Electronically Filed
Docket: 14-CRB-0010-CD (2010-2013)
Filing Date: 02/12/2018 08:48:08 PM EST

1 have a change in our schedule.
2 JUDGE VON KANN: All right. Well, let me
3 get these others first, and then we will find out
4 about that. Okay. I have the schedule here from Mr.
5 Stewart for next week, which is helpful.
6 If other parties have their schedules at
7 this point, fine, and if not, if they could get them
8 to us say by the time that we break at the end of this
9 week, to the extent that you know it. Is there an
10 issue on your scheduling?
11 MR. COOPER: I don't know if it is an
12 issue. It is sort of a change. On Wednesday, we are
13 going to have -- instead of having Commissioner Selig
14 in the morning, we are going to put him off until
15 later in the month to be determined.
16 JUDGE VON KANN: Okay.
17 MR. COOPER: And we will start Wednesday
18 morning with Michael Eagan in the morning, and then we
19 will have June Travis in the afternoon; or immediately
20 following Eagan.
21 JUDGE VON KANN: Eagan and Travis on
22 Wednesday?

1 MR. COOPER: Right.
2 JUDGE VON KANN: Okay. And that will
3 leave Selig and one other cable operator?
4 MR. COOPER: Selig and Judy Allan.
5 JUDGE VON KANN: And do we have any more
6 of a feel yet for whether the May 29 and 30th may be
7 doable? Do we know about the Canadian witness, and
8 whether that is a doable date for Dr. Engle? But it
9 is beginning to look reasonably promising for the 29th
10 and 30th. You think that your people will be
11 available those days?
12 MR. COOPER: The 29th, our people are
13 available.
14 JUDGE VON KANN: So if this worked, you
15 would take Selig and Judy Allan on the 29th?
16 MR. COOPER: Right.
17 JUDGE VON KANN: So I guess the question
18 would be whether Dr. Engle could come on the 30th.
19 Okay. Any other preliminaries before we get started?
20 Oh, yes, we were asked by the Copyright
21 staff if at the end of the day people could clean up
22 a little bit your area, and pick up empty water

1 bottles, and cups of coffee, and whatever, and throw
2 them away? I guess a complaint has been registered by
3 the cleaning staff, who were outraged at the notion of
4 cleaning or something like that. Okay. Anything
5 else? Okay. Mr. Cooper.
6 MR. COOPER: Dr. Crandall will be our next
7 witness.
8 Whereupon,
9 DR. ROBERT CRANDALL
10 was called as a witness, and having been first duly
11 sworn, was examined and testified as follows:
12 DIRECT EXAMINATION
13 BY MR. COOPER:
14 Q Good morning, Dr. Crandall. Could you
15 just give your name and your current employment?
16 A My name is Robert W. Crandall, and I am a
17 Senior Fellow at the Brookings Institution in
18 Washington.
19 Q And what are your responsibilities of the
20 Brookings Institution? What do you do there?
21 A Well, I do research on economic issues,
22 particularly as they pertain to specific industries

1 and economic and social regulation.
2 Q Do you do any research that is relevant to
3 broadcasting, or cable, or telecommunications?
4 A I certainly have in the past. I am not
5 currently at this very moment.
6 Q Prior to Brookings what did you do?
7 A Well, I taught at the Massachusetts
8 Institute of Technology for 8 years, and I was in the
9 government for 2 years, on the Council on Wage and
10 Price Stability; and then I joined the Brookings
11 Institution in 1978.
12 Q Have you testified before in connection
13 with these cable or satellite arbitration royalty
14 proceedings?
15 A Yes, I have.
16 Q Can you just briefly summarize when you
17 have testified before?
18 A I will attempt to at least get most of
19 them. I testified in the '89 proceeding, and I
20 testified in the 1992 proceeding, both for JSC; and I
21 testified in the -- I think it is the '94 proceeding
22 in the satellite case that took place around 1996 for

1 JSC.
2 And on one other occasion I think I
3 testified -- and Mr. Garrett can refresh my memory --
4 for the National Cable Television Association on an
5 inflation adjustment issue involving copyright.
6 Q And have you submitted written testimony
7 in connection with this proceeding?
8 A Yes, I have.
9 Q Okay. Voir Dire? Okay. Mr. Crandall,
10 could you just briefly summarize your testimony?
11 A Well, my testimony addresses the
12 methodology that the panel should use, the arbitration
13 panel should use, in allocating the royalty payments
14 under the compulsory license granted for imported
15 distant signals.
16 And suggest that the basis for doing so
17 ought to be based upon how a market would handle such
18 an allocation in the absence of a compulsory license.
19 Q And I think that discussion is on -- it
20 starts on page 6. Can you just explain why in your
21 view it makes sense for the panel to use a market
22 approach in valuing the claims here?

1 A As I understand the reason for the
2 compulsory license was to save on transactions cost,
3 which would be very, very high, if there were
4 individual bargaining between copyright owners and
5 cable systems, and a compulsory license was inserted
6 in lieu of such bargaining.
7 And given that fact, it seems to me the
8 appropriate way to allocate the royalty payments made
9 under the compulsory license is in a way which
10 simulates that sort of transaction that is a
11 bargaining between copyright owners and cable system
12 owners.
13 Q Have either the copyright royalty tribunal
14 or the CARP in the past considered this question of
15 whether to use market valuation to your knowledge?
16 A Yes. In reading past decisions of the
17 CARP, it is clear that they have moved ever closer to
18 this position, focusing more and more intently on how
19 a market would allocate these royalties, and less upon
20 other issues.
21 Q If you turn to page 8 in your testimony,
22 Roman Two there is the beginning I believe of your

1 discussion of the -- I'm sorry, I am one step behind.
2 On page 10, Roman 3, is your discussion of the board
3 survey. Can you just summarize your conclusions with
4 respect to the board survey?
5 A Well, it would be nice if we actually had
6 market transactions between copyright owners and cable
7 systems involving the signals in question, but first
8 we do not. And therefore we have to look to some
9 other way of simulating what these transactions would
10 look like.
11 And the best way to do it is simply to ask
12 the cable system owners, who would be the purchasers
13 of this programming from the copyright holders, how
14 they would allocate their funds in purchasing this
15 programming on the distant signals, and that is what
16 the board survey does.
17 Q And then -- well, are you familiar with
18 the CARP or the CRT's reliance in the past on the
19 board survey?
20 A Yes, I am. I have read or participated in
21 these hearings before and read their opinions, yes.
22 Q And particularly with respect to the 1990

1 to 1992 CARP, did they have any criticisms of the --
2 or comments on the board survey?
3 A Well, first, it is clear that they relied
4 upon it very heavily. However, they did have a couple
5 of misgivings, one of which dealt with the fact that
6 it was not an actual reflection of purchases, but
7 rather of the attitudes of the cable purchasers.
8 And secondly that it ignored the supply
9 side of the market transactions, since obviously the
10 survey was canvassing the buyers.
11 Q And what is your assessment from your
12 perspective of those criticisms and the panel's
13 downward departure with respect to sports from the
14 Board's number?
15 A Well, first of all, there is no doubt that
16 a survey is a somewhat imprecise measure of how a
17 market would actually work out. It would be nice to
18 have actual market transactions, though even those are
19 subject to a large number of reporting errors.
20 But if you were to try to obtain how the
21 market would function, and try to obtain information
22 on how the market would function, surely the best

1 source of information for those people making the
2 decisions and making the purchases.
3 And the fact that this is not a perfect
4 measure does not suggest necessarily that one ought to
5 subtract anything from the survey's total for any
6 particular class of claimants without further
7 evidence.
8 The fact that the survey captured the
9 cable owners' attitudes towards how they would spend
10 their money does not suggest that you ought to
11 discount the JSC claim and share that comes from the
12 board survey, thereby adding to one or more of the
13 other claimant's share, without other ancillary
14 evidence.
15 Secondly, on the supply side, there was no
16 evidence that I am aware of that the CARP cited that
17 would justify a departure based upon the supply side
18 for any particular claimant group. They simply said
19 that this was a reason for not relying in toto on the
20 board's survey.
21 But there was nothing cited that would
22 suggest that supply side considerations ought to

1 detract from the JSC claimants as opposed to the NAB
2 claimants, as opposed to, say the Devotional
3 claimants, or the program supplier claimants.
4 Q With respect to the devotional claimants
5 which you just mentioned was there any discussion in
6 the CARP report about whether to depart because of
7 their marketplace conduct?
8 A Well, my recollection is that there was
9 language in discussing the Devotional case that
10 pointed out that the devotional claimants often paid
11 for carriage. They not only didn't get a positive
12 price, they actually got a negative price off of it
13 for getting carriage of their programs on these
14 signals.
15 Q Is that an example of the kind of seller's
16 conduct that might be relevant in assessing a board's
17 number?
18 A It certainly might be. I mean, it would
19 suggest that the NAB market in which they are eager to
20 have their programs carried, even if they get a zero
21 price, or even have to pay for it, that they would not
22 obtain much in the way of copyright royalties if as a

1 matter of fact, they are willing to settle for
2 negative royalties.
3 MR. COOPER: Nothing further.
4 JUDGE VON KANN: Okay. Who are we leading
5 off with. or has that been resolved? Okay.
6 CROSS-EXAMINATION
7 BY MR. OLANIRAN:
8 Q Good morning. Dr. Crandall. I am Greg
9 Olaniran, counsel for Program Supplies. I just have
10 one or two questions. On page 7 of your testimony --
11 are you there?
12 A Yes, I am there.
13 Q You make a distinction between the
14 approach taken by the '89 CRT and the '90-'92 CRT with
15 respect to the application of the market valuation.
16 Are you with me?
17 A Yes, in paragraph 14, is what you are
18 referring to?
19 Q Yes, that's correct.
20 A Yes.
21 Q And there you go on to paragraph 15 to
22 conclude that the '89 CRT approach is more relevant in

1 this proceeding. Do you want to explain that just a
2 little bit?
3 A Well, the question is what would this
4 market look like in the absence of compulsory
5 licensing of the programming, and would the
6 negotiations take place between the cable system
7 owners and the copyright holders directly, or would it
8 take place with those people assembling the copyright
9 product on the distant signals.
10 It seems to me that it is most likely to
11 take place between the cable system owners and the
12 copyright owners directly, and there was some
13 difference in the language between those two opinions,
14 though perhaps less than my language here might
15 suggest, because in the '90-'92 decision the CARP
16 panel went on to explain that there would be
17 negotiations between the cable systems and the
18 copyright owners.
19 But we don't know how that market would
20 organize itself. There surely would not be
21 negotiation between each cable system and each
22 individual copyright owner.

There would probably be intermediaries of some sort, people representing some group of copyright owners.

Q All right. But your view is that it would be more relevant in what the panel is trying to do here to have direct negotiations between the cable system operators and the copyright owners?

A Well, it would obviate some of the complexities. I mean, the question is what would the copyright owners supply, and under what terms, and how much of it would the cable system owners take, and at what prices.

So you are really focusing on the two people who have something at stake here. They are often intermediaries in between because of the need to minimize transactions cost.

MR. OLANIRAN: That is all the questions that I have. Thank you.

JUDGE VON KANN: Okay. Mr. Stewart.

BY MR. STEWART:

Q Good morning, Dr. Crandall. I am John Stewart, and I am representing the Commercial

Television claimants in this proceeding.

A Good morning.

Q We have talked before.

A Un-huh.

Q If you would turn to page 9 of your statement, please. In paragraph 19 there, you identify to attributes of sports programming that you suggest makes sports programming uniquely valuable in this cable distant signal marketplace; is that correct?

A Yes.

Q And the first one is that because of the fact that sports games telecasts are live and aren't repeated often that there is an ephemeral value in effect to those programs?

A I don't know about ephemeral. The fact is that there is a substantial value to watching it live, because watching it the second time after you know the result is not quite the same experience.

Q And what is the point that you are making in the second part of the paragraph, "distant signals also provide a new source of live sports programming."

Do you see that?

A Well, to the extent that the cable system does not have access to cable networks now, local television signals that have these specific teams or events that are on distant signals, and it is indeed a new increment to the menu of sports choices for the local viewers.

Q And did you say to the extent that cable subscribers do not have access to cable networks?

A That they do not have access to some of these events that are on the distant signals. For instance, ESPN may not carry the Cubs games that WGN does carry. So this could be new programming to people who don't have other ways of getting the Cubs' program.

Q That is that the individual program or individual game might be available only via that distant signal?

A Yes.

Q And it is the case, however, that in this time frame of 1998 to 1999 that there were exhibitions of some games on the Fox Network. Are you familiar

with that?

A Yes.

Q And with respect to those games, there could be other sources available? That is, specifically the local Fox affiliates who would be carrying the same games as the distant Fox affiliates?

A There could be, but often, and especially for football, the importation of the distant signal would give you a different set of games than you got from your local signal, something that people in Washington recognize very much as being available from the Baltimore signals, for instance.

Q But that is not true in the majority of the cases is it?

A I don't know what you mean by majority. For a majority of viewers, I don't know whether it is true. I have not studied how often that takes place, but often if they are shifted into a market of someone else's sports franchise, then it would be true.

Q We had Mr. Tagliabue testifying, and he testified that in some cases the distant Fox affiliate is bringing in the same game as is on the local Fox

affiliate.
A I am sure that's true. What I do not know is as measured by some metric whether that constitutes the majority or the minority of cases.
Q I think that Mr. Tagliabue's testimony addressed that issue. What about regional sports networks on cable? First of all, is that a phenomenon that increased in any significant way between 1992 and 1998 that you are aware of?
A I suspect that it did, but I have not looked at that carefully.
Q And are you familiar with regional sports networks?
A Oh, sure.
Q And they provide substantial numbers of games of regionally important teams; is that right?
A That's correct.
Q And those are not subject to the distant signal and compulsory license, and are not part of this distant signal proceeding that we are in today, correct?
A Not typically.

Q And to the extent that they, for example, would be the principal source for a majority of the games of the local team, or the regional team, they would be a superior source to distant signals of those regionally important games, correct?
A For those people who are fans of the local team, but there are any number of people who might want to watch other games, and it is spread out around the Washington area, the sports bars that specialize in Cleveland Brown's games, and New York Giants' games, or whatever, and those people may pay or choose to subscribe to cable just because those are available on a distant signal.
Q I would like to discuss with you a pragmatic or sort of pragmatic concrete perspective, and the options that are available in the cable marketplace. And I am handing you a document which has been incorporated by reference by the Sports claimants into the record. This was the testimony of Paul Bortz in the prior proceeding.
JUDGE VON KANN: This was in Volume 2 of the Joint Sports claim and case where there were

various prior testimonies collected, I guess?
MR. STEWART: Yes, indeed.
JUDGE VON KANN: What tab is this under? Do we have that tab number? Volume 2, Tab 2. Okay.
MR. COOPER: This is selected papers?
MR. STEWART: It is only part of it, counsel. And I apologize for not having additional copies, but I will provide additional copies for the record.
JUDGE VON KANN: Here is one more. You are not planning on marking this as an exhibit are you?
MR. STEWART: Well, I wanted to ask the panelists' view about whether I should do so.
JUDGE VON KANN: I don't think so. It is in the record as some part of the JSC direct case, and I don't think it is necessary.
MR. GARRETT: We are not going to identify this as well.
JUDGE VON KANN: Okay. I don't think it is necessary.
MR. STEWART: I frankly think or guess

that I would prefer to have it marked in some way.
JUDGE VON KANN: All right.
MR. STEWART: And I am sorry not to have brought additional copies.
JUDGE VON KANN: Then give me that one back.
I guess we are being overly safe here, but I guess it can't hurt.
MR. COOPER: Should we then be marking, for example, all of the incorporated testimony that we have? Should we be marking it as demonstratives?
JUDGE VON KANN: I think that the distinction that is emerging is if there is specific examination of a witness about it, so that the transcript is going to show him flipping around at something, then perhaps we should have that something.
But, no, not all this other stuff that you are not examining people about.
MR. COOPER: Well, I am just wondering if the same, or actually a more complete version of this same thing is going to be one of the tabs, and he will testify about part of it, and we may refer to it in

our findings or proposed findings of fact.

JUDGE VON KANN: That's fine. It is in the record.

JUDGE GULIN: Anything that has been designated is in evidence subject to a conversation that we are going to be having about that.

MR. COOPER: Right. I just didn't want there to be any confusion about an exhibit marked, or somebody might cite to this paragraph as in the demo exhibit, or they might cite to it in the tab.

JUDGE GULIN: They would be well to cite to it in the tab.

JUDGE VON KANN: Yes. Fine. I think the distinction that I guess we are going to follow is that if it is plopped in front of a witness and he is interrogated about it, then to make the record crystal clear, it would be good to have it, but only as to those items that you do that with. So this becomes NAB Demo Number 1.

(Whereupon, NAB Demo No. 1 was marked for identification.)

BY MR. STEWART:

Q Correct. Thank you. What I have done here is to take the incorporated testimony of Paul Bortz in the 1990 to 1992 direct case, and I have given you the first several sections. I haven't copied the portions that deal with the actual Board survey in that case, but here is the reason that I wanted to put it before you all so that we could look at a concrete example.

If you would turn to page 10, which is the second to the last -- I'm sorry, which is towards the end what I have given you. You see there the first page in Table 1 of a channel guide from Mile High Cable Television of Denver. Do you see that?

A I do.

Q And then it continues on to the next page as well.

A Yes.

Q And the reason that I have handed this out is that I would like to look at the question of what cable operators, what kinds of decisions cable operators make in the context of a specific example, just so we are more clearly in line to what we are

talking about here.

Now, have you had a chance to review this Table 1?

A Well, roughly, yes. Go ahead.

Q On the first page here there is a listing of basic service, with a number of channel or station names and category indicated. Do you see that?

A Yes.

Q And then over on the next page, there is a listing of channels that are on an expanded basic at the top of the page, and then a la carte services, premium channels, and pay-per-view?

A Correct.

Q Now, based on you having just glanced at this, do you think that this is a typical kind of offering made by cable operators? I am looking in the 1998 time frame, and this may have been an earlier period.

A Yes, you told me this is from 1990-1992, and of course it is a very important event, which is the '92 cable carriage which re-regulated cable. So that might have had some impact.

And by typical, I don't know what you mean, but it is certainly an array of programming which at the time for a fairly large capacity system at the time would have been to my eyes not unusual. Let's put it that way.

Q Okay. And on the first of these pages the basic service, the categories include local broadcast stations, as well as a couple of distant signals. Do you see that?

A Yes, I do.

Q Now, how many of these channels on both pages would the cable operator have voluntarily selected in 1998? Let's assume that we are past the must carry statute?

A You mean the must-carry is in effect?

Q Yes.

A Then I need also to know whether the local stations invoke the must-carry or retransmission consent, and I guess it is a little complicated that way.

Q Let's just assume that all the local broadcast stations are carried pursuant to must carry

1 regulations, and by the way, must carry regulations
2 were adopted in the 1992 statute, and implemented by
3 FCC rules.
4 And they essentially require that cable
5 operators carry all of the television stations that
6 are within the same television market as the cable
7 system, and that is a simple version of that must
8 carry requirement; is that correct?
9 A That is one alternative. The other is
10 retransmission consent. The local station could deny
11 access, but doesn't get the payment it wants.
12 Q So let's come back and discuss that. I am
13 happy to discuss that with you at some length.
14 A Your question is how many of these reflect
15 the decision of the cable system on carriage; is that
16 it?
17 Q Right.
18 A Well, without doing careful research here,
19 the two distant signals would be discretionary
20 choices.
21 Q Okay.
22 A And then Galavision and the Learning

1 Channel I suppose on the first page, most of these
2 local access channels are pursuant to a franchise
3 agreement with the municipality, and so they are not
4 discretionary.
5 And if all the local broadcast signals are
6 invoked must carry, those are not discretionary either
7 assuming that the channel capacity is there.
8 And then on the second page, page 11 of
9 this testimony, it looks to me without -- I mean,
10 without any further thought, that all of them are
11 discretionary for the cable system.
12 Q And that includes the a la carte service
13 as the premium channels and the pay per view?
14 A Yes, unless there is something specific in
15 the franchise agreement which requires them to carry
16 those things, which I would doubt.
17 Q So this cable operator with this number of
18 channels available to fill, has certain channels that
19 are filled or that are required to be filled either by
20 local broadcast stations or local access channels that
21 are required to be provided by the local franchises,
22 but with respect to all the other channels, including

1 those on which they carry distant signals, a cable
2 operator may choose what to fill those channels with,
3 correct?
4 A Yes.
5 Q And what is the criterion in your view
6 that the cable operator follows in making those
7 choices?
8 A Well, as a profit maximizer, he has to
9 take into account what the response of his market
10 would be to alternative patterns of signal carriage,
11 and particularly because he earns most of his revenue,
12 or I suspect a very large share of his revenue, from
13 direct payments by his subscribers, and he has to take
14 into account which of these signals would add most to
15 subscriber payments.
16 That is, to subscriptions to his network,
17 or depending upon the regulatory framework in place at
18 the time, his ability to raise the price of that
19 package for adding different signals.
20 Q Now, with respect to the premium channels,
21 what you see is that this particular cable operator
22 offered $11.95 per service per month. Do you see

1 that?
2 A Yes.
3 Q But that means that if you took HBO and
4 Showtime, you would be paying something like $24, or
5 a little less than $24 per cable subscriber?
6 A That may be true. There usually are
7 packages of combinations which may or may not be shown
8 on this document.
9 Q Now, Mr. Bortz in his testimony -- let's
10 see. Over on page 14, in subparagraph 2 -- talked
11 about programming economics, and suggested that the
12 income from pay-per-view or from premium services is
13 divided generally about equally between the local
14 cable system and HBO, and his example. Do you see
15 that?
16 A Yes, that was his view of the time, '90-
17 '92, yes.
18 Q Was it different by '98?
19 A I have no idea how those deals are being
20 struck now.
21 Q Okay. All right. Now, when a cable
22 operator -- first of all, a cable operator had many

more distant signals and cable networks to choose from than the ones that are depicted as being carried here, correct?

