

Stanley M. Besen - 11/16/2006

Page 1

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF PENNSYLVANIA

3 -----x

4 CAROLINE BEHREND, STANFORD GLABERSON,
5 MICHAEL KELLMAN, LAWRENCE RUDMAN,
6 JOAN EVANCHUK-KIND and ERIC BRISLAWN,

7 Plaintiffs,

Civil Action No.

8 -against-

03-6604

Hon. John R. Padova

9 COMCAST CORPORATION, COMCAST HOLDINGS
10 CORPORATION, COMCAST CABLE
11 COMMUNICATIONS, INC., COMCAST CABLE
12 COMMUNICATIONS HOLDINGS, INC., and
13 COMCAST CABLE HOLDINGS, LLC,

14 Defendants.

15 -----x

16 November 16, 2006

17 10:14 a.m.

18 Deposition of STANLEY M. BESEN, taken by
19 Plaintiffs, pursuant to notice, at the offices
20 of Kasowitz Benson Torres & Friedman, 1633
21 Broadway, New York, New York, before Harold
22 Brown, a Certified Shorthand Reporter and Notary
23 Public within and for the State of New York.
24
25

Stanley M. Besen - 11/16/2006

Page 2

1 APPEARANCES:
 2 SUSMAN GODFREY L.L.P.
 Attorneys for Plaintiffs
 3 901 Main Street
 Suite 5100
 4 Dallas, TX 75202-3775
 5 BY: BARRY C. BARNETT, ESQ.
 -and-
 6 HEINS MILLS & OLSON, P.L.C.
 Attorneys for Plaintiffs
 7 3550 IDS Center
 80 South Eighth Street
 9 Minneapolis, Minnesota 55402
 10 BY: DAVID R. WOODWARD, ESQ.
 11
 12 KASOWITZ BENSON TORRES & FRIEDMAN LLP
 Attorneys for Defendants and Witness
 13 1633 Broadway
 New York, New York 10019-6799
 14
 15 BY: SHERON KORPUS, ESQ.
 -and-
 JAMES T. CAIN
 16
 ALSO PRESENT:
 17 KENNY CHIPKIN, CLVS, Videographer
 LegaLink Dallas
 18
 19 DAVID MAX
 20 Weil Gotshal & Manges
 21
 22
 23
 24
 25

Page 4

1 EXAMINATION
 2 BY MR. BARNETT:
 3 Q. Please tell us your name.
 4 A. Stanley M. Besen.
 5 Q. And Dr. Besen, are you a vice
 6 president at CRA International in Washington
 7 D.C.?
 8 A. I am.
 9 Q. How long have you been with CRA
 10 International?
 11 A. 14 years.
 12 Q. And what is your position aside
 13 from -- how would you describe your
 14 responsibilities at CRA?
 15 A. I am one of the researchers and
 16 analysts.
 17 Q. You've lived in the D.C. area for
 18 how long?
 19 A. 28 years.
 20 Q. And if you could just give us a
 21 quick rundown of your educational background.
 22 A. I was educated in the public
 23 schools in New York City. I went to the City
 24 College of New York for my bachelor's degree. I
 25 have a Master of Arts and Ph.D. in economics

Page 3

1 THE VIDEO OPERATOR: This is the
 2 Certified Legal Video Specialist speaking, Kenny
 3 Chipkin for LegaLink Dallas, 4144 North Central
 4 Expressway, Dallas, Texas. Today's date is
 5 November 16, 2006. Our time is 10:14. We are
 6 at the offices of Kasowitz Benson Torres &
 7 Friedman, 1633 Broadway, New York City, to take
 8 the videotape deposition of Stanley M. Besen in
 9 the matter of Caroline Behrend et al. versus
 10 Comcast Corporation et al. in the United States
 11 District Court for the Eastern District of
 12 Pennsylvania, Case No. 03-6604. Will counsel
 13 please identify yourselves and state whom you
 14 represent.
 15 MR. BARNETT: I'm Barry Barnett
 16 representing the plaintiffs.
 17 MR. WOODWARD: David Woodward from
 18 Heins Mills & Olson for the plaintiffs.
 19 MR. KORPUS: Sheron Korpus and
 20 James Cain of Kasowitz Benson Torres & Friedman
 21 for the defendants and the witness.
 22 STANLEY M. BESEN,
 23 having been first duly sworn by the Notary
 24 Public (Harold Brown), was examined and
 25 testified as follows:

Page 5

1 from Yale University.
 2 Q. Do you have a law degree?
 3 A. No.
 4 Q. Have you received any training in
 5 antitrust law specifically?
 6 A. No.
 7 Q. Have you had any course work on
 8 class actions?
 9 A. No.
 10 Q. Are you familiar with rule 23 of
 11 the Federal Rules of Civil Procedure?
 12 A. In general terms, yes.
 13 Q. How did you become familiar with
 14 those?
 15 A. I did some research on the
 16 internet.
 17 Q. In preparation for the deposition?
 18 A. Earlier.
 19 Q. Even before that?
 20 A. Yes. In connection with preparing
 21 my report.
 22 Q. Have you testified in an antitrust
 23 case before?
 24 A. Yes.
 25 Q. On how many occasions?

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 6</p> <p>1 A. To be clear, you mean trial 2 testimony? 3 Q. Yes, let's start with that, trial 4 testimony. 5 A. Once. 6 Q. And what case was that? 7 A. Pacific West v. City of Sacramento. 8 Q. Were you working on behalf of the 9 city of Sacramento? 10 A. I was. 11 Q. And what was your involvement in 12 that case? 13 A. I testified on behalf of the city 14 in connection with -- on the issue of whether it 15 was reasonable for the franchising authority to 16 believe that there would be only one cable 17 operator, successful cable operator in the city 18 of Sacramento. 19 Q. And what was the gist of your 20 testimony about that? 21 A. That in fact it was reasonable, 22 excuse me, it was reasonable for them to have 23 assumed that. 24 Q. That there would just be one? 25 A. Yes. And, by the way, this was not</p>	<p style="text-align: right;">Page 8</p> <p>1 Q. Have you ever submitted a 2 declaration before this case in connection with 3 a class certification proceeding? 4 A. No. 5 Q. How did you become involved in this 6 case? 7 A. A lawyer friend of mine called and 8 told me I would be hearing from the attorneys 9 for Comcast. 10 Q. Who was the lawyer friend? 11 A. Joe Simons with the Paul Weiss law 12 firm. 13 Q. Was he a personal friend or a 14 business-type friend? 15 A. Both. 16 Q. Had you done work for Mr. Simons 17 before? 18 A. Yes. 19 Q. In connection with what sorts of 20 matters? 21 A. I think they would have been 22 confidential and I would prefer not to divulge 23 them. 24 Q. Without giving specifics, just in 25 general.</p>
<p style="text-align: right;">Page 7</p> <p>1 based on anything specific to the city of 2 Sacramento, but more generally about the cable 3 industry as a whole. 4 Q. And give us just a summary of what 5 your reasons were for that conclusion. 6 A. Basically, that there were 7 significant scale economies that prohibited the 8 ability of a second firm to survive. 9 Q. And what year was that that you 10 gave your trial testimony? 11 A. I think it was late 1980s, but I'm 12 not certain. 13 Q. You've given deposition testimony 14 in other antitrust cases? 15 A. I'm trying to remember. No, I 16 think not. 17 Q. Have you ever given testimony in 18 connection with a class certification 19 proceeding? 20 A. No. 21 MR. KORPUS: Trial testimony, 22 deposition testimony? 23 BY MR. BARNETT: 24 Q. Any kind of testimony. 25 A. No.</p>	<p style="text-align: right;">Page 9</p> <p>1 A. It's hard to do that. 2 Q. Try. 3 A. I don't think I can. 4 Q. Without disclosing what it was? 5 A. Yes. 6 Q. Was it more than one matter? 7 A. Actually, two different times. 8 Q. And how long ago was that? 9 A. One quite recently, and one quite 10 awhile ago. 11 Q. I don't think I asked you this. 12 The city of Sacramento case, how long ago was 13 that? 14 A. You did ask me. 15 Q. I'm sorry. 16 A. And I said the best I can remember 17 it was the late 1980s. 18 Q. Thank you. So Mr. Simons contacted 19 you and said that you would be contacted about a 20 potential matter? 21 A. Correct. 22 Q. And what happened next? 23 A. I was contacted. 24 Q. Who contacted you? 25 A. I don't recall. Someone from the</p>

3 (Pages 6 to 9)

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 10</p> <p>1 Kasowitz Benson firm? 2 Q. When was that? 3 A. Earlier this year. 4 Q. Approximately when in the year? 5 A. I'm not certain. 6 Q. Were leaves on the trees? 7 A. No, it was earlier than that. On 8 the order of six months, but I'm not certain. 9 Q. And then what happened after that? 10 A. I met with -- here at Kasowitz 11 Benson to discuss the case. 12 Q. So you came up to New York to 13 visit? 14 A. Correct. 15 Q. Who did you visit with? 16 A. Mr. Korpus, Mr. Shuster, several -- 17 Mr. Cain, several other people here. 18 Q. What did they tell you they were 19 interested in you for? 20 A. They described the case and they 21 were interested in having me appear on their 22 behalf essentially to oppose the case. 23 Q. Had you received information about 24 the case before the meeting in New York? 25 A. I don't recall.</p>	<p style="text-align: right;">Page 12</p> <p>1 Q. Did you have a copy of the report 2 at that time? 3 A. I don't remember when I first saw 4 it. It might have been before the meeting, it 5 might have been at the meeting, it might have 6 been shortly after. I just don't recall. 7 Q. So you were asked to respond to Dr. 8 Beyer's report? 9 A. Correct. 10 Q. And what did you understand your 11 role to be? What you were going to need to do? 12 A. I was going to need to review what 13 he had done and evaluate it as an economist. 14 Q. And when did you begin evaluating 15 Dr. Beyer's report? 16 A. Shortly thereafter. 17 Q. And what did you do to evaluate it? 18 A. I read it, I looked at the -- the 19 data that he had analyzed, I collected some 20 additional data myself and I performed a variety 21 of calculations and began to write the report 22 that you have seen. 23 Q. In this meeting that you had, the 24 first meeting in New York -- 25 A. Correct.</p>
<p style="text-align: right;">Page 11</p> <p>1 Q. Did you review any documents during 2 that meeting? 3 A. I don't recall. 4 Q. For example, did you look at the 5 complaint? 6 A. I may have. I frankly don't 7 remember. The meeting was awhile back and I 8 just don't remember. 9 Q. So how long did the meeting last? 10 A. Several hours. 11 Q. And at the conclusion of that 12 meeting, were you retained? 13 A. I'm not sure of exactly at the 14 conclusion of the meeting, but either then or 15 shortly thereafter. 16 Q. Did you agree at the end of the 17 meeting that you would be willing to assist in 18 the case? 19 A. Yes. 20 Q. What were you asked to do? 21 A. At that moment? 22 Q. Yes. 23 A. I believe I was asked to begin to 24 prepare to respond to the plaintiff's expert's 25 report.</p>	<p style="text-align: right;">Page 13</p> <p>1 Q. -- at Kasowitz, did you reach any 2 impressions about whether Dr. Beyer's analysis 3 was incorrect? 4 MR. KORPUS: Objection to form. 5 You can still answer. I'm just objecting to 6 form. 7 THE WITNESS: I understand. Would 8 you repeat the question, please. 9 BY MR. BARNETT: 10 Q. Yes, during the meeting, the first 11 meeting in New York with the Kasowitz firm. 12 A. Right. 13 Q. Did you have any impressions about 14 whether Dr. Beyer's analysis was correct? 15 A. I'm not sure. I just don't recall. 16 Certainly at the time I would not have done a 17 thorough evaluation of the report. I certainly 18 would not be able to do that in the amount of 19 time we are talking about here. That would have 20 evolved over a period of weeks. 21 Q. Did you believe that you would be 22 able to identify flaws in Dr. Beyer's analysis? 23 MR. KORPUS: Objection. Please 24 pause. 25 THE WITNESS: I'm sorry.</p>

4 (Pages 10 to 13)

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 14</p> <p>1 MR. KORPUS: Objection to the form. 2 THE WITNESS: Not until I read it 3 carefully. 4 BY MR. BARNETT: 5 Q. So that would have been some weeks 6 after the meeting? 7 A. In the period of time. In the 8 period of time subsequent to the meeting, 9 correct. 10 Q. Let me just ask you what the 11 arrangements are between Comcast or Kasowitz and 12 CRA for your assistance in connection with this 13 case. 14 A. It's a standard retainer on a time 15 and materials basis. 16 Q. So CRA gets paid on an hourly basis 17 for your work? 18 A. Correct. 19 Q. And what is the hourly rate? 20 A. It is in my report. I believe it 21 is \$605 per hour. 22 Q. Is that for all the work that you 23 do? 24 A. I'm not sure I understand the 25 question.</p>	<p style="text-align: right;">Page 16</p> <p>1 Just give us an overview of it. 2 A. Generally establishing the 3 framework for the analysis that would be done, 4 reviewing results as they became available, 5 interacting with the various people on the staff 6 and drafting a report. 7 Q. Other than that first meeting at 8 Kasowitz in New York, have you had other 9 meetings with lawyers from Kasowitz? 10 A. Teleconferences. 11 Q. How many approximately? 12 A. I don't know. Six or eight, 13 something like that. 14 Q. Were they pretty evenly spaced out? 15 A. We tried to do it once a week, 16 sometimes not always successfully. 17 Q. And in the course of those 18 discussions, did you begin developing your 19 declaration? 20 MR. KORPUS: Objection to form. I 21 don't know what you mean by "in the course of 22 those discussions." 23 THE WITNESS: I don't either. 24 BY MR. BARNETT: 25 Q. Okay. Over time did you begin</p>
<p style="text-align: right;">Page 15</p> <p>1 Q. Some people charge different rates 2 for for example deposition testimony because 3 it's so stressful. 4 A. It's the same rate for all hours. 5 MR. KORPUS: Discounted for 6 deposition testimony. 7 Q. Very good. And other people in CRA 8 have assisted you? 9 A. Correct. 10 Q. And they -- CRA gets paid on an 11 hourly basis for their work as well? 12 A. Correct. 13 Q. Who at CRA has assisted you in 14 connection with your work in this matter? 15 A. Several people. I'll give you some 16 names and then some categories. One is Tasneem 17 T-a-s-n-e-e-m Chipty C-h-i-p-t-y, a Ph.D. 18 economist, vice president of CRA. The second 19 name is -- also I'll spell it for you. Sari 20 S-a-r-i second name P-e-k-k-a-l-a, a more junior 21 economist, also with a Ph.D., and then a number 22 of people who are analysts, more junior people, 23 some number of them. 24 Q. What work have you personally done 25 in connection with this case up until today?</p>	<p style="text-align: right;">Page 17</p> <p>1 preparing your declaration? 2 A. Yes. 3 Q. When did you begin preparing your 4 declaration? 5 A. I think I began the writing process 6 probably a couple of months ago. 7 Q. And did you prepare drafts that you 8 sent to people at Kasowitz? 9 A. Yes, at some point. 10 Q. And in the process of exchanging 11 drafts and getting comments back, were you able 12 to refine your declaration? 13 A. Yes. 14 Q. When did you finish your work on 15 your declaration? 16 A. I think the day you received it. 17 Q. I think I read in your declaration 18 that you spoke with people at Comcast too? 19 A. I or people on my staff did. I did 20 with some and people on my staff did more 21 extensively. 22 Q. Did you talk with people in person 23 from Comcast? 24 A. No, teleconferences. 25 Q. Tell us who it was at Comcast that</p>

5 (Pages 14 to 17)

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 18</p> <p>1 you spoke with personally. 2 A. A gentleman who filed an affidavit, 3 Mr. Palmer. The other was a group of people, I 4 frankly can't remember the names. 5 Q. What were their functional 6 responsibilities at Comcast? 7 MR. KORPUS: Talking about the 8 second group of people? 9 A. Yes, we are talking about the 10 second group of people. Which people are we 11 talking about? Mr. Palmer -- 12 Q. Mr. Palmer, I got that one. 13 A. Right. The others were various 14 officers of various sorts who knew about the 15 operation of the -- of Comcast and also about 16 the data that we used. 17 Q. So did you speak with different 18 groups of Comcast people at different times? 19 A. People from CRA did, yes. 20 Q. What is your understanding of 21 the -- some people helped with the data and some 22 people helped with the organization of Comcast? 23 A. At -- some Comcast people you are 24 talking about? 25 Q. Yes.</p>	<p style="text-align: right;">Page 20</p> <p>1 with data and as you probably know the data are 2 not always self-explanatory so you have to 3 interact with the source of the data in order to 4 do this and we had people do this over a period 5 of weeks. 6 Q. I do know it is not 7 self-explanatory, at least not to me. 8 A. Not to me either. 9 Q. Did you talk with any of the 10 Comcast executives who were involved in the 11 decisions to enter into the swap transactions 12 that are alleged in the complaint? 13 A. Not that I know of. 14 Q. How about any of the people who are 15 involved in the mergers and acquisitions? 16 A. Not that I know of. 17 Q. Did you personally review materials 18 that Comcast furnished directly? 19 A. Some. 20 Q. What sorts of materials did you 21 look at that Comcast provided? 22 A. The acquisition agreement also, the 23 rate cards, some other materials. 24 Q. What other materials can you think 25 of?</p>
<p style="text-align: right;">Page 19</p> <p>1 A. I think often it was the same 2 people or different people at the same meeting. 3 Q. Do you recall the titles of any of 4 the people that you spoke with? 5 A. I'm afraid not. 6 Q. You did speak with Mr. Palmer? 7 A. Yes. 8 Q. And what information did he give 9 you? 10 A. Basically, the structure of 11 Comcast, the organization from areas to regions 12 to systems and how they interacted and what 13 respective functions each of those entities 14 carried out. The sort of thing that appears in 15 his declaration. 16 Q. I notice that in your report you 17 have some maps that show the different regions, 18 the different areas and the different systems. 19 A. Correct. 20 Q. Is that information you got from 21 Mr. Palmer? 22 A. No. 23 Q. Who did you get it from? 24 A. The other people I described. I 25 mean, it was a long, involved process working</p>	<p style="text-align: right;">Page 21</p> <p>1 A. I can't remember offhand. There is 2 a lot of materials. All the materials that are 3 referenced in the -- in my declaration would be 4 materials that I would have included. 5 Q. You received the swap agreements 6 from Comcast? 7 A. The -- I'm not sure if they came 8 directly from Comcast or from the attorneys, but 9 they are the -- there are those agreements, yes. 10 Q. And the merger agreements as well? 11 A. Which merger agreements? 12 Q. Well, AT&T, for example. 13 A. Yes, as applied to this, that's 14 correct. There is a series of what I think of 15 as the acquisition documents. 16 Q. What did you review those, the swap 17 agreements and the merger agreements, for? 18 A. Not for the boilerplate. 19 Basically, to identify the systems that were 20 acquired. 21 Q. Were the terms and conditions of 22 those transactions important to your analysis? 23 MR. KORPUS: Objection. 24 THE WITNESS: Not particularly. 25 BY MR. BARNETT:</p>

6 (Pages 18 to 21)

Stanley M. Besen - 11/16/2006

Page 22

1 Q. For example, did you look for any
 2 noncompete provisions?
 3 A. I did not.
 4 Q. Did you look for any agreements
 5 relating to confidentiality of trade secrets and
 6 intellectual property?
 7 A. No.
 8 Q. Do you know Dr. John Beyer?
 9 A. No.
 10 Q. Have you ever run into him?
 11 A. No.
 12 Q. CRA used to be called Charles River
 13 Associates?
 14 A. Correct.
 15 Q. Forgive me if I am repeating, but
 16 tell us what CRA does.
 17 A. It is an economics -- you are not
 18 repeating yourself. It is an economics and
 19 business consulting firm.
 20 Q. How much of your professional time
 21 do you spend in work for CRA?
 22 A. All of it.
 23 Q. And how much of that work involves
 24 you being an expert in economics?
 25 MR. KORPUS: Objection.

