsel?

MR. CONRATH: Yes, they have, and I'm going to give them this version.

But may I approach to pass these up, Your Honor?

THE COURT: You may.

MR. CONRATH: May it please the Court.

Your Honor, this merger is a big deal. It would combine the largest pay-TV company in the country with one of the most important content providers. It would have a massive impact on the structure of the pay-TV industry.

It would change the relationship between the merging parties, obviously; but equally important, it would change all of their relationships with AT&T's competitors across the industry.

But this is not just a big deal to the companies involved; it's a big deal to consumers in this industry, and it's a big deal to antitrust.

We have a Clayton Act precisely because of deals like this, deals that could dramatically restructure an industry and leave us in a market with a few big players that could dominate an industry and leave consumers facing higher prices and fewer choices.

This case is about one simple question: Whether the effect of merging the largest pay-TV distributor with one of its most important sources of TV programming may be to substantially lessen competition. That's the Clayton Act question.

And the answer is that it would. And we know that because of the evidence from this trial, which shows us that the merged firm would have both the incentive and the ability to lessen competition.

Let's talk about the law for a moment. The

Clayton Act outlaws mergers where the effect may be substantially to lessen competition. As the Supreme Court said the last time it addressed Section 7, which was in *California versus American Stores,* the law, "subjects mergers to searching scrutiny.

The D.C. Circuit set forth the standard in the *Heinz* case. A predictive judgment, necessarily probabilistic and judgmental, rather than demonstrable, is called for.

In the words of the Supreme Court, the Clayton Act outlaws mergers that create just a reasonable probability of harm. It deals in probabilities, not certainties. And it does that so that consumers don't bear the risk of consolidation. It's a pro-consumer statute.

Now, we've talked here a little bit about the question of predicting the future, but the Clayton Act does not really require the Court to have a crystal ball. It doesn't ask the Court to predict exactly what will happen tomorrow or in five years or ten.

Rather, it asks a narrower question: What is a reasonably probable effect of this particular merger? What would change as a result of this merger?

Now, this particular merger is a vertical merger, as we all know. It's true that most vertical mergers are not significantly anti-competitive, but that happens to be true of most horizontal mergers as well.

What's called for in every merger case, every merger case, is a careful analysis of the specific facts of this transaction.

That's why we've had a trial. And as a result, we've learned one key fact that would change as a result of this merger.

Before the merger, Your Honor, Time Warner has the incentive to have its content widely distributed, widely available. You heard that from a lot of witnesses. It's a content company, and that's how a content company makes money today.

But this is what would change with a merger. The merged firm can still make money with wide distribution, but it could also make money if AT&T takes subscribers away from rival distributors.

That fact gives the merged firm more bargaining leverage. And it can use that bargaining leverage to raise its rivals' costs, which will raise their prices; and that will soften the competition that AT&T faces from those rivals.

And all the distributors are rivals, because DirecTV has a nationwide footprint. That's why the effect of this merger would reach all 90 million households in the country that get pay TV.

Understanding this critical change and what it would mean for competition in the industry is the critical fact that comes out of this trial.

THE COURT: What was the evidence to prove that?

MR. CONRATH: Well, I'm about to get there, Your Honor.

THE COURT: Good.

MR. CONRATH: So here's how I'm going to organize my presentation.

THE COURT: All right.

MR. CONRATH: I'm going to, first, address the evidence of industry concerns, industry views about this merger. Then I'll turn to the market evidence that underlies those concerns. Then I'll review the expert evidence from Professor Shapiro. And then I'll discuss some of defendants' responds to some of that evidence. And, finally, I'll talk briefly about remedy.

So let me go through that organization, if I can, Your Honor.

First, let's remind ourselves about what some of the industry witnesses said. The government's case, while it's based in a sound theory, it's not just made up -- not just theoretical. Rather, it has legal and economic underpinnings that are based on the specific facts of this industry that were proved in this trial.

First and foremost, the Court heard from a cross-section of actual industry witnesses. Now, we heard most of those in the early part of this trial. But there are a pretty broad away: satellite, cable, virtual, overbuilder, large, small.

These are folks who live and work in the industry every day, and they know what they're talking about about this marketplace. And they've explained how the merger would affect them, could harm them, would harm them, and, in turn, harm consumers, their customers.

As they explained to the Court, there will be a dramatic change in the dynamics of the marketplace. The way things are now, they bargain with Time Warner, a content supplier. And if the two of them don't work things out and get to an agreement, they both get hurt with the resulting blackout.

After the merger, though, they'd be bargaining with the combined company, AT&T-Time Warner. It would not be just a supplier; it would also we a direct competitor.

And the incentives in a negotiation about content would be different. If the two of them don't reach an agreement, AT&T would gain some of the subscribers who'd leave the distributor if it didn't have the Turner content. And those subscribers would be likely to stay with AT&T, even after the agreement -- an agreement was reached.

And the threat of this, just the threat would impact negotiations. Turner would be in a position to demand more money for content, higher prices that would be passed on to these industry members' customers.

These witnesses came in here from across the country, mostly early in the trial, to share their concerns with this Court. These concerns are genuine. And if their testimony is ignored, it's not just them but their consumers, their customers that would bear the consequences of lost competition.

Let's remember what they said.

So remember Mr. Montemagno of Charter. He was a negotiator with years of experience. He said it pretty clearly and pretty succinctly.

"Either I pay excessive increases, or I lose the product. And they, AT&T, have a more competitive distribution profile."

You remember Ms. Fenwick of Cox.

Ms. Fenwick told us that Cox is "very concerned that we are going to be presented with a horribly ugly deal and that when faced with that deal, we have to think about that. If we do go dark, they, AT&T, have a benefit of picked-up Cox customers."

And she said that Cox would "know going into these negotiations that that additional leverage is there."

You remember Mr. Schlichting, who came from Dish and Sling. He said it pretty clearly too.

"If I put myself in their shoes, they can raise prices and make more money and make us less competitive, or they can present onerous terms that we can't accept. We would certainly lose a lot of subs. It would be severe bleeding."

And he went on to say, "And most of those subs would accrue to their benefit. Lose-lose for us. Win-win for them."