A My recollection is that that is correct. The number of satellite delivered programming services grew very rapidly after the deregulatory decisions of the FCC in 1979. The precise number that were available as of these dates I don't know, but I would surmise that it would be substantially in excess of what this operator has chosen.

Q I think that Mr. Trautman testified that there were more cable networks certainly available than there were channels to be filled in most cases. Does that sound fair?

A Well, that may be true today. There certainly has been a continual growth of the number of these signals up on transponders, and what was true in '90-'92 is simply not something that I recall today.

Q Now, when a cable operator was considering whether to carry a distant signal, would the cable operator know what the price was for the distant signal?

A Presumably, he would know if it is a distant signal, and therefore subject to the compulsory copyright, he would know the copyright rate that would apply to the revenues which he obtained from the tier in which he places the signals as I understand it.

Q And similarly with respect to a cable network, and some of these which are in the expanded basic tier, would a cable operator know the price that he would have to pay to carry one of them?

A Ex-post he would certainly know it. Beforehand, that price is subject to some negotiation, and it may be different for him or for his MSO than it is for other cable systems. So that is a matter of mano-mano negotiations.

Q So there is in effect the rate card price or offering price that he might be able to ascertain from the cable network that he is deciding whether or not to carry?

A There may be. I don't know if they publish rate cards. There is publicly available information on what the typical rates are and they

vary.

Q Well, one way or another, the cable networks will quote a price to the cable operator, correct?

A Well, in the negotiation over it I would presume, yes.

Q Does the cable operator get to start at the price that he would like to pay for a cable network?

A I have no idea. When you sit down to buy something, imagine going to a car dealership. It is a similar sort of arrangement.

Q Now, with respect to cable networks, there is also potential advertising revenue for the cable operator to consider, correct?

A Yes, I believe that varies across the networks as to how much of it there is.

Q So with respect to each of the cable networks that we are talking about now, the cable operator would presumably make a decision based on as you suggested his profit maximizing position, as to whether the addition of the cable network at the price

that he can negotiate with the potential offsetting advertising revenue is worth it to him, as compared with other alternatives, correct?

A Yes.

Q Similarly with respect to a distant signal, a cable operator has a sense of the price that the distant signal is going to cost, and will make a judgment as a profit maximizer about whether the added value is worth the price, as compared with other alternatives, correct?

A Yes.

Q With respect to distant signals, there is no offsetting advertising revenue permitted, correct?

A That is my understanding.

Q Okay. Now, cable operators presumably, or cable operators are not required to carry distant signals are they?

A No.

Q The compulsory license, or the compulsory part of the compulsory license is only compulsory on us copyright owners, correct, and not on the cable system?

A That is correct.
Q So to the extent that cable operators do carry distant signals, one could reasonably assume that they have made determinations that carrying those distant signals at the cost that they have to pay is a profit maximizing alternative for them, correct?
A Yes.
Q And in fact the board survey is premised on the assumption that cable operators make some kinds of marketplace decisions, economic profit maximizing decisions in determining whether to carry distant signals, correct?
A Well, the board survey asks the operator how he would allocate a budget. I mean, it is possible that the cable operators is in business as a charitable institution, but not very likely. I don't think it is premised on that.
It simply asks the cable operator how much or how would he allocate his budget. It doesn't ask him whether he is a profit maximizer.
Q The Board survey only asks those questions with respect to distant signals actually purchased

during the year in question, correct?
A That's my understanding, yes.
Q Okay. Now, looking at this example, can you identify the cases in which the cable operator has created a channel of programming through direct negotiations with individual copyright owners?
JUDGE VON KANN: You are referring to pages 10 and 11?
BY MR. STEWART:
Q Yes, 10 and 11. I'm sorry, yes.
A Where he has actually negotiated directly with the copyright owner?
Q Of particular programs to create a channel of programming.
A Well, this ends in some respects -- I mean, I don't know who owns the copyrighting in certain types of programming. It may well be that some of these basic networks, the network itself owns the copyright or licenses the programming from the copyright owner. I simply don't know enough of the details.
Q Well, let me ask the question the other

way around. Isn't it the case that with respect to -- let's say let's look at all of the channels on page 11 here.
A Yes.
Q This intermediary that you described in your direct testimony is the one with which the table operator is negotiating?
A Yes, but my answer to your question was I don't know, because in some of these cases the packager of the basic network itself might own some of the copyrights. I simply don't know that.
Q But some of them might have licensed others, but in effect put together a channel's worth of programming with respect to which it, the packager, negotiates with the cable operator?
A I would say that is the typical case, yes.
Q Right. And that remained the case through 1998 and 1999, correct?
A It is a similar marketplace, and there are many more of these basic cable networks, and I would assume that typically it is the same, yes.
Q Well, can you find any example in which --

I have in mind a situation where, for example, if you are talking about the NFL as a copyright owner, it presumably would not be possible for a cable operator to go with I would like an NFL channel in which there is 24 hours a day, 365 days a year, of NFL games, correct?
A I suspect that is not possible without the NFL abrogating others in its contracts, but it is certainly possible. I mean, I think that is something similar to what Hughes did with DirectTV isn't it? They negotiated a package of all the games directly with the NFL I think, and with other sports teams.
Q But that package does not provide 24 hours a day, 365 days a year; or in other words, a full channel's worth of programming, continuous programming, does it?
A No, it doesn't, but of course it is always possible that the cable owner wants to negotiate with the sports programming, and doesn't care about the rest of those minutes. The rest of those minutes may not account for any value at all.
Q You mean blank space on this hypothetical

1 NFL channel?
2 A It might. I mean, there are stations that
3 go dark.
4 MR. STEWART: Well, okay. Then let's look
5 at the other side of the equation. I am handing out
6 a document which I would ask to be marked as NAB
7 Exhibit Number 7-X.
8 (Whereupon, NAB Exhibit No. 7-X
9 was marked for identification.)
10 BY MR. STEWART:
11 Q This is a copy of an article from the
12 Economic Journal of February 2001, and since you are
13 no busily reviewing it, I take it that you are
14 familiar with this?
15 A Well, you may have me at an advantage. You
16 probably read it more carefully than I have recently,
17 but let's go ahead. I wrote it about 3 years ago with
18 Professor Martin Cave from the United Kingdom.
19 Q Okay. And it is a description of the
20 sports broadcast industry in the United States and in
21 Europe, correct?
22 A Yes, and hopefully it is an analysis

1 there, too.
2 Q And some analysis, yes; and did you write
3 the U.S. portion, and Professor Cave the European
4 portion?
5 A Well, certainly that was the way the
6 initial drafts were done back and forth. We had it
7 out between one another, and it is a joint work.
8 Q So you each learned about the other's
9 marketplace?
10 A Yes.
11 Q Would you turn, please, to page F-5, and
12 you see there in the first full paragraph on that page
13 the sentence, and I quote, "The bargaining power of
14 the seller of sports broadcast rights depends in part
15 on the number of alternative sources of such
16 programming that are available." Do you see that?
17 A Yes.
18 Q And this is in the -- is it in the U.S.
19 portion? Yes, sports in the United States.
20 A Yes.
21 Q And the paragraph continues to describe
22 the U.S. professional football leagues, and says that

1 these leagues "currently have no professional
2 competitors in their respective sports. These
3 dominant positions have existed for at least two
4 decades." Do you see that?
5 A Yes.
6 Q And you made that point in order to
7 advance an analysis of the, in effect, market power or
8 bargaining power of the sports program rights sellers;
9 is that right?
10 A Well, also as a larger analysis of the
11 driving forces in the video market competition, too,
12 and contrasting the situation in the United States
13 with the situation in Europe.
14 Q And would you accept as a general
15 preposition something that seems commonsensical, that
16 if a seller has no competing sellers, it will be able
17 to exercise some kind of market power, or at least
18 will have better negotiating leverage when it is
19 trying to sell its product?
20 A That is almost by definition, that if it
21 has no competition, it has market power.
22 Q Good. This is going to go really well.

1 A Right.
2 MR. GARRETT: That is what you think.
3 BY MR. STEWART:
4 Q I have talked with Dr. Crandall before. Is
5 the same true on the other side? That is, if there is
6 a single buyer for a product than multiple sellers of
7 the product, then is the buyer able then to have some
8 kind of market power or negotiating leverage in terms
9 of what the price will be for that?
10 A Yes.
11 Q Okay. And here on page 5, you are talking
12 about the fact that the National Football League and
13 Major League Baseball, and the National Basketball
14 Association, and the National Hockey League, don't
15 have any competing sellers of professional games in
16 those same sports, correct?
17 A That is what that earlier discussion was,
18 yes.
19 Q Okay. Would you turn to page F-9, please.
20 You see there again in the first full paragraph a
21 reference at the end of the first sentence to the
22 effect that the NFL, "had been barred by a Federal

1 anti-trust case from pooling its television broadcast
2 rights into a single national contract." Do you see
3 that?
4 A Yes.
5 Q Now, the anti-trust laws, could you
6 explain why that was the case?
7 A Well, the premise here is that had they
8 attempted to do so, the would have been found to have
9 violated the Sherman Act for a combination in
10 restraint of trade.
11 Q And a combination in restraint of trade is
12 likely to have increased prices and/or reduced output;
13 is that right?
14 A Yes, if it can be demonstrated that
15 football, televised football programming, is an anti-
16 trust market.
17 Q Right.
18 A It is possible that football and baseball,
19 or other sports that are on at the same time, because
20 after all the leagues do overlap in time, constrain
21 one another's ability to raise price.
22 Q Okay,. but this anti-trust case, a

1 decision in the Federal Court in times long past held
2 that when the NFL tried to sell in a single package
3 the rights to all of its games and preclude teams from
4 selling their rights in competition with each other in
5 effect, that that was an anti-trust violation, and it
6 was barred from doing so?
7 A I don't remember the litigation, but it is
8 possible that there was actual litigation, and that's
9 why they did not do it.
10 Q Okay. And then just continuing on in the
11 same paragraph, in 1961 the Congress passed the Sports
12 Broadcasting Act. Do you see that?
13 A Yes.
14 Q Could you explain what that Sports
15 Broadcasting Act did?
16 A Well, it allowed the pooling of these
17 rights in the form of a league contract, and to offer
18 it to a buyer, be it a broadcast network or a series
19 of cable companies for licensing their program.
20 Q Is it the case that it applies to cable
21 companies?
22 A No, you have got me on that. I do not

1 know whether -- well, it may just supply the
2 broadcasting. You may be right. In '61 -- after all,
3 cable television really didn't get going in earnest
4 until the mid-to-late '60s. So it probably does apply
5 just to broadcasting.
6 Q Okay. So in essence this act made an
7 exception to this general anti-trust prohibition and
8 permitted the NFL to pool its game rights in order to
9 sell them as a single package?
10 A Yes.
11 Q And it applied to other sports and we will
12 get to that as well. Do you recall that it does apply
13 to other sports as well?
14 A Yes, sports broadcasting, and some
15 football.
16 Q And then you followed this by saying that,
17 "the result was a dramatic increase in the value of
18 national network television sports rights throughout
19 the 1960s as a network triply bid aggressively for the
20 right to broadcast NFL games." Do you see that?
21 A Yes.
22 Q And you have a chart at the bottom of the

1 page, entitled, "Real Value of U.S. Networks Sports
2 Broadcast Rights, 1962 to 1998." And that describes
3 some of those increases, correct?
4 A Yes.
5 Q And in this context, when you use the word
6 value, you mean the price and real value is price
7 adjusted for inflation; is that right?
8 A It was the total value of the rights as
9 adjusted for inflation.
10 Q Value in terms of the money that was
11 actually paid for them?
12 A Yes, the total payments for all the games
13 that were licensed.
14 Q Okay. Turning over to page F-10, in the
15 first full paragraph again there, you describe the
16 effect of adding another buyer, a bidding buyer to
17 this mix, when a fourth offeror network, Fox, entered
18 the market. Do you see that?
19 A Yes.
20 Q Now, Fox entered the market as a national
21 network sometime before 1994, correct?
22 A That was an evolution. At what point they

1 became a network I guess is subject to some dispute,
2 but yes.
3 Q And a network not for purposes of the 1119
4 issue, but a network --
5 A Yes, I believe that is right, but again
6 you are testing my memory. I think it was certainly
7 before '94.
8 Q Well, the NFL --
9 JUDGE VON KANN: Dr. Crandall, let me ask
10 you not to speak over the questions. We need to get
11 a clear question and answer record here if we can.
12 THE WITNESS: Okay.
13 BY MR. STEWART:
14 Q All right. Let's turn to page F-11,
15 please, and at the top of that page, there is a
16 carryover paragraph. And the reference is to -- if
17 you flip back to the previous page, you will see that
18 the reference there are to two companies, Direct T.V.
19 and EchoStar, and DISH Network. Do you see that?
20 A Yes.
21 Q Okay. And you say at the top of page F-11
22 that their growth has been hampered "by regulations

1 and copyright provisions that limit their ability to
2 retransmit local broadcast signals in areas where
3 subscribers can receive these broadcast off-air."
4 Do you see that?
5 A Yes.
6 Q What did you mean by that?
7 A Well, this was before the passage of the
8 Act which provided for compulsory copyright for
9 retransmission of local broadcast signals on satellite
10 signals.
11 Q So the satellite service providers were
12 not permitted in this period to in effect send
13 Washington, D.C. broadcast signals down to subscribers
14 in Washington and Richmond signals to subscribers in
15 Richmond and the like; is that right?
16 A That's correct, without negotiating the
17 rights on them.
18 Q And did you -- and why did that hamper the
19 growth of these companies?
20 A Well, it is surprising to me, but
21 apparently there are a large number of people who
22 still value the local broadcast signals sufficiently

1 that they would not switch from cable to direct
2 broadcast satellites, unless it also carried the local
3 broadcasting signal.
4 Q So, cable offered a package of services
5 like the ones that we looked at in Mile High Cable,
6 which included the local television stations, and the
7 satellite carriers provided a package of similar
8 services, not including the local television stations,
9 and that produced a competitive difference?
10 A Yes.
11 JUDGE VON KANN: Mr. Stewart, I think
12 maybe this is a good time to take our first break for
13 15 minutes. Let's come back at 10:45. Thank you.
14 (Whereupon, at 10:30 a.m., the hearing was
15 recessed and resumed at 10:45 a.m.)
16 JUDGE VON KANN: Okay.
17 MR. COOPER: Would it be useful for
18 purposes of lining up subsequent witnesses if we had
19 an estimation of how long the cross was likely to run?
20 JUDGE VON KANN: Okay. Do you have a
21 sense, Mr. Stewart?
22 MR. STEWART: I think possibly another

1 hour.
2 JUDGE VON KANN: All right, and do other
3 folks have a -- Mr. Hester?
4 MR. HESTER: Your Honor, I think I might
5 be an hour to an hour and a half.
6 JUDGE VON KANN: Okay, well, let's see.
7 Anybody else? Music folks?
8 MS. WITSCHEL: Very brief.
9 JUDGE VON KANN: Canadian? Brief, if any.
10 So maybe two to two and a half hours which would be
11 through lunch. So it sounds like you don't have to
12 get anybody here until after that. Okay?
13 BY MR. STEWART:
14 Q Dr. Crandall, would you turn to page F-13
15 of Exhibit 7-X, please?
16 A I'm there.
17 Q There in the middle of the page is the
18 discussion of the antitrust that you previously
19 discussed.
20 What I wanted to direct your attention to
21 the Table 5 at the bottom of the page there.
22 A Yes.

Q Now this is a representation of the percentage of the total revenues for each of these sports that are derived from to sale of broadcast rights. Is that correct?

A Yes.

Q So what other sources of revenue are there for these sports leagues?

A Well, obviously, the live gate and then merchandising revenues would be the principal sources of revenues other than broadcast revenues.

Q And for baseball, basketball and hockey, the gate receipts, the money that people pay to go see the games themselves is higher than the broadcast rights fees as a percentage of share, is that right?

A Well, the live receipts plus the merchandise -- whatever other sources of revenues there are, and merchandising.

Q Do you know, in fact, whether the gate receipts are higher than the broadcast receipts for these particular industries?

A I do not. I think the information might have been available in the sources we quote, but I

didn't see the need to cite it.

Q I want to show you the cite Kagan publication there, do you see that?

A Yes.

Q I want to show you a Kagan publication which is called Media Sports Databook 1998. Is this the source of revenue used, do you recall?

A Well, let's see. Kagan's Media Sports Business Databook 1998. Yes.

Q Okay, and if you look at page 31 which I'm handing you, beginning there are NFL and MLB revenues and on the next page NBA and NHL. Could you tell me whether, in fact, the gate receipts represented a larger percentage of total revenues for those latter three sports than broadcast rights fees?

JUDGE VON KANN: In which year are you looking at, 1997?

MR. STEWART: Maybe Dr. Crandall can enlighten us.

THE WITNESS: This is a 1998 publication, published in September 1998. Most of the data in here would probably be drawn from say 1997 because if you

look at the table of contents, the last year is typically 1997.

And this is obviously Kagan's estimate of these facts.

If I understand this chart correctly, the gate receipts which do not include the venue receipts, it must be merchandizing, stuff at the park, the gate receipts exceed the media receipts for the NHL and for Major League Baseball, but for the MBA they're slightly less and for the NFL they're substantially less.

BY MR. STEWART:

Q Now are you familiar with sports blackout rules, either in the federal statutes or in FCC regulations?

A I am no longer familiar with them. I might have been at one time.

Q Well, we probably share the same degree of sophisticated understanding of them, but in essence those rules allowed the sports league to black out a telecast of a game coming into a market on a distant signal if -- just to make it sort of big picture, if

that would compete with the actual gate receipts for the game being played in the market.

Is that roughly correct? Is that your understanding as well?

MR. COOPER: I object. He's already testified he doesn't understand the rules.

JUDGE VON KANN: Maybe he does, maybe he doesn't. We'll see.

THE WITNESS: Well, the purpose, whatever the rule is and whether it's one invoked by the league and permitted by the FCC or whatever, the purpose obviously would be to allow the league some latitude or perhaps the team some latitude in blacking out the broadcast in cases where it has a substantial effect on a gate.

In virtually every case, one would imagine that the broadcast of the game competes with the live attendance.

BY MR. STEWART:

Q Yes, because you could stay home and watch the game on television, local television or distant signal instead of going out and buying a ticket to go

to a game.

So this was a mechanism that allowed somehow for the deletion of the program from the distant signal in order to protect the different source of economic interest or revenues for the sports teams, correct?

A That's my understanding, yes.

Q And if the -- strike that. Would you turn to page 14, F-14 of Exhibit 7-X, please.

I want to talk about the second full paragraph there, the "in addition, individual teams" paragraph, do you see that?

A Yes.

Q So it's the case for the NFL that the individual teams do not sell their games separately, is that right?

The NFL sells national rights to all the regular season and play off games?

A I believe that's true.

Q With respect to Major League Baseball, there is some combination of rights sales, is that correct?

A That's correct.

Q So that the league, in effect, sells some national broadcast rights for some of the games, correct?

A Yes.

Q Sells them both to broadcast television and to cable networks as well?

A Yes.

Q And then in addition to that, but that doesn't encompass all the games that are played during the course of a season and so on.

In addition to that, the individual teams can negotiate for the sale of broadcast rights for other games that they play, correct?

A Yes.

Q And the teams will sell those rights to local broadcast television stations, correct?

A In some cases, yes.

Q And in other cases where else might they sell them?

A Regional cable networks. Often a combination of the two.

Q Okay. Now the second sentence of this paragraph says, refers to "league limitations on a team's right to sell broadcasts of its games to local outlets, regional sports networks or other broadcast services."

Do you see that?

A Yes.

Q Can you tell me what kinds of limitations leagues impose on a team's right to sell those broadcast rights?

A Well, I don't recall and this was something as you see from the paragraph in question, footnote 10 was litigated, involving the Chicago Bulls. And the issue would always be the exportation of a signal into the market of another team, thereby taking away some of the audience and therefore some of the potential revenue from the rights of that other team.

Q Are you familiar with the mechanism for imposing these kinds of limitations?

A No, I am not.

Q Are you aware whether there are other

kinds of limitations than the one you just suggested that are imposed by the leagues on the teams?

A I'm not aware of them in any detail, only occasionally over many years and sort of informal discussions. I've never studied them carefully.

Q Do you recall any others besides the one limiting distant exportation, I guess, of games?

A I can't offhand, no.

Q How about the Bulls case that's referred to there in the footnote? That was a litigation in which the Chicago Bulls joined with the station, WGN, to sue the National Basketball Association under antitrust and other laws because of a limitation the NBA wanted to impose on the number of games that the Bulls were allowed to license to WGN, correct?

A That may be correct. I think I read the case in doing this research, but that would have been three or four years ago and I simply don't remember the details as to who was the plaintiff and who was the defendant.

Q Do you recall the outcome of that case?