Page 23

1 THE WITNESS: Essentially all of
 2 it.
 3 BY MR. BARNETT:
 4 Q. What percentage of your work would
 5 you say relates to litigation matters as opposed
 6 to other sorts of work?
 7 A. I would say over a long period of
 8 time, probably 20 or 25 percent is litigation.
 9 Q. And the rest of it is consulting?
 10 A. No, it is merger-related which
 11 often does not involve litigation. It is work
 12 before -- well, let me be clear. Work before
 13 various agencies, the mergers involving the
 14 Federal Trade Commission and the Department of
 15 Justice and often work before the Federal
 16 Communications Commission which is not
 17 litigation either.
 18 Q. Let's take over the last couple of
 19 years. How much of your work has been involved
 20 in litigation matters?
 21 A. I would say perhaps 15 percent, but
 22 I'm not certain.
 23 Q. And how much has been related to
 24 agency proceedings?
 25 A. The rest.

Page 24

1 Q. So 85-15?
 2 A. Roughly.
 3 Q. Have you done work for Comcast
 4 before?
 5 A. Yes.
 6 Q. How many times?
 7 A. Once.
 8 Q. When was that?
 9 A. I'm bad on dates. Some years ago.
 10 Perhaps ten years ago.
 11 Q. I noticed in your resume you
 12 mentioned some work that you have done for TCI?
 13 A. Correct.
 14 Q. Is that a cable MSO?
 15 A. It was.
 16 Q. And what happened to it?
 17 A. It was purchased by AT&T.
 18 Q. And now is part of Comcast?
 19 A. Correct.
 20 Q. Do you know some of the people at
 21 Comcast who used to be at TCI?
 22 A. I don't.
 23 Q. Did you have a principal contact at
 24 TCI?
 25 A. No. Probably a number of different

Page 25

1 people. I tended to work through their counsel,
 2 FCC counsel.
 3 Q. Have you done other work with the
 4 Kasowitz firm?
 5 A. No.
 6 Q. How about White & Case?
 7 A. No.
 8 Q. Have you ever done work for my
 9 firm, Susman Godfrey?
 10 A. No.
 11 Q. How about Mr. Woodward's firm,
 12 Heins Mills & Olson?
 13 A. No.
 14 Q. Have you -- I think you said you've
 15 never given testimony in connection with a class
 16 certification proceeding?
 17 A. Correct.
 18 Q. Or submitted a declaration?
 19 A. Correct.
 20 Q. Give us an estimate of how much CRA
 21 has been paid so far for the work that you and
 22 your colleagues have done in connection with
 23 this case.
 24 A. I'm not certain. I'm not involved
 25 in the invoicing for this project, so I don't

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 26</p> <p>1 know the answer to that.</p> <p>2 Q. You can't give us any kind of an</p> <p>3 estimate?</p> <p>4 A. It's a few hundred thousand</p> <p>5 dollars.</p> <p>6 Q. Does that include unbilled time?</p> <p>7 MR. KORPUS: Objection.</p> <p>8 THE WITNESS: I'm not sure I</p> <p>9 understand the question.</p> <p>10 BY MR. BARNETT:</p> <p>11 Q. Sure. I phrased the question</p> <p>12 inartfully to begin with. I should have asked</p> <p>13 you -- I asked you how much CRA has been paid.</p> <p>14 A. Right.</p> <p>15 Q. And you said a few hundred thousand</p> <p>16 dollars?</p> <p>17 A. Actually, I should have said we</p> <p>18 have billed them a few hundred thousand dollars.</p> <p>19 Q. Whether you have been paid or not,</p> <p>20 have you been asked to do anything in addition</p> <p>21 to preparing your declaration?</p> <p>22 A. No.</p> <p>23 Q. Do you expect to continue working</p> <p>24 on this case?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 28</p> <p>1 A. Correct.</p> <p>2 Q. What do you mean by overbuilding?</p> <p>3 A. When a second wire line company</p> <p>4 covers the same geographic area that the</p> <p>5 incumbent operator covers.</p> <p>6 Q. Is there such thing as partial</p> <p>7 overbuilding?</p> <p>8 A. There can be.</p> <p>9 Q. And what is your understanding of</p> <p>10 what partial overbuilding would be?</p> <p>11 A. Partial overbuilding would be where</p> <p>12 someone chooses to overbuild a portion of the</p> <p>13 franchise area, but not all of it.</p> <p>14 Q. Do you know what OVS is?</p> <p>15 A. I used to, but I'm not sure.</p> <p>16 MR. KORPUS: Is that OVS?</p> <p>17 MR. BARNETT: OVS.</p> <p>18 BY MR. BARNETT:</p> <p>19 Q. Did you look at any of the</p> <p>20 franchise agreements that Comcast has with</p> <p>21 franchising authorities in the Philadelphia</p> <p>22 cluster?</p> <p>23 A. No.</p> <p>24 Q. Are you familiar with franchise</p> <p>25 agreements in general?</p>
<p style="text-align: right;">Page 27</p> <p>1 Q. What do you expect to do in the</p> <p>2 future?</p> <p>3 A. It depends on what happens at class</p> <p>4 cert.</p> <p>5 Q. If class certification is granted,</p> <p>6 what do you expect to do?</p> <p>7 A. I would expect to participate in</p> <p>8 the trial on the merits, although frankly, there</p> <p>9 has been no discussion of that. It is just an</p> <p>10 assumption I've made.</p> <p>11 Q. What do you believe you would be</p> <p>12 asked to do in connection with the merits of the</p> <p>13 case?</p> <p>14 MR. KORPUS: Objection.</p> <p>15 THE WITNESS: Analyze the</p> <p>16 plaintiff's case.</p> <p>17 BY MR. BARNETT:</p> <p>18 Q. And rebut the experts that the</p> <p>19 plaintiffs retained?</p> <p>20 A. If appropriate.</p> <p>21 Q. If you believe they are wrong?</p> <p>22 A. Correct.</p> <p>23 Q. Or if they made a mistake?</p> <p>24 In your declaration, you mention</p> <p>25 overbuilding.</p>	<p style="text-align: right;">Page 29</p> <p>1 A. In general.</p> <p>2 Q. What the typical provisions are?</p> <p>3 A. Yes.</p> <p>4 Q. What typically does a local</p> <p>5 franchise agreement provide will happen to the</p> <p>6 cable plant of the MSO if the franchise is not</p> <p>7 reviewed or if it is canceled?</p> <p>8 A. I don't really know.</p> <p>9 Q. Do you have an opinion about</p> <p>10 whether overbuilding tends to decrease prices</p> <p>11 for cable subscribers?</p> <p>12 A. Yes.</p> <p>13 Q. What is your opinion?</p> <p>14 A. My -- the analysis that I have done</p> <p>15 indicates that overbuilding tends to reduce</p> <p>16 prices only for the very smallest cable systems.</p> <p>17 Q. And what analysis have you done to</p> <p>18 reach that conclusion?</p> <p>19 A. It is an analysis that appears in</p> <p>20 one of the papers that I cite in my report. It</p> <p>21 is an article by John R. Woodbury and myself.</p> <p>22 It was published in a journal at the University</p> <p>23 of California law school.</p> <p>24 Q. Is that the COMM/ENT?</p> <p>25 A. Correct.</p>

8 (Pages 26 to 29)

Stanley M. Besen - 11/16/2006

Page 30

1 Q. I think I might even have brought a
 2 copy of that. Is it called "Rate Regulation,
 3 Effective Competition, and the 1992 Cable Act?"
 4 A. Yes.
 5 Q. It was published in the fall of
 6 1994?
 7 A. Correct.
 8 Q. Who is John Woodbury?
 9 A. Another vice president at CRA.
 10 Q. Was that paper one that was
 11 originally developed on behalf of TCI?
 12 A. Yes.
 13 Q. For submission to the FCC?
 14 A. Yes.
 15 Q. What you wrote, was that
 16 substantively changed from the submission to the
 17 FCC?
 18 A. Certainly the form would be very
 19 different. It is an academic paper.
 20 Q. But the conclusions and the
 21 analysis would have been the same?
 22 A. Identical.
 23 Q. I may have misunderstood what you
 24 and Mr. Woodbury wrote, but I think the gist of
 25 it was a critique of the FCC's methodology for

Page 31

1 calculating the differential between
 2 noneffectively competitive systems and
 3 effectively competitive systems?
 4 A. That is correct.
 5 Q. And one of your criticisms, your
 6 and Mr. Woodbury's criticisms, was that the FCC
 7 didn't notice that the differential was fully
 8 explained or almost fully explained by the
 9 difference between overbuilt systems and
 10 nonoverbuilt systems?
 11 MR. KORPUS: Objection.
 12 THE WITNESS: I don't understand
 13 that.
 14 BY MR. BARNETT:
 15 Q. What is wrong with that?
 16 A. It doesn't sound familiar.
 17 Q. Okay. I'm going to have to make a
 18 copy of this so I can ask you about it. I
 19 didn't bring an extra copy with me.
 20 MR. KORPUS: Do you want me to
 21 arrange for that?
 22 MR. BARNETT: Sure. That would be
 23 kind.
 24 BY MR. BARNETT:
 25 Q. Have you looked at any of Comcast's

Page 32

1 internal documents regarding the swaps and
 2 acquisitions that are the basis for the
 3 complaint?
 4 A. Other than the acquisition
 5 agreements themselves?
 6 Q. Yes.
 7 A. No.
 8 Q. For example, I would expect that
 9 Comcast has business cases that would justify
 10 the business decision to enter into the swaps
 11 and the mergers. Have you looked at any
 12 documents like that?
 13 A. No.
 14 MR. KORPUS: Objection.
 15 THE WITNESS: I'm sorry, I will go
 16 slower.
 17 BY MR. BARNETT:
 18 Q. I think you said earlier that you
 19 didn't talk to any of the Comcast executives who
 20 were involved in the process of making the
 21 business decision to enter into those
 22 transactions.
 23 A. I said not that I know of. It is
 24 possible some people that I spoke to were
 25 involved. I wouldn't know that.

Page 33

1 Q. So can we infer from that that you
 2 are not able to tell Judge Padova what reasons
 3 Comcast actually considered in deciding to enter
 4 into the swaps and acquisitions?
 5 A. Not specifically, no. I know
 6 generally why firms enter into these
 7 arrangements, but not in this case.
 8 Q. Can you tell Judge Padova that
 9 Comcast did not believe that the swaps and
 10 acquisitions would eliminate potential overbuild
 11 competition?
 12 MR. KORPUS: Objection.
 13 THE WITNESS: I think there were
 14 too many notes in the question.
 15 BY MR. BARNETT:
 16 Q. Maybe. Do you know whether Comcast
 17 believed that the swaps and acquisitions would
 18 eliminate potential overbuild competition?
 19 A. I haven't seen any documents or
 20 spoken to anyone, so I have no way of knowing.
 21 I can't answer your question.
 22 Q. Do you know under what
 23 circumstances a local franchising authority has
 24 the right to cancel a Comcast franchise in the
 25 Philadelphia cluster?

Stanley M. Besen - 11/16/2006

Page 34

1 A. No.
 2 Q. You do know that federal law
 3 prohibits local franchising authorities from
 4 granting exclusive cable franchises?
 5 A. I do know that.
 6 Q. And you also know that under
 7 federal law local franchising authorities cannot
 8 unreasonably refuse to grant a second franchise?
 9 A. I do know that.
 10 Q. Do you know whether or not an
 11 incumbent cable operator has to leave its cable
 12 plant in place after the franchise terminates?
 13 A. I don't, but I'm not sure what else
 14 they would do with it.
 15 Q. They could dig it up?
 16 A. I don't think so.
 17 Q. It would be hard. It would be
 18 foolish. And you're aware, Dr. Besen, that
 19 franchising authorities cannot regulate expanded
 20 basic cable rates?
 21 A. I know that.
 22 Q. Do you agree that an incumbent's
 23 exit from a cluster makes entry by that former
 24 incumbent, reentry, into that cluster more
 25 costly?

Page 35

1 A. Please repeat the question.
 2 Q. Sure. You've got an incumbent
 3 cable operator, MSO, in a cluster, say,
 4 Philadelphia, just to take an example, and that
 5 cable operator exits that cluster.
 6 A. Exits by selling its system to
 7 somebody else?
 8 Q. Sells its system so it doesn't have
 9 any presence there, it doesn't have any customer
 10 list, it doesn't have any customer licenseships
 11 anymore, is prohibited from using intellectual
 12 property and knowledge that it had gained having
 13 been a cable operator in that system. And then
 14 it decides later that it would like to be in
 15 that cluster.
 16 A. As an overbuilder?
 17 Q. As an overbuilder or taking over a
 18 franchise.
 19 A. It makes a difference.
 20 Q. Okay. Well, let's say taking over
 21 a franchise.
 22 A. They could certainly take over a
 23 franchise. There would be no limitation on
 24 doing that. They would just buy the customer
 25 list and the plant of the system nearby.

Page 36

1 Q. Say they wanted to be an
 2 overbuilder, would it be more costly for them to
 3 be an overbuilder having exited the cluster
 4 before?
 5 A. In my view, they wouldn't have
 6 wanted -- it would have been too costly to be an
 7 overbuilder even before that and so I don't
 8 think that the fact that they exited changes the
 9 probability that they would find entry
 10 profitable.
 11 Q. I understand that, but that wasn't
 12 quite my question. My question was would it be
 13 more costly for them to reenter having exited?
 14 A. I don't know.
 15 Q. You received some pricing data from
 16 Comcast?
 17 A. Rate cards.
 18 Q. Rate cards. Was that difficult
 19 information to get?
 20 A. It is always difficult to get
 21 information.
 22 Q. But it is available?
 23 A. Yes. I think we supplied it to
 24 you. It was not as hard for you to get as for
 25 us to get.