You remember Mr. Hinson from Cox. He explained how after the merger, the merged firm could impose restrictions on HBO and some that wouldn't even require re-negotiating the contract. He talked about the possibility of withholding HBO, of delaying access to content so that it shows up a week later or two weeks later on the competitor instead of when it showed up on AT&T; or about restricting the options for using HBO as a competitive tool to grab subscribers.

And, finally, Your Honor, remember Mr. Holanda of RCN, the overbuilder. He's concerned about what would happen to his rates after the merger.

He said, "Their actual incentive is to raise my pricing, make me drop the services, and steal my broadband and video customers."

And Mr. Holanda, his experience was informed by what might happen -- about what might happen after this merger by explaining what actually did happen to him at RCN after the NBCU merger. After NBCU became vertically integrated with Comcast, it blocked RCN's low-cost broadcast basic alternative that competed with Comcast. And it did that just by changing a simple non-price contract term.

To summarize, these witnesses from across the industry told the Court that the merger would change their relationships with Turner. They are, sensibly enough, concerned that AT&T will use its own content to advantage its own distribution.

Now, defendants, I think, will tell you: Don't pay any attention to these industry witnesses. They're just disappointed competitors.

And, look, do these witnesses have a self-interest? Sure, sure, they do. They are -- they're would-be competitors of the merged firm, just as they're competitors of AT&T today. But equally important, they would be customers of the merged firm.

So let's recognize that they have an interest but recognize that half of their interest, the customer interest, is parallel with the consumer interest.

So let's also take a look at what some of defendants' witnesses said. They're interested witness, too, so let's take a look at what they have to say.

On the stand, Mr. Stephenson of AT&T and others told the Court that these concerns of others in the industry are absurd. But let's look at some of Mr. Stephenson's own prior statements.

In fact, Mr. Stephenson, in an unguarded moment before the merger, expressed exactly the concerns about combining a content company with a distributor that the other industry witnesses have expressed. Let's look back at when it happened.

You may recall an email that summarizes this. There was a phone conversation between Mr. Bewkes and Mr. Stephenson. And after the phone call, Mr. Stephenson reported on the conversation in an email to Mr. Stankey.

We can see the e-mail in this board, which is PX47, and is also in the handout. This was before the merger agreement. It was August 2016.

The reason for the call, the reason for the call was that Time Warner was taking a 10 percent stake in Hulu, and Hulu was launching a new virtual MVPD.

Time Warner was, by taking this 10 percent stake in a new virtual MVPD, Time Warner was vertically integrating with a share of a new over-the-top competitor.

It's interesting that Mr. Bewkes knew that he needed to make a call to Mr. Stephenson, his biggest distributor. He needed to give him a heads-up about this little vertical integration he was about to do.

He called in advance to try to say, "He didn't think it would impact our relationship with you."

Even more interesting is probably Mr. Stephenson's reaction. He rejected Mr. Bewkes' attempt to downplay this. Mr. Stephenson said, "It's hard to imagine how it won't impact all of our relationships."

It's hard to imagine how it won't impact all of our relationships. So that's a 10 percent interest in a startup virtual competitor.

Even more important is Mr. Stephenson's testimony explaining the reason for his reaction. He said, You're going to take our content and put it in a virtual MVPD. What I hope is that we get -- you're going to take your content and put it in a virtual MVPD. What I hope is that we get the same rights for ours.

So just the fact that Time Warner had a small stake in a startup competitor made Mr. Stephenson worry that AT&T might not get the same Time Warner content on the same terms for AT&T's own virtual MVPD.

Mr. Stephenson, when you think about it, sounds a lot like what the industry witnesses who were concerned about this merger said. He testified that he was concerned that "with this ownership stake in a Hulu virtual MVPD, that would preclude Time Warner from licensing content to AT&T."

Mr. Stephenson was concerned that Time Warner, once it became vertically integrated, even a little bit, would use its content to advantage its own distribution and that that would not be good for AT&T. So maybe that concern isn't really so absurd after all.

There's a second set of statements that I want to call your attention to, because this idea of using your own content to advantage your own distribution, it's really a plausible enough idea.

In fact, you'll see in this second incident that Mr. Stephenson seems to express those same ideas that the industry witnesses did when they explained their concerns about the merger.

You'll remember that Mr. Stephenson, in order to present the merger to the Board, wrote up some notes for himself to use in a phone call with the Board. His notes talk specifically about this issue. You can see it here on the board, which is DX609.

This is what his notes say about key issues, concerns: "How can you advantage your own distribution (TV, broadband wireless) without harming Time Warner position as a wide distributor of content to other SVOD cable networks and broadcast networks?"

Let's, first, talk about exactly what that says.

It says that a key issue related to this merger is how to "advantage your own distribution in light of this general need to keep wide distribution."

You can see how this is exactly the theory of the government's case: use content to advantage distribution.

And, yes, it is true, it is correct that how you do it requires some balance of the need for broad distribution.

And the government's case talks about that.

And what else Mr. Stephenson's Board notes say about this topic here in the third bullet is that he's already discussed this at length with Jeff Bewkes.

Remember how I had to point that part out to him because they hadn't talked about it on direct? He had already had extensive talks about this with Mr. Bewkes.

Now, then do you remember Mr. Stephenson's explanation about this little passage? He testified that, "The intent of this was to tell the Board, 'You can't do that. Don't have that in your mind.'"

That's what he said. That's what he testified to.

Well, really, it's kind of curious, Your Honor. In this one place in his notes for talking to the Board of Directors about $108 billion deal, he wrote a note to himself to be sure to remember to say that, "advantage your own distribution is not the idea."

Really? That's not what the words on the page say? The words on the page say you have to do it without harming wide distribution.

And it's kind of implausible that you write one note about what you can't do next to a note about what you do want to do, followed by another note saying you've discussed this at length already.

Really, Mr. Stephenson's attempt to explain this away really kind of strains credibility.

But even if you do take him at his word, why would he need to tell that to the Board? If the whole premise of using content to advantage distribution is absurd, why did he have to make a note to himself to be sure to tell the Board, "Don't think about that"? This is definitely not the idea.

Did he think that maybe the Board that has a fiduciary duty to its shareholders would naturally think that this was one of the ideas of the merger? If using content to advantage your own distribution is ridiculous, why would he need to make a separate note to remind himself to disabuse the Board of that notion?

Look, he knows the Board is focused on profitability. They can see the basic market facts. Time Warner's content would give AT&T the ability to advantage its own distribution and to disadvantage that of its pay-TV competitors.