A No, I don't know. I honestly don't. I'm

1 sorry.
2 Q You cited that case as an example in which
3 the League sought to impose a limitation on the number
4 of games that could be broadcast on WGN?
5 A I don't know whether it was a quantitative
6 number or a geographical scope, but the -- my language
7 here and the sentence which cites that case says thus,
8 even sports teams in leagues with national network
9 contracts may sell broadcast rights in games in which
10 the league has no broadcast rights even though such
11 games may dilute the value of the national contract.
12 That's suggests, I guess, that the case came out
13 allowing WGN to do this.
14 Q Would you turn to page F-21 of this
15 exhibit?
16 A Yes.
17 Q The second full paragraph on that page
18 begins "were there greater competition among leagues,
19 the prices of these now ubiquitous U.S. telecasts
20 might be lower." Do you see that?
21 A Yes.
22 Q And that harkens back to the general sort

1 of common sense principle that we agreed on at the
2 beginning of my cross examination, that is if there
3 were more competition, the effect of that likely would
4 be to reduce the price of the rights being licensed?
5 A Certainly.
6 Q Okay. You go on to say "but the output of
7 televised sports events would probably not be much
8 greater".
9 Do you see that?
10 A Yes.
11 Q And there, you're considering the number
12 of games licensed across all outlets including
13 broadcast stations and cable networks and national
14 television networks and satellite services and
15 regional sports networks?
16 A Yes.
17 Q Any others besides that list?
18 A You covered most of them.
19 Q I want now to hand you a copy of some
20 other testimony that you've -- that's been
21 incorporated by reference into this.
22 JUDGE VON KANN: Do you wish to offer

1 this?
2 MR. STEWART: This is going to be another
3 demonstrative exhibit under the --
4 JUDGE VON KANN: Let's deal for a moment
5 with 7-X. Do you wish to offer that?
6 MR. STEWART: I do. I move that be
7 admitted into evidence.
8 MR. COOPER: No objection.
9 JUDGE VON KANN: Okay, received.
10 (The document, having been
11 marked previously for
12 identification as NAB 98-99
13 Exhibit 7-X was received in
14 evidence.)
15 BY MR. STEWART:
16 Q This is actually testimony. Do you
17 recognize that, Dr. Crandall?
18 (Whereupon, the above-referred
19 to document was marked as NAB
20 98-99 Demonstrative Exhibit 2
21 for identification.)
22 A I believe it was my testimony in the 1989

1 proceeding?
2 Q I think this actually was -- yes, it was
3 submitted in the 1989 Cable Royalty Distribution
4 proceeding. It's under -- it's Volume 2, Tab 8 of the
5 incorporated testimony by the Joint Sports Claimants.
6 This was rebuttal testimony rebutting some
7 testimony that had been submitted on behalf of the
8 Program Suppliers Claimants by Dr. Besen.
9 Do you recall that?
10 A I thought that was the testimony in the 90
11 to 92 case. Now you're testing my memory. This, I
12 thought -- this is the 1989 testimony? I believe this
13 is -- I don't recall it as rebuttal testimony direct.
14 I thought this was direct. I
15 It's a lawyer's distinction more than an
16 economist's distinction. You'll have to tell me.
17 Q This testimony actually, I think was
18 presented by the Sports Claimants as well in its
19 written form in the 1990 to 1992 case, but if you just
20 glance at the testimony you can see there that you are
21 responding to arguments that were made by Dr. Besen.
22 A Yes, but --

Q And that's in the 1983 proceeding.
A Right. Because in a later rebuttal testimony I was responding to something he did in that case, 90 to 92.
Q This is responding to something he did in the 1983 case.
A I can only plead that I'm an economist and not a lawyer.
Q You've got that distinction better than I do. If you would now, Dr. Besen had made one point that -- which is an economist's distinction from my lawyer's perspective that the Bortz study measured total value and not marginal value.
Do you recall that?
A Yes.
Q And one of the first parts of your testimony was in response to that criticism of the Bortz survey?
A Yes.
Q And if you would turn to page 7 which is difficult to read on this copy, but it's the second page after roman 3 summary of conclusions?

A I see it.
Q In the first full paragraph there after having given your first response which had to do with elasticities, your second point is that "the Bortz study's estimate of total value are a valid measure of marketplace value if the cable operators faced in an all or nothing choice for each program type."
Do you see that?
A Yes.
Q Now do you believe that that is a fair assumption in the context of these compulsory license proceedings?
JUDGE VON KANN: I'm sorry, what page are you on?
MR. STEWART: Seven. It's hard to read at the top there.
JUDGE VON KANN: All right, thank you.
BY MR. STEWART:
Q And at the end of the first sentence of the first full paragraph, that's the sentence.
A This hypothetical was a second hypothetical. The first one I dealt with was the

relevant price elasticity of demand, assuming they did not negotiate and all or nothing contract with the owners of all the copyright rights. I said, however, if they did, then the distinction between marginal and total value is not important because total value captures the entire area under the cable operators' demand curve and therefore it would be an appropriate measure.
Q And in fact, for those with interest in demand curves, there's more detail later in this document.
In the next paragraph you point out that the viewing study is not a measure of marketplace value. That was your testimony in that case, correct?
A Yes.
Q And in the next paragraph at the bottom of that page, you talk about the supply effects, do you see that?
A Yes.
Q You say that part way down that paragraph, "In fact, I believe quoting that these supply effects are likely to be more important for sports than for

movies and syndicated series because the loss of exclusivity in the initial exhibition of a sports event cannot be recaptured in frequent reruns of the event."
Do you see that?
A Yes.
Q Is that the same point you make in your testimony that was submitted in --
A It's an analogous point, yes.
Q Okay. So with respect to programs that are live and not repeated like sports games and I might add station produced newscasts, the supply side, the effect of considering supply side conditions to favor live, not repeated program categories as opposed to program categories that are subject to rerun, correct?
A I'm not sure that that is the case. It isn't necessarily just programming is live. It also has to do with whether there are any other ancillary benefits from licensing the program.
If the carriage of the program allows the copyright owner to exploit greater advertising

1 revenues, for instance, then that copyright owner
2 might offer it at a lower price. And that might be
3 true for a broadcast signal because it gives the
4 broadcast signal greater geographic scope and perhaps
5 allows it to advertise over a broader market.
6 It would not be true for the types of
7 copyrighted sporting events we're talking about in
8 this case with the Joint Sports Claimants, I do not
9 believe.
10 Q Do you believe that -- Commissioner
11 Tagliabue testified that the amount of the license
12 fees received by the NFL was significantly influenced
13 by the potential advertising revenues of the
14 purchasers of the rights and the programming.
15 A Certainly.
16 MR. COOPER: I'm not sure, I don't believe
17 that's a fair characterization of the weight -- I mean
18 if you want to ask him -- I think it's fine to ask
19 him, but I'm not sure that your research is right and
20 I object.
21 JUDGE VON KANN: I think we probably have
22 a transcript of that. If it's critical to get the

1 exact language, maybe you can refer him in a general
2 way without purporting to precisely characterize
3 Commissioner Tagliabue's testimony.
4 BY MR. STEWART:
5 Q Thank you. In general, the rights fees
6 attained or obtained by sports leagues, when they sell
7 their rights into national advertising supported
8 broadcast networks, are influenced by the potential
9 advertising revenue received by the buyers in that
10 market, correct?
11 A Well, but the copyright owner in this case
12 does not get those advertising revenues directly. He's
13 getting only the copyright payment. The only possible
14 minor ancillary revenues he might get, if he gets
15 greater exposure for his product might be some more
16 merchandising revenues. But in the case of the
17 broadcast station which is licensing its copyright
18 material in an adjacent market, it obtains the ability
19 to sell more advertising dollars, obtain more
20 advertising dollars from that greater geographical
21 expanse of its market.
22 The NFL, Major League Baseball, do not.

1 Q But the -- strike that. To the extent
2 that the purchase of the rights devises all of its
3 revenue from advertising sales and to the extent that
4 those advertising sales are potentially greater, the
5 amount of the rights fees to be paid or in this
6 bidding context that we have nowadays, the amount of
7 the rights fees bid by various broadcast networks is
8 increased, correct?
9 A Yes, but had Bortz surveyed network
10 programming managers and asked them why they paid so
11 much for these rights, the answer would then obviously
12 be the advertising revenues. When he surveys the
13 copyright owners and it has nothing to do with the
14 advertising revenues in that programming, generally
15 for the copyright owner or for the seller of the
16 rights.
17 The seller of the rights is not trying to
18 get greater coverage in order to be able to sell
19 advertising himself.
20 Q Okay, now for a broadcast station, are you
21 familiar with advertising sales by broadcast stations?
22 A I've been a student of broadcasting

1 markets off and on for 25 years. I've never been
2 involved in the nitty gritty of negotiating these
3 deals, no.
4 Q Do you know whether the advertising sales
5 are heavily dependent upon ratings in the television
6 market in which the station is broadcasting?
7 A I would think that they would be,
8 particularly for the local spot, but I suppose as the
9 signal becomes more of a national signal because of
10 distant signal imports that the spread of the signal
11 would influence the national spot rates it gets.
12 Q And you raise, in effect, the super
13 station phenomenon with that comment, correct?
14 A Yes, I guess so.
15 Q And Mr. Garrett in his opening statement
16 made the point that there is in the 1998-1999 context
17 essentially one super station, WGN. The rest of the
18 distant signals are carried to relatively far fewer,
19 by relatively far fewer cable systems in this
20 1998-1999 period.
21 If you will accept that as a premise, then
22 laying aside the super station phenomenon, are there

1 advertising revenues to be derived by a local
2 broadcast station from carriage in a variety of
3 distant other television markets?
4 A This would be an empirical issue that I
5 haven't looked at, but I would not be surprised that
6 the exporting of the Los Angeles signal, let's say,
7 slightly outside the ADI or whatever it's now called,
8 Los Angeles, would convey some ability to sell more
9 advertising, at least advertising the higher rate, but
10 I don't have independent, empirical evidence of that.
11 Q If it were the case that the ratings and
12 that outside the Los Angeles market television market
13 were reported in somebody else's book and not the Los
14 Angeles book, would it make it difficult for the Los
15 Angeles station to sell that advertising, would it
16 not?
17 A It would certainly make it more difficult.
18 There has to be information on the reach of the
19 signal.
20 Q Would you turn to page 12 of your
21 testimony, please?
22 A My testimony in this matter?

1 Q Yes.
2 (Pause.)
3 One more question on the advertising. Did
4 Major League Baseball have any rights to advertising
5 revenues in the national broadcasts of its games in
6 the 1990s?
7 A I don't know. The programs are often sold
8 with some barter rights, but I don't know whether
9 there's any of that in any of the sports rights. I
10 can't tell you.
11 Q To the extent that there is barter
12 involved, the copyright owner, in this case, a sports
13 league, would have a direct interest in advertising
14 revenues?
15 A If there is barter. It's my understanding
16 there isn't much of it. But I'm not aware of the
17 phenomenon for these sports leagues, but it may be the
18 case.
19 Q Could you explain what barter is?
20 A Barter is simply offering the program to
21 the purchaser in return for some revenues from the
22 purchaser, but also in return for the purchaser

1 granting the copyright owner or some intermediary the
2 right to advertise a certain number of sports in that
3 program. So not all of the advertising is placed by
4 the person licensing the program.
5 Q Okay, back to page 12. Thank you for
6 that. In paragraph 24, the third sentence reads,
7 "broadcasters have demonstrated a greater interest in
8 securing carriage on cable systems and making their
9 programming available to as many cable system
10 subscribers as possible at the lowest possible price."
11 Do you see that?
12 A Yes.
13 Q You use the word "greater" there, but
14 there's not a comparison. Greater than what?
15 A I guess what I'm referring to there as
16 expressed under the sports programmers, the
17 immediately preceding sentence.
18 Q You say in the following sentence "I am
19 not aware of any similar evidence of JSC members." Do
20 you see that?
21 A Yes.
22 Q What evidence with respect to broadcasters

1 are you referring to? I assume that's again a
2 comparison statement?
3 A Yes.
4 Q What's the evidence you have in mind?
5 A The evidence is that the broadcasters have
6 pushed for legislation, supported legislation which
7 indeed passed, which regulated the basic cable tier
8 and reduced cable rates on the broadcast tier, thereby
9 reducing the revenues to themselves from copyright
10 royalties and to other interests -- other copyright
11 owners. And have also supported, obviously very
12 aggressively, must carry regulations in which the
13 station is carried at a zero copyright rate.
14 Q And the rate regulation legislation is the
15 subject of Dr. Hazlett's testimony in this proceeding.
16 Are you aware of that?
17 A That's my understanding. I've read his
18 testimony. I haven't talked to him about it, but
19 that's my understanding.
20 Q Do you have other evidence you wanted to
21 bring to the attention of the panel beyond what Dr.
22 Hazlett's testimony will provide?

A No, I think having lived through that and written a book about cable television regulation, as these rules are being implemented, I think it's incontrovertible as to the broadcaster's position on these rights, so I can't tell you who, which organizations were lobbying precisely at what time.

Q I've read your book. I've even bought your book.

A So that's a second sale, I guess.

(Laughter.)

Q I don't want to have to go through all of the Dr. Hazlett cross examination with you. I guess, in short, if you talked about the rate regulation and the must carry, is there anything else that you consider to be evidence of broadcasters demonstrating interest in securing carriage at the lowest possible price?

A Those would be the principal ones. But I think you're quite right. It's probably something best left to discuss with Dr. Hazlett.

Q You talked about, you mentioned earlier on, retransmission consent. What is your -- why did

you bring that topic up?

A You'll have to remind me how it came up. I don't remember the context of it.

Q Is retransmission consent, in your view, relevant to the allocation of royalties in this proceeding?

A It could be with respect to the issue of supply conditions and how retransmission consent has worked out in practice might be relevant to the Panel's deliberations.

Q How so?

A Well, if, in fact, there has been relatively little retransmission consent, little in the way of retransmission consent payments and indeed, most of the carriage of local broadcast signals on cable systems has been at a zero copyright rate as the broadcaster invoked must carry, rather than attempting to obtain or succeeding in obtaining large amounts of payments of retransmission consent, it would be evidence on the willingness of broadcasters to negotiate with copyright owners and their ability to negotiate with copyright owners for the carriage of

that programming.

Q First, you talked about electing must carry at a zero copyright rate. Was that your term?

A Well, invoking -- yes. Invoking must carry, requiring the cable system operators to carry it, right.

JUDGE GULIN: Isn't it your understanding that there would be very little in the way of payments under retransmission consent?

THE WITNESS: That's my understanding. I haven't looked at it recently, but there was a considerable amount of discussion of this when it first went into effect after 1993, I guess.

And in some cases the larger stations were able to obtain essentially a tied arrangement where they would obtain yet the cable system owner to carry an ancillary or co-owned network. I don't know at what rates. It might have been very low rates, but the impression which I got when I put the book that Mr. Stewart and I were discussing to bed, was that there had been very few of these arrangements negotiated and most of them were must carry

arrangements.

JUDGE GULIN: In fact, some of those arrangements, I may be mistaken, but I think under some of those arrangements, the fledgling cable network would be carried actually for free. There would be no royalties anticipated. Do you have any understanding of that?

THE WITNESS: It's something -- it's an empirical question. I haven't looked at it recently and it's been a number of years since I investigated that. Sorry.

BY MR. STEWART:

Q I intended to get to this in some detail, but going back first to the must carry context, you called it a zero copyright rate, do you recall that?

A Yes.

Q That's not a retransmission consent negotiation, correct?

A Well, it's an alternative to retransmission consent, my understanding.

Q In 1976 -- in 1978 when the compulsory license first went into effect, under the Copyright

Act of 1976, there were must carry rules in effect at the time, correct?

A Yes, for a short period of time, as I recall.

Q And then they came back later and went away and then they came back again, correct?

A I guess over time.

Q But the Section 111 license from the very beginning of the existence of a compulsory license provided for zero payments for must carry stations or for any local stations, no matter how they were carried, correct?

A I believe that's correct, but again, it's something that I haven't looked at recently.

Q A compulsory license overrides any right of the broadcast station as a copyright owner to refuse to allow a local to carry it, correct?

A I don't understand the law perhaps as well as you do, but it's my understanding you have a choice. You can either invoke must carry or you can attempt to deny the signal to the cable operator and not invoke must carry and attempt to obtain some

copyright royalties through the retransmission consent agreement.

Q That's exactly my question. Those are not copyright royalties, are they?

A They are revenues paid -- you mean under retransmission consent?

Q Correct.

A They are revenues paid to the station which in turn would provide him with a greater revenue base which in turn would give the station owner the ability to pay more to whatever copyright programming might be on that station, but also the programming which he, himself produces.

Q Let's be clear. The compulsory license which is the subject of this proceeding specifically provides that for every copyright owner, the stations for its own programs, the sports leagues for their programs, the Motion Picture Association for their programs, none of them receive copyright royalties for the local retransmission of their programs, correct?

A I don't know how you're putting that, but in this proceeding, we're dealing with the distant

signal. You and I are not talking about the local must carry retransmission consent rules.

Q Exactly and that's why I wanted to be sure we were clear on this.

With respect to the local systems and that's why you called it a zero copyright rate, the copyright law provides that none of us copyright owners get any compensation any copyright royalties for cable operator retransmissions of stations within their local market, correct?

A Well, that may be true, but that may be a distinction without a difference. The question is what's in the interest of the station owner and can he obtain revenues from the cable system through this negotiation process or does he, is he forced to simply revert back to must carry and obtain zero. If it's zero, it's nothing, so it's not a copyright rate or anything.

Q You need to be very careful about what's copyright royalties which are the subject of this proceeding and what are other revenues and that's what I'm trying to do.

With respect --

A But we're talking about a negotiation process which exists in actuality as providing evidence on a simulated market that would exist in the case of distant signals. And what I'm saying is that when push comes to shove in this negotiation, the local signal owner, the broadcast station is not able to negotiate or is unwilling to withhold this product in return for obtaining a substantial copyright royalty. That is, he prefers -- well, one of the things he could do is to -- I mean this is, after all, a bargaining game. He could withhold his signal from the cable system and after a month, two months, six months, say do you want it at some price? They choose for the most part not to do it because the loss of advertising revenues apparently exceeds any potential gain from copyright royalties or from revenues they could get in this fashion.

Q You said twice again in that answer that the broadcast station could receive copyright royalties for allowing local retransmission of its signal.

Will you accept as a matter of law that that is not correct?

A I am not a lawyer and I would say that if that is true, I'm happy to accept it, but it is again, as I said earlier, a distinction without a difference.

Q And is there a distinction with a difference in your view between local retransmissions and distant retransmissions?

MR. COOPER: I object. I'm not sure for what purpose.

JUDGE VON KANN: Objection sustained. Let's clarify a little bit the frame of reference.

BY MR. STEWART:

Q Well, Dr. Crandall, you believe somehow that the retransmission consent negotiation or the retransmission consent rights are relevant in this proceeding?

A As I answered earlier, it strikes me that the retransmission must carry phenomenon an dhow it is worked out in practice is important evidence that the Panel could consider in determining the supply side conditions of this market.

Q And if you -- let me state a premise to you. Local retransmissions of stations are not a part at all in royalties that are being distributed in this proceeding? Will you accept that as my statement?

A Yes, I believe that's correct. We both agree on it.

Q Then does that change your view about whether the retransmission consent in the local market within the must carry or retransmission consent optional rules within the local market is relevant to what the Panel is doing here?

A No, it does not. I believe it is relevant because it reflects the willingness of the station to allow the cable system to carry his programming at a zero revenue, whatever you want to call the source of that revenue. And not to withhold it because he does not wish to deny himself the ability to obtain audience in that market which would be obtained through cable transmission and therefore, the advertising revenues.

Q In your view, is there any distinction between the local market version of that and other

markets?

A Well, you and I discussed somewhat earlier the distinction between local spot and national spot and how it's measured. There could be, but in terms of evidence on the willingness of broadcasters to offer their signal for retransmission by another medium, namely cable, at a zero price, it seems to me this is evidence the Panel would want to take into account, if they're going to get into this issue of the supply side considerations that have been raised in previous proceedings.

Q Okay, with that condition, and you said before that you're not fully aware of whether compensation has been paid across the board to broadcasters, correct?

A I think I said at the time I put my 1996 book to bed, the evidence was that not much was being paid and it's my impression that much has changed in that regard, but I have not studied it recently.

Q You don't have comprehensive facts, evidence to share with the Panel on whether or not there are payments made?

A I do not have any empirical evidence with me now, no.

Q But your point is that if, in fact, compensation is not paid, then that's relevant in the ways that you've described to whether the supply side, how the supply side considerations should be applied to adjusting the Bortz Study?

A There's certainly evidence for that purpose.

Q So it's, in effect, an opportunity that is not taken or is somehow not capitalized upon, correct?

A It's not necessarily an opportunity not capitalized upon. It's a reflection of the economics of broadcast stations. They depend very heavily on advertizing revenues and the amount of money that they apparently can gain from threatening to withhold their signal for retransmission on a cable system is much smaller, apparently, than the money that they would lose from not gaining carriage, from advertising revenues.

Q And it's your view that when the broadcaster in the local market, if the broadcaster in

the local market does not obtain compensation, that that reflects somehow on the nature of the broadcaster's interest in obtaining compensation under the Copyright Act for its programs?

A It reflects the supply conditions in that marketplace because of the source of revenues to the broadcaster.

Q And the broadcaster has the opportunity to seek such additional revenues under the retransmission consent law and rules, correct?

A Yes.

Q I'd like to introduce as Exhibit 8-X, a copy of the 1992 Cable Act.

(Whereupon, the above-referred to document was marked as NAB 98-99 Exhibit 8-X for identification.)

(Pause.)

If you would turn over to the page that's labeled in the upper right hand corner, 106 STAT 1483. This Section 6, retransmission consent for cable systems, is the provision that this Act amended the

Communications Act to provide for retransmission consent. And I would ask you to look at the last subparagraph of Section 6 which is in parentheses 6 over on page 1483 on the right hand side of this page.

Do you see that?

A Yes.

Q It says "nothing in this section" -- I'm quoting -- "shall be construed as modifying the compulsory copyright license established in Section 111 of Title 17, United States Code, or as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers."

Do you see that?

A Yes.

Q Now are you aware that the retransmission consent right granted in this statute was implemented by the FCC in regulations that it adopted?

A I suppose it had to be, yes. They would be the ones.

Q I want to show you as 9-X, I'm sorry, may I move for the admission of 8-X.

MR. COOPER: I don't know why you would need to move the admission of a copy of a statute. It's the law. It's not evidence.

On the other hand, I don't want to burden the record.

MR. STEWART: Of course, you could take official notice of this. I simply am following routine.

JUDGE VON KANN: I don't think we need to have it received as an evidentiary exhibit, given that it's the law and we can all take notice of it, but I don't have any strong objection either, frankly.

Why don't we receive it in an abundance of caution and recognize that we haven't added much that we couldn't have done without receiving it.

(The document, having been marked previously for identification as NAB 98-99 Exhibit No. 8-X, was received in evidence.)

MR. COOPER: Just for clarification, I assume --

JUDGE VON KANN: I don't think everybody else has to offer statutes, if they don't want to. But since he went to the trouble of xeroxing all these copies, it seems unkind.