Page 37

1 Q. Because you'd already gotten it for
 2 us?
 3 A. Because we had already gotten it.
 4 Q. I noticed in Mr. Palmer's
 5 declaration and maybe a little bit in yours,
 6 that certain regions, areas and systems make
 7 certain kinds of decisions relating to the cable
 8 operations in the Philadelphia cluster?
 9 A. Yes.
 10 Q. But I didn't see anything about how
 11 Comcast's -- how Comcast makes pricing
 12 decisions. Do you have an understanding about
 13 at what level in the organization pricing
 14 decisions were made?
 15 A. I know it is not at the system
 16 level, but I couldn't -- other than that, I
 17 can't answer it. I believe it is either in the
 18 region or the area level which are higher
 19 levels.
 20 Q. Might it be higher than that?
 21 MR. KORPUS: Objection.
 22 THE WITNESS: I suppose it's
 23 possible.
 24 BY MR. BARNETT:
 25 Q. Do you have information that leads

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 38</p> <p>1 you to believe that pricing decisions are made 2 at the regional or area level? 3 A. I think -- I think that's what 4 Mr. Palmer told me, but I'm not sure. 5 Q. You are welcome to look at his 6 declaration, but I didn't see anywhere where he 7 mentioned anything about pricing decisions. 8 A. You're probably right about that. 9 It's maybe from the conversation or I may be 10 just misremembering something. 11 Q. Dr. Besen, just from the context, 12 if pricing decisions were made at those lower 13 levels in the company, I would have expected 14 Mr. Palmer to have mentioned that. Do you agree 15 with that? 16 MR. KORPUS: Objection. I don't 17 know how he can answer that. 18 THE WITNESS: You can ask 19 Mr. Palmer. 20 BY MR. BARNETT: 21 Q. Is it true that Comcast tracks the 22 popularity of different channels that it offers? 23 A. I believe so, but it is not 24 something that I would have examined in this 25 particular case. I think cable operators as a</p>	<p style="text-align: right;">Page 40</p> <p>1 level and it is -- it's complicated, but it 2 involves usually and we are talking here about 3 basic channels, rates per subscriber, often with 4 quantity discounts, sometimes where the prices 5 -- I'm not talking about Comcast here, but 6 generally, the prices may depend upon whether or 7 not the carrier carries more than one of the 8 channels that are owned by the program -- by the 9 owner of the program service. Maybe channel 10 positioning requirements et cetera. 11 Q. Which way does the money flow? 12 A. Who pays whom? 13 Q. Yes. 14 A. It actually depends. For the 15 standard -- for typical channel let's take an 16 example USA, the arrangement would be that the 17 cable system would pay the owner of USA a per 18 subscriber charge per month. A certain number 19 of spots on the program would be reserved for 20 the network, USA, and a certain number of spots 21 on that channel would be held for sale by the 22 local operators, so the money flows in various 23 ways. 24 Q. As an economist, would you expect 25 that the price that is paid for the programming</p>
<p style="text-align: right;">Page 39</p> <p>1 general matter do that. 2 Q. For example, what would be the most 3 popular cable channel? 4 A. I don't know. 5 Q. Among the most popular? 6 A. TNT, TBS, CNN, USA, MS-NBC. There 7 is a long list of them. 8 Q. And I guess there is the Cable 9 Shopping Network? 10 A. I don't know. 11 Q. But you do agree that different 12 channels have different levels of popularity? 13 A. You mean by viewing? 14 Q. Yes. 15 A. Certainly different channels have 16 different levels of viewing. 17 Q. And you understand that MSOs 18 negotiate the terms on which they will not 19 broadcast but -- 20 A. Carry. 21 Q. -- carry different channels? 22 A. Yes. 23 Q. What is your understanding of how 24 that process works? 25 A. It is usually negotiated at the MSO</p>	<p style="text-align: right;">Page 41</p> <p>1 would indicate its value to the MSO? 2 A. Certainly would be a factor, yes, 3 but it is more complicated because the price -- 4 the amount that the operator, excuse me, the 5 amount that the program service receives is some 6 combination of the value of the advertising 7 spots made available and the explicit 8 compensation from the cable system to the 9 program service, so you could imagine a service 10 that paid little or nothing to the -- where the 11 cable operator paid little or nothing, but had 12 lots of valuable advertising time reserved for 13 the program service and that might have a 14 relatively small per month per channel -- per 15 month per subscriber fee. 16 Q. Did you do any analysis to 17 determine the relative value of the different 18 channels that Comcast offers in the Philadelphia 19 cluster? 20 A. No. 21 Q. And I believe you did an analysis 22 of pricing per channel? 23 A. Correct. 24 Q. In doing that analysis, did you 25 consider the relative value of the channels that</p>

Stanley M. Besen - 11/16/2006

Page 42

1 were offered in the different -- the different
 2 franchise areas?
 3 A. We treated all channels -- we
 4 treated each channel as if -- we weighted each
 5 channel equally.
 6 Q. Okay, so in your analysis, the most
 7 popular channel received the same weight as the
 8 least popular channel?
 9 A. By the way, this is precisely the
 10 approach that the Bureau of Labor Statistics
 11 uses when it constructs the price index for
 12 cable and satellite services.
 13 Q. Okay. That was a little more
 14 information than I asked for.
 15 A. Then I shouldn't have given it to
 16 you.
 17 Q. That's okay. Let me go back to the
 18 question to make sure I'm clear. Your analysis
 19 gave the same weight to the most popular channel
 20 as it did to the least popular channel?
 21 A. We divide it by the number of
 22 channels.
 23 Q. So that would be a yes?
 24 A. Yes.
 25 Q. Is there a difference between a

Page 43

1 competitor and a potential competitor?
 2 A. Yes.
 3 Q. What is the difference?
 4 A. A competitor is already competing
 5 and a potential competitor isn't and may be.
 6 Q. In the context of the cable MSO
 7 business, an actual competitor of an incumbent
 8 cable operator is an overbuilder?
 9 A. Correct.
 10 Q. And a potential competitor is
 11 somebody who has not actually overbuilt yet?
 12 A. But might.
 13 Q. But might? Do you know whether or
 14 not Comcast considered AT&T Broadband a
 15 competitor during the time frame that is alleged
 16 in the complaint?
 17 A. Actual or potential?
 18 Q. Either way.
 19 A. They certainly were not an actual
 20 competitor. I don't know whether they perceived
 21 them as a potential competitor, but there is no
 22 evidence that they would have entered and I
 23 would have treated them as -- not as a potential
 24 entrant.
 25 Q. Not a potential entrant?

Page 44

1 A. Not a potential entrant.
 2 Q. Let me go back to my question. Did
 3 you do any analysis to determine whether Comcast
 4 in its heart of hearts considered AT&T Broadband
 5 a potential competitor in the Philadelphia
 6 cluster?
 7 MR. KORPUS: Objection to form.
 8 THE WITNESS: I did not, as I said,
 9 review documents. I think this is the same
 10 question you asked before. I have not seen
 11 documents or spoken to people at Comcast about
 12 that issue.
 13 Q. It was a little bit different
 14 context, but thank you for helping me.
 15 BY MR. BARNETT:
 16 Q. Let's take a simple example or
 17 simplified example. You've got a cable MSO that
 18 is present in a cluster, okay?
 19 A. Okay.
 20 Q. And you've got Comcast that is also
 21 present in a cluster in a different franchise
 22 area?
 23 A. By the way, I'm not sure I
 24 understand. Is it important to your story that
 25 it be a MSO?

Page 45

1 Q. Yes.
 2 A. Or just another cable system?
 3 Q. I'm not sure, but let's go with MSO
 4 for the moment.
 5 A. Fair enough.
 6 Q. Let's take Time Warner, for
 7 example, since they don't seem to be too
 8 involved in this. You've got Time Warner that
 9 is present in a cluster and you've got Comcast
 10 that is also present in a cluster.
 11 MR. KORPUS: What do you mean by
 12 cluster?
 13 THE WITNESS: You mean they are
 14 both present in Philadelphia?
 15 BY MR. BARNETT:
 16 Q. Yes. Then you've got another MSO,
 17 lets say, Charter that is not present in the
 18 cluster, has no presence at all, no physical
 19 presence in that cluster. Do you believe that
 20 Comcast would view Time Warner as more of a
 21 potential competitor than Charter in that
 22 example?
 23 A. No.
 24 Q. Why not?
 25 A. Because I don't think they would

Stanley M. Besen - 11/16/2006

Page 46

1 regard either of them as a potential competitor.
 2 Q. That's because you believe that it
 3 is a dumb idea for anybody to overbuild anyway?
 4 A. For cable companies and that is
 5 reflective of the data. They don't do it.
 6 Q. What is your understanding of
 7 whether overbuilding activity nationwide has
 8 increased or decreased in the past five years?
 9 A. I don't know. Excuse me. Careful
 10 here. We were discussing before overbuilding by
 11 MSOs, by other cable operators.
 12 Q. Yes.
 13 A. There certainly has been some
 14 overbuilding. I am not sure if it is more or
 15 less, by firms other than MSOs or firms other
 16 than cable operators.
 17 Q. For example --
 18 A. RCN.
 19 Q. ILEC's?
 20 A. That's a more recent phenomenon,
 21 yes.
 22 Q. Let's eliminate them for a minute.
 23 Do you know whether non-ILE overbuilding
 24 activity has increased or decreased in the past
 25 five years or stayed the same?

Page 47

1 A. I don't know, but I do know the
 2 most prominent overbuilders are in fact not MSOs
 3 in your jargon.
 4 Q. RCN, for example, would not be an
 5 MSO?
 6 A. RCN, Knology, the four I believe
 7 the SEC referred to are Grande and WOW.
 8 Q. Let's first take RCN. Why is it
 9 not an MSO?
 10 A. Because it is not categorized as
 11 such. It is not a cable operator and it offers
 12 a broader array of services, broadband access,
 13 telephony et cetera. It offers a broader range
 14 of services as will the ILEC's of course.
 15 Q. Comcast also offers a broader range
 16 of services?
 17 A. More recently, yes, that's correct.
 18 Q. But it is still an MSO?
 19 A. That is historically how it has
 20 been categorized, yes.
 21 Q. So what would we call RCN and
 22 Comcast to reflect the fact that they do both
 23 provide an array of services?
 24 MR. KORPUS: Objection.
 25 THE WITNESS: The FCC refers to the

Page 48

1 RCNs of the world as broadband service
 2 providers. They put them in a different
 3 category.
 4 BY MR. BARNETT:
 5 Q. Okay. I got it.
 6 I guess we got a copy, so I can now
 7 ask you about it. Let's mark that one.
 8 (Besen Exhibit 1, article entitled
 9 "Rate Regulation, Effective Competition, and the
 10 1992 Cable Act?" by Dr. Besen and Dr. Woodbury
 11 was marked for identification.)
 12 BY MR. BARNETT:
 13 Q. Dr. Besen, can you identify what we
 14 have marked as Exhibit 1?
 15 A. It seems to be my article, although
 16 it is not the published version of it. It comes
 17 off the internet, apparently.
 18 Q. This is the Westlaw version.
 19 A. The Westlaw version, yes. It is
 20 not the way I usually see it.
 21 Q. It is copyrighted material, but
 22 this is fair use.
 23 A. I hope so.
 24 Q. Would you take a look at the bottom
 25 of page four in Exhibit 1.

Page 49

1 A. Yes. I'm here.
 2 Q. At the very bottom sentence
 3 says "Thus, although the FCC claimed that its
 4 estimate" --
 5 A. I'm sorry, please.
 6 Q. That sentence at the bottom of page
 7 four says "Thus, although the FCC claimed that
 8 its estimate of the competitor differential was
 9 based on behavior of all effectively competitive
 10 systems, the weights accorded to the low
 11 penetration in municipal systems appear to be so
 12 small that in effect the differential was based
 13 almost entirely on the behavior of the overbuilt
 14 system."
 15 A. I see that.
 16 Q. What did you mean by that?
 17 A. Well, there are three categories or
 18 were at the time three categories of effectively
 19 competitive systems -- the overbuilt systems,
 20 the municipal systems and systems of very low
 21 penetration, that is, low ratios of subscribers
 22 to homes passed. It appears from our looking at
 23 the data that the estimated competitive
 24 differential was determined as used by the
 25 commission in its rate setting or its decision

Stanley M. Besen - 11/16/2006

Page 50

1 to roll back rates, was based almost entirely on
 2 the behavior of the overbuilt systems. They
 3 seemed to have -- seemed to predominate in terms
 4 of how that particular parameter was calculated.
 5 Q. So the differential between
 6 effectively competitive and noneffectively
 7 competitive rates according to the FCC's
 8 analysis could be explained almost entirely by
 9 the differential between overbuilt and
 10 nonoverbuilt systems?
 11 A. I don't think "almost entirely" is
 12 quite right. "Almost entirely" is just not the
 13 right construction.
 14 Q. That is the word you used.
 15 A. In a statistical sense we are
 16 talking here. Let's go back. I'll separate two
 17 things.
 18 Q. Okay.
 19 A. One is the issue of which of these
 20 three categories of effectively competitive
 21 systems played the biggest role in determining
 22 the number the commission used for the rate
 23 rollback. When the commission conducted a
 24 statistical analysis, it put a variable in for
 25 overbuild or effectively competitive and used

Page 51

1 that parameter, the parameter of that variable,
 2 as its estimate of the competitive differential.
 3 That doesn't mean that variable explained all
 4 the variation in rates in a statistical sense.
 5 That was the problem I was having with your
 6 question.
 7 Q. It doesn't mean in a statistical
 8 sense, but it does mean it in some sense?
 9 I'm sorry, Dr. Besen, I'm probably
 10 not understanding, but the words that I see here
 11 --
 12 A. It's estimated -- I'm sorry, go
 13 ahead.
 14 Q. The differential was based almost
 15 entirely on the behavior of the overbuilt
 16 system?
 17 A. Its estimate of the differential
 18 was based almost entirely on the behavior of the
 19 overbuilt systems.
 20 Q. I understand you're not necessarily
 21 agreeing that that is true, that that is a
 22 reflection of reality.
 23 A. I think the difference we are
 24 having is I think you are saying that the
 25 differential is completely explained. I'm

Page 52

1 saying that the estimate of the differential --
 2 Q. The FCC's estimated differential?
 3 A. -- estimated differential is based
 4 essentially -- think of it as having three
 5 different estimates. The question is how does
 6 it combine those to come up with a number that
 7 it is going to use for rate purposes?
 8 Q. Right.
 9 A. And it said I'm going to give --
 10 they gave the predominant rate to the overbuilt
 11 systems.
 12 Q. So the FCC's estimate at least was
 13 explained almost entirely, the differential, was
 14 explained almost entirely under the FCC's
 15 analysis by the difference between overbuilt and
 16 nonoverbuilt systems?
 17 A. Its estimate was based primarily on
 18 the overbuilt systems, correct.
 19 Q. On the bottom of page 7 of your
 20 article, Exhibit 1, the last paragraph that
 21 starts with "This expanded equation."
 22 A. Yes.
 23 Q. The expanded equation that you are
 24 talking about is an equation that you and Mr. --
 25 Dr. Woodbury put together?

Page 53

1 A. Estimated.
 2 Q. The next sentence says "Moreover,
 3 when the cable rate is predicted using the means
 4 of all the variables, the competitive
 5 differential is about 17 percent, approximately
 6 the same as the FCC's estimate. " What did you
 7 mean by that?
 8 A. You predict the rates using the
 9 means of the variables in the -- that we used to
 10 estimate the -- used to estimate the equation.
 11 You plug them in and you predict differential
 12 between the overbuilt and the nonoverbuilt
 13 systems or the effectively competitive or the
 14 noneffectively competitive.
 15 Q. So your tweaking of the FCC's
 16 analysis resulted in your calculating the same
 17 competitive differential?
 18 A. I wouldn't use "tweaking."
 19 Q. What would you describe it as?
 20 A. Effectively, you use the equation
 21 to simulate the differential using the means --
 22 using the values -- using the means of the
 23 variables used to estimate the equation. Not
 24 surprising, actually, that you end up with
 25 essentially differential.

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 54</p> <p>1 Q. Why is it not surprising?</p> <p>2 A. Because the same data were used to</p> <p>3 generate the equation.</p> <p>4 Q. But my understanding of this is you</p> <p>5 were saying that the FCC's analysis is flawed.</p> <p>6 End of sentence. Plus and one way to show that</p> <p>7 is that if we just look at the influence of that</p> <p>8 one variable, overbuilt versus nonoverbuilt, you</p> <p>9 reach the same conclusion?</p> <p>10 MR. KORPUS: Objection, what is the</p> <p>11 question.</p> <p>12 THE WITNESS: I don't think I</p> <p>13 understand the question.</p> <p>14 BY MR. BARNETT:</p> <p>15 Q. Is that what you were meaning to</p> <p>16 say?</p> <p>17 A. I didn't think -- I didn't</p> <p>18 understand what you said.</p> <p>19 Q. Okay. Let me back up.</p> <p>20 A. Fine.</p> <p>21 Q. I understood the burden of this</p> <p>22 article to be that the FCC's methodology for</p> <p>23 calculating the competitive differential between</p> <p>24 noncompetitive and competitive systems, cable</p> <p>25 systems, was flawed.</p>	<p style="text-align: right;">Page 56</p> <p>1 A. When you perform this "simulation"</p> <p>2 using the means of the variables, the nationwide</p> <p>3 averages rather than the averages of the -- the</p> <p>4 means of the variables used to generate the</p> <p>5 equation the estimated differential shrinks to</p> <p>6 only 3 percent. But again, I think what you</p> <p>7 should be focusing on actually is the table</p> <p>8 above it, you may not want to do that, but that</p> <p>9 in some ways is a more intuitive explanation of</p> <p>10 what is going on.</p> <p>11 Q. The table?</p> <p>12 A. Yes, the table above it estimates,</p> <p>13 that provides different competitive</p> <p>14 differentials for different size systems.</p> <p>15 Q. I see. So the table reflects that</p> <p>16 the competitive differential as calculated using</p> <p>17 the FCC's methodology is sensitive to the size</p> <p>18 of the system?</p> <p>19 A. Instead of using a single variable</p> <p>20 for effectively competitive systems, that is,</p> <p>21 the same for all size systems, when you instead</p> <p>22 use a number of different binary or dummy</p> <p>23 variables for overbuilders, but people who</p> <p>24 overbuild different size systems, you get very</p> <p>25 different results and you get very different</p>
<p style="text-align: right;">Page 55</p> <p>1 A. Correct.</p> <p>2 Q. And you tried to illustrate that in</p> <p>3 a number of different ways.</p> <p>4 A. Correct.</p> <p>5 Q. And one of the ways you illustrated</p> <p>6 that was by showing that by using the FCC's data</p> <p>7 and methodology but expanding it, that the</p> <p>8 competitive differential that the FCC came up</p> <p>9 with is the same if you just calculate the</p> <p>10 competitive differential between overbuilt and</p> <p>11 nonoverbuilt systems.</p> <p>12 A. I am just basically lost by the</p> <p>13 question.</p> <p>14 Q. That's probably a reflection of my</p> <p>15 not understanding what you meant to say here.</p> <p>16 MR. KORPUS: Why don't you just ask</p> <p>17 him what he meant to say.</p> <p>18 MR. BARNETT: I think I did, but</p> <p>19 let me try again so that I can understand it.</p> <p>20 BY MR. BARNETT:</p> <p>21 Q. The next to last sentence</p> <p>22 says "Thus, the FCC's presumption that the</p> <p>23 explanatory variables have the same effects,</p> <p>24 rate effects for overbuilt and other franchises,</p> <p>25 is incorrect." What did you mean by that?</p>	<p style="text-align: right;">Page 57</p> <p>1 results in two important respects. One is the</p> <p>2 differential itself, estimated differential</p> <p>3 itself varies dramatically, actually three</p> <p>4 factors. It varies widely across system sizes.</p> <p>5 It is not statistically significant for the</p> <p>6 larger systems and as we point out as well, when</p> <p>7 you do this, when you add four extra variables,</p> <p>8 the addition of those explanatory variables is</p> <p>9 in fact statistically significant. That is, an</p> <p>10 equation that includes the extra variables</p> <p>11 explains a larger portion of the variance than</p> <p>12 one that assumes that the overbuild -- that the</p> <p>13 coefficient for overbuilding is the same for all</p> <p>14 systems.</p> <p>15 Q. Looking at your table on page 7.</p> <p>16 A. Yes.</p> <p>17 Q. It looks like the competitive</p> <p>18 differential is is that 8 percent?</p> <p>19 A. No, it is 16 percent for systems</p> <p>20 who have fewer than 1,000 subscribers.</p> <p>21 Q. I'm sorry, I meant to say above</p> <p>22 50,000 subscribers.</p> <p>23 A. Yes. It is 8 percent, because it</p> <p>24 doesn't have an asterisk next to it. It is not</p> <p>25 statistically different from zero.</p>