And the evidence shows, Your Honor, that they can use Time Warner content to advantage AT&T distribution, and they can do it without sacrificing wide distribution. They do that, first, by making content more expensive, raising their rivals' costs; and, second, by making that content available only on less-flexible, less-competitive terms, making life a little harder for those who want to be disruptive entrants.

The reality is, as Mr. Stephenson said to Mr. Bewkes in the Hulu conversation about vertical integration, it's hard to imagine how it won't impact all of our relationships.

So let me switch gears here. We've talked a little about what all the industry witnesses said, including third parties and some of defendants' witnesses. What do some other market facts tell us? I'm going to talk, first, a little bit about incentive and then a little bit about ability.

AT&T is the biggest pay-TV distributor in the country. It's deeply invested in the status quo, what they call the pay-TV ecosystem.

The pay-TV ecosystem, that is, of the big traditional pay-TV providers, like cable and satellite, the big bundles of channels that include a lot of stuff that you don't want, and the prices that go up every year.

Here are some numbers. AT&T has 25 million subscribers out of about 90 million in the country.

If you look at their 10K, they've got over $36 billion in video revenue annually. They raise the price every year.

You recall Mr. Stephenson testifying about that. They're so accustomed to these annual price increases that Mr. Stephenson called them inconsequential.

With those prices, this makes their traditional pay-TV business what they called a cash cow or a golden goose. Those are their words from their own documents admitted in this trial.

That gives AT&T an incentive to weaken its pay-TV competitors, especially the disruptive emerging ones, and to preserve that cash cow for as long as they can.

You'll recall that the merger integration team met to review core beliefs and discuss the strategy for the new company. And AT&T had a presentation prepared in connection with that meeting that mentioned Core Belief No. 1.

The economic incentives of the major TV players will encourage stability as the ecosystem evolves.

And the speaker notes that were prepared, they're even a little more explanatory. Traditional pay TV will be a cash-cow business to AT&T for many years to come, during which we can slowly pivot the broader strategy. Dramatic changes don't need to happen overnight.

That's AT&T's incentives. They don't want and don't need dramatic changes to happen overnight.

And, indeed, the Court heard from Mr. Christopher, about the changes that are happening, threatening the profitability of the new subscribers that they're getting. That's not good for the company.

Time Warner, today, has some different incentives. You heard about this from Mr. Bewkes. Time Warner wants to be distributed broadly. Mr. Bewkes has overseen a lot of creative distribution, and that would have continued if the merger does not happen.

Mr. Martin testified about this incentive, too. It makes them willing to engage with the virtual MVPDs or the potential disruptive force, with new distribution models.

And Mr. Martin admitted that the traditional MVPDs see the virtual MVPDs as a threat.

Mr. York put these different incentives in sharp relief. We can look at PX42 for this. This is an email exchange Mr. York had with the prior CEO of DirecTV.

This is right after Sling TV launched. They know that the Sling model would be a competitive challenge. The CEO asked, 'Why would the content companies be willing to give Sling the rights to do that?"

Mr. York explained, not very politely, Your Honor, he explained that the content companies are shortsighted whores to whomever is willing to write them a new check for their content.

Now, that little expression just underscores the different incentives between a content company and a distribution company.

Turner was one of those content companies he was talking about as being shortsighted. They seemed shortsighted to Mr. York because they're not thinking about preserving the ecosystem.

Another exchange with Mr. York underscores the different incentives that AT&T has with respect to distribution. This one was an exchange with Mr. Stankey, who was then Mr. York's boss, but who would be put in charge of Time Warner if the merger goes ahead.

What the backstop here -- backstory here is that Time Warner had worked with Apple on a new innovative offering.

That's the ability side of it. Time Warner content was important enough to support a new innovative development in the industry.

Mr. Stankey learned about the Time Warner innovation with Apple. What was his reaction? You can see it at the end of the first paragraph there. "It sets me on fire."

And up above that, it explains why it sets him on fire. It does it because it will deteriorate the value of the bundle.

That reminds us of AT&T's incentive to preserve the ecosystem. Core Belief No. 1.

And you can see Mr. York up above adds he had the same visceral reaction.

Well, what was the upshot of this before the merger? Well, Mr. Stankey's on fire about Time Warner deteriorating the value of the bundle. So what did he and Mr. York settle on? Write a letter. Because that's all they can do beforehand.

We actually have a copy of the draft letter that's -- that they prepared in evidence. They didn't send this, but this was the draft. And it's revealing about their thinking. It's PX40.

It explains the incentives pretty well. It explains that they think Time Warner is taking its relationship with pay TV in general for granted. They're angry at this deal with Apple, and also about the fact that HBO Now is offering an online service that didn't require going -- a customer to go through an MVPD, as they saw it.

These things that Time Warner was doing are pro-consumer things to try to get broad distribution. But obviously they weren't good for AT&T.

But what could they do about it now before the merger? Write a letter, write them a stern letter. Because AT&T had the incentive to preserve the bundle, but not the ability.

But if the merger goes forward, the ability and the incentive will be combined. Mr. Stankey would be in charge of Time Warner. He wouldn't be limited to writing a letter. He could give the orders.

Let's change gears. We know what AT&T's incentives are. The other important fact is that Time Warner would give AT&T the ability to act on those incentives.

A central issue in this case has been the significance of Turner content in the market. At trial, there was pretty widespread recognition that Turner content is highly significant. A lot of people in the industry use the term "must have."

Now, we heard that phrase from just about everybody. Industry witnesses said they really need the Turner content.

Mr. Schlichting, for example, put it this way. He said, How do you get through March Madness without TBS and TNT. Can you imagine going through another election season without CNN or basketball playoffs without TNT?

AT&T and Time Warner's own documents talk about the content in terms of its value. They use the term "must have." And they're paying $108 billion for it, so they must think it's worth a lot.

And defendants' executives accepted that they use the term "must have," but they try to kind of run away from it and said it just means popular.

So let's be precise. We're not going to quibble about the exact words.

For this case, what's important about must-have content is what it means for competition. What matters here is that pay-TV companies need Time Warner content to compete effectively in the market, including competing with AT&T.

And, really, there wasn't a lot of evidence to the contrary in this trial. No one said pay TV's content is just nice to have. To use a phrase that came up sometimes is this trial, it's not just what people want; it's what they need.