MR. COOPER: I assume this is the relevant, I mean to the extent there would be later any dispute about whether this is actually the effective law, I assume we haven't waived that by allowing the admission of this.

JUDGE VON KANN: If somehow we've got it wrong, we can deal with that.

MR. STEWART: Thank you. And I believe I moved for the admission of Exhibit 7-X. That was the article that was written by Dr. Crandall.

JUDGE VON KANN: It was received.

JUDGE GULIN: To clarify, are you suggesting that the lack of payments under retransmission consent goes to the supply side considerations with respect to all of the copyright owner types within the signal or only to NAB, locally produced programs?

THE WITNESS: NAB is the program, excuse

me, the broadcast station is unable to obtain revenues for what it is offering which is its signal. If, in fact, it is unable to do so, then it does not enhance its revenue position in negotiating with these other people who supply programming. It has nothing to do with the compulsory license in this case. It has to do with how much they are able to -- the copyright owners are able to negotiate independently with a broadcast stations for programs they license directly to it.

Let's say it's an independent station and it buys syndicated programming. The fact that it is unable to negotiate a substantial amount of retransmission consent means it doesn't add to its revenue base from which the copyright owner for the syndicated programming can obtain a share. It doesn't apply to the Claimants in this case.

MR. STEWART: I would like to have introduced as NAB Exhibit 9-X, a comment filed in the FCC proceeding on behalf of Major League Baseball.

(Whereupon, the above-referred to document was marked as NAB

98-99 Exhibit 9-X for identification.)

BY MR. STEWART:

Q Would you turn over to the third page of this exhibit?

A Right, okay.

Q You'll see that the proceeding has implementation of the 1992 Act.

A Uh-huh.

Q An issue was raised in that proceeding with respect to the interpretation of that last clause that we just read in the statute about the extent to which retransmission consent would affect existing or future video programming licensing agreements between broadcasting stations and video programmers.

And the issue was whether programmers could, in fact, negotiate to take over or limit a condition of retransmission consent, the operation of the retransmission consent rights by the broadcasters, the exercise of those rights by the broadcasters. Are you familiar with that?

A I'm not familiar with that issue, no.

Q Here, you'll see that Major League Baseball is -- refers to comments filed by Tribune. Are you familiar with Tribune?

A Yes.

Q What is that?

A Tribune is a media organization in Chicago, among other things, at least probably at this time, I don't know if it's still true, owns newspapers and even sports teams.

Q And Major League Baseball says here that the Tribune comments cited certain "recently adopted standard provisions of baseball club broadcast contracts."

Do you see that?

A Yes.

Q Is that -- does that refresh your recollection about the mechanism by which leagues impose limitations on their teams' ability to convey broadcast rights?

MR. COOPER: I object. I don't think that's the proper way to refresh recollection. You have to establish that he once knew and has forgotten,

something before you can refresh his recollection.

MR. STEWART: I withdraw the question.

JUDGE VON KANN: Okay.

BY MR. STEWART:

Q Over on the next page, the last page of this exhibit 9-X, the comments read "baseball urges the Commission to reject the position set forth in Tribune's comments and in accordance with its explicit directions set forth in Section 325(b)(6)" -- that's the provision we just read.

Returning to the quote, "to construe the Cable Act as preserving the absolute right of broadcast stations and copyright owners to freely negotiate and enter into contracts regarding, among other things, the exercise of retransmission rights."

Do you see that?

A Yes.

Q Now, let me round this out and introduce as Exhibit 10-X, a copy of the comments of the broadcasts to which those comments refer.

(Whereupon, the above-referred to document was marked as NAB

1 98-99 Exhibit 10-X for
2 identification.)
3 Please feel free to review this document
4 to the extent you need to. I'm going to be directing
5 your attention to the second to the last page of the
6 document which is the recently adopted standard
7 provisions of baseball club broadcast contracts of the
8 Major League Baseball comments referred to.
9 Is this the page immediately before Mr.
10 Riley's signature?
11 MR. STEWART: Yes, it is.
12 JUDGE VON KANN: Focusing on the
13 retransmission consent section?
14 MR. STEWART: Yes, correct. Well,
15 actually, these are alternative provisions.
16 JUDGE VON KANN: Okay.
17 MR. STEWART: On the face of it.
18 JUDGE YOUNG: I think you should help the
19 witness.
20 (Laughter.)
21 BY MR. STEWART:
22 Q If you go to the very back of the very

1 last page of the document --
2 A Oh, I see here. I see, I see, okay.
3 Q You see at the top it's entitled "Required
4 language for local broadcast contracts, revised April
5 15, 1992, page 5." I don't have any of the other
6 pages of that, whatever document this is excerpted
7 from because Tribune did not provide them in the
8 comments that it submitted.
9 A By required language, it's required by the
10 Tribune. I don't know what required means.
11 Q This -- if you look at page 11 of the
12 Tribune comments, you'll see that this page in Exhibit
13 A is according to Tribune, "consists of representative
14 provisions from recently formed contracts prepared by
15 program syndicators and Major League Baseball's
16 'required language for a broadcast contracts.'"
17 A Oh, I see.
18 MR. COOPER: And this sentence goes on to
19 say "all predating the Cable Act which prohibit the
20 retransmission of the subject programs or limit a
21 station's right to grant retransmission consent."
22 JUDGE VON KANN: And what is the question,

1 Mr. Stewart?
2 By MR. STEWART:
3 Q The question is and I'm glad that Mr.
4 Cooper raised this, the provisions on retransmission
5 consent would say in one of two alternative provisions
6 begin "if during the term of this agreement rights
7 holder gains the right through legislative or
8 administrative action or otherwise, to grant consent
9 to cable system operators and/or other multi-channel
10 programming distributors for the retransmission of its
11 broadcast television signal, rights holder shall not
12 grant such consent with regard to the games broadcast
13 hereunder without the express written consent of
14 club."
15 It goes on to say, continuing the quote,
16 "it is understood and agreed that the granting of such
17 consent by club, shall be contingent upon the parties
18 hereto reach an agreement as to the compensation to be
19 paid to club in consideration of its consent."
20 A This doesn't surprise me.
21 Q Why not?
22 A Well, once you started to change the

1 relevant competitive positions of two distributors of
2 programming in the market, then the supplier of the
3 program to these distribution outlets wants to be able
4 to come back and renegotiate the deal.
5 I mean if you have a situation in which
6 the broadcasters now can get a substantial amount of
7 additional revenue and that could occur in this case,
8 then there's no doubt that the program suppliers want
9 a share of that revenue. And if indeed, the carriage
10 in the retransmission consent leads to a different
11 economic competitive position between cable and
12 broadcasting in that market, they'd want to
13 renegotiate the deals, I guess. I mean I think that's
14 what's going on. I'm not sure.
15 MR. STEWART: Let me provide as
16 Exhibit 11-X, excerpts from CRT record and this again
17 may not be subject to official notice, but I wanted to
18 close the loop here because Tribune was arguing in its
19 comments that the FCC should not allow program
20 suppliers, in effect, to reach over the shoulders of
21 stations and control the exercise of retransmission
22 consent rights. Baseball was arguing that they should

1 be permitted to enter any such contracts and here in
2 Exhibit 11-X is what the FCC said.
3 I have -- it's a very long opinion and I
4 have the full version here, but the second page of it,
5 of 11-X begins simply as consent contracts.
6 (Whereupon, the above-referred
7 to document was marked as NAB
8 98-99 Exhibit 11-X for
9 identification.)
10 BY MR. STEWART:
11 Q Have you had a chance to scan that?
12 A I just see paragraph 172 here.
13 Q If you look at 173 as it goes over on to
14 the next page, you'll see that the FCC, in effect,
15 decided in favor of the sports league request and
16 Motion Picture Association request to permit
17 contracts, permit the program suppliers, in effect, to
18 enter contracts with stations taking over the
19 retransmission consent rights.
20 A Renegotiate the contract.
21 Q To renegotiate or negotiate new contracts,
22 correct.

1 A Yes.
2 Q Do you agree, Dr. Crandall, that if the --
3 if a sports league or sports team had the right under
4 contract that it had negotiated with the station to
5 take over the retransmission consent rights and
6 receive all compensation under any retransmission
7 consent agreement, and in fact, as the Tribune
8 attachment shows, specifically condition
9 retransmission consent on retransmission in certain
10 markets, that the sports league would be in control of
11 whether compensation was received for retransmission
12 consent?
13 A Under your hypothetical, I would have to
14 agree, but there's an important adjective and you said
15 "all." There's no reason to believe that the
16 renegotiation of these contracts would lead the
17 copyright owners, baseball, whoever else it is, to be
18 able to obtain all of the benefits from the additional
19 revenue potential of the station. It's my impression
20 that today the stations retain a substantial share of
21 revenues and may be going down because of competition
22 from broadcast satellites and from cable.

1 However, they've always had the ability to
2 obtain a substantial share of the revenue for
3 themselves. So there's no reason to believe that the
4 renegotiation of these contracts would lead the
5 copyright owners to get all of the revenues from
6 retransmission consent.
7 What they want are clearly and what was at
8 issue here, was that they want the ability to get a
9 piece of the action prior to the expiration of their
10 contract at which point they'll be able -- they will
11 be able to negotiate it.
12 JUDGE GULIN: Mr. Stewart, I may be a
13 little lost and I want to make sure I understand
14 what's going on here.
15 You're suggesting that, in fact, under the
16 law in place in 1998 and 1999 that any copyright
17 holder of programming had the right to renegotiate
18 their contracts under retransmission consent, their
19 contracts with the station?
20 MR. STEWART: Had the ability to
21 renegotiate, through renegotiating their contracts
22 with the station to influence effect, collect

1 compensation from any retransmission consent
2 negotiations that occurred.
3 JUDGE GULIN: Once a station agreed to
4 retransmission consent and say got compensation or
5 didn't get compensation, then any copyright holder can
6 then come back and say we want to renegotiate such as
7 an NFL or Major League Baseball and say we want to now
8 renegotiate our contract with you?
9 You're saying that is the law in 1998 and
10 1999 and I'm not sure that this witness has said that
11 it is or it isn't.
12 Do you know if that's the case?
13 THE WITNESS: I don't know if it's the
14 law, but keep in mind that the implication here --
15 JUDGE GULIN: Same page, with respect to
16 the law or is this all just hypothetical? That's
17 where I'm a little confused.
18 MR. STEWART: No, not at all. I believe
19 that it's not hypothetical and that in short, this
20 provision which reflected that condition on the 1992
21 Cable Act in that subsection 6 that we read permits
22 any program owner to negotiate with a station to take

compensation to tell them they can't exercise, they can't grant retransmission consent without their own consent --

JUDGE GULIN: And there is no disagreement about that.

MR. GARRETT: I didn't hear everything that he said, but I would be curious to know whether it is the position of the National Association of Broadcasters that copyright owners, including sports leagues, do have the right to insert one of these clauses into their contract and that it is not preempted by anything in the Communications Act here; and in fact, whether it is the position of the National Association of Broadcasters that these types of contractual provisions are valid, that in fact, they have been inserted in agreements, that other broadcasters have not objected or refused to put them in.

You're opening up a whole hornets nest of issues here, about the position of the National Association of Broadcasters on this I would find illuminating.

JUDGE VON KANN: Let me make a suggestion. I think we're at the break time. It seems to me we may have slid from interrogation of a witness into early argument of the case which is fine, but let's reslide back to where we need to be. You've been about an hour and three quarters with this witness. How are we coming on wrapping up?

MR. STEWART: That is essentially the end of my cross examination.

JUDGE VON KANN: With respect to these three exhibits, 9, 10 and 11-X, I assume you may wish to move them for impeachment purposes?

MR. STEWART: I would like to move that they be admitted as evidence under official notice and I have certified copies of the comments filed at the FCC to that end. That's with respect to the two exhibits 9-X and 10-X and 11-X, I believe, does not require -- is admitted for impeachment purposes.

JUDGE GULIN: I'm sorry, 11-X is?

MR. STEWART: Should be admitted for impeachment purposes. Should be admitted into whatever extent the public law was as well.

MR. COOPER: I think with respect to 11-X and 8-X, the two copies of law with the same -- I don't think they need to be in the record and we don't waive any objection to their being the proper law, but to ease the burden, we don't have any objection under that.

JUDGE VON KANN: Why don't we receive 11-X as, in effect, official notice of something we can take official notice of, subject to your checking this is correct, a copy of the right version or something.

(The document, having been marked previously for identification as NAB 98-99 Exhibit No. 11-X, was received in evidence.)

How about 9 and 10-X?

MR. COOPER: He is not a sponsoring witness, so they would come in as -- we would have no objection on impeachment only. If there's some other basis, you're saying -- putting him aside --

JUDGE GULIN: He is suggesting official notice, although these are comments.

JUDGE VON KANN: Why don't I make a suggestion that you all discuss this for a minute over the break and then let us know when we come back what position you'd like to take on it.

Let's take 15 minutes and resume at 12:08 or something like that.

(Whereupon, the proceedings went off the record at 11:53 a.m. and resumed at 12:08 p.m.)

JUDGE VON KANN: Yeah. Let's wrap up these exhibits, I guess. What's the --

MR. STEWART: Mr. Chairman, I would move at this time to have them admitted for impeachment purposes only.

JUDGE VON KANN: 9 and 10 X?

MR. STEWART: Yes. Right.

MR. COOPER: No objection.

JUDGE VON KANN: All right. So received.

(Whereupon, the document previously marked as NAB98-99 Exhibits 9-X and 10-X for identification were received into evidence.)

MR. STEWART: And that concludes my cross examination.

JUDGE VON KANN: Okay. All right. Mr. Hester.

MR. HESTER: Good afternoon, Dr. Crandall. I guess we've just moved into the afternoon anyway. My name is Timothy Hester. I represent the Public Television claimants.

CROSS EXAMINATION

BY MR. HESTER:

Q Could I ask you to turn please to page 5 of your testimony, and in particular, I wanted to direct you to Table 2 in the middle of the page.

A Yes.

Q And in this table, you show shares for Public Television out of the Bortz Survey Results. Is that correct? You show a share of 2.7 to 3.0 for the three years in question?

A Yes.

Q And were you aware that there was an adjustment that was made to the Bortz Survey Results as to Public Television that was accepted by the panel

in the 1990 to `92 proceeding?

A No, I'm not aware of that.

Q Okay. Let me ask you to --

MR. HESTER: Maybe this is actually a good time to ask a procedural question. I'm going to ask the witness a question about a few passages out of the 1990 to `92 opinion. I presume you all have your own carefully dog-eared copies, but I'm happy to hand copies up if that's helpful. And I presume we should have one for the witness, but I had assumed you perhaps didn't want to mark multiple copies as exhibits during the proceeding.

JUDGE VON KANN: I think actually it would be helpful.

MR. HESTER: Okay. So maybe that would be helpful.

JUDGE VON KANN: Thank you.

MR. HESTER: Okay. I hope the parties have their's, but if anybody needs one, let me know. Should we mark this as an exhibit, or is simply to have it as --

JUDGE VON KANN: Actually, I had been

thinking of asking you all, and maybe this is as good a point as any to do it. And I hadn't quite decided on whose shoulders I was going to ask this, but I would find it, as one member of the panel, very useful to have a notebook which had each of the CARP or tribunal reports that have dealt with these distribution cases over the years. It would be very handy for me to just have a compendium that had them all. I don't necessarily think they have to be exhibits. I think we can take official notice of it, but just as a convenience device, it would be wonderful to have a notebook that had them all in there. And so frankly, I was getting to the point I was going to discuss with my colleagues over lunch, on whose shoulders we should make that fall, the Copyright Office, or you guys, or whatever. Mr. Garrett, do you have any thoughts on that?

MR. GARRETT: Well, if they would agree to start supplying the water, we could supply the copies. I just have a question as to what it is you're looking for. We have a book that has all of the decisions going back to the 1978, the decision in the 1978 case.

We have also the opinions of the Court of Appeals in these various cases.

There are Phase 1 decisions, and there are also Phase 2 decisions. There are also sometimes decisions, for example, on remand from the D.C. Circuit, so there's a big -- there's a lot of material there.

JUDGE VON KANN: Maybe what I think might -- may I make suggestions as we're getting -- let us discuss this over lunch among the three of us, and then perhaps come back to you all with some suggestion. I don't want to put an undue burden. My initial reaction is I'm not sure we would need the Phase II stuff, although I don't know if maybe we would. But how about for just this morning's purposes, let's just let him refer to whatever it's going to be, the 1992 CARP report. I don't think we have to mark it at this stage.

MR. HESTER: All right. Thank you.

JUDGE VON KANN: And we'll try after lunch to give you some view about it.

BY MR. HESTER:

Q Dr. Crandall, what we've handed you is a document that's the 1990 to `92 decision of the Copyright Arbitration Royalty Panel, and the first page of the document, just to identify it, is a letter from the chairperson of that panel, Mel R. Jiganti, J-I-G- A-N-T-I, dated May 31, 1996. Have you seen this document before?

A Yes.

Q Okay. And if I refer you please to page 117, do you see there that in the middle of the page, the panel recites adjusted numbers for Public Television in the Bortz Survey of 6.1 percent, 6.3 percent, and 5.7 percent?

A Yes, I see that. That's Dr. Fairley's adjustment of the PTV share.

Q Right. And then if I refer you back to page 124, if you see the carry-over paragraph at the top of the page, the last sentence of that carry-over paragraph you see, "No party having presented any alternative to Dr. Fairley's methodology, we accept it for purposes of this proceeding." Do you see that?

A Yes.

Q Okay. So I simply wanted to establish that there was this adjustment to the Public Television share in the Bortz Survey that the panel accepted for purposes of the prior proceeding. And I think you said before you were not aware of that point.

A I was aware of this. I didn't realize that's what you were talking about.

Q When you say "this", what are you saying?

A The Fairley, I didn't know Dr. Fairley's name. I didn't remember his name, but I remembered this discussion in the report. But it does not correspond precisely to the number in my Table 2.

Q Right. The number in your Table 2 is - and let me refer you back to that on page 5 of your testimony - the number for Public Television you show in there is before any adjustment to the Bortz results. Correct?

A It is the award of CARP before the Librarian did anything to it. It is a weighted average.

Q No, I was -- I'm sorry. I was focusing

you on the middle column where you show the Cable Operator's Survey Share. Do you see that?

A Yes.

Q That number is the Bortz number before any adjustments were made. Correct?

A Yes, I believe so. Yes.

Q Okay. And in fact, I mean, just to absolutely confirm that point --

JUDGE VON KANN: There is no dispute as to this.

MR. HESTER: No. Okay. All right. Fine. Thank you.

MR. GARRETT: I just want to make sure I understand. You're saying the top Bortz number is --

JUDGE VON KANN: Mr. Garrett, there is no dispute that on page 5 of Dr. Crandall's testimony, the middle column, it says Cable Operator's Survey Share of the numbers from the Bortz Survey. I think there's nobody disputing that.

JUDGE YOUNG: And then that gets adjusted.

JUDGE VON KANN: And that was adjusted by the CARP Panel.

JUDGE YOUNG: But there's a separate award. The award may be different.

Judge von KANN: By the Librarian.

MR. HESTER: Yes. I'm sorry, Your Honor.

BY MR. HESTER:

Q Dr. Crandall, let me just ask just so there's no confusion on this. The column that you show in your Table 2 of Weighted Average Award, that's the weighted average award after the final decision in the 1992 case. Right?

A It is the weighted average award from the panel, not the final Librarian's decision. The weight average of the Basic and the 3.75 Fund.

Q Right. Okay. And because Public Television did not participate in the 3.75 Fund, the weighted average was less than the number assigned by the panel as to the Basic Fund. Right?

A That is correct, because the 3.75 Fund had a weight of about 25 percent.