15 (Pages 54 to 57)

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 58</p> <p>1 Q. That is because you don't have the 2 confidence level in that number? 3 A. Correct. It is estimated. You 4 cannot reject the hypothesis that the true 5 competitive differential for systems above 6 50,000 is zero. 7 Q. In preparing this article, did you 8 and Dr. Woodbury come up with an analysis 9 independent of the FCC's analysis? 10 A. I'm not sure what you mean. 11 Q. The FCC used a methodology for 12 calculating the competitive differential for 13 purposes of possibly rolling back the rates that 14 cable operators were able to charge. And this 15 was in an era when the FCC had authority to 16 regulate rates? 17 A. Yes. 18 Q. And they don't anymore? 19 A. Yes. 20 Q. When did that change? 21 A. I think in the late nineties, I 22 believe, but I'm not certain. 23 Q. Has the FCC continued to estimate 24 competitive differential? 25 A. It sometimes does, yes.</p>	<p style="text-align: right;">Page 60</p> <p>1 differential between overbuilt and nonoverbuilt 2 systems? 3 A. We started with their approach 4 primarily because we wanted to stay as close to 5 it as possible and see how sensitive the results 6 were to what seemed to us reasonable 7 modifications. 8 Q. On page 9 of your article Exhibit 9 1, the second sentence says that "Instances of 10 overbuilding may be unsustainable because the 11 rates being charged are insufficient." 12 A. I'm not sure where you are. 13 Q. The second sentence. 14 A. Second sentence, yes. 15 Q. "Instances of overbuilding may be 16 unsustainable because the rates being charged 17 are insufficient for both systems to cover their 18 entire cost, so observed rates may reflect 19 disequilibrium behavior"? 20 A. Correct. 21 Q. What did you mean by that? 22 A. Suppose someone makes a mistake and 23 overbuilds, makes a mistake in the sense that 24 after he has overbuilt, neither firm can operate 25 profitably. Neither firm can cover its costs in</p>
<p style="text-align: right;">Page 59</p> <p>1 Q. Has the methodology stayed the 2 same? 3 A. Similar. Similar and importantly 4 in the sense that it still despite this result 5 does not attempt to estimate -- to determine 6 whether or not there is a different competitive 7 differential for different size systems. 8 Q. So they didn't take your advice? 9 A. Correct. So much the worse for 10 them. 11 Q. Did you and Mr. Woodbury in 12 connection with writing this article attempt 13 independently to estimate whether there was a 14 competitive differential between overbuilt and 15 nonoverbuilt systems? 16 A. I think the answer to that question 17 is we started with the FCC's methodology and 18 used their data and tried to stay as close as 19 possible to their underlying approach but 20 modified it in important ways, one of which is 21 the way we just discussed. 22 Q. So I'm gathering that the answer is 23 you did not come up with a methodology 24 independent of the FCC's methodology to 25 determine whether there was a competitive</p>	<p style="text-align: right;">Page 61</p> <p>1 the long run. That is not an equilibrium. When 2 the time comes to rebuild the plant, one of 3 those firms will choose not to do so. It is a 4 disequilibrium in the sense that the 5 overbuilding is unsustainable in the long run. 6 Q. So somebody is going to fail or 7 there may be a merger as a result of the 8 disequilibrium behavior that can't be sustained? 9 A. Correct. 10 Q. Is it your view, Dr. Besen, that 11 all overbuilding is economically irrational? 12 A. I think some overbuilding is 13 clearly a mistake. Some could conceivably turn 14 out in the long run to be viable, but there is 15 no evidence at this point that in fact 16 overbuilding has been a particularly good idea 17 for anyone. In fact, we know that the BSPs have 18 gone bankrupt and we know for example that 19 Ameritech's foray into this was unsuccessful as 20 well. 21 Q. Let me go back to the local 22 franchising authority for a minute. Are you 23 aware of whether or not local franchising 24 authorities can impose buildout requirements on 25 cable operators?</p>

16 (Pages 58 to 61)

Stanley M. Besen - 11/16/2006

Page 62

1 A. I believe they generally do.
 2 Q. Do you know whether or not they can
 3 limit the build out requirements?
 4 A. In what way?
 5 Q. Such that you don't have to serve
 6 the entire area covered by the franchise.
 7 A. I think my understanding is that
 8 all or most franchise authorities expect the
 9 overbuilder or the franchisee to build the
 10 entire area.
 11 Q. Are you aware of whether or not the
 12 franchise authorities have the discretion to not
 13 impose buildout requirements or to limit
 14 buildout requirements?
 15 A. I don't know.
 16 Q. Did you do any analysis to
 17 determine any of the Comcast legacy systems
 18 previously had been systems operated by another
 19 cable operator?
 20 MR. KORPUS: Objection.
 21 THE WITNESS: No.
 22 BY MR. BARNETT:
 23 Q. I think I noticed in your
 24 declaration that you assumed that any franchise
 25 area within the Philadelphia cluster if it

Page 63

1 wasn't mentioned in one of the swap agreements
 2 or the merger agreements, then it was a legacy
 3 Comcast system?
 4 A. We treated it as such.
 5 Q. So if in fact Comcast acquired one
 6 of the franchise areas other than through the
 7 swaps and merger activity that are alleged in
 8 the complaint and it actually had had been
 9 another cable operator's area, then treating it
 10 as a legacy Comcast system would not be an
 11 accurate way to look at it?
 12 MR. KORPUS: Objection.
 13 THE WITNESS: I'm not sure I
 14 understand the question. When did this
 15 acquisition take place?
 16 BY MR. BARNETT:
 17 Q. At any time.
 18 A. Earlier than 1999?
 19 Q. Since then.
 20 MR. KORPUS: Objection.
 21 THE WITNESS: The underlying data
 22 we used to generate the sequence of transactions
 23 was the agreements and we processed them in the
 24 way that is described in the report.
 25 BY MR. BARNETT:

Page 64

1 Q. Okay. Let me make sure I
 2 understand how that worked.
 3 MR. KORPUS: If you are going to
 4 move on to a new exhibit, do you want to take a
 5 short break?
 6 MR. BARNETT: Sure.
 7 MR. KORPUS: Is that okay with you?
 8 MR. BARNETT: Yes.
 9 THE VIDEO OPERATOR: This is the
 10 end of videotape 1. The time now is 11:19.
 11 (A recess was taken.)
 12 (Besen Exhibit 2, map entitled
 13 "Exhibit 3: Legacy Comcast, prior to April 1998"
 14 was marked for identification.)
 15 THE VIDEO OPERATOR: The beginning
 16 of videotape two in the deposition of Stanley
 17 Besen. The time is 11:27. Back on the record.
 18 BY MR. BARNETT:
 19 Q. Dr. Besen, you should have in front
 20 of you Exhibit 2, your Deposition Exhibit 2.
 21 A. 3 you have in front of me.
 22 Q. I was about to try to clarify that.
 23 It is titled "Exhibit 3: Legacy Comcast Prior to
 24 April 1998" but we put a deposition exhibit
 25 sticker on it so that it is Exhibit 2.

Page 65

1 A. I got it.
 2 MR. KORPUS: Do you have a copy for
 3 me?
 4 MR. BARNETT: I'm sorry, I don't.
 5 I have a noncolor version of it.
 6 MR. KORPUS: That's all right. You
 7 can start. James will get it. I know the
 8 exhibit.
 9 BY MR. BARNETT:
 10 Q. So this is Exhibit 3 to your
 11 declaration?
 12 A. Yes.
 13 Q. And somebody in your office
 14 prepared this?
 15 A. Correct.
 16 Q. And you reviewed it?
 17 A. Yes.
 18 Q. It has in yellow legacy Comcast
 19 areas and then it has in gray non-Comcast
 20 franchises in alleged counties; is that right?
 21 A. Yes.
 22 Q. By alleged counties, you're not
 23 saying that they are not counties, you're just
 24 saying they are counties alleged in the
 25 complaint?

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 66</p> <p>1 A. Correct.</p> <p>2 Q. So that the yellow reflects</p> <p>3 franchise areas in the alleged Philadelphia</p> <p>4 cluster that did not show up in the swaps or</p> <p>5 acquisition merger documents that you and your</p> <p>6 staff looked at?</p> <p>7 A. Correct.</p> <p>8 Q. Do you know for a fact whether</p> <p>9 these systems indicated in yellow were acquired</p> <p>10 by Comcast before April 1998?</p> <p>11 MR. KORPUS: Objection.</p> <p>12 THE WITNESS: I'm sorry, do you</p> <p>13 mean were they the original franchisee or were</p> <p>14 they acquired from somebody else?</p> <p>15 BY MR. BARNETT:</p> <p>16 Q. Did Comcast own them before April</p> <p>17 of 1998?</p> <p>18 A. My understanding is they did.</p> <p>19 Q. But the way, you got to that</p> <p>20 conclusion by eliminating the ones that were</p> <p>21 mentioned in the swap agreements and acquisition</p> <p>22 agreements?</p> <p>23 A. That's correct.</p> <p>24 Q. So isn't that kind of a negative</p> <p>25 way to go about figuring out which ones are</p>	<p style="text-align: right;">Page 68</p> <p>1 operators operating," I'm sorry, "competing head</p> <p>2 to head are more likely to reach an</p> <p>3 accommodation to maintain price at super</p> <p>4 competitive levels." I notice that you put the</p> <p>5 qualifier "in the FCC's view." Do you disagree</p> <p>6 with that view?</p> <p>7 A. I don't really know, but I haven't</p> <p>8 look at this sentence for awhile, so I don't</p> <p>9 really know.</p> <p>10 Q. The next paragraph that appears on</p> <p>11 page 9 under the heading "Other Observations on</p> <p>12 the FCC's Approach," first sentence says, "In</p> <p>13 addition to the shortcomings noted above, there</p> <p>14 is an additional problem with the FCC's</p> <p>15 approach." Then going on, "The full reduction</p> <p>16 rate itself is probably exaggerated for many</p> <p>17 noncompetitive systems. The FCC calculated the</p> <p>18 differential by comparing a franchise with no</p> <p>19 competition to one that is completely overbuilt.</p> <p>20 In fact, most systems face some competitors</p> <p>21 whether they are SMATV operators, MMDS</p> <p>22 operators, HSDs or other cable operators at the</p> <p>23 boundaries of the franchise area. Yet the FCC's</p> <p>24 use of the 17 percent differential does not</p> <p>25 account for the fact that these franchises,</p>
<p style="text-align: right;">Page 67</p> <p>1 legacy Comcast?</p> <p>2 A. It is the only way we could do it.</p> <p>3 Q. Well, presumably, Comcast knows</p> <p>4 when they acquired what.</p> <p>5 A. Yes, you might think so.</p> <p>6 Q. Yes, you would think so. But --</p> <p>7 A. I should say it's the only way we</p> <p>8 could do it given the information we had.</p> <p>9 Q. Did you and your staff ask Comcast</p> <p>10 to verify that that was a 100 percent accurate</p> <p>11 way of determining what was legacy Comcast for</p> <p>12 April 1998?</p> <p>13 A. I believe we had this reviewed. I</p> <p>14 don't know whether the number 100 percent is</p> <p>15 correct.</p> <p>16 Q. Who do you believe reviewed it at</p> <p>17 Comcast?</p> <p>18 A. I don't know.</p> <p>19 Q. Let's go back please, to Exhibit 1.</p> <p>20 This is your 1994 article. I'm looking at page</p> <p>21 9 again, the third full paragraph. It starts</p> <p>22 with "The FCC also." Are you with me?</p> <p>23 A. I am.</p> <p>24 Q. The third sentence says, "By</p> <p>25 contrast, in the FCC's view, two private cable</p>	<p style="text-align: right;">Page 69</p> <p>1 while not effectively competitive according to</p> <p>2 the 1992 Cable Act, may still be charging rates</p> <p>3 that are lower than the fully noncompetitive</p> <p>4 rate." Did I read all that correctly?</p> <p>5 A. I believe so.</p> <p>6 Q. To summarize at least my</p> <p>7 understanding of what you were saying here, you</p> <p>8 and Dr. Woodbury, an additional flaw in the</p> <p>9 FCC's approach was that they didn't take into</p> <p>10 account that there might be some kind of partial</p> <p>11 competition within certain franchise areas?</p> <p>12 A. Partial overbuilding?</p> <p>13 Q. Partial overbuilding. The SMATV,</p> <p>14 that stands for?</p> <p>15 A. Satellite master antenna</p> <p>16 television.</p> <p>17 Q. What is that?</p> <p>18 A. It is often an apartment house roof</p> <p>19 will put up basically a dish and receive signals</p> <p>20 off a satellite, but they will distribute the</p> <p>21 signals only to the residents of that particular</p> <p>22 building.</p> <p>23 Q. And then MMDS, multichannel</p> <p>24 multipoint distribution system.</p> <p>25 A. Wireless cable.</p>

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 70</p> <p>1 Q. Okay. And then home satellite 2 dish, is that like what do you call it? 3 A. Direct broadcast satellite. 4 Q. Direct broadcast. I've lost track. 5 Are there two of those now? 6 A. There are two now. 7 Q. Is Echostar still in the running? 8 A. Yes, Echostar operates under the 9 trade name Dish. 10 Q. Dish. What is the other one? 11 A. DirecTV. 12 Q. And then HSDs we just talked about. 13 And then other cable operators at the boundaries 14 of the franchise area. When you were talking 15 about other cable operators at the boundaries of 16 the franchise area, were you referring to 17 overbuilders? 18 A. Partial overbuilders. 19 Q. Partial overbuilders into the 20 franchise area? 21 A. Partial overbuilders. 22 Q. You say the other cable operators 23 at the boundaries of the franchise area. Why 24 didn't you just end that sentence after you 25 said "other cable operators?"</p>	<p style="text-align: right;">Page 72</p> <p>1 wires. 2 Q. They do it through copper wires and 3 fiber wires, not coaxial cable? 4 A. Everybody is upgrading to fiber, so 5 that is not an important distinguishing factor, 6 but the most likely overbuilders I believe, at 7 the present time is the ILEC's. 8 Q. Let's eliminate them since they 9 weren't doing this in 1994. Back in 1994, who 10 did you believe was the most likely overbuilder 11 for a given franchise area? 12 A. At the time actually they were 13 doing some of this because at the time, 14 remember, Ameritech among others -- the 15 telephone companies at the time believed that 16 they could enter and more or less 17 unsuccessfully, so they were actually 18 overbuilding. I'm not sure whether this 19 predates or not the RCNs of the world or not, 20 but I would not put the adjacent cable operator 21 as the most likely potential entrant. 22 Q. Why not? 23 A. Because for all the reasons 24 described in my report. There are significant 25 scale economies that make it difficult for two</p>
<p style="text-align: right;">Page 71</p> <p>1 MR. KORPUS: Objection. 2 BY MR. BARNETT: 3 Q. Why did you mention that they were 4 at the boundaries of the franchise area? 5 A. I frankly don't remember the 6 sentence. It has been a long time, but I 7 believe we were referring to partial 8 overbuilding. 9 Q. Do you believe or at least at the 10 time that you wrote this do you believe you 11 believed -- let me try that again. Do you 12 believe now, let's go with that. Do you believe 13 now that a cable operator that is at the 14 boundary of another cable operator's franchise 15 area is the most likely overbuilder for that 16 franchise area? 17 MR. KORPUS: Objection. 18 THE WITNESS: Actually, no. 19 BY MR. BARNETT: 20 Q. Who do you think the most likely 21 overbuilder would be? 22 A. At present it's the ILEC's. 23 Q. Let's do that for a moment because 24 they do it through their own wires? 25 A. Everybody does it through their own</p>	<p style="text-align: right;">Page 73</p> <p>1 firms to successfully compete side by side and 2 it is very risky to enter because of the sunk 3 nature of the investments that you have to make 4 and so that makes it very difficult for anyone 5 to enter. The people who enter are likely to 6 have offsetting advantages and the most 7 important and it seems to me the most likely one 8 today would be the ILEC's who have offsetting 9 advantages. 10 Q. Let me back up just a bit. I know 11 just a little bit about economics. A little 12 bit. I know you can make assumptions about 13 things. Let's assume for the moment that 14 overbuilding could be profitable. Is the 15 adjacent operator most likely to make a go of 16 overbuilding as compared to somebody who is not 17 currently in the area? 18 A. Not necessarily. 19 Q. What would determine whether or not 20 the adjacent one would be most likely to make a 21 go of it? 22 A. Well, the adjacency is one of a 23 number of factors. I think the most significant 24 factor, I think, is the presence of other 25 significant things that would make entry</p>