And why is Turner content so important for pay-TV companies? Well, the evidence was they've got marquee sports; they've got live news. And both of those are core to a pay-TV service.

They're what distinguish MVPD services from other things like Netflix that just provide video on demand.

Live sports, live news, those are reasons why consumers are paying to get MVPD services.

Mr. Martin of Turner talked a fair amount about this; talked about their NBA contract, a billion dollars a year, and said that that will give them high-value, must-have programming for many years to come.

Mr. Martin testified that they have higher affiliate rates and higher margins than their peers. Their prices are going up every year.

They have key rights locked up for a long time. The NBA contract is through 2025. March Madness is through 2032.

Mr. Martin summarized this pretty succinctly, a bit crudely when he was writing about what Dish -- Dish's Sling service would be without Turner. He said it would be -- I'm going to use the euphemism. He said it would be crap without Turner.

And that's a recognition of just what they think about how important their content is.

The evidence at trial really didn't show that there are good substitutes for Turner content.

There was an attack on Turner content that showed up in defendants' answer, but it kind of turned on them. You'll remember this, Your Honor. It was a reference about Google's entrant into the virtual MVPD world, YouTube TV.

Defendants' Answer said the fact that YouTube TV launched without Turner proved that you didn't need Turner to compete in pay TV. But the facts got in the way of that argument.

Mr. Warren testified. And he told us that they'd been negotiating with YouTube TV almost at the same time that that Answer was drafted. He explained that YouTube TV was "anxious to add us." And by the time we got to trial, YouTube TV had added Turner content, just like every other significant pay-TV service. And they did it even though they had to raise their price $5 in order to be able to do it. That's how important Turner content is.

Pay-TV companies need Turner content to compete effectively with AT&T. That's what would give AT&T the ability to harm competition. They'd be a gatekeeper for the content that their rivals need.

And let's remind ourselves of the significance of that change. For a distributor, if you go without content, your subscriber losses can be AT&T's subscriber gains. That's the big change to the bargaining leverage.

Now, what response, what pushback do we get on this topic from defendants about the change in bargaining leverage?

One of the things they said is that whole idea about going dark, that's just preposterous. Turner would never go dark. It would cost them too much money. It's just a theory. It's not a credible threat.

But that pushback too ran into the face of evidence. We heard from the industry witnesses the negotiations really do depend on your threat of your blackout, your alternative of what you do in the case you don't reach an agreement.

You heard that from a number of industry witnesses and also from the industry witnesses.

Mr. Breland, a corporate representative for Turner, listened and heard those arguments that going dark would be preposterous. But up on the witness stand, he admitted that threatening to go dark is exactly what happens.

He admitted that Turner does threaten to go dark in negotiations. He admitted they threatened to go dark with every major distributor. He admitted that Turner prepares go-dark analyses precisely to understand their leverage in their negotiations around going dark.

And Mr. Breland's successor, Mr. Warren, is their current chief negotiator. You saw his documents. He wrote about the massive power that Turner had against a distributor because of the threat of going dark.

Mr. Martin, Turner's CEO, also contradicted their theory on this. He testified about being prepared to take

Dish dark in March 2016, even after Dish and Turner had already had a blackout just the fall before. And he talked about knowing that Charlie Ergen would have to think about how -- what it would mean to him not to get those Sweet 16 games if they went dark in March.

This is why Turner content is expensive. They're good negotiators. They use the leverage they have. They want broad distribution. They need broad distribution. But they know they've got some leverage that lets them get high prices. That's why they have higher affiliate rates compared to their peers.

This bargaining leverage is what changes with the merger. The merged firm would have the new corporate incentive to consider, and going dark would not be all bad for them. That bargaining leverage is going to affect the outcome of negotiations, just like the bargaining leverage they have today has already affected the outcome of negotiations.

Let's talk for a moment about HBO, because leverage would increase after the merger, not only with Turner content, but also with HBO.

The evidence at trial shows us three important things to remember about HBO. First, HBO is the strongest, most valuable of the premium content networks.

Second, distributors use HBO to gain subscribers.

In the words of AT&T, "HBO is a proven acquisition driver."

Competitors often use HBO to get and to keep subscribers, sometimes taking them away from DirecTV. They do this by including HBO in bundles and promotional offers.

But the third thing we know is that to use HBO this way, a distributor needs HBO's approval.

So what do these three things together mean? It means that if this merger goes forward, then the combined firm could limit the use of HBO as a competitive tool, if that competition threatens to impact AT&T.

And you'll remember when Simon Sutton, the HBO executive who oversees its relationship with distributors, was asked, "Would you follow an AT&T directive even though it wouldn't maximize HBO revenues after the merger?" he gave the only reasonable answer someone could: "I have to do what my boss asks me to."

So the putting HBO under the control of AT&T is another way in which competition could be softened, in addition to the evidence of the relationship with Turner.

The threat of losing access to Time Warner content would be the big change in bargaining leverage after this merger. Time Warner could morph, credibly threaten to walk if it has subscribers to gain if it does so.

As Mr. Schlichting explained -- Mr. Schlichting explained, before the merger, they're in a mutual headlock in negotiations with the content providers. But the merger, he said, "throws the card table up in the air."

Now, what did we hear from the other side?

Well, defendants' witnesses said they don't see how that's going to happen. The content won't be worth any more after the merger. So why would somebody like Mr. Ergen we willing to pay more?

But, really, this is just a point. The deal won't be worth more to Dish or to Cox or to Charter, but a deal will be worth less to Turner, because the alternative to a deal got better for Turner because it's now part of AT&T.

The chance of winning subscribers for AT&T, for the merged company, makes the merged company able and willing to demand more.

And what would they do with that leverage? Well, AT&T's incentive would be to use it to make more money and to reduce -- to lessen competition in the process. It's just the concern you heard from the industry witnesses, both high prices and reduced innovation.

Mr. Schlichting's testimony was particularly telling here. He expects Dish to get higher rates that make them less competitive, but he also explained that Sling's bundle is pretty unique as a skinny bundle.

He testified about how Turner could blow up that skinny bundle just by insisting that they put all the Turner channels into it, because that would lead to a cascade of the same effect across other industries. That's the importance of putting that control in the hands of a competitor of Dish.