Q Okay. And I simply wanted to confirm what I think is evident from the numbers we've just gone over. In your Table 2, you show what you identify as

1 a surplus for Public Television, comparing it to the
2 original Bortz Survey shares. Right?
3 A Yes.
4 Q That surplus becomes a shortfall if you
5 compare it to the adjusted Bortz shares that we just
6 went through. Correct?
7 A Well, I'm not sure this is an adjusted
8 Bortz share. This is an adjusted PTV share, based
9 upon some methodology, which apparently was accepted
10 in that proceeding, to suggest that there's some value
11 to cable owners from Public Television signals that
12 they don't carry.
13 Q Well, you are aware, Dr. Crandall, that
14 the panel accepted adjustments to the Bortz shares.
15 Right?
16 A I'm aware that their final award did not
17 correspond to the Bortz shares. I don't know that
18 they were adjustments to the Bortz shares. They
19 provided an award which was in excess of the Bortz
20 shares, and that's exactly what's in my Table 2.
21 Q Okay.
22 A And they did it perhaps in part because of

1 this procedure that Dr. Fairley used.
2 Q Well, maybe we're quarreling over
3 semantics. I simply wanted to establish that the
4 panel in 1990 to `92 case accepted an adjustment to
5 the PTV Bortz share.
6 A I think you're putting words in my mouth.
7 I did not say that.
8 Q Well --
9 A Table 2 says that in every case, they
10 provided an award which differed from the Bortz share.
11 By that reasoning, everything is an adjustment to the
12 Bortz share, I suppose, but all that table was
13 supposed to show was that they did not come out at the
14 Bortz shares.
15 Q All right. Let me ask it this other way
16 then. I'll ask it the other way. In computing this
17 supposed surplus for Public Television, you took no
18 account of the adjustment that was made to the Public
19 Television share, did you?
20 A No, I did not, because I did not attempt
21 to explain in Table 2 all of the reasons that the
22 panel might have used for reaching an award level

1 different from the Bortz share. The purpose of Table
2 2 is just to show that indeed they did.
3 Q Okay. Now if we take the number that I
4 showed you from page 117 of the CARP opinion, where
5 they showed -- and I'm just going to take a year for
6 purposes of example so we don't have to spend our time
7 going through three years. But in 1991, the panel
8 showed an adjusted figure for PTV of 6.3 percent.
9 Right?
10 MR. COOPER: I object to the extent it
11 characterizes it as a panel -- are you saying Dr.
12 Fairley's calculation?
13 MR. HESTER: I think the witness and I are
14 on the same page here, Your Honor. If I need to go
15 back and spend more time on it, I will. Should I
16 clarify this again?
17 JUDGE VON KANN: Well, what is the
18 objection, Mr. Cooper?
19 MR. COOPER: I'll withdraw the objection.
20 JUDGE VON KANN: Okay.
21 MR. HESTER: Okay.
22 BY MR. HESTER:

1 Q At page 117, the panel shows the adjusted
2 number out of the Fairley results of 6.3 percent.
3 A Yes, that's right.
4 Q And the number you show in your Table 2 on
5 page 5 is 4.2 percent as an award to Public
6 Television. Is that right?
7 A Yes, that's averaged over the years, so
8 that's not just for `91, but go ahead with your --
9 Q Well, it was the same award across the
10 three years, wasn't it?
11 A Yeah. No, I'm -- that I'm not sure. We'd
12 have to go to the page where they actually printed out
13 the award. It's in here somewhere.
14 Q Okay. Well, I'm sorry. If you look at
15 page 143 --
16 A They're very similar.
17 Q You can see that -- your point is fair.
18 There's a slight difference if you average, but
19 they're very close numbers. Right?
20 A Yeah.
21 Q Okay. So if we look at these two numbers
22 simply again making perhaps an obvious point, but the

1 actual award is 50 percent less than that adjusted
2 share for Public Television. Right?
3 A The actual -- I'm sorry. The actual award
4 --
5 Q Being 4.2 percent, the adjusted Bortz
6 number being 6.3 percent. A But the 6.3
7 percent applies to Fairley's result starting with the
8 Bortz Survey, adjusting the Bortz Survey for his
9 methodology. And then that only applies to the Basic
10 pool, whereas the 4.2 is for the weighted average of
11 basic and 3.75, so I think you've got to compare the
12 6.3 with 5.8.
13 Q 5.8 is what?
14 A 5.81 and 5.75 are the awards of the Basic
15 Fund to non- commercial television according to page
16 143 of this document.
17 Q Okay. So if I take your point, I'm simply
18 trying to establish that in your Table 2 where you
19 have shown a surplus, if we go back and we look at
20 what the panel actually found as the Public
21 Television, it comes out the other way. It's not a
22 surplus if you look at what the panel accepted as the

1 Public Television.
2 A I'm not sure that the -- what the panel
3 accepted for Public Television is what they wrote
4 down, 5.81 or 5.75. They refer to the study by DR.
5 Fairley, and then later on point out they referred to
6 the fact that apparently it was not rebutted or
7 contradicted.
8 Q Well, they said they accepted it.
9 A Yeah. They accepted it as evidence, but
10 that does not necessarily mean that they were going to
11 give exactly that percentage.
12 Q Okay. Now let me ask you to look at the
13 -- in the middle of page 5, you say that -- right
14 above Table 2, you say that, "No other claimant group"
15 - you're talking here about JSC - "No other claimant
16 group received such a substantial dollar reduction
17 from its share in the Bortz Surveys." Do you see
18 that?
19 A Yes.
20 Q You would agree with me, I take it, that
21 in percentage terms, other claimant groups received a
22 larger reduction in their award vis a vis their Bortz

1 share. Right?
2 A From a casual inspection of this, I would
3 have to agree with that.
4 Q Okay. You also would agree with me, I
5 take it, that the JSC award in the `90 to `92 case was
6 closer to its Bortz share than it had ever been
7 before.
8 A That's my recollection. And if that's
9 your's, I'll take your word for it.
10 Q Okay. Now let me ask you to turn to page
11 6, Dr. Crandall. You say that -- you conclude at the
12 very top of the page that the award to JSC should not
13 have been less than the royalty share reflected in the
14 Bortz Surveys. Do you see that?
15 A Yes.
16 Q Now I take it from what you've already
17 said that you know full well that the CARP looked at
18 many other factors aside from the Bortz data in
19 reaching all of these royalty shares.
20 A Yes.
21 Q Okay. So you recognize that the issue
22 presented in the last case was not simply or not

1 whether any particular party would get precisely its
2 Bortz share.
3 A Well, the way it may have been framed by
4 the panel was not that, but as an economist I would
5 suggest to you that there were only two studies that
6 served as sort of polar cases for how this money
7 should be divided up, the Bortz Study and the Viewing
8 Study. And I would argue as an economist, the Nielsen
9 Study of Viewing is irrelevant and, therefore, that
10 absent any other information that would give you a
11 better handle on how a market would have allocated
12 this pool, that the panel should have used the Bortz
13 Study in toto.
14 Q Now well, let me ask you about that. There
15 were other pieces of evidence as to valuation
16 presented by different parties aside from the Bortz
17 Study. You're aware of that?
18 A Yes.
19 Q And it is not simply the viewing data.
20 There were other factors presented by different
21 parties.
22 A Yes, I believe that's correct.

Q Okay. So that in fact, the decision about whether the panel would give Joint Sports precisely its Bortz number had to take into account the entirety of the evidence presented on valuation, of which Bortz was a part. Right?

A I suppose as a matter of law, that's true.

Q Well, and as a matter of the way the evidence would be evaluated, it wouldn't simply be whether you award a particular number or not to one party. You have to look at the range of evidence.

A Well, to the extent that you conclude that the Bortz Survey is the best available information on the value of this programming, the share of the budgets that cable systems would allocate to these various types, but that you have some problems with the Bortz Study. Then you would want evidence that reduces or adds to the Bortz share based upon these concerns. And what testimony says is, they didn't provide any such justification. Why was the supply -- the fact that Bortz doesn't take into account supply considerations, why is that a case for reducing the Joint Sports share? It might have been a case for

increasing it had they looked into it. The fact that this survey was a 10 or 15 minute survey, and it reflected the attitudes of the cable operators might have meant that it was subject to some minor random error, but it doesn't suggest any bias for adjusting one way or the other.

Q Well, let me try to break that down a bit. I simply, first of all, wanted to establish what I think is common ground between us, that there are other pieces of evidence on valuation aside from Bortz, and aside from the Neilsen Study that were presented in the last case. The panel looked at the range of things.

A That is correct.

Q Okay.

A As a matter of fact, as an economist, you and I could discuss these pieces of evidence and ask whether they should have been used to add to or deduct from the Bortz share.

Q And the panel, in fact, had some concerns about the Bortz study, some of which you just mentioned that cause it to give less than full weight

to Bortz. That was the panel's judgment. Right?

A That was the panel's judgment, but unfortunately, they did not back it up with a reasoned analysis of why it should lead to some shares being increased, and some being decreased.

Q And you also recognize, I take it, that the panel in its opinion said it wasn't purporting to summarize all of the evidence in the record, or to discuss every piece of evidence.

A I don't recall that statement, but I'm sure it's here.

Q Well, let me just -- so when you say on page 6 that, "In your judgment the Joint Sports' share should have been at the Bortz number", I take it implicitly you're giving zero weight to the rest of the evidence in the record.

A Not necessarily. I'm giving -- I'm suggesting that in the record, and in the panel's decision, there's no analysis where it suggests that you would deduct from Bortz for certain categories, and add to Bortz for other categories based upon the infirmities or purported infirmities in the Bortz

Survey.

Q Well, but my point is simply Bortz wasn't the only piece of evidence, so your disagreement is with any deviation from Bortz, and the question I'm putting to you is, doesn't that inherently put a zero value on everything else?

A Not necessarily, but what is not present is why it was, if you go back to my Table 2, why it was that the Bortz Survey says that the program supplier share is 40 percent to 46 percent, and they gave the program supplier 56 percent. Where did that 10 percent come from? It came from putting some weight on the Viewing Study, I would suggest that was a mistake from the standpoint of economics.

Q And tell me why you think that was a mistake.

A Because the Viewing Study tells you nothing about the willingness of cable systems to pay for various forms of copyrighted material.

Q Why is that?

A Because their ability to obtain revenues and net profits is not directly correlated, or is not

a function directly -- solely of viewing, but rather of the types of programs that are offered, and whether they can obtain greater revenues from the sale of subscriptions from adding those programs.

Q And why wouldn't that equate into programs that are widely viewed?

A Well, it would certainly equate into programs that are viewed, and there may be some minor correlation there. But the viewing data itself doesn't tell you anything about the willingness of cable operators to pay, or the derived information about the willingness of their subscribers to increase their subscriptions to the cable system.

Q So putting it another way, in your view, the viewing data doesn't tell you what kinds of programs are valuable in terms of attracting and retaining subscribers?

A By itself, no.

Q Now I take it you also recognized the panel reached a different view on that issue.

A Well, they may have reached a different view. They struck a compromise of some sort, but I

think over time, as you suggest, the panels are moving more and more towards the Bortz Survey, because I think they recognize correctly that there's no analytical basis for these subtractions and additions from the Bortz Study. And perhaps this time around we can hope that any analysis of the Bortz Study, and any deviation from it would be justified by analysis of information in the record.

Q I take it you would agree with me that there are imperfections in the Bortz Study. You couldn't look at it alone as a perfect measure of value in this context, would you?

A Put that way, obviously, I'd have to agree with you. It's obviously not perfect.

Q I was looking for agreement.

A Economists are often a little skeptical of survey study. But as I pointed out, I don't know if it was in answer to Mr. Stewart's question, data obtained in other ways often has random errors in it too. I don't claim to be knowledgeable about survey research techniques, and I, myself, don't see any particularly large problems with the Bortz Survey.

Q Why do you say that, "Economists are often skeptical about survey research"?

A Well, because it's often used to determine the willingness of subscribers - excuse me - of consumers to pay for something. And so, for instance, I ask you how much is it worth to preserve the Grand Canyon? You might answer anything under the sun. In this particular case, these are cable operators who were asked how would they come out in allocating a budget, and so they were forced to consider a budget constraint. Often the survey research for consumers doesn't take into account the budget constraint, and what you find is consumers saying they'd be willing to pay more than their net wealth for something.

Q I wanted to ask you just one more small question on your Table 2, page 5.

A Uh-huh.

Q Where you've calculated these dollar amounts, you're working off of the point estimates in the Bortz Survey shares for purposes of calculating these shortfalls and surpluses. Right?

A Yes.

Q And you haven't taken into account the confidence intervals of the estimates.

A No, there's no standard deviation.

Q Dr. Crandall, are you also aware that with respect to the claimant categories in the `90 to `92 case, that Sports was the programming category that had the largest deviation between the Viewing Share and the Bortz Share?

A Yes. I think that's right. I can't -- without looking at the numbers. I wouldn't be surprised because if you look at other evidence, you'll see that cable systems pay more per viewer for sports-related programming than for other kind of programming.

Q They pay more per program when -- let me follow up on that last comment. You said they pay more for sports programming. That's in relation to programming on which they can run advertising?

A Some of it they may, but they pay huge premium for ESP over some Nickelodeon, or something like that. The ratio of what they pay to audience.

Q And they can run advertising on ESPN.

Right?
A They probably can run advertising on some of these other networks too.
Q Let me ask you about ESPN.
A I think that's right. I haven't looked at it.
Q Okay. You say at page 10 at the bottom of your paragraph 20, you say that the third arbitrator rejected the concern about the supply side, and supported a higher award for JSC that was more consistent with the Bortz analysis. Do you see that?
A Yes.
Q I take it you recognize that the dissenter in the prior proceeding still proposed an award substantially below the Bortz share that you show in your table.
A Yes.
Q And in fact, he only proposed one additional percentage point for JSC. Is that right?
A Something like that.
Q So even the dissent didn't accept the Bortz Survey in full as the only measure of value. Is

that right?
A Apparently, but he discounts the supply side effects entirely, so I'm not sure why. He doesn't explain why he didn't give them the full Bortz share.
Q So your critique is really focused more on what the panel wrote, than on what they did?
A Well, the only way to understand what they did is to have them explain to me why they did it. I mean, they could have generated the numbers, you know, randomly, but presumably, there's some basis for this. And what I was trying to find out was why they adjusted or why they offered shares which are different from the Bortz Survey, and they don't really explain it very well.
Q But your point in your testimony is you think the dissent got it right?
A My point in my testimony is that I think the dissent was closer to having it right. And he discounted the supply side argument on the grounds that this was a forced sale, it was a compulsory copyright.

Q Okay. Let me ask you to turn to page 13, please. I'm sorry. Make it 12.
A Okay.
Q Well, I guess my question really covers both of these pages, and something you said in your direct testimony this morning. I believe you've testified both in your written paper and earlier today that you believe the free market to be simulated in transactions between cable system operators and the owners of the copyrighted programming that's being carried on the distant signal. Is that correct?
A I think that's the best way to think of it. As I testified, there could be intermediaries there.
Q And so, in this market to be simulated, the buyers that you would be focusing on are the cable operators?
A Yes.
Q And you would recognize, I take it, that cable operators follow a common pattern of purchasing full channels of programming. That's the way they run their business.

A I think that's typically true, yes.
Q Cable operators aren't in the business of buying individual pieces of programming, and amalgamating them into a full 24 hour a day signal, are they?
A They might do it on some channels, and obviously they even program some channels. But for the most part, they are downloading a basic cable network or a premium cable network and offering it in toto.
Q So let's just make that clear. A cable operator will look for a full channel of programming to fill the 24 hours of a day, and it might get that channel of programming from a cable network. It might get it from a local signal. It might get it from a network signal, might get it from a distant signal, all of these sources. Correct?
A Yes.
Q Can you give me any examples where cable operators actually amalgamate programming build-up of a 24 hour day by amalgamating the programming?
A Well, I can give you an example. On my

own cable system there's a local news channel, Channel 8 on D.C., Comcast Cable System, where there's periodically different insertions of programming that they negotiate for and carry on that channel, that is not simply the local newscast. Now I don't know if they own -- they probably own that channel, and they may pay copyright royalties to various people selling them content for that channel.

Q But they don't build up a 24 hour day, do they? Your point is they insert certain programming into the day?

A Well, this -- again, I don't know who owns this channel, but they do have local access programming. In many of these cases, they may actually participate in the assembly of the rights and of the programming. But you're right, that for the largest part of their channel offerings, they are picking up an entire channel, and not mixing and matching them themselves.

Q And so these cable operators are really not in the business of negotiating directly with owners of programming, are they?

A They may be on certain occasions, as I pointed out.

Q Pretty rare though.

A I haven't looked at that.

Q Well, let's take your example of Comcast, which is maybe a nice counterpoint to the one I wanted to ask you about. You recognize that a lot of Form 3 systems are much, much smaller than Comcast.

A Well, Comcast owns a -- it's a multiple system.

Q Right.

A It may own some small systems. I'm talking about the system in the District, which is, I suspect, one of the larger systems.

Q Right. But if you think about cable systems all around the country, Form 3 cable systems, a lot of them are substantially smaller than Comcast. Right?

A Smaller than D.C. Comcast, if you're talking about systems. Comcast is a large multiple system.

Q Right. And so, it would stand to reason

that a number of Form 3 operators aren't going to be in any position at all to have the infrastructure to negotiate with different owners of programming to build up a channel from scratch.

A I don't know it takes. I mean, it may be they negotiate with local people who do have copyrights and to whom they make payments. I don't think you have to be terribly large to do that.

Q But in any event, you agree with me they don't really do that as a norm today.

A I don't know they don't do it as a norm. I agreed with you earlier that they don't do it on a large share of their channels.

Q Okay. Now you're familiar with the fact that the panel in the 1990 to `92 case rejected the suggestion that there should be a market based on negotiations between program owners and cable operators.

A I don't think they rejected it. I'm trying to find -- if you can find the page for me. I cited in here, but I don't know what the page is. I think -- as I pointed out earlier -- oh, here it is.

Hang on one second and I'll answer your question.

Q Okay.

A Right. I got it.

JUDGE VON KANN: What page?

MR. HESTER: I can point you -- it's footnote 4 in your written testimony, and there's a sentence on page 7 in your written testimony, which refers to page 23 to 24 of the CARP report.

THE WITNESS: Yes, and it talks about operators that substitute for direct negotiation among cable operators and copyright owners. And then later on -- I had it earlier. I'm sorry, sir.

MR. HESTER: I could maybe -- do you want me to point you to some of it, Dr. Crandall?

THE WITNESS: Yeah. But anyway, I think later on they point out that there might be -- that this is a simulation of a market between cable system and the demand side, and the owners of programming on the supply side. But you're right, they did talk about initially a substitute for negotiations between cable operators and distant signal broadcasters.

BY MR. HESTER:

Q Right.
A I don't know that they rejected in saying that there would be negotiation between cable operators and the copyright owners directly.
Q Okay. Well, let me point you to the middle of page 24. Do you see in the middle of that page, CARP said, "Where the simulated market diverges from the compulsory license system, and what we must construct is the negotiations between the cable system and the broadcast stations." Do you see that?
A I do.
Q And then also if you look at the very top of that page, the panel says - and if you look at the carry-over from 23, they pose the question as, "What would the cable system have had to pay and be willing to spend ... if, in fact, it had been `required' to negotiate with the broadcast station." Do you see that?
A Yes.
Q And that's what you were referring to in your testimony, in fact, when you said you didn't agree fully with what the CARP said on this point.

A NO, I said that I think of it more in terms of negotiations between the ultimate owner, the copyright owner and the cable system. And, in fact, in the decision by CARP in the `90/92 case, in the middle of that paragraph on page 24 they say, "Further, we must hypothesize a situation whereby the cable system negotiates not for a channel, such as WTBS or TNT, but rather for an entire program category, such as Sports programming, movies or public broadcasting programming on a proportional basis." That could imply more direct negotiation with the owner of the rights.
Q Well, I recognize that passage, and I didn't want to slide over it, but the description of the negotiation that they were talking about is, in fact, consistent with the way cable operators negotiate today with cable networks when they're bringing in a whole channel of programming. Right?
A Yes. As I mentioned earlier, there are often intermediaries just to save transactions costs.
Q Now are you aware also that in the satellite rate proceeding, the panel in that

proceeding considered and rejected an argument by the Joint Sports claimants that the negotiations in the satellite context should be conceived as between satellite carriers and copyright owners. Were you aware of that?
A I read that decision, but I don't recall that.
Q Okay. Let's see.
MR. HESTER: This report, Your Honor, actually was previously marked as NAB 2-X. It may be -- I really only had one question for the witness. May I approach? Is it all right if I --
JUDGE VON KANN: Yes.
BY MR. HESTER:
Q Dr. Crandall, I hope you don't mind if I just point you --
A Sure.
MR. GARRETT: I'm sorry. Do you have a good copy of that?
MR. HESTER: You don't carry your NAB exhibits with you?
MR. GARRETT: I burn them as soon as I get

them.
MR. HESTER: Yes, we do have some more. I'm on page 14 at the bottom, and footnote 17. I'll let you look at it.
THE WITNESS: I've looked at it.
BY MR. HESTER:
Q And, Dr. Crandall, I just wanted to direct your attention to the footnote there. You see where it says, "JSC and the commercial networks further assert that these negotiations would proceed between satellite carriers as buyers, and copyright owners as sellers." And then the panel says, "We agree that satellite carriers would be the buyers, but negotiations need not necessarily involve copyright owners directly as sellers."
A I see that, and in response to your earlier question, that doesn't suggest that they reject a notion that it could take place that way.
Q Okay.
A It says, "not necessarily."
Q My word "rejection" was maybe a tad strong, so I take your point. But the point I wanted

to make is that in the satellite rate case, and in the 1990 to `92 CARP case, the market as described was a market where the buyer is the cable operator, and the seller is the distant signal.

A Well, all it says here is that it could -- it may or may not be. It's not necessarily directly the copyright owner. It could be the signal in the hypothetical market, or it could be the copyright owner.

Q Do you see over on the next page, same footnote, footnote 17, there's a clause, "The ultimate re-transmission negotiations would likely transpire between satellite carriers and broadcast stations with no direct copyright owner involvement." Do you see that?

A I see it.

Q Does that make sense to you?

A That's their conclusion. I think it makes sense that in many cases there would be an intermediary, and it might be the station, but it could be directly with the copyright owner depending upon the size of the copyright owner, and the amount

of programming he had at stake.

Q Okay. I take it in terms of what you discussed before with Mr. Stewart, you would agree that for purposes of looking at any hypothetical market, we need to look at one that does not involve the sale of programming used to generate advertising revenue.

A I'm sorry. For what purpose? I'm not sure I understand your --

Q In other words, in looking at the value and in looking at the marketplace to be modeled here, we should not be looking at analogous marketplaces where programming is sold for purposes of generating advertising.

A Well, no. You might look for support in those markets. You just have to take into account how much of it is advertising. For instance, the fact that cable owners pay huge fees to ESPN, you wouldn't ignore, but you might want to back out the amount they obtained in advertising revenues to get a net value. But I wouldn't ignore it.

Q And I take it you'd also agree that if you

were looking at the amount paid by ESPN for a particular kind of programming, you'd need to back out the fact that they generate a lot of advertising revenue from that programming.

A If they do. You want to take into account how they obtain their revenues, yes.

Q Okay. Because you really need to know, in terms of assessing the value, you need to know how that programming is used to generate value.

A Of course.

Q Okay. Let me ask you to turn to page 11, please.

A 11 of?

Q I'm sorry. Your testimony in this proceeding. Now this is where you talk about the 1990 to `92 CARP decision, and in particular, you offer criticism here of what the panel said about what you called "the supply side of the market." Right?

A Yes, in paragraph 22.

Q Right. But the panel didn't say that you needed to look at sellers' motivations, did you? That wasn't what the panel said in that part of its

critique of the Bortz Survey.

A I say that in paragraph 22, "They appear to suggest that the motivation of the seller might not be captured in the Bortz Survey." That is, the seller's willingness to sell the programming at a specific price.

Q And that's what I wanted to drill down into first. You bring the word "motivation" in. The word "motivation" is not actually in the CARP decision, is it?

A I don't recall. We'd have to do a search.

Q Well, let me point you to page 65. Do you have that page?

A I do.

Q You see toward the bottom of page 65, there's -- I think the key sentence you're focusing on is this one, "While the operator may be willing to spend a certain amount of its budget for a given category of programming, the market supply may be at odds with what the operator is willing to spend." Do you see that?