Stanley M. Besen - 11/16/2006

Page 74

1 profitable and I think the collection of things
 2 that would do so are most in the hands of the
 3 ILEC's at present. Not to say that they will be
 4 successful, but I believe that they have the
 5 greatest potential to be successful
 6 overbuilders.
 7 Q. I also know that you can say other
 8 things being equal, so I am going to ask you
 9 now, other things being equal, is adjacency a
 10 plus for a potential overbuilder?
 11 MR. KORPUS: Objection.
 12 THE WITNESS: It could be, but of
 13 course all things are not equal.
 14 BY MR. BARNETT:
 15 Q. Of course, but I'm asking you to
 16 assume that.
 17 A. If there were no other
 18 differentiating factor, adjacency would be a
 19 factor.
 20 Q. Do you know how significant a
 21 factor it would be?
 22 A. No.
 23 Q. It would depend on the
 24 circumstances, I guess, that you mentioned?
 25 A. It could. And again, to be clear,

Page 75

1 your premise was that entry was profitable.
 2 Q. Yes.
 3 A. So it is a compound set of
 4 assumptions here.
 5 Q. Right. Entry was profitable or
 6 somebody could construct a world in which they
 7 believed that entry could be profitable.
 8 A. Again, you have two things. You
 9 said suppose entry was profitable, who was the
 10 most likely entrant?
 11 Q. Yes.
 12 A. That is the colloquy we just went
 13 through.
 14 Q. Right. But we know that people
 15 don't always make the right business decision.
 16 A. I've heard that.
 17 Q. And there are many people who think
 18 that something could be profitable that turns
 19 out to be incorrect. For example, Ameritech's
 20 entry into video in the 1990s in the upper
 21 Midwest.
 22 A. Right.
 23 Q. Page 13 of your article Exhibit No.
 24 1, there is a footnote 42 near the top of the
 25 page. It looked to me that you were quoting

Page 76

1 from something the FCC said. Was that what you
 2 were doing?
 3 A. Yes.
 4 Q. And the quote says, "In selecting
 5 the 17 percent figure, we are guided by the 16
 6 percent figure estimated from our data on
 7 overbuilds that measures (sic) full head to head
 8 competition. We moved upward from 16 percent to
 9 reflect our conclusion that cable operators in
 10 an overbuild situation are likely over time to
 11 develop a tacit understanding of rate levels
 12 that may limit the intensity of rate
 13 competition." Do you agree or disagree with the
 14 FCC's statement that cable operators in an
 15 overbuilt situation are likely over time to
 16 develop a tacit understanding of rate levels?
 17 A. I don't at this time have any view
 18 about this. I just haven't thought about the
 19 issue for a long time.
 20 Q. Then on page 15 of your article,
 21 Exhibit 1, footnote 77 about a fifth of the way
 22 down, the last sentence says, "Indeed, the
 23 competitive differential is 17 percent when
 24 estimated using only observations for overbuilt
 25 and noncompetitive franchises." I don't mean to

Page 77

1 beat a dead horse, but please explain what you
 2 meant by that.
 3 A. From memory or at least what this
 4 says is that again there were three kinds of
 5 effectively competitive systems. The
 6 observations for low penetration systems are
 7 illuminated from the data, the equation is
 8 reestimated and that is what this is reporting
 9 and it is a calculation that the commission did,
 10 not that we did.
 11 Q. Then at the bottom of that page,
 12 footnote 90, there is a sentence, the third
 13 sentence. Let me start with the second
 14 sentence. No, I can't do that. Let me start
 15 with the first sentence. "We understand that
 16 the FCC must develop some standards for an
 17 'effectively competitive rate'. They would urge
 18 the FCC to attempt to validate its estimates by
 19 comparing them with estimates obtained using
 20 different approaches. For example, one might
 21 rely on past differences between regulated rates
 22 and nonregulated rates as a measure of the
 23 competitive differential." What did you mean by
 24 that?
 25 A. I just don't remember. It is

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 78</p> <p>1 another alternative way to get at the estimate. 2 It was not an elaborate study. It was just an 3 example of something they might do and for 4 example, I suspect that should be "we would 5 urge" rather than "they would urge." 6 Q. Probably an artifact. 7 A. No, just a typo. 8 Q. So we or they were suggesting that 9 one way to establish a benchmark for determining 10 a competitive differential was to look at past 11 differences between regulated cable rates and 12 nonregulated cable rates? 13 A. I guess so. I frankly don't 14 remember this footnote. 15 Q. Okay. We are to the end of this 16 and one hopes I will not go back to it. 17 One thing that I was a little bit 18 puzzled about in your declaration is there seems 19 to be at some points a suggestion that Dr. 20 Beyer's analysis assumes that all of the 21 Philadelphia cluster would have been overbuilt 22 and at other points you seem to say that Dr. 23 Beyer is talking only about the potential, the 24 likelihood of overbuilding being greater when 25 other competitors are in the cluster</p>	<p style="text-align: right;">Page 80</p> <p>1 reflects actual overbuilding? 2 A. The estimate is based on behavior 3 where there was actual overbuilding. 4 Q. So the point of that is you can't 5 use the 17 percent number to calculate damages? 6 A. Unless you believe -- well, there 7 are two things wrong. Unless you believe there 8 would be actual overbuilding No. 1 and you have 9 to believe the 17 percent differential applies 10 everywhere. We have already explained -- I've 11 already explained why I don't believe the second 12 part is correct, but the fundamental -- the 13 other premise of the calculation is if you want 14 to use the 17 percent number which I wouldn't, 15 is that it is based on an actual overbuild 16 situation, not a potential competition. 17 Q. I see. So you can't use an actual 18 overbuilding differential, price differential, 19 to estimate what the differential would be as a 20 result of potential overbuilding? 21 A. Yes, correct. 22 Q. And you also believe that 23 overbuilding is unlikely in any event? 24 A. By -- yes. Overbuilding, 25 especially overbuilding by the entities that</p>
<p style="text-align: right;">Page 79</p> <p>1 A. I think -- 2 MR. KORPUS: Wait, wait. Wait 3 until there is a question. 4 THE WITNESS: I'm sorry. 5 BY MR. BARNETT: 6 Q. Are both of those conclusions of 7 yours? 8 A. What I said was his method for 9 estimating damages assumes that they would be 10 overbuilding and therefore he relies on the 11 FCC's or someone's estimate of the competitive 12 differential, so his damages calculation is 13 based on an assumption that there in fact would 14 be overbuilding and that the overbuilding would 15 have the effect that is estimated by the FCC and 16 I think both premises are wrong. 17 Q. And if I recall correctly, Dr. 18 Beyer cites the 17 percent differential that -- 19 competitive differential that the FCC calculated 20 between areas where there has been overbuilding 21 and areas where there hasn't been? 22 A. Correct. 23 Q. And your critique of what Dr. Beyer 24 says on that is that you can't calculate damages 25 using that 17 percent number because that</p>	<p style="text-align: right;">Page 81</p> <p>1 were in fact acquired by Comcast in 2 Philadelphia. 3 Q. Why especially? 4 A. Because they are not the most 5 likely potential entrant. 6 Q. The ILEC's are now? 7 A. We have already gone through that. 8 And before the ILEC's, the most likely potential 9 entrants were the BSPs. We have already 10 discussed that. 11 Q. The BSPs like? 12 A. RCN, Knology, WOW, Grande, et 13 cetera. 14 Q. Okay. Got you. What is the basis 15 for your conclusion that overbuilding is 16 unlikely? 17 MR. KORPUS: Objection, 18 overbuilding by the counterparties or 19 overbuilding in general? 20 BY MR. BARNETT: 21 Q. In general. 22 A. It hardly ever happens. 23 Q. Anything else? 24 A. That seems good enough for me. 25 Q. Okay. I just want to know if there</p>

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 82</p> <p>1 is anything else other than that it seldom 2 occurs. 3 A. Those are good data. 4 Q. I did not find in Dr. Beyer's 5 declaration a place where he said that he 6 assumes that overbuilding would have occurred in 7 the entire Philadelphia cluster. Did you see 8 that? 9 A. I think you are maybe not -- if 10 this is related to the previous question, his 11 damages calculations would assume that 12 wherever -- whatever area you were talking 13 about, he assumes that area would be overbuilt. 14 Q. I see. 15 A. If he believes there are other 16 areas that some areas would not be overbuilt, 17 then presumably there would be no damages for 18 keeping out a potential entrant in which case 19 there would be no damages there at all. I 20 assumed that he was providing an analysis, not 21 necessarily area by area, but generically 22 describing how he would do the calculation. 23 Q. Well, let's make another 24 assumption, Dr. Besen. Let's assume that the 25 possibility of overbuilding in fact does have a</p>	<p style="text-align: right;">Page 84</p> <p>1 Q. Yes. If you eliminated a potential 2 entrant who previously had a constraining 3 influence on Comcast's pricing. 4 MR. KORPUS: Wait. So you are 5 changing the hypothetical now. It is not 6 overbuilding by anybody, it is overbuilding by 7 two different counterparties to the transaction. 8 Is that what you are positing? 9 BY MR. BARNETT: 10 Q. Dr. Besen, I'm asking -- let's 11 assume that as a result of the swap 12 transactions, Comcast eliminated competitors 13 that it believed were potential entrants and 14 whose presence in the area constrained pricing 15 by Comcast in the Philadelphia cluster. Using 16 that assumption, is there any way to calculate 17 damages for the people in the Philadelphia 18 cluster who were Comcast subscribers? 19 MR. KORPUS: Objection to form. 20 You can answer the question. 21 THE WITNESS: My -- I guess my 22 answer is it ranges from either very difficult 23 to impossible. 24 BY MR. BARNETT: 25 Q. Well, let's give it a shot. Let's</p>
<p style="text-align: right;">Page 83</p> <p>1 constraint on pricing by incumbent MSOs. 2 A. Overbuilding by whom? 3 Q. By anybody. 4 A. Okay. 5 Q. If that assumption is correct, we 6 will just assume it. Is there any way to 7 calculate damages for the entire Philadelphia 8 cluster? 9 MR. KORPUS: Objection. 10 THE WITNESS: I don't think -- is 11 there something about the entire Philadelphia 12 cluster that is relevant to the question? I 13 don't quite understand it. 14 BY MR. BARNETT: 15 Q. The principal reason I'm asking is 16 because that is what the lawsuit is about? 17 A. I understand, but you made an 18 assumption, so we are talking about an area, 19 right? 20 Q. Right. 21 A. You're asking the question could I 22 calculate damages? 23 Q. Yes. 24 A. If I eliminated a potential 25 entrant.</p>	<p style="text-align: right;">Page 85</p> <p>1 start with the very difficult. Impossible takes 2 longer, I understand. 3 A. The constraining influence you are 4 describing is presumably, I mean just to accept 5 your hypothetical which I don't, but for the 6 purpose of this, their constraining influence 7 and the question is well, how much of a 8 constraining influence are they? And that would 9 seem to depend on Comcast's perception of how 10 likely they were to enter. I mean, suppose it 11 turns out that they are -- there is a one in a 12 million chance that they might enter or a one in 13 two. Those would be very different in terms of 14 Comcast's behavior prior to the acquisition. 15 And frankly, I don't know how -- because you're 16 asking me here to try to tease out the effect of 17 eliminating a potential entrant. 18 Q. Right. 19 A. Where it is potential, so there is 20 some probability they might enter. Exactly how 21 you would translate that into how Comcast's 22 prices were affected pre acquisition, I frankly 23 don't know that you could do that. 24 Q. Well, maybe if we make another 25 assumption, that will help. Say that the</p>

22 (Pages 82 to 85)

Stanley M. Besen - 11/16/2006

Page 86

1 elimination of the competitor prompts Comcast to
 2 raise its prices 10 percent.
 3 A. Well, you've assumed the answer
 4 now.
 5 Q. Yes, you are right. I have. But
 6 the assumption has to be that it is 10 percent
 7 systemwide throughout the cluster, right?
 8 MR. KORPUS: Objection.
 9 THE WITNESS: I don't think I
 10 understand.
 11 BY MR. BARNETT:
 12 Q. Let me try again. Let me just --
 13 maybe just a little background would help. I
 14 understand one of the things that you say in
 15 your declaration is that the impact of
 16 eliminating a potential competitor if there was
 17 any and I understand you think there wasn't any,
 18 but assume that there was an impact, that it
 19 would be difficult if not impossible to
 20 calculate what that impact was because there are
 21 differences among the different areas within the
 22 cluster.
 23 A. That is one of the reasons, yes.
 24 Q. And one of the differences is the
 25 proximity to the franchise area, the Comcast

Page 87

1 franchise area and where the competitor operated
 2 within the cluster?
 3 A. On -- I believe, if I understand
 4 the plaintiff's theory, that would follow.
 5 Q. Okay. And what other differences
 6 are there that are significant to your analysis?
 7 A. I list them. The question is
 8 whether the existing system had been upgraded to
 9 digital.
 10 Q. Right.
 11 A. Just as matter of timing when the
 12 system was acquired, because that would affect
 13 the length of the class period. And the last
 14 that I described is the Comcast entity to which
 15 the franchise was assigned because there are
 16 some differences among the different Comcast
 17 regions or areas.
 18 Q. Let's make a further simplifying
 19 assumption, please. And that is that Comcast
 20 made its pricing decisions at headquarters and
 21 that it attempted to price the same throughout
 22 the Philadelphia cluster.
 23 MR. KORPUS: Hang on. Is that the
 24 question?
 25 MR. BARNETT: Not yet.

Page 88

1 THE WITNESS: I'm sorry, thank you
 2 for stopping me.
 3 BY MR. BARNETT:
 4 Q. Are you with me so far?
 5 A. Yes.
 6 Q. If it is true that that further
 7 assumption is true, that there were centralized
 8 pricing decisions for the entire cluster and
 9 Comcast attempted to keep prices close together,
 10 pretty much the same across the entire
 11 Philadelphia cluster, that would make it easier
 12 to calculate or to determine whether there was
 13 an impact from the anti-competitive conduct?
 14 MR. KORPUS: Objection to the
 15 hypothetical and the assumption. You can answer
 16 the question.
 17 THE WITNESS: I actually don't
 18 know. I don't think you've given me enough
 19 information to answer that or maybe I don't
 20 understand it well enough.
 21 BY MR. BARNETT:
 22 Q. Well, if Comcast made decisions on
 23 pricing on a franchise by franchise basis within
 24 the cluster, are you with me?
 25 A. Yes.

Page 89

1 Q. Then you would have to look at each
 2 franchise to determine whether or not there was
 3 an impact within that franchise of the
 4 anti-competitive conduct, right?
 5 A. Yes.
 6 Q. But if the decision-making was made
 7 for the entire cluster and it was centralized at
 8 headquarters of Comcast, then you would just
 9 need to know what decisions the headquarters
 10 people made about pricing?
 11 A. I don't think the fundamental
 12 problem is how many data points you have. The
 13 fundamental problem is conceptual.
 14 Q. What is the conceptual problem?
 15 A. The conceptual problem is that you
 16 are trying to determine the effect of potential
 17 entry on Comcast's pricing and that is very
 18 difficult if not impossible to do.
 19 Q. But we already assumed that.
 20 A. I'm sorry. This is a compound set
 21 of assumptions.
 22 Q. It is. It gets longer. But isn't
 23 this the sort of thing you guys like to do,
 24 economists, tease out the assumptions?
 25 A. You like to be careful and sort of

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 90</p> <p>1 write them down in the same place you can see 2 them all at one time. 3 Q. And it is difficult to do in this 4 back and forth and I'm doing the best I can. 5 A. I'm having difficulty remembering 6 which of the earlier assumptions are still 7 present now. 8 Q. That's fair, that's fair. Let's 9 try to state them all so that we are being 10 accurate. One assumption is that the 11 elimination through the swaps and 12 transactions -- I'm sorry, the swaps and the 13 acquisitions, had the effect of removing a 14 constraining influence on Comcast's pricing 15 decisions. Okay? 16 A. Yes. 17 Q. And the second assumption is that 18 Comcast made pricing decisions for the entire 19 cluster as opposed to on a franchise area by 20 franchise area basis so that there was uniform 21 pricing throughout the cluster. 22 A. Yes. 23 Q. Or nearly uniform. 24 A. Yes. 25 Q. Under those assumptions, is it</p>	<p style="text-align: right;">Page 92</p> <p>1 from the area removed a constraining influence 2 on the pricing decisions by Comcast. And 3 further, Comcast made pricing decisions on the 4 centralized basis for the entire Philadelphia 5 cluster and as a result made uniform -- kept 6 prices almost uniform throughout the cluster. 7 A. What I am suggesting -- 8 MR. KORPUS: Hang on. Wait for the 9 question. 10 THE WITNESS: I'm sorry. And? 11 BY MR. BARNETT: 12 Q. In those circumstances, is it 13 possible to determine the damages that the 14 individual class members sustained? 15 MR. KORPUS: Objection to form and 16 already asked and answered for this will be the 17 third time. 18 THE WITNESS: I believe that's 19 correct. The point is not how many observations 20 there are. It is the first step in the 21 assumptions which is even if you assumed that 22 the potential entrance, elimination and we are 23 assuming that for purposes of this discussion. 24 BY MR. BARNETT: 25 Q. Sure.</p>
<p style="text-align: right;">Page 91</p> <p>1 possible to compute the damages that would have 2 been sustained by the class members throughout 3 the cluster? 4 A. Again, the problem is not how many 5 data points there are. The problem is with your 6 first assumption and I suggested before that I 7 don't know, I've never seen anyone, estimate the 8 effect of eliminating a potential competitor on 9 the prices that the incumbent firm would charge. 10 And you can't -- and the way Dr. Beyer deals 11 with this problem is simply to assume that 12 overbuilding would have occurred and he uses the 13 competitive differential as estimated by the FCC 14 and for the reasons I've already suggested, I 15 think that's wrong. 16 Q. Yes, I understand. 17 A. Because I don't think potential 18 competition has the same effect as actual entry. 19 Q. You are fighting my assumption. 20 MR. KORPUS: I don't think he is. 21 BY MR. BARNETT: 22 Q. The assumption was that there was 23 elimination of potential competitors from the 24 area for these swaps and acquisitions and that 25 the elimination of those potential competitors</p>	<p style="text-align: right;">Page 93</p> <p>1 A. Eliminated a constraint on pricing, 2 translating that into how big an effect on 3 prices there was is in fact I would say 4 essentially impossible. 5 Q. It can't be done? 6 A. I don't know how you would do it 7 and I certainly can't do it the way Dr. Beyer 8 has proposed. 9 Q. Okay. I understand what you are 10 saying now. Thank you. I probably have to add 11 another assumption then. 12 A. I think you have to assume you know 13 the answer or as we would say, assume you have a 14 can opener. It is an old economist joke. 15 Q. I haven't heard that one. 16 A. A bunch of guys have a can of beer 17 before pop tops. They can't open it. One is an 18 economist. They have various proposals to deal 19 with this, physicist et cetera. The economist 20 says assume we have a can opener. I've been 21 there. 22 MR. BARNETT: Let's see what time 23 we've got. 24 MR. KORPUS: Okay. 25 MR. BARNETT: I suggest we take a</p>