And one more thing. Let's remember that AT&T wouldn't be the only vertically integrated company with this incentive and ability. These tactics would be all the more problematic, with Comcast out there, no longer subject to any decree or FCC supervision, and vertically integrated with NBCU. That regulatory review of Comcast-NBCU expires this year. You'll recall Mr. Gibson's explanation about what might happen with the regulatory supervision gone.

He wrote that they would be a "more formidable negotiating power that can play hardball and threaten blackouts, and of the possibility that they could choose not to license content online and discriminate on price against online distributors."

Look, there would be two big vertically integrated firms that would have some similar incentives. And the effectiveness and the likelihood of a lessening of competition would be greater with the both of them out there.

As Mr. Harran of Turner wrote, "If a pay-TV service lost access to both Turner and NBC programming, that would be a recipe for failure."

So another concern from this merger is that even if this merger doesn't lead to some other big copycat mergers that gives us a third firm, just like the other two, this merger would leave the industry with two big players, both vertically integrated, who watch each other; and if they behave in parallel ways, can minimize the growth of the people who might disrupt the industry and put to threat their profit streams.

Let me switch gears, and now I'll talk about how the economic analysis helps to confirm the competitive problems with this merger.

The government called Professor Carl Shapiro. He had carefully examined this merger's potential effects. He developed a model of the effects of the merger on competition and on consumers. He used conservative assumptions that were supported by industry witnesses and industry documents to produce a range of estimates of the likely effects.

Look, the reason why we use economics in merger analysis is not to get a precise number. It's to help confirm that we're thinking the right way about markets and how they work.

The Clayton Act, let's remember, comes from 1914, so long before there were computers, models, numbers. It's about competition. But there's a long history in antitrust law of recognizing and respecting that economic thinking can be helpful. It can be helpful to assess the threat of harm to competition.

Here in this case, the evidence from Professor Shapiro about the Nash bargaining model was helpful to the Court. The Nash prediction comes from the insight that bargaining leverage changes when one side's walk-away option improves. He won a Nobel Prize for that work.

And that's exactly what the third-party witnesses told you. It's a logical conclusion. We know -- they need to know what their walk-away option is, and that affects their ability to get a good deal.

It's a good example of the value of economics. Economic analysis confirms what these witnesses told you, confirms the basic intuition that putting incentive and ability to hinder competition together is a risk to competition.

Professor Shapiro's Nash model confirmed that prices would go up and made some estimates about how much that would be. So this Nash bargaining model was a lot like those that have been used before to evaluate other vertical transactions, including Comcast.

He testified about how a model like this has been used at the FCC in evaluating these kinds of transactions.

And he reminded us how defendants' expert, Professor Katz, considers the bargaining model to be mainstream economics.

The model looks like the leverage shifts in bargaining. The more the leverage shifts, the higher the price increase. That's a useful tool, given the testimony from the witnesses who have already explained how that would happen.

You remember the aphorism that Professor Shapiro reminded us of. A model should be as simple as possible, but no simpler.

Well, Professor Shapiro developed a model using that principle. And he looked at industry facts as inputs for his model. So one of those critical input facts is the subscriber loss rate. How many subscribers might a distributor lose if it didn't have Turner content?

And Professor Shapiro looked at five different pieces of evidence. Comcast's ordinary course of business study, which I won't talk about any further because it's under seal; Altman Vilandrie's ordinary course study; Professor Hauser's survey; the actual experience of a Suddenlink drop of Viacom, a network that's a lot -- everybody agreed is a lot less valuable than Turner; and the Cable ONE experience of dropping Viacom.

Professor Shapiro considered all of this evidence and concluded that for a distributor that lost Turner content for the long term, for the long term, a significant subscriber loss, ranging from 9 percent to 14 percent, could be expected.

Now, on this topic, defendants spent a lot of time attacking Altman Vilandrie. There are a lot of attacks, and they're all aimed right at Mr. Bewley, who was over here and testified. Mr. Bewley explained what they did for the survey and how they used survey data for the study, the survey data and actual viewership data from set-top boxes.

He explained their analytical processes. He explained that they had a change. He explained that the change in the recommendation they made was to move the recommended prediction from 14 percent down to 9 percent.

And he rejected the conspiracy theory that the defendants were pedaling.

Mr. Bewley's testimony was credible, and the Court should reject the attacks on this range.

But the Court should also remember that Professor Shapiro, in total, looked at five different pieces of evidence to come up with this number, and they all led him to the same range of values.

He also used evidence from ordinary course documents and industry evidence about customer value, about marketshares, and the other figures that went into his prediction.

And it gave the Court a range of likely outcomes, which is in the nature of hundreds of millions of dollars of annual harm to consumers.

This model, its prediction confirmed what the industry witnesses had already explained. Content cost increases can come about from a change in bargaining leverage. If they do come about, they'll get passed on to consumers. If AT&T is able to push up competitors' prices, it's consumers who will pay the bill.

Let's talk about Professor Carlton, defendants' economist, briefly. He did not do a model of his own to try to explain some different view of how competition works in the industry.

Instead, he mainly took potshots of the input Professor Shapiro used. But what was the basis of those potshots?

First off, he mainly looks at Professor Shapiro's conservative estimates at the lower end of his range, and Professor Carlton ignores the full analysis that Professor Shapiro did.

Professor Carlton takes potshots at the lower end and tries to pick at some of these estimates. And two of the ones that we talked about a bit during the trial really show the limits of that kind of economic analysis.

First, let me talk about lifetime value and margins.

We know what Professor Carlton did here. He picked the lowest number that is out there from one month, June 2017, and made a calculation based on that.

But after the Court ordered some discovery during the trial, we learned more about the months before and after that number. Every other month had a higher value. Some were final; some were not. But the months before and the months after were higher. If that's not cherry-picking the lowest number, I don't know what it is.

Professor Carlton's defense, his defense of picking the lowest number, was the June 2017 was the most recent final number.

But you remember that the later months, July, August, September, were higher and they told us those weren't quite final yet? Remember, Mr. Christopher said that these numbers take seven months to prepare; and he just got the June 2017 numbers, he said, right before his deposition in mid-February.

But then a funny thing happened or didn't happen, really. Mr. Christopher got the June 2017 numbers in February. But then March came along, but those preliminary numbers for July that were higher, they didn't get finalized.