A Yes.

Q And from that, you read that as talking about motivation. Right?
A No. I think the effect of the supply side, the people offering the programming, is what I was referring to. And, in fact, if you -- I don't have the pages here or the language, but if you look at the opinion on the devotionals, I believe they said something about these people being willing to take negatives prices; that is, pay for carriage, because they were motivated by something other than pure profit maximization. They were motivated by more Evangelistic matters.
Q Well, I really wanted to focus first on the question, when you say in your page 11 of your testimony, "The panelists appear to suggest that the motivations of the seller might not be captured by the Bortz Survey." First of all, that's your construction of this language. Right?
A Well, in part, but that's one of the things that would drive the sellers, is motivation. And they don't provide any analysis of why it is that they think that the Sports claimants would be willing

to sell their programming at low prices, and therefore need a deduction, and the program suppliers would not, who are selling, after all, reruns of syndicated programming and movies that are played over and over, why they would be less willing to take a low price, a 10 percent bump over Bortz.
Q Let me just ask you -- again, I simply am trying to figure out, first of all, when you say motivations of the seller, that's the way you construed this passage in the whole opinion. That's not in there per se, is it?
A It is not, and I said they appear to suggest that.
Q Okay.
A I mean, that's one of the things that would drive the seller.
Q Right.
A His motivation.
Q Right. I wanted to ask you about an alternative way to read that language, and see if it makes any sense to you.
A Which language now are we talking about,

the language of the panel?
Q Yeah, the language out of the panel.
A Okay.
Q And I just maybe can illustrate it with an example, and see if we can get to common ground here. If you have a --
JUDGE VON KANN: Mr. Hester, can you just pause a moment and let me -- I think we're going to go into this, I'd like to read this passage. It'll take me about a minute.
MR. HESTER: Sure.
JUDGE VON KANN: And I take it we're talking about the section of the CARP report headed "Observations Concerning the Bortz Study", which is page 65 and 66?
MR. HESTER: Yes, Your Honor.
JUDGE VON KANN: Okay. Can we just take a second?
MR. HESTER: Oh, sure.
JUDGE VON KANN: It is actually mainly page 65 more than 66, I think.
MR. HESTER: Yes.

JUDGE VON KANN: Because 66 talks about the way in which the study was carried out.
MR. HESTER: Right.
JUDGE VON KANN: You're not focusing on that at the moment.
MR. HESTER: Right.
JUDGE VON KANN: Okay.
MR. COOPER: He also referred to this devotional claimant --
MR. HESTER: Well, I object to that.
JUDGE VON KANN: All right.
MR. HESTER: I mean, I really do object to that. It is my cross examination.
JUDGE VON KANN: Well, let me just read these two pages. Okay. I'm up to you.
MR. HESTER: Okay. I just wanted Dr. Crandall to take an example to see if there's another way to think about this passage, where the panel says it doesn't take account of the supply side. The point I wanted to make is this. If you have a signal, assume this box is my signal - okay? It's just my 24 hours a day, and it has different categories of

1 programming, and it's got Category A, B, C, D, and E
2 down here. Okay? And just take -- just to help walk
3 it through, these are the categories of programming
4 that are on the distant signal. And then when one
5 goes to the operator, the operator says well, I would
6 allocate, you know, 75 percent to A, and the balance
7 to E, let's say.
8 THE WITNESS: Can I ask you a question
9 about your chart so we understand each other?
10 MR. HESTER: Sure.
11 THE WITNESS: The right-hand side is a bar
12 chart showing the breakdown of dollar values of
13 payments or time?
14 MR. HESTER: It's the percentage
15 allocations value in the Bortz Survey.
16 THE WITNESS: In the Bortz Survey.
17 MR. HESTER: Okay. And A, and this column
18 is the distant signal.
19 THE WITNESS: Okay.
20 MR. HESTER: Okay?
21 THE WITNESS: All right.
22 MR. HESTER: And this is just to

1 illustrate a point.
2 BY MR. HESTER:
3 Q You recognize, I take it, that the
4 composition of the programming in the distant signal
5 is set by the broadcaster.
6 A It's set by negotiations between the
7 broadcaster and the supplier of programming.
8 Q Right. But it's by negotiation in the
9 current world. It's not set by negotiation between
10 the cable operator and the distant signal.
11 A Not directly, no.
12 Q Well, not indirectly either.
13 A Well, if, in fact, the copyright royalties
14 are large enough to the various programming factions,
15 it may not be in this case, they might negotiate
16 differently to get on the independent distant signal
17 or the superstations. It could have feedback effects.
18 Q Well, okay. You recognize, for instance,
19 that the copyright royalties paid in this proceeding
20 are a very small fraction of the total programming
21 compensation that flows to owners of copyrighted
22 programming in this country.

1 A I think that's right.
2 Q Okay. And you also recognize that in the
3 current environment, the distant signal itself
4 receives no value from the distant signal
5 re-transmission, except in so far as it generates
6 additional advertising.
7 A Well, if it generates additional
8 advertising it might have an effect. I mean, again,
9 there may be feedback effects in this negotiation with
10 its suppliers. I don't know.
11 Q But by virtue of the way the compulsory
12 license works in today's environment, the mix of
13 programming set by a distant signal is going to
14 reflect its judgment about the programming mix that
15 maximizes its revenues in an advertising-based model.
16 Right?
17 A Yes, in part, but also there's a supply
18 effect here. And there may be -- if, in fact, there's
19 a substantial -- as I mentioned, a substantial amount
20 of revenues flowing back from the importation of
21 distant signals to the copyright owners, they may
22 change their negotiating patterns too.

1 Q Well, but that statement you just made is
2 counter-factual. Right? In today's world, the amount
3 of money that goes back to copyright owners from the
4 compulsory license is not going to be enough to cause
5 them to modify their negotiations with distant
6 signals, is it?
7 A It probably isn't going to have a major
8 effect on average around the country. It could have
9 on some signals.
10 Q Okay. Only on the superstations?
11 A Probably.
12 Q Okay. And so a lot of the distant signals
13 we're talking about in this proceeding are not even
14 ones that are carried as superstations. Right?
15 A Right.
16 Q Okay. But the point I'm trying to make is
17 that in today's world where we have a distant signals
18 that generate their revenue out of advertising,
19 they're going to decide on the mix of these signals A
20 through E, mix of programming Categories A through E,
21 based on their judgment about where they make the most
22 advertising revenue. That's the way the distant

signal would set its mix of programming.
A That's the way the broadcasters' interest is in maximizing his net revenues.
Q Okay. And now you have a cable operator that's bringing the signal into its system. And that cable operator, unlike the distant signal, generates zero revenue from advertising. Right?
A From the distant signal, yes.
Q Right. Just focus -- you're right. Just focusing on the distant signal. So you have this situation where there's a divergence between the decisions made by the entity that sets the mix of programming, which is the distant signal, versus the decisions made by the entity that decides to bring the distant signal into its particular system via re-transmission. Right?
A You do, and there's no -- and at this point, it's difficult for that feedback on the programming decision of the independent station to have an effect. But I guess what you're saying then is that the dissenter in this case had it right; that is, this is, after all, a compulsory licensing scheme

for a given distribution of programs, and you don't need to worry about the supply effects.
Q Well, I don't know how you got there from my question, but I was just focusing kind of narrowly on -- and then isn't it quite possible you could have a situation where you have a bunch of cable operators who are saying I would just love if the distant signal would give me more of A. I just really want A. A is what I really want, but the distant signal doesn't carry as much A, as what the cable operator wants, because the distant signal has different motivations.
A It's possible he'd say that, but when he's asked the question, he's asked for those signals, how would he allocate them, given what they offer him? And, therefore, this fixed carriage, how would he allocate his budget for buying that mix of programming.
Q But isn't one way to read what the panel was talking about when they talked about supply side considerations, is this phenomenon where the operator could want, want, want all day long. The cable operator wants much more programming than is, in fact,

available as a supply in the distant signal marketplace, because the distant signals are not motivated by the same considerations that cause the cable operator to want particular categories of programming.
A I don't think so. I think if you're going to hold that Signal A, B, C, D, E in the right bar constant, then the supply consideration simply goes away. If, in fact, supply has an affect here, can have an affect by different offerings of programs at different prices and a different equilibrium. It's very hard to imagine how you hold the quantities constant.
Q Because you don't get to an equilibrium in this market, because there isn't the -- in the current world, under the current compulsory license, there is no way equilibrium, there's no incentive for equilibrium between the distant signal decision-making, and the cable operators' decision-making about what it wants.
A Well, even if we agree that there's no feedback, there's still an equilibrium. The

equilibrium is the one, your right-hand column. Those are the quantities. It doesn't affect those quantities, and the cable operator is asking given those quantities, how much of your budget do you think you'd have to spend to get those in direct negotiation, for just those quantities? And that's the answer he gave you. There's no supply effect to worry about.
Q Well, I don't disagree with it, but my point is, the panel could have been talking about something other than motivations of sellers. It could have been talking about the fact that the distant signals aren't going to supply the amount of programming that the cable operators are allocating to different categories.
A Well, I don't -- I guess I don't agree. I think what they are talking about is saying that for the quantities A, let's say, the price that the copyright owner would demand is much higher than that area suggests and, therefore, they would never reach a deal. That's one possible way to explain it. In another case of devotionals, let's call them D, that

1 the devotionals would give the stuff away, and so
2 therefore, that area goes to nothing. It's a straight
3 line. It's not an area at all. I think that's what
4 they're talking about. It's not clear what they're
5 talking about, but the final point is, they never use
6 this analytical insight to adjust the Bortz numbers.
7 They simply say it doesn't take into account supply
8 considerations. And then later on we find out they've
9 adjusted someone up 10 percent, and someone down 6
10 percent, but they haven't tied it to the supply
11 consideration.
12 Q Right. I guess, I recognize that's your
13 critique of it. I'm trying simply to suggest that the
14 issue here in this proceeding, and the complexity of
15 the market valuation is not simply the motivation of
16 the sellers of individual categories of programming.
17 There's the further complexity that you have the
18 motivations of the distant signal that diverge from
19 the motivations of the cable system.
20 A The motivations of the economics, yes. But
21 the -- I agree with you that it is not simply
22 motivation, but because the best example of the panel

1 actually taking into account supply effects, the
2 devotionals, is based upon motivation; that is, these
3 people are not maximizing net profits, they're
4 maximizing souls.
5 JUDGE VON KANN: That sounds like a good
6 place to stop for lunch. Is this an all right place,
7 Mr. Hester?
8 MR. HESTER: Yes, it's fine, Your Honor.
9 JUDGE VON KANN: All right. Why don't we
10 break and resume at 2:10.
11 (Whereupon, the proceeding in the
12 above-entitled matter went off the record at 1:12 p.m.
13 and resumed at 2:12 p.m.)
14 JUDGE VON KANN: We were talking a little
15 bit over lunch, and there is two or three sort of
16 administrative matters that are floating around here
17 that we probably would like to take up with you all
18 this week, but I am thinking that it might be better
19 to defer it.
20 First of all, we have got -- we want to
21 finish Dr. Crandall, and then you have another expert.
22 Maybe -- it sounds like Wednesday may be a little

1 lighter day than Monday and Tuesday, and I am thinking
2 that maybe right after lunch on Wednesday that we
3 would talk to you about three things that I am aware
4 of.
5 One is this sort of continuing issue of do
6 we need to do anything about the fact that some of the
7 direct cases refer to percentages of the whole, and
8 some of them refer to percentages of less than the
9 whole, and what do we have to do about that.
10 Number 2, the issue of the designated
11 testimony, and the fact that a number of parties have
12 designated quite a bit of prior testimony, and how are
13 we going to handle that.
14 And a third issue is what we were talking
15 about a moment ago, perhaps getting a collection of
16 the relevant CRT and CARP reports, and Librarian, and
17 D.C. Circuit, but how much of that do we really need.
18 Do we need the stuff with respect to all six prior
19 proceedings, or maybe only certain ones, and I think
20 it might be worth talking about that, too.
21 So why don't we put all of that on the
22 agenda for Wednesday after lunch when we perhaps will

1 have a little less of a pressed schedule. Yes, sir
2 MR. MAUSE: Your Honor, this is Philip
3 Mause, representing the Music claimants. In talking
4 about the percentages as a whole, and I know that we
5 want to get moving, but an issue -- somebody had
6 talked about an issue which was a cousin of the issue
7 that you raised, and this one might be a nephew or an
8 illegitimate child. I don't know.
9 But a number of the parties cases, and I
10 think the NAD case explicitly says they are dividing
11 the whole, except for whatever goes to music, because
12 music is a program element rather than a program type.
13 But we would also like some clarification
14 as to whether the parties represent program types
15 here, types of programming, are allocating a hundred
16 percent of everything, or a hundred percent of what
17 goes to program types after some amount is set aside
18 for music. That is a program element.
19 JUDGE VON KANN: Well, I think that is a
20 relative of some sort of the issue, and so let's put
21 that on the agenda on Wednesday as well if we can.
22 MR. MAUSE: All right. Thank you, Your

1 Honor.
2 JUDGE VON KANN: Mr. Garrett.
3 MR. GARRETT: I would also suggest that we
4 also put on the agenda an issue that you raised at the
5 outset, Judge Kann, and that is the settlements that
6 we have here with NPR and the Devotional claimants. I
7 think that we should probably be able to take that on
8 Wednesday, and by putting it on the agenda pushes all
9 of us to devote some attention to it.
10 JUDGE VON KANN: Okay. I think that on
11 the first day, we had counsel here for the Devotional
12 claimants at least, who as I remember said that he was
13 happy to have that put in the record, but he would
14 like to have some discussion with you all about how
15 that is done.
16 So I don't know if you have gotten back to
17 him or not, but maybe between now and Wednesday, you
18 could talk with him and there would be some consensus
19 on what the best way to do it, and perhaps NPR as
20 well.
21 MR. GARRETT: He has made a proposal that
22 he sent around to the rest of us, and the rest of us

1 have not gotten together to talk about it and see
2 whether or not it is acceptable, and we have not
3 gotten back to him.
4 But that's why I think if we put this down
5 on the agenda, we will have that taken care of.
6 JUDGE VON KANN: Okay. Let's add that,
7 too. Anything else? I don't want this to get too
8 large. I think we have enough there probably. Okay.
9 Mr. Hester, you are back on.
10 CROSS-EXAMINATION (Continuing)
11 BY MR. HESTER:
12 Q Okay. Dr. Crandall, I wanted to talk a
13 bit about the relationship between value of different
14 types of programming and the amount that cable
15 operators have to pay in compulsory license fees.
16 I take it that you would agree with me
17 that the value of particular signals of programming
18 could readily exceed the amount that a cable operator
19 has to pay as a compulsory license?
20 A Yes, and particularly those who take more
21 than one are likely to, and for marginal ones that may
22 be worth more than they had.

1 Q What do you mean by that, operators that
2 take more than one?
3 A Well, in every market, and certainly a
4 downward one, you and I consume up to the point where
5 a marginal benefit to us is equal to marginal costs,
6 and, all those earlier units of consumption had
7 greater marginal benefits than the marginal costs, and
8 that's what I am referring to.
9 Q And in particular these relationships
10 reflected in the compulsory license were established
11 by statute back in the late '70s; is that right?
12 A Yes.
13 Q And so when a cable operator confronts a
14 decision to day about whether or not to take a
15 particular distant signal, it could readily been seen
16 that the value of that distant signal to the cable
17 operator could be far in excess of what it has to pay
18 to get that particular signal?
19 A It could be.
20 Q I want to now take you through an example
21 just to talk about that a bit more. Just for
22 simplicity, let me take an example of three systems --

1 I'm sorry, three signals, A, B, and C, carried by a
2 cable system.
3 And let's make the first column the pay
4 in,a nd assume that under the way the license fees are
5 set, for Signal A the system has to pay 12; and for
6 Signal B, it has to pay 8; and for Signal C, it has to
7 pay 4, okay? And then the value --
8 MR. COOPER: Can I just object? I think
9 that this goes beyond the scope of the direct.
10 JUDGE VON KANN: Well, let's see, what in
11 the direct do you think this relates to, Mr. Hester?
12 MR. HESTER: It relates to the witness'
13 discussion about at the bottom of seven, and over the
14 top of eight, the witness talks about a competitive
15 environment would compensate copyright reporting to
16 the copyright's marginal contribution to cable system
17 net revenues.
18 And then he talks in the next paragraph
19 about determining this market value for specific types
20 of programming is difficult, and speaks about
21 estimating a hypothetical market, and it seems to me
22 that in relation to estimating that hypothetical

1 market, we need to talk about what cable operators
2 actually pay, versus the value of the programming that
3 they receive.
4 JUDGE VON KANN: We will allow some leeway
5 here and see if it appears to get to that part of the
6 direct.
7 BY MR. HESTER:
8 Q Okay. And then if you take a value for
9 Signal A, and assume the value of Signal A is 15, and
10 assume the value of Signal B is 25, and assume the
11 value of Signal C is 20. And can you see those
12 numbers?
13 A Yes.
14 JUDGE VON KANN: Excuse me, but I can't.
15 BY MR. HESTER:
16 Q Now, you can see in this simple example
17 the pay-in in all respects fits. I am asking you to
18 assume here that these pay-in figures are set by
19 statute, and you can see in this example that in
20 varying degrees the value can exceed at different
21 percentages the amount that the operator has to pay to
22 get the signal. Does that make sense to you?

1 A Yes.
2 Q And that in fact is presumably what we see
3 going on out int he real world today, because the
4 compulsory license doesn't vary according to the value
5 that the cable operators actually receive.
6 A Well, what it varies by is subscriber base
7 and revenue base, and so to some extent it does.
8 Q But the per subscriber price is set by
9 statutory framework and then he could see a value that
10 is far in excess of what he has to pay?
11 A Yes.
12 Q So in this context, we might even call the
13 compulsory license somewhat like an access fee to that
14 kind of program? I don't mean to use -- if I am using
15 jargon, tell me.
16 A Well, it is a price that the law demands
17 that he pay for those signals.
18 Q Okay. And then if we look at this in
19 terms of an award, and if we did the award based on
20 the percentage of value -- well, let me back up. The
21 amount paid in in my simple example, is going to be
22 24, right?

1 The total value of these three signals is
2 going to be 60, okay?
3 A Right.
4 Q So you can see in my simple example that
5 the value here is 25 percent, and the value of Signal
6 B is 41 percent, and the value of Signal C is 33
7 percent. So just in looking at Signal C, 20 is a
8 percent of 60, okay?
9 And then if we have -- we know how much we
10 paid in, and that is our 24, and so we come up with
11 the awards. If we did an allocation of awards based
12 on value here, would you agree with me that the awards
13 would be 6, 10, and 8, simply taking 24, 25 percent of
14 the amount paid in becomes 6.
15 And 41 percent of the amount paid in, 10;
16 and 33 percent of 24 becomes 8, right? So you can see
17 that in --
18 JUDGE VON KANN: Could we get a response
19 to the right?
20 MR. HESTER: I'm sorry.
21 THE WITNESS: The fact is that because of
22 the schedule of copyright payments in the law, you

1 can't say that he paid 12 for A and 8 for B. What you
2 can say is that if he buys one, he pays 12; and if he
3 buys a second one, then he pays 20.
4 But either one of them could be considered
5 marginal signals, and so he is not paying 12 for A and
6 8 for B. He is paying 20 A plus B the way that the
7 thing works out. I mean, we have the problem of unit
8 DSEs and fractional DSEs that could complicate this a
9 bit.
10 BY MR. HESTER:
11 Q Okay. So your point is that if he took A
12 as his first signal, he might have had to pay 12, and
13 if he takes under my simplifying example, if he took
14 A and B, he pays 20?
15 A Yes. There is on first or second signal.
16 He either takes 1, 2, or 3 in this case.
17 Q I guess what I am getting at is that I am
18 just asking you to assume for purposes of this example
19 that the operator is able to say, well, this is my
20 first, and this is my second, and this is my third.
21 In other words, we can see how much was
22 paid in. I recognize your point, but I want you to

take it to illustrate something else. You can see in this example that the total awards come out to 24, right?

A Right.

Q And yet the difference between the pay-in and the award can be different, depending on the relationship between the value and how much paid in. In fact, signal -- for signal A, the award would be less than the amount paid in based on the relative value. Does that make sense?

A No, it doesn't again, because the problem is that what he has paid is 24 for all three signals. He pays four for the third signal, and it could be A, B, or C.

Q Okay.

A So you can't allocate his pay-in in that fashion, any more than when you buy minutes on your cell phone that you can say once you go over that, that any one minute costs you more. It was all those infomars on minutes that led you to have to go over.

Q Okay. Well, let me take another simplifying example here. You can see that the values

here, the values exceed the amount that has to be paid in, correct?

A Correct.

Q And that is exactly what you expect in the marketplace. That is what you would expect to be happening, that the value of the distant signals coming in exceeds the amount that the operators pay in license fees, correct?

A That is correct. That is what market system does. It generates surplus to the participants.

Q And then you would also agree with me that depending on how the value is allocated between those signals that you can have more or less of a divergence between the amount paid in with respect to different signals, in terms of allocating the award based on value?

A Well, what you have is this guy paid 24 units, whatever they are, for all three signals, and on average he paid eight for each one, and in some cases he had a huge surplus, and in other cases a smaller surplus.

But you can't assign the payments by themselves to any one signal unless you change the copyright schedule.

Q Okay. Well, let's take your point. If the average is eight, your point is that is the average of the pay-in, right?

A Yes.

Q And you can see given the differences in value that if you assign awards, if you allocated the pool paid in based on value, that the amount assigned as an award to different owners of those signals could be higher or lower than the amount that the cable operator paid in to get them?

A Oh, sure, and it is true throughout, and as I said, all you established is that there is some surplus going to someone here, and that is true in almost any market. That's why people are in business to exploit some of that surplus.

Q And so, for instance, we wouldn't necessarily say -- and I recognize your point that the third signal is not -- that you can't necessarily assign a lower number to it.

A Right.