24 (Pages 90 to 93)

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 94</p> <p>1 lunch break. We will be finished before five. 2 THE VIDEO OPERATOR: Going off the 3 record at 12:03. 4 (Luncheon recess: 12:03 p.m.) 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 96</p> <p>1 A. I have. 2 Q. You've read it through? 3 A. Yes. 4 Q. I just want a point of 5 clarification. Did you find anywhere in this 6 complaint an allegation that the Philadelphia 7 cluster would have been completely overbuilt but 8 for the anti-competitive conduct of Comcast? 9 MR. KORPUS: Objection. 10 THE WITNESS: As I said this 11 morning, the complete overbuilding is a part of 12 Dr. Beyer's damages calculation. If you are 13 telling me that there is no allegation that it 14 would have been overbuilt, then presumably there 15 are parts of the class that are off the table, I 16 guess, but I just assumed that the allegations 17 applied to the entire class. 18 BY MR. BARNETT: 19 Q. Okay. So my question was did you 20 find anywhere in the complaint the allegation 21 that but for the anti-competitive conduct of 22 Comcast, the entire Philadelphia cluster would 23 have been overbuilt? 24 A. I just assumed that was the case. 25 I'm not sure I can find the exact words.</p>
<p style="text-align: right;">Page 95</p> <p>1 AFTERNOON SESSION 2 1:13 p.m. 3 THE VIDEO OPERATOR: We are back on 4 the record at 1:13. 5 STANLEY M. BESEN, 6 resumed, having been previously duly sworn, was 7 examined and testified further as follows: 8 BY MR. BARNETT: 9 Q. Dr. Besen, we are back from our 10 lunch break. Have you thought about anything 11 over lunch that causes you to want to correct or 12 modify any of the testimony you gave this 13 morning? 14 A. No. 15 MR. BARNETT: Mark this one. 16 (Besen Exhibit 3, third amended 17 class action complaint for violation of the 18 Sherman Antitrust Act was marked for 19 identification.) 20 BY MR. BARNETT: 21 Q. Dr. Besen, you have just been 22 handed Exhibit 3. This is the third amended 23 class action complaint for violation of the 24 Sherman Antitrust Act. Have you seen this 25 before?</p>	<p style="text-align: right;">Page 97</p> <p>1 Q. You assumed that's in the 2 complaint? 3 A. No, that's how I interpreted. 4 Q. Could you show us where -- 5 A. I think just the general reading of 6 it. 7 Q. It would be helpful if you could 8 point to where that is in the complaint. 9 A. I will not be able to do that. 10 Q. Why not? 11 A. Because what I am describing is an 12 inference that I drew from the way Dr. Beyer's 13 report is written and the way he describes how 14 he calculates damages. He doesn't say this only 15 applies to half the cluster. He seems to be 16 describing this as it applies to the whole 17 cluster. That's how I am interpreting it. 18 Q. This being that the whole cluster 19 would have been overbuilt? 20 A. His whole methodology for 21 calculating damages seems to be applicable as he 22 describes it, to the entire class, the entire 23 cluster, and it seems to assume overbuilding and 24 that is -- there is no statement to the contrary 25 I guess I would say.</p>

25 (Pages 94 to 97)

Stanley M. Besen - 11/16/2006

Page 98

1 Q. So you are assuming that the
 2 plaintiffs are alleging in the complaint that
 3 but for Comcast's anti-competitive conduct, the
 4 entire Philadelphia cluster would have been
 5 overbuilt?
 6 MR. KORPUS: Objection.
 7 THE WITNESS: No, I'm assuming that
 8 the method of calculation implicitly assumes,
 9 the way in which the damages are being
 10 calculated, as if the entire cluster had been
 11 overbuilt. By using the competitive
 12 differential from the FCC which is the
 13 illustration, one of the illustrations that Dr.
 14 Beyer provides, that is an implicit assumption
 15 that in fact -- when you use that number, you
 16 are assuming that there would have been
 17 overbuilding. That number comes from an
 18 overbuilding assumption. Now, whether it
 19 applies -- whether -- I assume that applies to
 20 all the cluster.
 21 BY MR. BARNETT:
 22 Q. So the source of your inference
 23 about what the plaintiffs are alleging comes
 24 from what Dr. Beyer said in his declaration?
 25 A. And in his deposition.

Page 99

1 Q. Okay, but it doesn't come from the
 2 complaint?
 3 A. Not explicitly.
 4 Q. Well, I am going to have to ask you
 5 now to look at it and show us where it is.
 6 A. I am not going to be able to find
 7 it. It comes from Dr. Beyer.
 8 Q. Okay, good.
 9 (Besen Exhibit 4, declaration of
 10 Dr. Beyer, was marked for identification.)
 11 THE WITNESS: Again, to be clear,
 12 that's from the damages calculation part of the
 13 discussion.
 14 BY MR. BARNETT:
 15 Q. I see.
 16 A. I think the question of whether it
 17 was actually overbuilt, because the question of
 18 whether potential and actual competition are the
 19 same. They are somewhat separate issues.
 20 Q. Doctor, you should have in front of
 21 you the updated declaration of John C. Beyer
 22 Ph.D. regarding class certification?
 23 A. I do.
 24 Q. You've seen this before?
 25 A. I have.

Page 100

1 Q. You've read it cover to cover?
 2 A. Yes, not the resume.
 3 Q. Can you show us where in Dr.
 4 Beyer's updated declaration that he says that
 5 but for the anti-competitive conduct of Comcast,
 6 the entire Philadelphia cluster would have been
 7 overbuilt?
 8 A. In paragraph 40 he says and I
 9 quote, "The first 'yardstick approach' benchmark
 10 is to estimate the supra-competitive overcharge
 11 that Comcast's subscribers have paid, and
 12 continue to pay, because Comcast's cluster
 13 systems do not have effective competition from
 14 an existing or potential competitor, including
 15 an overbuilder or another large cable MSO that
 16 has exited the cluster area. Government and
 17 academic economic studies have variously
 18 estimated that where incumbent cable system
 19 operators face effective overbuild competition,
 20 cable service prices are 15 to 20 percent lower
 21 than in comparable cable system markets that do
 22 not face effective overbuild competition. These
 23 studies, or a similar study using a combination
 24 of information and data that are publicly
 25 available and that can be provided by defendant

Page 101

1 Comcast, can be used as a basis for estimating
 2 the supra-competitive price level that Comcast
 3 has maintained as a consequence of its cluster
 4 strategy."
 5 Q. So that's what you are drawing your
 6 inference from?
 7 A. Yes.
 8 Q. Dr. Beyer is saying that those
 9 studies or a similar study can be used as a
 10 basis for estimating the supra-competitive price
 11 level means to you that he believed that the
 12 entire Philadelphia cluster would have been
 13 overbuilt?
 14 A. Again, his damages calculations
 15 assume that the -- whatever area he is
 16 calculating damages for, would have been
 17 overbuilt. It is not about potential
 18 competition.
 19 Q. I just want to make sure I
 20 understand. The reason you're drawing that
 21 inference is that he is saying that that study
 22 or a similar study can be used as a basis, a
 23 basis for estimating the supra-competitive price
 24 levels means to you that he assumes complete
 25 overbuilding?

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 102</p> <p>1 A. "Government and academic economic 2 studies have variously estimated that where 3 incumbent cable operators face effective 4 overbuilt competition" that's the operative 5 phrase. 6 MR. KORPUS: You should read the 7 whole paragraph including the last sentence. 8 THE WITNESS: Last sentence says, 9 "For example, if the appropriate overcharge 10 benchmark is determined at 15 percent, estimated 11 class-wide damages would be 15 percent of 12 Comcast total cable service revenue from Class 13 members during the Class or damage period." 14 Thank you for the clarification. 15 BY MR. BARNETT: 16 Q. Okay. So is there anything else in 17 this declaration that indicates to you that he 18 assumes complete overbuilding? 19 A. That's enough. 20 Q. So there is nothing else? 21 A. There may be something else, but 22 that's enough. 23 Q. Well, we have plenty of time. 24 A. I understand. I'll stick with 25 that.</p>	<p style="text-align: right;">Page 104</p> <p>1 A. Yes, as long as the benchmark -- as 2 long as the yardstick is correct. 3 Q. Sure. Tell us how the yardstick 4 approach works, to your understanding. 5 A. The yardstick is supposed to 6 generate a but for estimate of what in this case 7 the price would have been in a but for world and 8 he is proposing various but for alternatives. 9 But the but fors in both cases assume, just to 10 be -- the word's right, "where the incumbent" -- 11 excuse me. "Where incumbent cable system 12 operators face effective overbuilt competition." 13 So that's clearly an assumption integrated into 14 this analysis. 15 Q. Very good. And he uses two 16 different kinds of yardsticks? 17 A. A level and a rate of change 18 yardstick, yes. 19 Q. Tell us what you understand about 20 the level approach using the yardstick. 21 A. He would take the current number, 22 take the estimate of the competitive 23 differential and reduce -- and assume the 24 overcharge, the price would have been lower by 25 the amount of the supposed overcharge and</p>
<p style="text-align: right;">Page 103</p> <p>1 Q. Okay. 2 A. That's the basis upon which I 3 reached the conclusion. 4 Q. Thank you. 5 Since we are on that page already, 6 actually, let's go back one page to page 20 of 7 Exhibit 4, Dr. Beyer's updated declaration. At 8 the top of the page, it has a heading 9 "Feasibility of Assessing Damages on a Class 10 Wide Basis." 11 A. I see it. 12 Q. Dr. Beyer talks about two different 13 damages methodologies, the yardstick approach -- 14 MR. KORPUS: I think they are both 15 the yardstick approach. 16 BY MR. BARNETT: 17 Q. Yardstick approaches, but two 18 different kinds of yardsticks? 19 A. Either in dollar or percentage 20 terms, yes, those are the two approaches. 21 Q. Is the yardstick approach a method 22 that you are familiar with for calculating 23 damages in an antitrust case? 24 A. It can be, yes. 25 Q. Is that a recognized methodology?</p>	<p style="text-align: right;">Page 105</p> <p>1 purported overcharge. 2 Q. And then the second yardstick 3 benchmark? 4 A. He would take the rate of change of 5 prices over I presume the class period in -- 6 in the class and compare that to the rate of 7 increase of prices in systems that faced 8 effective overbuilt competition. 9 Q. Assuming that Dr. Beyer does have a 10 benchmark that reflects areas where there is 11 effective competition, are the two yardstick 12 approaches that he describes recognized 13 methodologies for calculating damages in 14 antitrust cases? 15 MR. KORPUS: Objection to form. I 16 don't understand the question. 17 THE WITNESS: Again, the question 18 is whether the benchmark is appropriate. It is 19 certainly true that you can use a benchmark 20 approach. You are not free to use any number as 21 the benchmark. Yes, the approach as a principle 22 is accepted, but that doesn't mean that you can 23 apply it any way you like without regard to 24 whether the yardstick or the benchmark is 25 appropriate.</p>

27 (Pages 102 to 105)

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 106</p> <p>1 BY MR. BARNETT: 2 Q. I see. 3 A. So the complaint here is not about 4 the principle, the complaint is about the 5 implementation. 6 Q. Okay. Let's take a look at 7 paragraph 28 of Dr. Beyer's declaration. It's 8 on page 15 of Exhibit 4. Dr. Beyer cites some 9 studies in paragraph 28. 10 A. He does. 11 Q. One of them is your favorite, Hal 12 Singer's article about "Does Clustering By 13 Incumbent Cable MSOs Deter Entry By 14 Overbuilders?" 15 MR. KORPUS: Objection to form. 16 THE WITNESS: It's not my favorite. 17 BY MR. BARNETT: 18 Q. I was being facetious. 19 MR. KORPUS: That doesn't always 20 come across in the transcript. 21 MR. BARNETT: True, you are right, 22 okay. 23 BY MR. BARNETT: 24 Q. One of the studies that Dr. Beyer 25 cites in paragraph 28 of his declaration is Hal</p>	<p style="text-align: right;">Page 108</p> <p>1 the portion that you just cited which is no 2 evidence of overbuilding for systems that have 3 been upgraded to digital. 4 Q. Do you recall the time frame during 5 which Dr. Singer's study -- 6 A. I believe it was 1990s, somewhere 7 in the 1990s. 8 Q. And Dr. Beyer also cites a study by 9 the General Accounting Office? 10 A. Footnote 25, you mean? 11 Q. Yes. 12 A. Yes. 13 Q. And a paper by William Emmons and 14 Prager, "The effects of market structure and 15 ownership on prices and service offerings in the 16 U.S. cable television industry?" 17 A. Yes, and I think you have to be 18 careful what inference you want to draw from the 19 Emmons Prager paper, because the Emmons Prager 20 paper has nothing to do whatever with 21 clustering. 22 Q. What does it have to do with? 23 A. Well, the measure of the number of 24 cable systems owned by a cable MSO is not the 25 number owned by a cable MSO in a particular area</p>
<p style="text-align: right;">Page 107</p> <p>1 Singer's article about clustering by income but 2 cable MSOs and whether that deters entry by 3 overbuilders. 4 A. Correct. 5 Q. And you disagree with Dr. Singer's 6 analysis? 7 A. I say in a footnote to my paper 8 that I don't necessarily accept Singer's 9 analysis, but I think if you accepted it, it has 10 implications that Dr. Beyer does not draw from 11 it. 12 Q. I think what you say about 13 Dr. Singer's article, one of the things that you 14 say about it, anyway, is that where he didn't 15 find any instance where overbuilding occurred 16 after there had been an upgrade to digital? 17 A. Digital, yes, I'm sorry, yes. 18 Correct. 19 Q. And the inference you draw from 20 that is that there is no overbuilding after an 21 upgrade to digital. 22 A. If you are going to use the Singer 23 study as Dr. Beyer does, clearly this is an 24 example of where he uses it, then you should use 25 it, all of it. And one of the pieces of it is</p>	<p style="text-align: right;">Page 109</p> <p>1 but the number owned nationwide. It has nothing 2 to do with clustering whatever. 3 Q. Okay. And how about the Government 4 Accounting Office study? 5 A. That is -- 6 MR. KORPUS: Hang on, what is your 7 question, how about it. 8 THE WITNESS: Yes, I'm sorry. 9 MR. KORPUS: What about it? 10 THE WITNESS: Again -- 11 MR. KORPUS: Wait for the question. 12 THE WITNESS: I'm sorry, please. 13 BY MR. BARNETT: 14 Q. If you want to answer, you can. 15 A. No, I'll wait for the question. 16 Q. Fine. Dr. Beyer says that the 17 Government Accounting Office study using 1998 18 cable prices found a positive and statistically 19 significant relationship between a cable 20 operator's affiliation with a large cable MSO 21 and the average monthly prices -- monthly price 22 for cable service. 23 A. Again, as stated, that is not about 24 clustering either. 25 MR. KORPUS: There is still not a</p>

Stanley M. Besen - 11/16/2006

Page 110

1 question on the table.
 2 THE WITNESS: I apologize. Go
 3 ahead.
 4 BY MR. BARNETT:
 5 Q. Do you agree that that is what the
 6 study found?
 7 A. Yes, I guess so.
 8 Q. What Dr. Beyer states it found?
 9 A. Yes, but it's irrelevant to the
 10 question on the table because it has nothing to
 11 do with clustering. It is about national
 12 ownership, ownership by a national MSO, not to
 13 do with how many subscribers or systems an
 14 operator has in a particular area. Again, not
 15 on point.
 16 Q. I understand that that is your
 17 view.
 18 A. It is not my view, it's the truth.
 19 I'm sorry.
 20 MR. KORPUS: Just try to respond.
 21 Wait for the question mark at the end.
 22 Visualize the question.
 23 BY MR. BARNETT:
 24 Q. In a previous sentence in paragraph
 25 28 Dr. Beyer says, "A study reported in 1997

Page 111

1 found that an increase in the number of cable
 2 systems owned by a cable MSO was associated with
 3 higher monthly cable rates." Do you agree that
 4 that is an accurate statement?
 5 A. We just actually discussed the
 6 Emmons Prager study just a moment ago and I said
 7 before that that does not address the issue of
 8 clustering at all. The ownership that we are
 9 talking about, the variable that they measure is
 10 the number of cable systems owned by an operator
 11 nationwide, not relevant to the question of
 12 clustering.
 13 Q. Do you remember my question?
 14 A. I'm not sure.
 15 Q. I asked you if that was an accurate
 16 statement, what Dr. Beyer said about the study.
 17 A. The study does find that, yes, and
 18 I said my question had two parts. Yes, it is
 19 accurate, but it is irrelevant.
 20 Q. And I didn't ask you whether you
 21 thought it was relevant or not, I asked you
 22 whether it is accurate.
 23 A. I'm sure you didn't want to leave
 24 the record fuzzy on this.
 25 Q. I'll tell you what.