And then April came along, and those preliminary numbers for July and now August, both higher than June, they didn't get finalized either, although Mr. Christopher told us they were just on the edge of being finalized.

So Professor Carlton was able to sit here and say he's using the latest final numbers; but, really, it's kind of curious that that seven-month process just got -- kept getting stretched out and to the point where we're almost to May now. But it let Professor Carlton sit up there and say he's using the lowest numbers because they're the most final, most recent, final numbers.

Let's think about another thing. Professor Carlton told this Court that he did exactly what Professor Shapiro had done but with 2017 data.

But that wasn't right, was it? Professor Shapiro had averaged three months, not just picked one. But Professor Carlton did not calculate that average for the three months he had for 2017.

By contrast, Professor Shapiro did come back and calculate the average of those 2017 months. That average was significantly higher than just the June month that Professor Carlton chose.

Professor Shapiro explained that just using the average of the three 2017 months that were final, his model would project between $98 million and $348 million in net cost increases to the rival MVPDs.

And that's a conservative number in itself, because it only uses margins for the brand-new customers.

You'll remember that existing customers are more valuable, and the customers you don't lose are valuable because you don't have to pay to acquire them. And focusing on that would have led to harm estimates even higher. So that's the "margin lifetime value" discussion.

The second thing Your Honor will recall is Professor Carlton's attack on Professor Shapiro's work on the Suddenlink-Viacom blackout.

Both Professors Carlton and Shapiro agree that this blackout, being a permanent blackout, is the most relevant kind of evidence, even though it understates the harm because Turner is a much more valuable content than Viacom.

Professor Carlton said that Professor Shapiro didn't take into account that there was a downturn in the industry trend right exactly at the moment of October 2014 when there was the blackout.

But Professor Shapiro explained that he, in fact, had taken the industry trend into account. You'll recall that we can eyeball that red, or some people say magenta, line going down, down, down, not kinking down at October 2014.

And then you remember there was this attempt on cross-examination of Professor Shapiro to try to get Professor Shapiro to concede that he'd intentionally eliminated December 2016 because it would have resulted in a big drop of subscribers.

But you heard Professor Shapiro last Thursday. The drop that's -- that supposed drop was all due to data from Dish. It was an anomaly, suggested they lost a million subscribers out of 14, suddenly in one month. Something was wrong with that data. Because Professor Shapiro was careful, he noted that.

So that one anomalous bit of data from one MVPD in one month does not say that there was an industry trend dating back to two years earlier on October 2014.

Professor Shapiro was careful; but Professor Carlton in his criticism, and frankly, the cross-examination, was not. And that criticism of Professor Shapiro was frankly just wrong.

There are some other numbers that Professor Carlton and Professor Shapiro disagree on, but that's not the point. Professor Shapiro's model is conservative. It gives a range. It recognizes that the world is messy; you can't predict an exact number. It says there's a high point and a low point, all based on reasonable information taken from industry facts.

He found the net harm to consumers based on the 2016 market configuration in the amount of $286 million on the low end.

Professor Shapiro was conservative in another way, too. One of the main possible benefits from vertical mergers is what economists call elimination of double marginalization, or we lay people think of it as something like eliminating the middleman.

Well, there's not too much of this effect in this merger because almost everybody already has Turner content. Professor Shapiro did take it into account, included that in his model, subtracted it from his harm numbers, just to be careful and cautious.

All the numbers we've cited about harm to consumers take into account this elimination of double-marginalization effect.

And looking to 2017 and 2021, Professor Shapiro's estimates of harm to consumers range from over $400 million to over $500 million.

Look, Professor Shapiro's model was realistic. He reported the range. He considered the possibility that inputs might -- are imperfect and hard to measure. That's why the evidence that he offered can be helpful to the Court, because it confirms -- it confirms what the industry witnesses have told us, that there's going to be a change in bargaining leverage; they're going to wind up paying more; and competition is going to be lessened. That's a risk that the Clayton Act says consumers shouldn't have to bear.

In sum, this merger would substantially lessen competition and would impose substantial harm on consumers. But let's talk a little bit about some of the things the defendants say in response to that observation. They mentioned the FAANG companies, the trapped wholesaler, efficiencies, corporate structure, and their private arbitration fix. And let me just touch on a few of those.

AT&T started from the beginning to tell us what a difficult time they had. They had to do this deal, they said, because they're falling behind, chasing the taillights of the FAANG companies.

In this story, they're all running away from AT&T and dominating the market. But the evidence at trial told us a different story. In the pay-TV market, the pay-TV market, the ones at issue in this case, it's the status quo MVPDs that are dominating.

The fact that AT&T would like to compete in some other market, maybe Internet advertising or all eyeballs, that doesn't give them a free pass to reduce competition in the pay-TV market.

And in the pay-TV market, AT&T's own witnesses confirmed that the FAANG companies are far from dominating;

they're actually small. Most of them don't even have an MVPD. The one that does, Google's YouTube, has about 300,000 subscribers, compared to AT&T's 25 million.

And not only that, but AT&T's proposed acquisition threatens to lessen the future competition these kinds of companies can provide.

If AT&T controls content that entrants need in order to be successful, then that kind of entry that could bring more competition to this market is going to be less likely.

Indeed, one measure of just how tangential the FAANG companies really are to this competition that's at issue in this merger is the email that Mr. Stephenson sent to Mr. Zuckerberg, the head of Facebook, PX558.

Mr. Stephenson wrote, "After we finish our merger with Time Warner, let's see if we can find ways to work together." The message was not, "After the merger we're coming after you." No. It's, "Let's see if we can work together." And that's logical enough because they're not in the same market. They're in adjacent markets, and they might find ways to work together.

And, frankly, if they can make more money by working together than they can by trying to go after Facebook, of course, that's what they're going to do; that's their fiduciary obligation.

The second argument we heard is Time Warner is a trapped wholesaler. But the fact is Time Warner doesn't need this merger to do well. It's moving forward. You heard from some of the executives who are doing a good job. They're coming out with direct-to-consumer services. They've been developing their own targeted advertising, and they have been growing that. Mr. Martin told you about their innovations.

They've cut deals with Snapchat, a new social media company that the Court heard about. Mr. Martin told you about how they have been innovating and said they'd do just fine without the merger.