Q But if you have an example where the cable operator had some way to assign a lower value to the third signal, or if you knew for some other reason that there was a lower value paid in for the third signal, that doesn't necessarily equate to a lower value in terms of what would be paid out as an award does it?

A Well, in a hypothetical marketplace it does. I mean, presumably, what these guys are giving you is a measure of how they think their budgets would be allocated in this market, and in a hypothetical market, all these programs compete with one another until the marginal value of an expenditure in any one of them is equal to its marginal costs. In other words, a dollar is worth a dollar.

Q Yes, but the marginal cost doesn't rise in the current market does it because it is set by statute?

A That is correct. As he adds more and more signals, the rates will go down in step functions.

Q Right. So you don't really have a market

1 function in terms of the amount paid in by the cable
2 operator?
3 A He is operating in the market, and he
4 decides how much to buy given that the prices are set
5 externally by the compulsory copyright.
6 Q Right. Right. And maybe I should have
7 been clearer on this point. When I put this column of
8 the award, the award of course is not going back. The
9 award doesn't go back to the cable operator, the pay-
10 in in value. These are the relationships that the
11 cable operator sees. The award would go back to these
12 three signals in my simplifying example?
13 A Yes, it is their homogeneous signals.
14 Q And so you could have a situation where
15 the cable operator sees a value in a particular
16 category of programming such that the award back to
17 the signal C could be substantially greater than the
18 value -- I'm sorry, could be substantially greater
19 than the amount paid in for signal C, and that would
20 make sense to you?
21 A That's right. We have been over this
22 before, but the first signal C could be signal A.

1 Q I'm with you.
2 JUDGE GULIN: Are you finished with this
3 subject now?
4 MR. HESTER: Yes.
5 JUDGE GULIN: Okay. So just to clarify.
6 What you are saying I think, and I think you are
7 agreeing with Mr. Hester, and saying that if we were
8 able to identify all of the royalties that were paid
9 into the pool that were attributable to Public
10 Television distant signals, that doesn't necessarily
11 mean that the value we allocate to Public Television
12 cannot rise above that number?
13 THE WITNESS: Oh, yes, and there is -- I'm
14 sorry.
15 JUDGE GULIN: It can rise above that
16 number, and the amount that we allocate to Public
17 Television can be higher than the amount of royalties
18 which are attributable to the carriage of the Public
19 Television distant signals; can we or can't we?
20 THE WITNESS: No, I don't think -- well,
21 I don't think based on anything in this record that I
22 know about that you could do that. The board survey

1 gives you estimates of value.
2 JUDGE GULIN: I am just saying as a
3 hypothetical, as a theoretical matter, based upon what
4 has just been put up on the board right now, and
5 forget about what the other studies show.
6 THE WITNESS: Right.
7 JUDGE GULIN: I am just saying
8 theoretically speaking are we limited to allocating
9 public television claimants the amount that has been
10 paid in to the pool attributable to the carriage of
11 public television distant signals?
12 THE WITNESS: Well, the problem is that
13 you can't attribute -- in cases where they are
14 importing more than one distant signal, you can't
15 attribute -- the parts of that, one signal or the
16 other.
17 You have one distant signal, 1-1/4, or 1-
18 1/2, 1-3/4, and the sum of those distant signals gives
19 you the copyright payment schedule, but you can't
20 attribute any piece of that to any one of those
21 signals.
22 Any one of them is at the margin, and the

1 choice of the cable system is does he incur that
2 additional cost, whatever the copyright schedule says,
3 and is that cost less than the value at the margin of
4 any one of those signals, A, B, or C. You can't
5 attribute it.
6 If, for instance, one of those is a 1-DSE,
7 the other is a .25, and the third one is a .25, and he
8 owes for 1.50 DSEs. And you can't break that down
9 between A, B, and C.
10 At the margin, he has decided that every
11 one of them is worth at least .25 of a DSE, or
12 whatever cost; 1, or a .25, or a .25. The only case
13 where you can is where he has only brought in one
14 signal, and in that case -- or one signal above his
15 minimum payment for 1-DSE, then you can.
16 JUDGE GULIN: Well, I accept that is the
17 case, and that it really can't be done.
18 THE WITNESS: Right.
19 JUDGE GULIN: What if it could be done?
20 THE WITNESS: Well, if there were specific
21 payments attributable to specific kinds of signals
22 that could be identified, and it wasn't whether you

brought in another one like it, then perhaps you would have a possibility.

BY MR. HESTER:

Q Even though it is a compulsory license?

A If in fact the compulsory -- well, in the first place, our hypothetical starts out with the assumption that these are sort of homogeneous signals. If they were three homogeneous signals, and let's say A is a sports channel, and B is a the devotional channel, and C is the public television channel, and there are specific copyright royalties for each type of channel, then it is a cake walk as to how much work you have to do, and they only take one of each.

JUDGE GULIN: Even though it would be set by statute, and not based upon a free market valuation, the royalties for each signal?

THE WITNESS: Well, in each case, they are distinct products, and the copyright or the cable system has a decision to make for distinct products and distinct fees for each one of those products. I would think that that would be a fairly simple issue, yes.

BY MR. HESTER:

Q Well, let me go back to that though. I think we agreed at the outset that the value for a particular kind of channel carried could be substantially greater than the amount paid as a compulsory license fee?

A Yes.

Q And in fact the relative value for one particular kind of channel could be substantially higher in relative terms than the value of the other?

A Sure, there could be different relative valuations of different kinds of signals --

Q And if you are doing a determination of awards based on relative value, you can't rely on the amounts paid in to figure out what the award should be based on relative value can you?

A No, and I don't think any of it is. You apply those relative amounts to the total pool.

Q Well, let me just go back and make sure that we are on the same page here, because I am not sure. If we assume in the aggregate that commercial signals account for 96 percent of the pool, and Public

Television signals account for 4 percent of the pool, and I recognize your point that you think you can't figure those numbers out.

But let's say that we can't, taking Judge Gulin's point. And let's say we knew that the value -- we knew that the total royalty pool paid in was 120, and that's how much was paid to carry these commercial signals in Public Television signals in the aggregate, okay? Are you with me so far?

A Yes.

Q Okay. And we know that cable operators in the aggregate say that those signals to me in the aggregate have a value of 200 million, which makes sense, right?

A Yes.

Q So that is value. Now, I am just making up numbers, and so if a cable operator said that the Public Television signals had 10 percent of the value, that would be $20 million. If they said that Public Television has 10 percent of the value, and they said that commercial signals have 90 percent of the value out of these signals we carried, that means that there

is $180 million of value if we take 200 as the total value. Does that make sense?

A Yes, your right-hand side makes sense.

Q Okay. Now, if we -- we talked about the amount paid in, and the amount paid in for Public Television, and now I am running out of space, but you can assume it is 4.8 for Public Television and 115.2 for the Commercials. So the relationships are not the same in other words as the valuation.

The relative value of Public Television is higher than the amount paid in.

A Well, again, you cannot attribute the money that way. If you have in the typical case here one commercial independent signal imported, that is one DSE.

The Public is a .25 DSE. Under the current system, this guy has to pay for 1 DSE no matter what. The importation of the second signal costs him .25, and the second signal could be considered to be either C or P. He could drop either one, and therefore the marginal cost to him of C is .25 of a DSE, and the marginal cost to him of P is

1 also .25 of a DSE.
2 Q Okay. I understand your point, but I just
3 want you to indulge me in the alternative hypothetical
4 for right now, which is that we know that they have
5 paid the aggregate, in the aggregate 96 percent of the
6 pool for commercial, and in the aggregate 4 percent of
7 the pool for public television.
8 But if we look at the valuation and you
9 look at 10 percent of the value, if you allocated the
10 royalty pool, you are going to have a situation where
11 the award to commercial is going to be 90 percent of
12 the pool, right, based on value, and so it is going to
13 be 108.
14 So for Public Television the number is
15 going to be 12, and that is very sensible under the
16 way that the compulsory license works isn't it?
17 A No, absolutely not. It is a total
18 misreading of how this system works, because --
19 Q In the relationship between value and the
20 amount paid in?
21 A Because we have just been through this.
22 How are you possibly going to assign revenues from the

1 compulsory licenses or costs to C or P? There is a
2 possibility. Let's assume that every cable system
3 imported either two commercial stations, in which case
4 he has to pay for one more DSE. His first one is
5 free, right? He already has to pay for that.
6 Now, for the Public Television one, the
7 only way this could work is if everyone who imports
8 one Public Television station imports five of them,
9 and imports none of the commercial ones.
10 Then at the margin, it is costing him .25
11 for any one of those five, and it doesn't get mixed up
12 with the commercial. So if you could show me evidence
13 that all of the commercial signal importation by cable
14 systems are in groups of two, with no other public
15 systems, or that all of the public ones are in groups
16 of five, with no commercial ones, then your
17 hypothetical works.
18 Q Well, I am just asking you to accept an
19 assumption from me for purposes of the discussion so
20 that we can get to --
21 A But your assumption is at odds with how
22 the compulsory license schedule works. That's the

1 problem.
2 Q Can I ask you a hypothetical question
3 here? You used a hypothetical question, and --
4 MR. COOPER: I would object. It is
5 argumentative.
6 JUDGE VON KANN: Let's hear the question.
7 BY MR. HESTER:
8 Q I am asking you to take the hypothetical,
9 and the hypothetical question is that we know, we know
10 that the percentage mix of how much was paid for
11 commercial, and how much was paid for Public
12 Television is accepted, and I recognize your point
13 that you don't know that in the real world.
14 But in that circumstance, you would agree
15 with me that there could readily be situations where
16 the relative value leads to a conclusion that if you
17 are making an award based on the relative value that
18 the amount paid in could be less than the amount
19 awarded based on the relative value?
20 A It is possible, but it is not possible
21 under the current compulsory copyright license
22 schedule, except under rather extreme circumstances,

1 which I think you will agree don't exist, but it is
2 possible.
3 Q But if you take my assumption, that would
4 be a conclusion that would be realistic.
5 A And then we go back to that testimony, and
6 I guess you put in the record, or I can't remember who
7 did it, but which I gave in the '89 proceeding, where
8 we compared marginal and total value, and the only way
9 this could happen is if the demand elasticities were
10 quite different.
11 Q I think I am asking a simpler question
12 though, which is simply the relationship between value
13 and the compulsory license, and that the relative
14 value can be quite different from the relative amounts
15 paid in under a compulsory license?
16 A Yes. Now you said under a compulsory
17 license, and under some compulsory license systems,
18 other than the one that we are talking about here,
19 that is indeed possible.
20 Q I think either you are worn out or I am
21 worn out, or maybe we are both worn out. Let me ask
22 you to turn to page 9 of your testimony, please. At

the bottom of the page, you say that distant signals also provide a new source of live sports programming. Do you see that?

A Yes.

Q And I take it that you would agree that the evaluation of how much value a distant signal brings to a cable operator has to take account of what else they have on their system? In other words, what other kinds of programming they have on their system?

A Yes, certainly.

Q And so you would certainly agree with me that distant signals are not unique sources of programming for live sports?

A They are in many cases unique sources of specific kinds of sports, and it may be that those kinds of sports are what attracts certain subscribers.

Q And most cable systems, in addition to a distant signal with live sports, most cable systems will have live network sports on them, right?

A Yes, they will have the local broadcast stations, and plus they will have some cable networks that have sports on them.

Q And most of the live network programming includes at least some measure of live sports?

A In this period, I am not as expert as some. I don't recall how NBC was in the mix and so forth, but yes, I think they probably all had some mix of live sports.

Q And most of the cable systems during this period also would have been carrying at least one regional sports network?

A I suppose, but I have not looked at that carefully.

Q And most of the cable systems would also have been carrying ESPN?

A Virtually all of them do because of the high value of sports, yes.

Q And most of them would have also been carrying ESPN-2?

A At this time? You probably have a book over there that shows that, but I don't know the numbers. I am not sure.

Q Okay. So the way that you would approach the valuation exercise in that context is to look at

all of the other categories of live sports that are already on that cable operator system, and assess whether there is additional or incremental value delivered by the sports on the distant signal. That would be the method that you would apply?

A Well, the method -- well, any measure of value is at the margin, and so when boards ask these cable operators how much would they spend for a given type of programming out of their budget, obviously it is at the margin, given whatever else the cable system has on its system.

Q At the bottom of 9, and over to 10, you emphasize the point about the uniqueness of sports programming, and I think you made this point earlier in your testimony about games being unique. What is it about unique or first-run programming that in your view adds value for cable operators?

A Well, for all programming, what adds value is an attraction of more subscribers. So I am not a psychologist, and I don't know why subscribers subscribe but being an American male, I know that a lot of us take cable or DirectTV in order to get more

choices of sports programs.

Q And you had said before lunch when I was examining you, I believe, that certain old series that are commonly available would not add as much value in your view. What is the difference that you are drawing between those two categories of programming?

A Well, I am not disparaging any one kind of programming. What I am suggesting is that there is nothing unique to yet another rerun of MASH or whatever. That would will be able to see it again, and again, and again, perhaps on different networks.

The value of a live sporting event, except to a total fanatical who watches the replays over and over again, largely is extinguished once the match is over, and the result is decided and posted, and everybody absorbs it.

And that I think is the difference, and that is what makes having the Super Bowl so important. You are not going to be able to go back and watch it with the same degree of suspense on a replay 10 years later.

Q The Super Bowl is pretty broadly available

on network television though, right?
A It has generally been offered on network television. I use that as an example. It could be any event. It could be Sammy Sosa or Barry Bonds hitting a home run on WGN, you know.
Q And I take it that the point that you just made would apply to other kinds of first-run programming, too?
A Oh, certainly. I think that live -- a variety of live events of that sort, and there may well be that there are some kinds of programming whose value does not go down very rapidly with successive replays. You know, you may want to watch Casablanca over and over again.
But I am saying that in general sports has this fairly unique characteristic of timeliness.
Q And the point might apply as well to other categories of programming that are being shown for the first time?
A Yes, it could be.
MR. HESTER: Okay. Dr. Crandall, that's all I have. Thank you very much.

THE WITNESS: Well, thank you.
JUDGE VON KANN: Okay.
BY MS. WITSCHEL:
Q Good afternoon, Dr. Crandall. I am Carol Witschel, representing the music claimants.
A How are you?
Q Very well, thanks, and you?
A Well, I am getting tired. Le's go at it anyway.
Q For a very few minutes.
A Okay.
Q If I could direct your attention to Table 1 at page 4 of your testimony.
A Yes.
Q Now, this table omits the shares that were received by Music claimants from 1990 to 1992, correct?
A Yes. Well, it may include it if some of it is out of payments from these payments, but it does not break the Music claimants out separately, that's correct.
Q Okay. If you would turn to Appendix A in

your testimony at page 15. That does break out the Music claimants' share?
A Yes.
Q And it shows that Music claimants received 4.5 percent of each of the basic, and 3.57 percent of the funds in 1990, and 1991, and 1992?
A Yes, I believe that -- if I am not mistaken, that was by a prearranged agreement was it not? I don't know, but I think that is right.
Q Well, this is what it shows, right?
A That's right. That is what the final award was, but how they got there is another matter.
Q Well, that is all I am asking you to agree with; that is what got awarded?
A Yes, that is what is on there.
Q The board survey does not take any measure of the value of music that is used in the program categories that the board survey measures; is that right?
A Ask me that question again? It does not take into account?
Q It does not take any measure of the value

of the music that is used in the different programming types?
A No, it is implicit in the total value, and that is just one of the inputs, I presume, to the total value of the program suppliers, or any of the others.
Q So the music is embedded in each of the different values?
A Yes. Right. There is nothing in there for Paul Newman either, yes.
Q And would you agree that the board survey numbers will need to be adjusted for whatever award the panel makes to music?
A They will need to be adjusted? Well, if in fact the way the process works, and I am an economist and not an administrative lawyer, is that the panel awards a certain amount of money to the music claimants, and by definition it comes out of what they could award to someone else.
Whether they start with a total broken down five ways, and then pull some of it out for music claimants or not, I don't know how they proceed.

Q But one of the criticisms that I think you had of the prior CARP panel was that they didn't explain themselves. They didn't explain why they were reducing, for example, the amount that sports got?

And one good reason for reducing it would be whatever shares would go to Music, right?

A It might be, yes, if they justify that, and it showed the Music as valuable, yes.

Q And as an economist, you would like to see or would have liked to have seen in the 1990 to 1992 CARP decision a better or more analytical explanation as to why the panel deviated from the board's numbers?

A Yes, and my testimony suggested that I find it hard to believe that they could find one, particularly on the supply issue, or on the other issue.

Q Did you -- strike that. If the judges find that the Board's survey design and/or methodology tends to over-value some types of programming, and under-values other types of programming, wouldn't an adjustment to the Board's numbers be appropriate?

A Absolutely, if they find that, certainly.

MS. WITSCHEL: Thank you. That's all the questions that I have.

JUDGE VON KANN: Okay. Anything from the Canadians?

MR. SATTERFIELD: We have no questions.

JUDGE VON KANN: Okay.

MR. COOPER: I would like to ask to take a short break so that we could get organized.

JUDGE VON KANN: That sounds like it is a good idea all around. Why don't we take until 5 after 3:00. How's that?

MR. COOPER: Okay.

(Whereupon, at 2:53 p.m., the hearing was recessed and resumed at 3:10 p.m.)

JUDGE VON KANN: Okay. No redirect?

MR. COOPER: Well, I understand the Panel may have --

JUDGE VON KANN: We may have some questions, so why don't we take those. Judge Gulin?

JUDGE GULIN: All right. Dr. Crandall, I just have a couple of loose ends hopefully that you'll tie up for me. I thought I heard you say somewhere

during your examination, during cross examination, that you looked favorably upon the dissenter in the last CARP Panel when that dissenter expressed the notion that the supply side was really not that important, because we were dealing with a forced sale under the compulsory license. Do you remember that?

THE WITNESS: Yes.

JUDGE GULIN: Well, on the other hand, when you first started to testify, I think what you said is our charge should be to attempt to replicate a market and determine how that free market would handle royalty allocations among copyright owners in the absence of a compulsory license.

So I guess my question, is there some inconsistency here? If we're trying to replicate a free market where there's no compulsory license, are we then to think about that free market as if the compulsory license had some influence?

THE WITNESS: I understand it. I guess the question is whether you think of it as the -- with the quantities fixed as we were discussing in the questions that Mr. Hester raised, or whether you think

of the market as allowing the proportions of programming to change. That would be how the supply affects would work.

Or, on the other hand, you could perhaps attempt to determine how relative prices would be determined, given the fixity of the programming on the distant signal. I think it's almost an impossible task. I don't know of any evidence that could be produced that would allow you to do that.

So I guess what I'm saying is that even if you could figure out how a free market would lead to varying prices for the fixed quantity constraints because of the compulsory license, it would be very difficult to do.

JUDGE GULIN: All right. And along the lines also about this free market standard, the way I would look at a free market would be one where copyright holders would be negotiating with the buyers of their work for the future -- to negotiate a license for the future use of their work. That's the way negotiations are generally handled.

The parties get together and they say that

1 you'll pay me X dollars, and you'll get to use my
2 copyrights for the next year, the next 10 years,
3 whatever. Of course, the Bortz survey doesn't do
4 that. What the Bortz survey is doing -- and I guess
5 there are some cases where technically -- let's say
6 there was a resolution of a legal dispute.
7 One could be looking retroactively to
8 price a right that has always accrued. Maybe there
9 was some dispute as to whether the right existed or
10 something like that. But generally, you're looking
11 prospectively when you're pricing -- when the free
12 market is looking at pricing copyright works.
13 Bortz looks prospectively by saying -- I'm
14 sorry, Bortz looks retrospectively by saying, "What
15 would you have paid?" If we're trying to replicate a
16 market, it would seem to me it would make more sense,
17 for example, for 1998, 1999, to ask to be looking at
18 -- take the survey before 1998 and say, "What would
19 you pay to the copyright purchasers, the cable
20 operators?"
21 Why I think this has some significance is
22 that we're going to hear testimony that 1998 was an

1 exciting year for baseball. And there was a very
2 exciting home run contest going on involving the Cubs
3 on WGN, and a pennant race. Those things were not
4 known beforehand. It happens when you look back, you
5 can see value, but that's not something that would
6 have been taken into consideration by the parties when
7 they would have negotiated had there been a free
8 market.
9 Is that a defect in the Bortz study?
10 THE WITNESS: Well, I think it would be
11 difficult to do otherwise, frankly, because you
12 wouldn't know what he's about to carry. He's
13 responding during the year, and, as I understand the
14 way the compulsory license works, if he carries it any
15 time during the six months he pays for the whole six
16 months.
17 I mean, he could have been picking it up
18 during the period of --
19 JUDGE GULIN: Let me --
20 THE WITNESS: -- the Home Run Derby.
21 JUDGE GULIN: I agree with you it would be
22 very difficult to do. But I guess -- let me put the

1 question this way. Is that type of testimony that
2 there was an exciting home run contest in 1998
3 something that we should even consider?
4 THE WITNESS: I think so, because as I
5 just mentioned the cable system could have made an
6 adjustment to carry it when it wasn't otherwise
7 carrying it. And so I suppose there's some
8 prospective aspect there.
9 I agree with you that most contracts are
10 negotiated for a prospective period. There are some
11 contracts where there's a true-up for retrospective
12 results in broadcasting in particular, but it would be
13 better. But, again, it's hard to specify the
14 questions in advance of the economic activity in the
15 survey.
16 JUDGE GULIN: Thank you. That's all I
17 have.
18 JUDGE YOUNG: Picking up on something Mr.
19 Hester said at the end, we talk, as you've talked in
20 your testimony, or you're in testimony, about general
21 characterization of sports fans as intensely loyal, as
22 liking live events. Isn't it more precise in this

1 analysis to say any cable operators -- it also goes
2 beyond that and sort of analyzes what's missing from
3 already in the system, and then decides whether its
4 sports fans are going to be interested and what they
5 might bring in through distant signal?
6 THE WITNESS: Well, I think we can agree
7 that they are always interested in what any program
8 decision would do to attract incremental subscribers.
9 JUDGE YOUNG: Right.
10 THE WITNESS: It doesn't have to be the
11 intense loyalty of sports fans. It might be just a
12 different mix of programs of some sort, and it may not
13 be just because of loyalty. It may be because the
14 DirecTV package, for instance, assumes that -- I
15 presume is valuable to some because you get to choose
16 among a whole host of games at any one period of time.
17 So the economics of it are what will attract more
18 subscribers to my system.
19 JUDGE YOUNG: So if I'm in New York, as I
20 am, and I can get on both network as well as local
21 television my hometown sports team, and the cable
22 operator knows that, they've got to make a judgment

that there's something else out there that would be attractive from a sports perspective, and that the typical New York fan would want to see, for example, the Cubs. Is that correct?

