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In the Matter Of ADJUSTMENT OF THE RATES FOR NONCOMMERCIAL EDUCATIONAL BROADCASTING COMPULSORY LICENSE	Docket No. 96-6 CARP NCBRA

ASCAP'S REPLY TO THE PUBLIC BROADCASTERS' OBJECTION TO ASCAP'S MOTION TO COMPEL PRODUCTION

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Dated: November 26, 1997

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The American Society of Composers, Authors and Publishers ("ASCAP") makes the following limited reply to the Response (the "Response") of the Public Broadcasting Service, National Public Radio and the stations on whose behalf they seek rates in this proceeding ("Public Broadcasters") to ASCAP's Motion to Compel Production (the "Motion").

As a preliminary matter, we note that much of the Motion has been mooted by Public Broadcasters' assertions that they have no responsive documents underlying specific testimony. (See, e.g., Response at II(A)). In that regard, we would only note that, had in the first instance Public Broadcasters admitted that there were no underlying documents responsive to ASCAP's Requests for Underlying Documents, the Office would not have been burdened by ASCAP's rather voluminous Motion.

Notwithstanding Public Broadcasters' accession with respect to the bulk of the Motion, there are three substantive issues left open:

(1) Production of Portions of Documents. In their Response, Public Broadcasters take the position that they need only produce those "portions" of documents which their witnesses actually reviewed when preparing his or her testimony. Their argument is crystallized at page 7 of the Response, wherein Public Broadcasters state "ASCAP is not entitled to production of irrelevant portions of documents which do not 'underlie' the testimony of any witness, the production of which would needlessly entail thousands of additional pages of documents."

Section 251.45 of the CARP Rules clearly provides that parties may request "non-privileged underlying documents related to the written exhibits and testimony." See 37 C.F.R. § 251.45(c)(1) (emphasis added). ASCAP knows of no other provision of the CARP rules, or of any order of the Office or a CARP interpreting those rules, which permits a party to produce only a "portion" of documents, much less those "portions" which the party deems relevant. Allowing a party to redact portions of documents would make disclosure in CARP proceedings incredibly burdensome on the Office which would be called in to mediate over exactly what was reviewed by, or shown to, the witness on a page-by-page or even line-by-line basis. Moreover, disclosure of entire documents in necessary, as redacted portions of the documents may shed light on assumptions or qualifications underlying the portions of the documents actually relied upon by the witnesses.

As for the burdensomeness objection, ASCAP would be happy to meet with Public Broadcasters to inspect those documents which were produced in part or to pay for the reasonable copying charges thereof. (Parenthetically, we note that we may be the only litigant ever told by Weil, Gotshal & Manges that the production of a dozen or so books, aggregating one to two thousand pages, is a "significant burden.")

(2) Documents Underlying the Data Produced. Public Broadcasters have continued their refusal to produce documents underlying, among other things, summaries prepared by the Corporation for Public Broadcasting ("CPB") of the revenues and expenditures of the broadcasting stations that are being licensed in this proceeding. That data, on a station by station basis, is critical to the determination of an appropriate revenue-based fee to be paid to ASCAP by Public Broadcasters.

In support of their objection, Public Broadcasters cite to the alleged facts that (i) CPB collects individual station data in the regular course of its business, (ii) "typically" there is some regulatory oversight of the data compilation and (iii) there is no "credible basis to assert that such aggregated data were inaccurately tabulated." (Response at 3.) We merely note for the Office that these rationales are exactly the same as those put forth by ASCAP as part of its objection to Public Broadcasters' motion to compel ASCAP's production of data underlying Dr. Peter Boyle's music use data -- i.e., that ASCAP summarizes the raw data in the ordinary course of business, that the data compilations are overseen by a Federal District Court and the U.S. Department of Justice, among others, and that there is no proffered basis to believe that the summaries were not true.

To the extent that the Office determines that the CPB summary financials produced are business records of the individual stations, the financials may indeed be sufficient for the purposes of CARP Rule 251.45(c)(1). However, as a matter of fundamental fairness, if ASCAP is ordered to produce data underlying Dr. Boyle's business record summaries, the office should order Public Broadcasters to produce documents underlying CPB's summaries as well. Conversely, if Public Broadcasters do not produce, ASCAP should not produce either. After all, what is sauce for the goose is sauce for the gander.

(3) Budget Data Underlying Dr. Jaffe's Testimony. As a final matter, as part of their "summary data" objection, Public Broadcasters have refused to produce documents underlying statements made by Dr. Adam Jaffe regarding "station budgets." At page 9 of the Response, Public Broadcasters admit that Dr. Jaffe "did not rely on anything other than the aggregated Expense Data [i.e., CPB year-end financials] developed and reported by CPB in the ordinary course of its business." While ASCAP accepts such statement on its face for the purposes of the Motion, the statements in Dr. Jaffe's written direct testimony regarding budgets must be stricken in accordance with ASCAP's Motion to Strike filed with the Office on November 7, 1997. Clearly, without having reviewed individual station finances or "budgets," or for that matter CPB budgets, Dr. Jaffe can hardly be competent to testify about what individual public broadcasting stations "budget" for particular line-items or how they allocate funds for the payment of licensing fees.

As for the gratuitous comments by the Public Broadcasters in footnotes 1 and 4 of the Response, ASCAP trusts that the Office will disregard these unfounded, inflammatory accusations.

Conclusion

For the foregoing reasons, ASCAP respectfully requests that its Motion to Compel Production from the Public Broadcasters be granted.

Dated: November 26, 1997

Respectfully submitted,

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	)	

CERTIFICATE OF SERVICE

I am an associate at White & Case. On November 26, 1997, I caused to be served by hand same day delivery true copies of ASCAP' Reply to the Public Broadcasters' Objection to ASCAP'S Motion to Compel Production on the following persons:

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Dated: New York, New York
November 26, 1997

J. Christopher Shore