Let's talk about efficiencies. Efficiencies was another -- synergies, as it is sometimes called, another possible response the defendants have to the evidence that the merger would lessen competition.

It's important to keep in mind how this fits into the legal analytical framework, Your Honor. The idea is if a merger has already been found to lessen competition, it could be true that there are so many efficiencies that will let them bring the cost down and consumers will wind up better off, even though there's a reduction of competition. So it's a pretty high standard to prove that.

I don't think any court has ever approved a merger, an otherwise anti-competitive merger, on this basis.

And the D.C. Circuit explained in *Anthem* that it isn't even clear that this defense or response even exists. That's how skeptical the law has been of an efficiencies defense or response.

But if it does, it's pretty clear defendant has the burden. They have to show, if you're going to prove an otherwise anti-competitive merger you've got to really believe that these changes are going to happen, that you need the merger to do them, and that they're going to go through and benefit consumers. And those are the burdens that defendants have.

How did defendants try to meet that burden in this case? Well, version 41, it's a draft slide show. It's full of unsupported numbers. The Court only admitted it for the state of mind of the company, and that was the right approach. And what that means is what comes into evidence is the defendant's bottom-line projections. And that's all they have.

Mr. Stankey was their only witness on version 41. He didn't make it. He came into the process after the numbers had all been set. He couldn't explain how some of the numbers were derived.

He admitted that he'd learned that some of the people at Time Warner who are actually responsible for making great content thought that the content intelligence efficiencies were speculative, unproven, and untested.

And you heard from our efficiencies expert, Mr. Quintero. In discovery, we asked AT&T: Tell us everything that's behind these numbers. Give us the justification so we can examine it and see if it's verifiable.

Mr. Quintero looked at it and said, you know, its really assumptions. It's -- here's the number. We assume we're going to get there, and the backup just wasn't there.

Do you remember what the response from defendants was? They tried to make it our burden to disprove their assumptions, their claims.

They said to Mr. Quintero, did you ask for other documents; that is, in addition to the ones that AT&T had provided? Did you go out and talk to AT&T witnesses?

Well, no. Those are AT&T witnesses, who, by the way, never showed up at trial to explain the basis for these assumptions.

So AT&T hasn't met its burden here. What they have offered is really Mr. Stankey and Mr. Stephenson saying, we intend to do this. We're going to try to do it. We're committed to this. We've done it sometimes in the past, although there was evidence as well of a big miss on the DirecTV acquisition on the revenue synergies.

But even if they're well-intentioned and they have every reason in the world to want to achieve -- try to achieve efficiencies, that's not sufficient for courts to approve an otherwise anti-competitive merger, because if all that was required was for well-meaning executives to come in and say, we're going to improve things; we're going to get some efficiencies; we're going to be good for consumers -- well, every merger would be approved because they always say that.

That's why the law says, no. Show us. Let's see if it's really true. Let's see if you need the merger to do it. And let's see that it really passes through to consumers.

That's a burden that wasn't met here.

I should mention in passing, Professor Athey, who looked specifically at the advertising synergies that we looked at so significantly, who explained that there are lots of ways to achieve these efficiencies. And, frankly, the idea that they depend on making their advertising platform profitable by getting all their competitors to give them their inventory was going to be a huge lift, something -- nothing that the Court could rely on in approving an anti-competitive merger. So that's what we've got to say about efficiencies.

There was another line of response that we heard from defendants, which was that even if the company had the incentive and the ability to reduce competition, they wouldn't act on those incentives.

We're going to set up the corporate structure, they said, with Time Warner over here and AT&T over here, and never the twain shall meet. And so there won't be any way to act on their combination of incentives and have an anti-competitive effect. They'd be in separate silos. They'd keep blinders on so they couldn't see what's going on.

The problem with this defense also is that it proves too much. It asks the Court to suspend logic and the principles of economics and the principle of corporate law.

Logic. Well, if there's money to be made, people are going to look for a way to find a way to do it.

Economics. Professor Shapiro said the assumption that corporations act to maximize their total profits is a standard working economic assumption.

Professor Carlton agreed that a firm with multiple divisions will act to maximize profits across the whole firm.

And corporate law tells us that the company has a fiduciary duty to maximize profits across the whole enterprise.

The business folks who testified here really conceded a lot on this point.

In 2015, Mr. Bewkes, you'll recall this incident, directed the heads of HBO, Turner, and Warner Brothers that they ought to coordinate their efforts on negotiating agreements, because they're all part of the same company.

You may recall Mr. Plepler's email response to that, was, "Oy."

And Mr. Sutton responded, "Uh-oh." And he went on to explain in that email that what he meant was that HBO might lose its ability to maximize revenues for HBO.

That's what can happen and what logically should happen within a single corporate entity.

You heard an example of that from Mr. Sutton as well, where he testified about shutting down HBO's negotiations with YouTube because Turner needed the leverage.

After the merger, he'd do the same if his boss told him to, as he candidly admitted.

Mr. Stankey testified that even with the separate business units, he'd consider taking actions that would benefit -- that wouldn't be beneficial to his own business unit, if it was good for the business as a whole.

After all, long-term shareholder value, long-term shareholder value is what drives decisions in companies.

And remember, the compensation of the executives is tied expressly to the long-term success of the company as a whole.

And, most importantly, this corporate structure that they're setting up is something that could change in a heartbeat after the merger.

As Mr. Stankey said it quite succinctly, he said, "If there's one thing I know, organizations change."

So the suggestion that the defendants can set up a corporate structure to prevent them from combining their ability and incentive is just impractical and not realistic.

More to the point, it's another one that proves too much. If corporations could resolve reduction of competition in a merger by coming to court and saying, I promise to set up separate subsidiaries; I'll have them compete against the other, even though they're owned by the same parent -- we can just forget about having an antitrust division because everybody would come in and promise that. It's an easy promise to do.

But the law doesn't go that way. The law says, look at the business realities; look at the economic incentives. And so for that reason, this defense by defendants fails.

There's a variation of this that they offered us. They pointed to Comcast and NBCU and asked them, well, do you, Comcast-NBCU, consider Comcast when you're doing NBC negotiations?

The problem with that is let's remember they're talking about the last seven years when Comcast and NBCU have been subject to FCC supervision, as well as supervision by this Court.