THE WITNESS: Well, but the typical -- I mean, this is a country where 20 percent of people move every year. There are a lot of people living in New York who didn't grow up with an affinity to the Mets or Yankees. There may be a lot of Cubs fans there who moved from Chicago.

So, I mean, I -- we're getting beyond my expertise here, but it strikes me that it's possible that there could be a substantial number who would want WGN for that reason.

JUDGE YOUNG: The reason I'm asking you is that in your testimony there's this general description of why this all makes sense in light of what we know about sports fans. And I guess I'm just trying to get sort of a nuanced understanding of that, that, in fact, one could agree that sports fans may or may not like something, but on the other hand it doesn't mean that they're going to subscribe to a

cable system, if they tend to bring on a particular program or not.

THE WITNESS: No, it doesn't necessarily mean that. That's certainly true. The fact that the Bortz survey uncovers time and again that the cable system views the sports programming as so important on these distant signals I think suggests that it must appeal to someone, and you must be getting some value out of it.

JUDGE YOUNG: Now, when you were -- had your interchange, the colloquy with Mr. Stewart, I want to just make sure I understood your perspective on some of the issues he raised. And we had talked about the retransmission.

THE WITNESS: Yes.

JUDGE YOUNG: And at least I think I understood your point to be that the fact that there's -- the broadcasters are not obtaining or trying to obtain significant revenues for retransmission rights is at least evidence as to the value of the locally produced programming that are the subject of their claim, the NAB claim?

THE WITNESS: Well, again, if it goes back to the supply issue, it's not a measure -- it doesn't reflect the value to the cable system of that programming, but, rather if you're going to take into account how the prices might settle out in equilibrium for -- again, getting back to Mr. Gulin's point -- for the fixed allocation of programming on those distant signal imports, then the fact that the broadcaster would be unwilling to negotiate is hard -- and withhold this station in a cable system, because in so doing he reduces his audience, and, therefore, his advertising revenue, it seems to me goes to the supply issue -- an incentive that, for instance, the sports leagues do not have.

JUDGE YOUNG: So if they were willing to play hard ball, it might reflect a greater valuation of their own programming or a different mix about a value that they're producing.

THE WITNESS: It would reflect a willingness to go after the revenue stream -- I won't call it copyright royalties, but the revenue stream, and risk the withholding of the signal and the loss,

therefore, of the advertising stream. It doesn't have any effect on the value of it to the cable system or the ultimate subscriber.

JUDGE YOUNG: And the last question I have is the issue came up earlier when Mr. Stewart was citing to your own article with respect to the leverage that the football leagues have given that they have no real professional level of competition in this country. Do you remember that?

THE WITNESS: I remember that discussion.

JUDGE YOUNG: Okay.

THE WITNESS: I'll respond after you finish asking --

JUDGE YOUNG: Well, I wasn't sure I got -- understood whether you were making a point with respect to that or you were being asked to make a point, and I guess I want to at least understand your -- any conclusions you might draw from that fact.

THE WITNESS: Well, in the first place, if I may for just a moment, the thrust of that article was to look at how sports broadcasting affects consumer welfare through the dissemination of loss of

1 games as well as competition in the distribution
2 media.
3 And what we came -- what we found was --
4 maybe it wouldn't be surprising to you, but it was
5 quite surprising to me, was that in Europe the
6 dominance of the Premier Football League, the Premier
7 League in the U.K., Serie A in Italy, means that there
8 is very little competition for the sports dollars in
9 the United States, even though there may only be one
10 football league, one baseball league, one basketball
11 league, one hockey -- professional hockey league.
12 I mean, there are some smaller ones -- a
13 continental basketball league, and so forth. It
14 doesn't mean there's no competition. There is much
15 more competition from what ESPN does between the
16 leagues.
17 However, were there more leagues, clearly
18 there would be more people negotiating to try to get
19 carriage on the cable systems, and the rents would
20 shift from the leagues to the cable systems, who are
21 not without market power of their own.
22 JUDGE YOUNG: Okay. So to the extent,

1 though, that -- taking into account all of your sort
2 of other variables, but to the extent that at least
3 one variable in this mix is that they do have that --
4 that power, the pro -- all leagues have that power, I
5 mean, do you view that as sort of an artificial
6 inflator as to the value, or is that something that we
7 should just take as an indication of value?
8 THE WITNESS: The fact that they have some
9 -- that there's not a perfectly competitive market for
10 professional football or professional basketball to me
11 is no different as far as your considerations than the
12 fact that Paul Newman is not a perfect substitute for
13 Tom Cruise. These people earn substantial rents
14 themselves. So it really doesn't matter that much.
15 You can't -- not anybody can do what Tom Cruise does,
16 and not anybody can offer the NFL or offer
17 professional football.
18 So there are rents -- the nature of
19 broadcasting in cable and the media is that there are
20 huge rents earned by everybody. They are all getting
21 more than they would get in their next best
22 alternative.

1 JUDGE YOUNG: And the last question I had
2 is following up on a colloquy, again, that you had
3 with Mr. Hester regarding what's on the chart there.
4 THE WITNESS: Yes.
5 JUDGE YOUNG: The value which is paid. Do
6 you accept the proposition that a programmer like PBS
7 or public TV can have value in excess of what they're
8 getting paid through the -- you know, through the
9 royalties attributed to their programming?
10 THE WITNESS: Well, if you could, if, in
11 fact, there were -- it were possible to isolate just
12 the royalties paid for PBS, then the question is: is
13 it possible that they should get even more?
14 JUDGE YOUNG: No, I understand you -- a
15 lot of that discussion was that it's not possible
16 necessarily to isolate the royalties paid for PBS.
17 THE WITNESS: Right. Right. But assuming
18 it were --
19 JUDGE YOUNG: Right.
20 THE WITNESS: -- is it possible that, you
21 know, if you had explicit pools that seemed to go to
22 sports, to PBS, and so forth, is it possible you could

1 allocate more. And there it strikes me the only way
2 you could make such a decision is if, by making these
3 payments, there is a contingency value to the cable
4 system. That is, it keeps these guys alive a little
5 bit longer, so that they are there for -- they have an
6 option to take it at some future time period.
7 But I can't see how that theory holds
8 together. It doesn't seem to me that these copyright
9 payments are necessary in order to keep that option
10 alive.
11 JUDGE YOUNG: Well, as I understand part
12 of the discussion is that Congress, through this
13 formula, has said public television is worth X amount,
14 and X amount may be less than commercial TV in terms
15 of just the royalty calculations and the royalty
16 formulas.
17 THE WITNESS: If there's something in the
18 statute that says that, I'm not aware of that.
19 JUDGE YOUNG: Well, I may not be --
20 (Witness laughs.)
21 -- but I thought that was part of the --
22 THE WITNESS: Yes.

JUDGE YOUNG: But that one could then argue that, you know, having non-commercial TV in this country has a certain value which might exceed that. And to some extent, we should -- we should understand that and maybe reflect on it.

THE WITNESS: If that's your instruction from Congress, then that's possibly true. I mean, you can make arguments or the public goods sorts of arguments for a variety of services. I'm not sure I've seen that made in the context of these cases, though.

JUDGE YOUNG: Okay. Thank you.

JUDGE VON KANN: Judge Gulin a follow up.

JUDGE GULIN: I apologize to you, Dr. Crandall, but I'm going to follow up --

THE WITNESS: Sure.

JUDGE GULIN: -- two questions from my colleague. Getting back to PBS, if it were possible to determine what the royalties were attributable to PBS, I'm still not quite understanding why that amount really has much meaning if it's not a free market amount. If it's an arbitrary amount imposed by

Congress, what does that have to do with allocations under a free market standard? Why would we be limited to that amount?

In other words, under your theory I think what you're saying -- whatever that is, if it's X, that necessarily follows, then, that the amount that we would have to give as a value to public television is also exactly X. And it's not clear to me why that's the case if we're talking about two different standards.

THE WITNESS: Well, the only reason, I mean, to an economist that this is interesting, it seems to me, is that they are buying a mixture of programming on signals, and it's hard to determine how much is due to X.

If you can determine that -- that is, if the copyright system were structured in such a way, the compulsory copyright system, you could determine precisely how much was paid in, that reflects the market decision.

Now, if you're going to tell me that, in fact, the Congress set the rates wrong and is

instructing you to set them right --

JUDGE GULIN: Okay. For the sake of our discussion, let's assume that whatever that rate is it's not a fair market rate. It's a rate that Congress set arbitrarily. Okay? It's not a fair market rate.

That being the case, is there really any correlation necessary between the money coming into the pool, which is based upon whatever Congress says it should be -- and you know what it is, it's based upon these DSE values. It doesn't have anything to do with the value of public television. It's simply an arbitrary amount that's been imposed by Congress.

That has nothing to do with dividing up a pool based upon fair market value, does it?

THE WITNESS: Well, the size of the pool doesn't, no. I mean, the question is how you divide it up relatively, and the fact that in fact -- the fact that these imported distant signals may create, say, $500 million worth of value and only cost the broadcast -- the cable systems $100 million, simply means that they are getting a substantial amount of

surplus.

But it doesn't say that you throw out the estimates of relative value therein, unless there is some -- unless the Congress did something, which would be rather bizarre -- that is, set the relative rates for different types of signals incorrectly, and then instructed you to find out what the correct one is.

But in this particular case, because the rates are set in the step function that they are, and because you import mixtures of programming particularly on the independent signals, it's very difficult for an economist to make those attributions.

JUDGE GULIN: Okay. All right. I also wanted to follow up my colleague's question about retransmission consent, because I'm still a little bit fuzzy as to what your point is there.

If it is a fact, as you believe, that very little money changed hands as a result of retransmission consent, I think all I got from you is that all that means is that that revenue stream is not very important to the broadcasters. I'm trying to put that in context of how -- the relevancy of that with

1 respect to this proceeding.
2 I think I asked, and I think my colleague
3 also asked, are you trying to say that -- that the NAB
4 value is somehow diminished as a result of that? And
5 I don't think you said yes either time. All you
6 continue to say is that all it shows is that the
7 revenue stream -- that revenue stream is not important
8 to the broadcasters.
9 But what's important to the broadcasters
10 is expanded reach and more viewership. So I'm still
11 not getting the point exactly as to what it says about
12 the supply side.
13 THE WITNESS: Well, I'm sorry for the
14 imprecision in my answer. But I -- what I was
15 attempting to say was that the value of these signals
16 are determined relatively by the Bortz survey, but
17 that to the extent the Bortz survey does not take into
18 account the supply conditions it may be that in the
19 head-to-head bargaining between the buyer and the
20 seller that the seller would be -- would find himself
21 willing to offer that programming for close to nothing
22 or at very low prices, because he does not want to

1 risk not having it carried because his revenue -- he
2 would put at risk his revenues from advertising.
3 And, therefore, it only goes to the supply
4 conditions, not to the value --
5 JUDGE GULIN: All right. Okay. So then,
6 what you're saying is that the hypothetical market
7 that we should be looking at is one where it's the
8 distant signal that is the buyer, and not the
9 individual copyright owners. If that's -- if
10 retransmission consent and lack of payment, therefore,
11 shows the supply side, showing the supply side of what
12 transaction? So in showing the supply side of a
13 transaction between the distant signal and the cable
14 operators, correct?
15 THE WITNESS: Well, it would be for the --
16 to the extent -- for the -- the only copyright he owns
17 is for his own programming.
18 JUDGE GULIN: Right.
19 THE WITNESS: Right. So we're talking --
20 to the extent that he has the right over that, then he
21 would be unwilling to deny that -- that -- but by
22 derivative he -- any decision he makes about allowing

1 carriage has an affect upon his upstream supplier of
2 sports, syndicated programs, movies, etcetera.
3 JUDGE GULIN: Directly -- the most direct
4 significance is it shows the supply side of NAB,
5 because that's the programming that's owned by the
6 station.
7 THE WITNESS: That's how I look at it.
8 JUDGE GULIN: Gotcha.
9 THE WITNESS: Yes.
10 JUDGE VON KANN: Dr. Crandall, just -- I
11 have just a few questions. Hopefully, it won't delay
12 your getting out of here too much.
13 Looking at page 9 of your testimony, and
14 a paragraph that you were directed to earlier,
15 paragraph 19, which talks about the Bortz data, shows
16 that cable operators place a very high value on sports
17 programming. And this whole question of valuation I
18 find is a little bit like beauty, somewhat in the eye
19 of the beholder I guess, and I'm trying to understand
20 how we go at it.
21 You say this result is not surprising, and
22 then you give some reasons. You say the programming

1 of the JSC is unique in that it is live, first-run
2 programming.
3 Now, I guess I want to ask if it -- if
4 that is -- if the JSC programming is really, in that
5 sense, unique. Yes, there is a lot of live, first-run
6 programming. But it seems to me there's a fair bit of
7 live, first-run programming in some of the other
8 claimants.
9 I mean, the State of the Union address I
10 guess is a live, first-run event, you might say. The
11 Academy Awards I guess is a live, first-run event. The
12 final episode of The Sopranos, which everyone was
13 dying to see at one point, wasn't -- I guess it was
14 not live. It had been taped. But that was the moment
15 that you turned on to see whatever it was that people
16 were talking about.
17 I mean, it doesn't strike me that JSC is
18 the only guys in town who have sort of live, first-run
19 events that people want to see right at that moment.
20 Would you --
21 THE WITNESS: No, I think that's true. I
22 mean, there are obviously other events, but I think

they are a much smaller share of the programming offered in other areas.

For instance, you might say that news -- something those of us who followed day by day what was going on in Iraq --

JUDGE VON KANN: Right.

THE WITNESS: -- would be an example. But having just returned from Europe and watched CNN International on numerous hotel televisions, I assure you that most of what CNN carries is just a repeat of the same stuff over and over and over again, stories which they can continue to repeat for several days.

Sports is rather different. Once someone knows the outcome, he's not as interested in hearing about it again and again and again. I think most people aren't. But ultimately the question is: why is it that cable systems, in their actual behavior, in the purchase of ESPN and other sports-related networks, and in their assessment of the value of these distant signals, put such a high value on sports?

And I think that's probably the reason,

but my -- my observations as an economist are the value of this programming, because it apparently attracts additional subscribers.

My explanation as to why this is is more in the area of, I don't know, psychology or sociology. But it's an attempt to try to explain why this is.

JUDGE VON KANN: So I think what you're saying is that perhaps -- let's see if I get this -- the JSC is unique in that virtually all of their programming is of this character, whereas other claimants have some first-run live programming, but it's a smaller part of their total package I guess.

THE WITNESS: Right.

JUDGE VON KANN: You have not, I take it, undertaken a study, though, as to what portion of, let's say, the news -- you know, the broadcaster's programming is live, first-run programming.

THE WITNESS: No, I have not.

JUDGE VON KANN: Okay. You've also referred in this paragraph that another factor is the sports fans being intensely loyal. We've had some discussion about that, but I'm told that so are Star

Trek fans and, unfortunately, some fans of Jerry Springer, and other -- there's loyalties and there's loyalties out there, I guess.

And you're not aware -- I'm not aware -- and I wonder if you are -- of any studies of the comparative loyalty of fans of sports versus fans of some of these other claimants.

THE WITNESS: No. But assume you're an intense fan of Tolkien novels and Tolkien movies. You can watch them at the Uptown Theater up here. You could wait for the DVD, or you could get it on cable, or you could get it on subsequent network broadcast.

You could still satisfy your hungering for that, albeit with some time delay. Once the result is in on the Super Bowl, particularly if yours was the losing team, you're not interested in going back and rewatching that. So I think there is a difference here.

JUDGE VON KANN: But I take it you would agree that some of the other claimants probably have some intensely loyal fans within their ranks as well.

THE WITNESS: Certainly.

JUDGE VON KANN: And you don't know a comparative study of the volume of those fans or the number of intensely loyal -- the hours that intensely loyal fans of PBS may be glued to their sets, I take it.

THE WITNESS: No, I don't, nor do I know how that translates in their willingness to subscribe to cable television, which is the important question here.

JUDGE VON KANN: And I guess the sort of final question about that is that not withstanding these characteristics, these JSC characteristics, of having predominantly live, first-run programming and lots of loyal fans, the sports group came in second here in terms of the claimants that we deal with. The program suppliers beat them in the Bortz survey, correct?

THE WITNESS: That's right. I mean, in toto they --

JUDGE VON KANN: In toto, when you put the two components of --

THE WITNESS: Right, right. Yes, yes,

1 yes.
2 JUDGE VON KANN: -- it together. So
3 whatever the value of the live, first-run programming,
4 and the loyal sports fans, it was not enough to
5 displace the program suppliers as having a larger
6 valuation in the Bortz survey.
7 THE WITNESS: I think that that reflects
8 sort of my wife's solace, which is there is much more
9 of this other stuff than sports in terms of minutes,
10 right? I mean, there's a huge amount of syndicated
11 programming and motion pictures out there relative to
12 the number of live sporting events in each one of
13 these leagues here.
14 JUDGE VON KANN: So that suggests that it
15 is appropriate for the Panel to consider the volume of
16 programming that these different claimants are
17 providing?
18 THE WITNESS: No, not at all. I think all
19 you -- the Bortz survey is sufficient. But I think
20 your reflection on the fact that the program suppliers
21 get a larger share is indeed a reflection of the fact
22 that this is a huge mass of this. The value of any

1 one piece of it, particularly certain important
2 sporting events, is very high relative to the average
3 value of a syndicated program or a movie.
4 But there's so -- there's such a huge mass
5 of syndicated programming and movies that overall the
6 values come out somewhat higher for the program
7 suppliers than for the sports.
8 JUDGE VON KANN: Okay. Mr. Cooper?
9 MR. COOPER: Nothing further.
10 JUDGE VON KANN: All right. Well, thank
11 you very much. You are excused. Thank you.
12 (Whereupon, the witness was excused.)
13 JUDGE VON KANN: Okay. Fine.
14 MR. COOPER: Our next witness will be Dr.
15 Hazlett.
16 JUDGE VON KANN: Okay.
17 WHEREUPON,
18 THOMAS W. HAZLETT
19 was called as a witness by Counsel for the Joint
20 Sports Claimants and, having been first duly sworn,
21 assumed the witness stand, was examined and testified
22 as follows:

1 DIRECT EXAMINATION
2 BY MR. COOPER:
3 Q Good afternoon, Dr. Hazlett.
4 A Good afternoon.
5 Q Can you just give your name and your
6 current position, please?
7 A My name is Thomas W. Hazlett, and I'm a
8 Senior Fellow at the Manhattan Institute for Policy
9 Research. And I have other affiliations; would you
10 like me to list those or --
11 Q If you could just briefly summarize your
12 other affiliations, that would be fine.
13 A I'm a Senior Research Associate at the
14 Columbia Institute for Tele-Information. Also, a
15 Senior Advisor to the Analysis Group, and economic
16 consulting firm.
17 Q And before you were with the Manhattan
18 Institute, can you tell me where you were?
19 A Well, I taught economics and finance at
20 the University of California at Davis, essentially
21 from 1984 through -- I was on the faculty through
22 2000. I left there in 1998 and was a Resident Scholar

1 at the American Enterprise Institute. I've been at
2 the Manhattan Institute since 2001. I also served as
3 Chief Economist of the Federal Communications
4 Commission, 1991/'92.
5 Q With respect to that, the last position
6 that you mentioned, Chief Economist at the FCC, can
7 you just explain what the responsibility -- what the
8 -- just sort of generally explain the responsibilities
9 in that position?
10 A The Chief Economist slot at the FCC is a
11 -- essentially a visiting slot where academics come in
12 on a temporary basis, so to speak, and serve as
13 advisors to the Commission, primarily the chairman of
14 the Commission on a range of areas, whatever might be
15 the policy issues of the day related to regulation and
16 communications and the responsibilities of the FCC,
17 which extend, of course, over wire-line
18 communications, telephone and cable, and also
19 spectrum-based services, wireless telephone and
20 satellite, and so forth.
21 Q And have you, in connection with this
22 proceeding, have you submitted written testimony?

Certificate of Service

I hereby certify that on Monday, February 12, 2018 I provided a true and correct copy of the Robert Crandall Direct Oral Testimony (JSC Written Direct Statement Vol. III) to the following:

SESAC, Inc., represented by John C. Beiter served via Electronic Service at jbeiter@lsglegal.com

Devotional Claimants, represented by Matthew J MacLean served via Electronic Service at matthew.maclean@pillsburylaw.com

American Society of Composers, Authors and Publishers (ASCAP), represented by Sam Mosenkis served via Electronic Service at smosenkis@ascap.com

Public Broadcasting Service (PBS), represented by Ronald G. Dove Jr. served via Electronic Service at rdove@cov.com

National Public Radio, Inc. (NPR), represented by Gregory A Lewis served via Electronic Service at glewis@npr.org

Spanish Language Producers, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

Broadcast Music, Inc. (BMI), represented by Jennifer T. Criss served via Electronic Service at jennifer.criss@dbr.com

Multigroup Claimants, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

Canadian Claimants Group, represented by Lawrence K Satterfield served via Electronic Service at lksatterfield@satterfield-pllc.com

National Association of Broadcasters (NAB), represented by David J Ervin served via Electronic Service at dervin@crowell.com

MPAA-represented Program Suppliers, represented by Alesha M Dominique served via Electronic Service at amd@msk.com

Signed: /s/ Michael E Kientzle