Page 112

1 A. Yes.
 2 Q. I'll ask you, do you think it's
 3 relevant?
 4 A. No.
 5 Q. Thank you. We got that on the
 6 record now.
 7 A. Hear hear.
 8 Q. Okay, great. Then in paragraph 29
 9 Dr. Beyer talks about studies on MSOs. Have you
 10 looked at those studies?
 11 A. I have.
 12 Q. Is there anything that Dr. Beyer
 13 says in paragraph 29 about the studies that you
 14 think is inaccurate?
 15 A. No.
 16 Can I add something as well or do
 17 you object? Again, the way -- the way a
 18 cluster -- as I put it in my paper, the way a
 19 cluster is measured here is simply a 01
 20 variable. I think it's a misspecification in
 21 the FCC's equation. They do not distinguish
 22 between small and large clusters in their
 23 analysis and I think that's a mistake
 24 Q. You don't disagree -- never mind.
 25 Paragraph 30 of Dr. Beyer's declaration talks

Page 113

1 about studies showing the existence of price
 2 differentials. Is there anything that Dr. Beyer
 3 says about those studies that is inaccurate?
 4 A. No, but of course that's the issue
 5 that we discussed at length this morning. Now
 6 let's take a look at your declaration.
 7 (Besen Exhibit 5, expert report of
 8 Dr. Stanley M. Besen, was marked for
 9 identification.)
 10 THE WITNESS: I have a black and
 11 white version of all the charts. Is that going
 12 to make a difference later?
 13 BY MR. BARNETT:
 14 Q. I don't think it will.
 15 A. Okay.
 16 Q. If it does, we will pull out the
 17 maps again. Dr. Besen, Exhibit 5 is the expert
 18 report that you prepared in the form of a
 19 declaration on November 9, 2006. That's when
 20 you completed it?
 21 A. Correct.
 22 Q. Would you turn to page 8, please.
 23 Paragraph 16 you talk about the theory of
 24 contestable markets.
 25 A. Yes.

Stanley M. Besen - 11/16/2006

Page 114

1 Q. It talks about the entry process
 2 being entirely or almost entirely reversible
 3 without cost. You do talk about that?
 4 A. I do.
 5 Q. What is the significance of that to
 6 you?
 7 A. The significance in general or in
 8 this matter?
 9 Q. For the purpose of this case.
 10 A. Dr. Beyer, particularly in his
 11 deposition, tries to equate potential and actual
 12 competition and their effects. There is a
 13 theory, not applicable here, under which those
 14 two statements would be true. If a market is
 15 contestable, that is, essentially if a firm can
 16 enter and exit without sunk costs, then in those
 17 circumstances, potential competition can produce
 18 the same effect as actual competition. However,
 19 in this particular case, entry costs are sunk
 20 and so potential and actual competition are
 21 different.
 22 Q. I see. Turn to page 14. Down at
 23 the bottom is paragraph 30 where you talk about
 24 information from the acquisition agreements.
 25 A. Correct.

Page 115

1 Q. Those are the swaps and merger
 2 agreements that we talked about earlier?
 3 A. Yes.
 4 Q. On the next page, you mention the
 5 full list of all franchise areas served by
 6 Comcast in the Philadelphia cluster. Do you see
 7 that?
 8 A. Yes.
 9 Q. Who provided you with that list?
 10 A. Comcast.
 11 Q. And what was the date of that list?
 12 Effective as of when?
 13 A. I don't recall.
 14 Q. Is it a current list? Reasonably
 15 current?
 16 A. Reasonably current.
 17 Q. Since we are now focusing on your
 18 declaration, I want to make sure I understand
 19 your previous testimony about how you compiled
 20 your list of legacy franchise areas. The
 21 process was if one of the franchise areas on the
 22 current list of Comcast franchise areas was not
 23 listed in or referred to in an acquisition
 24 agreement, you assume that those franchise areas
 25 were Comcast franchise areas prior to February

Page 116

1 1998?
 2 A. That they were legacy Comcast, yes.
 3 Q. So there is a time period between
 4 some time in 1998 and the present during which
 5 you assume that all of those franchise areas
 6 were Comcast franchise areas?
 7 A. I'm not sure if it's 1998 or 1999,
 8 but yes, that's the principle.
 9 Q. Did you attempt to get from Comcast
 10 any historical information about ownership of
 11 the legacy franchise areas prior to the current
 12 period as of the date of the list that Comcast
 13 provided?
 14 A. I'm sorry, please, again.
 15 Q. Did you try to get from Comcast
 16 historical information about those areas? The
 17 legacy area?
 18 A. No.
 19 Q. So is it true that you can't say
 20 whether or not those areas were Comcast areas
 21 before 1998?
 22 MR. KORPUS: Objection.
 23 THE WITNESS: I told you the method
 24 by which we did the calculation. I can't say
 25 anything more than that. We did the assignment

Page 117

1 based on the merger and swap agreements, the
 2 acquisition agreements and the subscriber list,
 3 or the franchise list.
 4 BY MR. BARNETT:
 5 Q. And would you just confirm that
 6 footnote 41 describes the methodology that you
 7 used?
 8 A. Yes.
 9 Q. "I treated a franchise as Legacy
 10 Comcast unless it was explicitly mentioned in
 11 one of the Acquisition Agreements?"
 12 A. Correct".
 13 Q. On page 18, paragraph 41 of your
 14 declaration, Exhibit 5, here you are talking
 15 about Dr. Singer's study; is that right?
 16 A. Yes.
 17 Q. And you say, "At the very least,
 18 Dr. Singer's result indicates that the
 19 probability of overbuilding depends upon whether
 20 or not the incumbent has upgraded to digital,"
 21 correct?
 22 A. Yes.
 23 Q. Do you know at what point during
 24 the study period that Dr. Singer used the
 25 systems that upgraded to digital upgraded to

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 118</p> <p>1 digital?</p> <p>2 A. No.</p> <p>3 Q. On page 19, paragraph 43, you talk</p> <p>4 about locations of the acquired systems; is that</p> <p>5 right?</p> <p>6 A. Yes.</p> <p>7 Q. And you say "A fundamental premise</p> <p>8 of plaintiff's position, as interpreted by Dr.</p> <p>9 Beyer, is that the acquisitions that are likely</p> <p>10 to have the largest anti-competitive effect are</p> <p>11 those of cable systems that operate in close</p> <p>12 proximity to the acquiring operator." Is that</p> <p>13 right?</p> <p>14 A. Yes.</p> <p>15 Q. Do you agree with that?</p> <p>16 A. Yes, I agree that it is a</p> <p>17 fundamental premise.</p> <p>18 Q. Do you agree with the premise?</p> <p>19 MR. KORPUS: Objection.</p> <p>20 THE WITNESS: Not necessarily. I'm</p> <p>21 sorry.</p> <p>22 MR. KORPUS: That's okay.</p> <p>23 BY MR. BARNETT:</p> <p>24 Q. Not necessarily?</p> <p>25 A. Not necessarily.</p>	<p style="text-align: right;">Page 120</p> <p>1 morning.</p> <p>2 Q. Yes, we did, but not in context of</p> <p>3 your declaration.</p> <p>4 On page 22 of Exhibit 5, paragraph</p> <p>5 48, you have a list of items there. You are</p> <p>6 quoting from different sources. One of them is</p> <p>7 "Operators who own adjacent or nearby franchises</p> <p>8 often consolidate overhead expenses such as</p> <p>9 administrative office work and service crews."</p> <p>10 Is that an advantage you see a MSO that is</p> <p>11 actually present in an area has over potential</p> <p>12 rivals?</p> <p>13 A. No, this is about the effect of two</p> <p>14 adjacent systems owned by the same operator who</p> <p>15 are able to consolidate functions.</p> <p>16 Q. Right. So you agree that that is</p> <p>17 an advantage that the incumbent has over rivals?</p> <p>18 MR. KORPUS: Objection, misstates</p> <p>19 the answer.</p> <p>20 THE WITNESS: It is an efficiency.</p> <p>21 BY MR. BARNETT:</p> <p>22 Q. And therefore an advantage?</p> <p>23 MR. KORPUS: Objection.</p> <p>24 THE WITNESS: It is an efficiency.</p> <p>25 BY MR. BARNETT:</p>
<p style="text-align: right;">Page 119</p> <p>1 Q. Do you have an opinion one way or</p> <p>2 another about whether that is an appropriate</p> <p>3 premise?</p> <p>4 A. We talked about that this morning.</p> <p>5 We talked about the fact that it may make no</p> <p>6 difference at all if in fact the most likely</p> <p>7 potential overbuilder is someone other than a</p> <p>8 nearby or local MSO, so it might turn out that</p> <p>9 it has no effect whatever, but on the</p> <p>10 plaintiff's theory that these are the most</p> <p>11 likely potential entrants, then this would</p> <p>12 follow.</p> <p>13 Q. On page 21, paragraph 46 of Exhibit</p> <p>14 5, it is entitled "The franchises in the</p> <p>15 Philadelphia cluster belong to different</p> <p>16 functional regions within Comcast." Do you see</p> <p>17 anywhere in paragraph 46 where you talk about</p> <p>18 pricing decisions?</p> <p>19 A. No.</p> <p>20 Q. Do you know whether or not pricing</p> <p>21 decisions within Comcast are made on a regional</p> <p>22 basis?</p> <p>23 A. I believe they are either made on a</p> <p>24 regional or an area basis. Somewhere above the</p> <p>25 franchise level. I think we discussed that this</p>	<p style="text-align: right;">Page 121</p> <p>1 Q. Are you saying it is not an</p> <p>2 advantage?</p> <p>3 A. It is an advantage, but a perfectly</p> <p>4 appropriate one.</p> <p>5 Q. You also say "Operators who</p> <p>6 specialize in specific geographic areas are more</p> <p>7 successful at packaging and marketing their</p> <p>8 products than those who do not concentrate</p> <p>9 geographically." That is another advantage that</p> <p>10 an incumbent has?</p> <p>11 MR. KORPUS: Objection.</p> <p>12 THE WITNESS: It is an advantage</p> <p>13 that a set of clustered systems has.</p> <p>14 BY MR. BARNETT:</p> <p>15 Q. Owning systems --</p> <p>16 A. By the way, you say I clearly each</p> <p>17 of these cases is where I am quoting from</p> <p>18 somebody.</p> <p>19 Q. Right, but you are actually</p> <p>20 agreeing with what they are saying, aren't you?</p> <p>21 A. Correct.</p> <p>22 Q. And the next thing you quote</p> <p>23 is "Owning systems in adjacent franchise areas</p> <p>24 can enable a cable firm to capture scale</p> <p>25 economies in the deployment of its distribution</p>

Stanley M. Besen - 11/16/2006

Page 122

1 plan?"

2 A. Correct.

3 Q. That is another advantage that an

4 incumbent operator that has multiple systems in

5 a cluster has over rivals?

6 A. It is another efficiency benefit

7 from clustering.

8 Q. The next thing you say is or you

9 quote, "Cable systems may not be able to offer

10 local telephone services on a competitive basis

11 unless through clustering or other means they

12 can assemble service areas that approximate the

13 areas served by the local telephone provider."

14 An additional advantage that the clustering

15 incumbent has, right?

16 A. Yes.

17 Q. Then the last thing that you quote

18 is "The clustering strategy enables firms to

19 consolidate facilities for receiving and

20 transmitting programming, reduce the number of

21 repair crews, have regional customer service

22 centers, reduce management and compete more

23 effectively for local advertising dollars."

24 Another efficiency advantage that an incumbent

25 clustering MSO has?

Page 123

1 A. I should be careful here and I

2 probably should have said this a moment ago. At

3 present, in my view, the most likely entrants

4 are ILEC's, the local exchange carriers. They

5 too have these benefits, so these entrants will

6 have the same efficiencies as a cluster cable

7 operator and there will be no advantage of the

8 clustered cable operators vis-a-vis the ILEC

9 which has the same benefits that are described

10 here.

11 Q. Do you remember my question?

12 A. I think I answered it.

13 Q. I don't think you did.

14 A. Well, you are talking about an

15 advantage over other operators and I'm just

16 saying it is an advantage over somebody who

17 isn't clustered but not an advantage over

18 somebody -- not an advantage over the most

19 likely entrant who too will be clustered.

20 Q. It is not an advantage over ILEC's,

21 it is an advantage over other potential

22 competitors?

23 A. Yes, it could be, but again, in my

24 view, the other entrants are not the most

25 likely -- the other firms are not the most

Page 124

1 likely entrants.

2 Q. In 1996 were ILEC's the most likely

3 potential entrants in the Philadelphia cluster?

4 A. I don't know.

5 Q. '99?

6 A. Don't know.

7 Q. 2001?

8 A. Well, there were some entries by

9 telephone companies during that period, not very

10 successful.

11 Q. 2004?

12 A. Remember, no one was likely to be a

13 successful entrant during this period.

14 Q. I understand that's your view.

15 A. Yes.

16 Q. But I'm asking you whether in 2004,

17 ILEC's were likely entrants?

18 A. They are beginning to discuss --

19 discuss the prospect of entering, yes.

20 Q. Can you tell us a single instance

21 where an ILEC entered the Philadelphia

22 clustering as late as 2004?

23 A. No.

24 Q. How about in 2005?

25 A. No, I believe Verizon is now in the

Page 125

1 process of entering.

2 Q. Here at the end of 2006, they are

3 starting to do that?

4 A. Correct.

5 Q. Page 23 and 24 of Exhibit 5. You

6 discuss pricing issues.

7 A. Correct.

8 Q. And I think an important difference

9 you have with Dr. Beyer is that you believe that

10 the appropriate way to look at pricing is on a

11 per channel basis?

12 A. Yes.

13 Q. And Dr. Beyer doesn't do it on a

14 per channel basis, he does it on a package

15 basis? Total price basis?

16 A. Well, No. 1, he doesn't ever do an

17 analysis that looks at channels at all, so he is

18 comparing prices but not -- but those

19 comparisons are inappropriate where the number

20 of channels involved are different.

21 Q. What about Dr. Beyer's data lead

22 you to believe that he didn't weight the data

23 according to the number of subscribers?

24 A. That's what he says in his

25 deposition.

Stanley M. Besen - 11/16/2006

Page 126

1 Q. Could you help us find that? I am
 2 going to hand you the appendix to defendant's
 3 memorandum of law in opposition to plaintiff's
 4 motion for certification of the Philadelphia
 5 class and I would direct you to Exhibit C.
 6 MR. KORPUS: Do you have a copy for
 7 me?
 8 MR. BARNETT: Of the filing? No, I
 9 don't.
 10 MR. KORPUS: David, could you get
 11 me a copy of Dr. Beyer's deposition, please,
 12 thank you.
 13 THE WITNESS: I wish I had
 14 committed the page number to memory.
 15 BY MR. BARNETT:
 16 Q. It does have an index in the back.
 17 A. I understand.
 18 Q. That would be helpful.
 19 I'm sorry, is something pending?
 20 MR. KORPUS: He is asking you to do
 21 his work for him and find the subscriber
 22 weighted testimony.
 23 THE WITNESS: I remember a long
 24 colloquy between Mr. Korpus and Dr. Beyer on
 25 this very point. I read it again just this

Page 127

1 Monday, so I know it's here. Whether I can find
 2 it or not is a separate question.
 3 BY MR. BARNETT:
 4 Q. I would like you to find it.
 5 MR. KORPUS: If you need the time,
 6 go ahead.
 7 THE WITNESS: An example, page 167.
 8 "Question: When you say in
 9 paragraph 33, for example, that 'over 70 percent
 10 of all Philadelphia cluster subscribers have an
 11 expanded base service price that is within 5
 12 percent of the mode price,' is that based on
 13 subscriber-by-subscriber or on communities?
 14 "Answer: Communities."
 15 BY MR. BARNETT:
 16 Q. So that tells you that he didn't do
 17 any weighting of the data?
 18 A. It's what he says he did in his
 19 deposition.
 20 Q. I don't think that's what he meant.
 21 I don't think that's what he said.
 22 A. No, that's --
 23 Q. If you think that's the basis of
 24 it, that's fine.
 25 A. Let's be careful here. This is

Page 128

1 what he said.
 2 Q. Right.
 3 A. Right. So that's one basis. I
 4 think he actually did something somewhat
 5 different, okay? But let me be clear. There
 6 are two parts of what he did and I have a
 7 complaint about actually both parts. The first
 8 is that in calculating the mode, he calculated
 9 the mode based on communities, not on
 10 subscribers. That I think is clear if you go
 11 back and look at what he did. He says that when
 12 he calculated the percentage that are more than
 13 5 percent from the mode, he says he did
 14 communities. My belief is that he probably did
 15 subscribers, although that's not what he says
 16 here, but it would still be incorrect because
 17 the mode is incorrect. Even if he did weight by
 18 subscribers in order -- in calculating the
 19 percentage that are more than 5 percent from the
 20 mode because the mode itself is incorrectly
 21 calculated. The fact that it is based on
 22 communities, not subscribers.
 23 Q. Thank you, I understand your
 24 position now.
 25 THE VIDEO OPERATOR: Counsel,

Page 129

1 please excuse the interruption, we have less
 2 than five minutes.
 3 MR. BARNETT: Let's go ahead and
 4 change tapes now.
 5 THE VIDEO OPERATOR: This is the
 6 end of videotape two. The deposition of Stanley
 7 Besen. The time is 1:53.
 8 (A recess was taken.)
 9 THE VIDEO OPERATOR: This is the
 10 beginning of videotape 3 in the deposition of
 11 Stanley Besen. The time is 2:04. We are back
 12 on the record.
 13 BY MR. BARNETT:
 14 Q. Dr. Besen, looking at your
 15 declaration, Exhibit 5, could you please turn to
 16 page 26.
 17 A. Yes.
 18 Q. I would direct your attention to
 19 footnote 71. You say, "As with Dr. Beyer's
 20 data, the rate card prices ignore discounts.
 21 For example, I understand that Plaintiff
 22 Glaberson received a discount off of list price
 23 in purchasing video services." What is your
 24 understanding of what services Mr. Glaberson
 25 received a discount for?