The FCC's order had over 150 conditions, as well as regulatory oversight, including explicit non-discrimination provisions for online companies in the FCC order, non-discrimination provisions about who they provide programming to, non-discrimination provisions for those utilizing the remedy. And beyond those conditions, regulatory supervision, review of arbitrations, annual reports, that kind of thing can constrain what you can do.

You heard Mr. Orsini cross-examine Mr. Bond with all sort of questions: Did you ever think about this? Did you ever think about that?

But if the answer had been "yes" at any point during the last seven years, the possibility that Mr. Bond and everybody else at NBCU had to think about is they might have to be answering to the FCC about that.

In any event, we know that the FCC decree did not prevent all effect on competition.

First, Mr. Bond, there was some testimony that was under seal, so I'm not going to go farther on it. But look at PX382 and the testimony around it. The company gave some flexible rights once, but did it ever happen again?

Mr. York, with a turn of phrase noted that NBCU was restrained "at least philosophically."

And then you'll remember what Mr. Holanda from RCN explained about the harm that a vertically integrated firm could do even under a consent decree and using non-price terms. They had that product, broadcast basic, that they were able to use NBCU content before the Comcast acquisition; after the Comcast acquisition, it changed. They got more stringent penetration requirements. They couldn't offer that product the same way they had in competition with Comcast.

What that tells us is you can't just look at what's been going on with Comcast and say -- as defendants would have it, there's no possibility of harm in this case. So we can sweep away that issue.

One more topic to cover of the things defendants have said to us.

They offered this private arbitration letter that they sent to a thousand companies that supposedly would cure the anti-competitive problem.

But industry witnesses explained a lot of the problems with this proposed fix. Let me just run through them real quickly.

One, it can only last seven years. It's temporary.

Two, there's an information advantage for the third-party distributors, because they don't get access to the information on the same level as -- on the same utility that the other side has.

Third, the arbitrator has to determine fair market value, and that's never defined. And the parties' witnesses, Richard Warren and Dan York, both said that they don't use that term.

Fourth, the arbitration focuses on two terms: price and the size of the bundle; yet the industry witnesses said there are many, many terms that are equally or also equally important.

Fifth, if the arbitration covers those other terms, how's the arbitrator to judge balancing one against the other in this baseball-style arbitration? Which terms are really closest to fair market value?

Sixth, benchmarks are lacking here. That's different from Comcast-NBCU. Because DirecTV is everywhere, there's no competitive benchmark to compare against.

Seventh, of particular note, a virtual MVPD offering a skinny bundle like Dish faced the risk of their business being killed if the arbitrator picks based on a comparable that's not really comparable.

And eight, kind of wrapping it up, Mr. -- it's just the arbitration process is just -- puts too much at risk for the other firms. Mr. Schlichting described it as "putting your head in a noose."

For these and other reasons, it's just not realistic to expect that real-world negotiators would actually choose to invoke arbitration.

And, in fact, you heard the evidence. They sent a thousand letters; 20 have been signed.

And, more fundamentally, this arbitration proposal is trying to substitute a regulatory solution for a competitive problem when competition is the right solution.

Let me turn just for a moment to the subject of remedies, Your Honor.

We will, according to the Court's request, address this in our post-trial papers. But we invite the Court's attention to two cases in particular: *Ford Motor* and *du Pont*.

In *Ford*, the Supreme Court declared that once the government has proved a Section 7 violation, all doubts as the remedy are to be resolved in its favor.

And *du Pont* emphasizes that an injunction barring the transaction is a preferred remedy in Section 7 cases, because it is a simple, relatively easy-to-administer, and sure remedy. And that's precisely the remedy that the government urges in this case.

As Professor Shapiro testified, to completely eliminate the incentives for the combined entity to act in an anti-competitive manner, the structural remedy would we needed.

Now, alternative variations of structural remedies, as the Court might consider -- a good example, for example, could involve, for example, partial divestitures. The heart of the problem here arises from the proposed ownership by AT&T of both distribution, particularly DirecTV, and content, especially Turner.

So alternative remedies might enable AT&T to purchase all or some of Time Warner and, thereby, allow the merged firm to achieve some of the purported pro-competitive benefits that they say they're looking for in this merger.

For example, this could be accomplished by a decree prohibiting AT&T from acquiring Turner but permitting it to acquire the other parts of Time Warner.

Or the Court might permit AT&T to proceed with an acquisition of all of Time Warner on the condition that it divest itself of DirecTV, which it acquired only a few years ago.

Or the Court might provide both such options and leave it to up the defendants as to which they wish to pursue.

By contrast, different from structural relief, behavioral relief. Mere behavioral relief is just likely to include many of the flaws of defendants' private remedy proposal, and it's likely to be ineffective for those reasons. But also at bottom, it's a regulatory scheme, rather than a permanent, pro-competitive solution.

All right. Let me take just one minute to conclude, Your Honor.

The Clayton Act outlaws mergers where there's a reasonable probability of harm. There's only one place to get Time Warner content. Time Warner content, industry witnesses have explained how that content is valuable content that consumers demand. They explained that if that content is in the hands of their competitor, AT&T, they're looking at, as Mr. Schlichting of Dish and Sling said, "They can raise prices and make more money and make us less competitive, or they can present onerous terms that we can't accept."

That's what this merger would do. It would let AT&T make its rivals less competitive. That's the lessening of competition from this merger. It would be substantial, and the Clayton Act calls upon us to remedy it.

Industry witnesses, economic analysis, and the parties' own statements before this merger was announced all support the entry of this injunction.

Defendants' efficiencies claim, their do-it-yourself arbitration remedy, just don't solve the problem, they just don't solve the problem.

So we urge the Court to solve the problem. Hold the merger unlawful and impose a meaningful remedy that stops the problem. That's what consumers deserve in this case, Your Honor.

Thank you very much.

THE COURT: Thank you, Mr. Conrath.

All right, Counsel. We'll reconvene at 2:00 for the defendants' closing argument. We'll go to 3:30, and then we'll take a 15-minute break. And then the government will have an opportunity to present a rebuttal argument for 15 minutes. All right?

We'll stand in recess until 2:00.

DEPUTY CLERK: All rise.

This Honorable Court now stands in recess until the return of court.

(Proceedings concluded at 12:31 p.m.)

C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: April 30, 2018________ /S/__William P. Zaremba______

William P. Zaremba, RMR, CRR