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 130</p> <p>1 A. I don't recall. 2 Q. Do you believe it was for basic 3 extended services? 4 A. I don't know. It says "video 5 services," but I don't know. 6 Q. And on the next page of Exhibit 5, 7 page 27, paragraph 63 talks about your analysis 8 and Dr. Beyer's analysis regarding pricing. In 9 footnote 76 you refer to the consumer price 10 index. Do you see that? 11 A. The cable and satellite consumer 12 price index. 13 Q. Right. And that is published by 14 the Bureau of Labor Statistics; is that right? 15 A. That's correct. 16 Q. Does the cable and satellite CPI 17 include the charges for things other than the 18 extended basic tier of cable service? 19 A. Yes. 20 Q. What else does it include? 21 A. It says here it includes 22 installation and activation fees, premium 23 channels, digital cable installation fees and a 24 box if there is a charge for it. 25 Q. Dr. Beyer does not include in his</p>	<p style="text-align: right;">Page 132</p> <p>1 MR. KORPUS: Objection. Are you 2 talking about basic? Are you talking about the 3 regulated rate? 4 THE WITNESS: I think once again I 5 think you've sort of assumed your answer. 6 BY MR. BARNETT: 7 Q. So the answer is yes, they would be 8 affected by it? 9 A. As you've assumed that they would 10 be. 11 Q. Okay. Well, let me assume further 12 that if the anti-competitive conduct of Comcast 13 resulted in a price increase for extended basic 14 cable, then all of the members of the class 15 would have been affected by that too, right? 16 A. You are saying if I assume that all 17 of them have had a price increase -- 18 Q. Yes? 19 A. -- then is it the case that all of 20 them had a price increase? 21 Q. Because they all have extended 22 basic cable. 23 A. Yes. But not necessarily of course 24 the same price increase. 25 Q. Not necessarily, true?</p>
<p style="text-align: right;">Page 131</p> <p>1 analysis charges for things other than the 2 extended basic tier of service; is that right? 3 A. That's correct. 4 Q. You understand that all the members 5 of the proposed class received basic cable 6 service in the Philadelphia cluster, true? 7 A. Yes. 8 Q. And all of them received extended 9 basic cable services from Comcast as well? 10 A. That's my understanding. 11 Q. If the anti-competitive effects 12 alleged by the plaintiffs in this case did 13 produce a price increase for basic cable 14 services in the Philadelphia cluster, all the 15 members of the class would have been affected by 16 that? 17 MR. KORPUS: Objection. 18 THE WITNESS: Please repeat that. 19 BY MR. BARNETT: 20 Q. Sure. If the anti-competitive 21 conduct alleged in the complaint in this case 22 resulted in a higher price for basic cable 23 services in the Philadelphia cluster for 24 everybody, then all members of the class would 25 have been affected by that?</p>	<p style="text-align: right;">Page 133</p> <p>1 A. Yes. 2 Q. What if we changed the assumption 3 so that the extended basic cable that different 4 people, the expanded basic cable that different 5 people within the cluster received had minor 6 differences in the channels that they received 7 in their expanded basic cable package, would 8 they also have been impacted by the 9 anti-competitive conduct? 10 MR. KORPUS: Objection to the 11 hypothetical. 12 THE WITNESS: I'm not sure what 13 role the assumption about minor differences in 14 channels is playing in your hypothetical. 15 BY MR. BARNETT: 16 Q. Okay. Well, I'm asking you whether 17 you think it would have an effect on whether 18 there was a common impact. 19 A. It seems to me if you are talking 20 about an increase, you cannot talk about an 21 increase irrespective of what is happening to 22 the quality of the service being offered which 23 you can measure in part by the number of 24 channels being offered. So it seems to me that 25 all these comparisons should all involve</p>

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 134</p> <p>1 comparisons on a per channel basis or something 2 similar to take into account quality 3 differences. 4 Q. I'm asking you to assume that there 5 are minor differences in the channel offerings 6 in the expanded basic package. 7 A. You are asking me to assume that 8 contrary to fact the differences are minor? 9 Q. I'm not asking you to assume it 10 contrary to fact. I'm asking you to assume it, 11 whether it is factual or not. 12 A. If there were no differences in 13 channels, then in fact there is no reason to 14 adjust for differences in channels. 15 Q. Okay. Does it follow that if there 16 are only minor differences in the channel 17 offerings in different franchise areas within 18 the cluster that a price increase for 19 extended -- for all extended basic package 20 offerings would affect all members of the class? 21 A. I think we are back to the point 22 that you assume that all members of the class 23 are affected and I am saying that they will be 24 differentially affected because of the number of 25 differences in channels offered even if the</p>	<p style="text-align: right;">Page 136</p> <p>1 increase of the national average and the ones 2 with negative bars, that is, bars below zero, 3 have price increases that are smaller than 4 the -- increases in price per channel that are 5 smaller than the 35 percent shown by the cable 6 and satellite CPI. 7 Q. So is it true that to prepare this 8 graph, you compared the cable and satellite CPI 9 that we discussed earlier to preferred basic 10 prices per channel? 11 A. Correct. To changes in the 12 preferred prices per channel. Percentage 13 changes to be more precise. 14 Q. And just so the record is clear, 15 the CPI includes charges for things other than 16 preferred basic? 17 A. We discussed that earlier, yes. 18 Q. Why do you think that is an 19 appropriate comparison? 20 A. Well, for one thing, Dr. Beyer 21 proposes it in his report. I'll just read to 22 you from paragraph 8. "Second, the average 23 price of expanded basic tier of television 24 channels in both Comcast clusters has increased 25 more rapidly, almost twice the rate of increase</p>
<p style="text-align: right;">Page 135</p> <p>1 price change is the same. 2 (Besen Exhibit 6, chart, was marked 3 for identification.) 4 Q. Take a look at Exhibit 6. 5 A. Yes. 6 Q. Which is a color copy of your 7 Exhibit 18 from your declaration Exhibit 5. 8 A. Correct. 9 Q. This is entitled "Changes In Price 10 Per Channel in the Philadelphia Cluster Relative 11 to United States as a Whole (1999 to 2006) Using 12 Beyer Data." If you would please describe what 13 you did in order to prepare this graph or have 14 your helpers prepare it. 15 A. For each area, these are all data 16 areas that we have figures from data. I 17 calculated the change, percentage change, in 18 price per channel over the period 1999 to 2006. 19 I compared that to the percentage change in 20 price per channel as given by the cable and 21 satellite CPI that we discussed a moment ago, 22 approximately 35 percent over this period, and 23 then subtracted so bars that are above zero are 24 areas in which the rate of increase of prices 25 per channel were faster than the rate of</p>	<p style="text-align: right;">Page 137</p> <p>1 since 1999 than has the average price for 2 equivalent cable TV programming across all cable 3 TV systems in the United States. The 4 differences between Comcast rates of price 5 increase in the Philadelphia and Chicago cluster 6 systems and the average rate of price increase 7 for other cable systems provide the second type 8 of benchmark measures for the Comcast overcharge 9 in each cluster." So I am basically doing 10 something that he proposed to do but did not do. 11 Q. Okay. What I understand Dr. Beyer 12 to be doing is prepare the pricing for the 13 package of preferred basic channels, the package 14 with the CPI. 15 A. Say again. 16 Q. Dr. Beyer discussed comparing the 17 cable and satellite CPI with the pricing for the 18 package of preferred basic. 19 A. And that's what we are measuring 20 here. 21 Q. You are doing it on a price per 22 channel basis? 23 A. Yes, I'm sorry. Yes, he proposes 24 it on a price basis, but for the reasons that we 25 have gone through numerous times here, it is</p>

35 (Pages 134 to 137)

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 138</p> <p>1 inappropriate to just compare -- to compare 2 prices without regard to what is being sold. 3 You will agree with me that if a 4 firm is selling milk by the pint and then starts 5 selling it by the quart and doubles the price, 6 there is no real price increase. And you simply 7 cannot look at price increases without regard to 8 what it is that is being sold. 9 Q. So it is important to see how the 10 product is being actually offered in the market? 11 A. It is important to make sure that 12 you are doing a comparison that is apples to 13 apples. I have already pointed out that in 14 calculating the CPI, the Bureau of Labor 15 Statistics takes into account changes in the 16 number of channels. If you want -- so that if 17 in fact prices had doubled but the number of 18 channels had doubled, they would show no 19 increase in the index. So that is the best they 20 can do on a per channel basis. If you want to 21 compare that to what is going on in the 22 Philadelphia cluster or the various components 23 of the Philadelphia cluster, you've got to do 24 that on a per channel basis as well. There is 25 no sense of comparing the absolute rate of price</p>	<p style="text-align: right;">Page 140</p> <p>1 into account what is being offered at those 2 prices. 3 Q. Are you aware of any cable service 4 provider currently or in the last ten years who 5 has offered cable services on a per channel 6 basis? 7 A. That is not relevant to this 8 question. 9 Q. I didn't ask you whether it is 10 relevant. 11 A. The answer is no, but it is 12 irrelevant because they are offering packages 13 and if you want -- if my cable operator doubles 14 the number of channels offered and its price 15 goes up -- put it differently. If he doubles my 16 prices, it makes a big difference to me whether 17 that is accompanied by a large increase in the 18 number of channels or none at all. And any 19 comparison or any analysis that doesn't take 20 into account the changes of what is being 21 offered is going to be misleading. 22 Q. So your answer is there is no cable 23 service provider to your knowledge in the past 24 ten years or currently that offers cable 25 channels on a channel-by-channel basis?</p>
<p style="text-align: right;">Page 139</p> <p>1 increase without regard to the number of 2 channels in Philadelphia when the price index 3 against which you're comparing them is based 4 upon -- takes into account changes in the number 5 of channels. 6 Q. I want to come back to the CPI in a 7 minute, but you do agree that the way the 8 service provider is actually offering the 9 service in the market is an important 10 consideration in determining whether something 11 had an anti-competitive impact on pricing? 12 MR. KORPUS: Objection, vague. 13 THE WITNESS: Is that somehow 14 related to the question we were just talking 15 about? I don't see the connection. 16 BY MR. BARNETT: 17 Q. Can you answer the question? 18 A. It seems too vague for me to 19 answer. 20 Q. When you're looking at pricing to 21 determine whether or not it has gone up as a 22 result of anti-competitive conduct, do you 23 believe it is important to look at pricing as it 24 is actually done in the market? 25 A. I believe it is important to take</p>	<p style="text-align: right;">Page 141</p> <p>1 A. Certainly for premium service, they 2 are on a channel-by-channel basis. 3 Q. Excluding premium services? 4 A. Yes, they are not offering a la 5 carte service. 6 Q. And a la carte service is something 7 that is currently being discussed with the 8 Federal Communications Commission? 9 A. Correct. 10 Q. As a possibility? 11 A. They are discussing whether some a 12 la carte rules should be adopted. 13 Q. But as things stand today and as 14 they stood for the last ten years, cable 15 operators offer extended or expanded basic cable 16 service on a take it or leave it basis, right? 17 A. Yes, all or none. 18 Q. All of the channels or none of the 19 channels? 20 A. Except for digital, right, but the 21 basic package is a certain number of channels 22 for a certain fee. By the way, that does not 23 mean that you should ignore increases in what is 24 being offered when you look at a price increase. 25 Q. Did you do any analysis to</p>

36 (Pages 138 to 141)

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 142</p> <p>1 determine the relative value of the channels 2 that were offered in different expanded basic 3 packages across the Philadelphia cluster? 4 A. No. But that is better than not 5 taking it into account at all. 6 MR. BARNETT: Can we take a break. 7 MR. KORPUS: Sure. 8 THE VIDEO OPERATOR: We are going 9 off the record at 2:20. 10 (A recess was taken.) 11 THE VIDEO OPERATOR: We are back on 12 the record at 2:26. 13 BY MR. BARNETT: 14 Q. Dr. Besen, is it true that all of 15 the calculations that you made regarding pricing 16 in connection with your declaration were made on 17 a per channel basis? 18 MR. KORPUS: Objection. 19 THE WITNESS: No. 20 BY MR. BARNETT: 21 Q. What other calculations did you 22 make? 23 A. Well, if you look at for example 24 Exhibit 14, Exhibit 14 reports price, channels 25 and price per channel.</p>	<p style="text-align: right;">Page 144</p> <p>1 Q. The difference between you and Dr. 2 Beyer, at least with respect to the calculations 3 you show in Exhibits 14 through 17, is that you 4 used a different subscriber weighting method 5 from the one he used? 6 A. 14 through 17? 7 Q. Yes, sir. 8 A. Well, there are -- there are two 9 differences. Well, three differences. One, he 10 calculates the mode differently from the way I 11 would. I believe the mode should be calculated 12 based on subscribers. In fact I'm sure that's 13 right. I provide information about channels, he 14 does not and I provide information on a price 15 per channel basis which he does not. 16 Q. And then with respect to exhibits 17 19, 20, 21 and 22, what are differences from the 18 way Dr. Beyer did his calculations and the way 19 you did your calculations? 20 A. Dr. Beyer never compares the named 21 plaintiffs to the class. 22 Q. Any other differences? 23 A. He doesn't do any calculations 24 involving the named plaintiffs. 25 Q. I see. But the methodology, is</p>
<p style="text-align: right;">Page 143</p> <p>1 Q. Is there anywhere else in your 2 report that you did calculations other than on a 3 per channel basis? 4 A. Let's make sure. Exhibits 15, 16, 5 17 all have a pie chart for the preferred basic 6 price. It is the left most pie chart in all of 7 those figures. Exhibit 19 reports price for -- 8 the comparisons on Exhibit 19, price, channels 9 and price per channel. Exhibits 20 through 22 10 also have the left most pie chart is on a 11 price -- on a price basis, not a price per 12 channel basis. 13 Q. I see. So for Exhibits 14, 15, 16 14 and 17, you show pricing based on a package 15 basis? Preferred basic package basis? 16 A. Figures 14 through -- 17 Q. 17. 18 A. Those report information about the 19 distribution of the preferred basic price alone, 20 the preferred basic channels alone and the 21 preferred basic price per channel. They are all 22 reported there. That is true of 14 through 17 23 and then it is repeated again. The same three 24 variables are measured on -- in Exhibits 19 25 through 22.</p>	<p style="text-align: right;">Page 145</p> <p>1 your methodology different from the one you 2 think he would have used? 3 MR. KORPUS: Objection. 4 THE WITNESS: He hasn't done this 5 calculation. 6 BY MR. BARNETT: 7 Q. Okay. But knowing what you know 8 about the methodology that he did use, do you 9 believe there are any differences from the way 10 you've made the calculations in these exhibits 11 and the way he would have? 12 A. He would have? 13 MR. KORPUS: Objection, that's 14 completely speculative. How is he supposed to 15 know what your witness would have done? 16 BY MR. BARNETT: 17 Q. You may answer. 18 A. I can't guess what he would have 19 done. 20 MR. BARNETT: Those are all the 21 questions I have. 22 THE WITNESS: Thank you. 23 MR. BARNETT: Thank you. 24 MR. KORPUS: No questions for 25 defendants. Just designate the transcript</p>

37 (Pages 142 to 145)

Stanley M. Besen - 11/16/2006

<p style="text-align: right;">Page 146</p> <p>1 confidential pursuant to parties' agreement. 2 THE VIDEO OPERATOR: This is the 3 end of videotape three. The time is 2:30. We 4 are off the record. 5 (Time noted: 2:30 p.m.) 6 7 8 9 Subscribed and sworn to before me this ____ day of _____, 2006. 10 11 _____ 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 148</p> <p style="text-align: center;">EXHIBITS</p> <p>1 DESCRIPTION PAGE LINE 2 3 REQUESTS FOR DOCUMENTS AND/OR INFORMATION PAGE LINE 4 5 DIRECTIONS NOT TO ANSWER PAGE LINE 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p style="text-align: right;">Page 147</p> <p>1 CERTIFICATE STATE OF NEW YORK) 2 : ss. COUNTY OF NEW YORK) 3 4 I, HAROLD BROWN, a Certified Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify: 5 That STANLEY M. BESEN, the witness whose deposition is hereinbefore set forth, was 6 duly sworn by me and that such deposition is a true record of the testimony given by the 7 witness. I further certify that I am not 8 related to any of the parties to this action by blood or marriage, and that I am in no way 9 interested in the outcome of this matter. IN WITNESS WHEREOF, I have hereunto 10 set my hand this ____ day of _____, 2006. 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 148</p>