Before the
COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re	
DISTRIBUTION OF CABLE ROYALTY FUNDS	**Docket No. 16-CRB-0009 CD (2014-2017)**

PUBLIC TELEVISION'S REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF ORDER 33

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INTRODUCTION

Tellingly, four of Public Television's five adversaries in this proceeding do not oppose its motion for reconsideration. Only JSC opposes Public Television's motion.

JSC acknowledges that no statute expressly authorizes the Judges to enter Order 33, but argues that Order 33 is an exercise of the Judges' power to make "necessary … evidentiary rulings." That is incorrect. Order 33 is neither "necessary" nor an "evidentiary ruling."

Moreover, JSC's proposed rationale for Order 33 would be arbitrary and capricious because it did not order similar agreements involving the programming of other parties to be filed. JSC now argues that the NCTA Agreements are relevant and should be filed because, according to JSC, the amount a broadcaster charged for consent to retransmit a distant broadcast signal constitutes the marketplace value of the copyrighted programming on that signal. *See* Opp. at 8. That novel theory is incorrect and at odds with every methodology presented in these proceedings (and, as far as we are aware, with every methodology ever presented in this history of these proceedings). It is a particularly bizarre theory to deploy against Public Television, given that for decades, *commercial* television stations have had the ability to demand cash compensation from cable operators, yet have consistently failed to convince cable operators to pay any cash for retransmission consent for distant signals. *See infra* at 4-5. Contrary to JSC's argument, that does not mean all of the programs on those signals had zero value. Indeed, JSC itself has previously argued that "[r]etransmission consent is intended by the communications laws to provide a means for broadcasters to receive compensation only for carriage of their

signals—not for the copyrighted programming on those signals."[1] Regardless, if the Judges were to adopt JSC's rationale for Order 33, they would have to order the filing of all of those other agreements, which would be similarly situated under JSC's rationale.

ARGUMENT

I. The Judges Lack the Authority to Enter Order 33.

JSC does not dispute that there is no statute or regulation that expressly authorizes the Judges to enter *sua sponte* orders compelling the production and filing of documents that were never considered by any witness in the proceedings before the Judges. JSC instead argues that Order 33 was an "evidentiary ruling" that the Judges could issue pursuant to their authority to "make any necessary procedural or evidentiary rulings." Opp. at 9-10 (citing 17 U.S.C. § 801(c)). But Order 33 is not an "evidentiary" ruling, and JSC does not even attempt to argue that it was "necessary."[2]

A government agency's *sua sponte* order compelling a party to submit undisclosed confidential documents to the government is not an "evidentiary ruling." An evidentiary ruling is "a decision whether or not to allow a piece of evidence to be considered by the fact finder."[3] That type of ruling is distinct from a ruling on whether a party must provide documents to a government agency. Indeed, Order 33 does not even purport to make any evidentiary ruling.

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[1] JSC Reply Comments, *In re Section 109 Report to Congress Regarding Cable and Satellite Statutory Licenses*, Copyright Office Docket No. 2007-1, at 9 (Oct. 1, 2007), *available at* https://www.copyright.gov/docs/section109/replies/joint-sports-reply.pdf.

[2] JSC appears to acknowledge, as it must, that Order 33 is not a "procedural" ruling.

[3] Richard D. Friedman, *Evidentiary Rules and Rulings: The Role of Treatises*, 25 Loyola of L.A. L. Rev. 885, 886 (1992).

The NCTA Agreements have been filed only as "proposed hearing exhibit[s]," as instructed in Order 33, and have not been admitted into evidence.[4] JSC does not cite any authority supporting its argument that Order 33 is an "evidentiary ruling."

JSC's unsupported interpretation of the phrase "evidentiary rulings" is further contradicted by congressional intent demonstrated in other statutes. When Congress decides to vest an investigative agency with *sua sponte* powers to compel parties to produce documents, it does not do so by providing them with the authority to make "evidentiary rulings." Investigative agencies rely on statutes that provide investigative powers. *Cf., e.g.*, 15 U.S.C. § 78u (SEC); 15 U.S.C. § 46 (FTC). Those intrusive powers are not granted lightly by Congress, and are accompanied by checks and balances, including the separation of functions between investigators and adjudicators. *See, e.g.*, 5 U.S.C. § 554(d); *FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 102 (D.C. Cir. 1977) ("[R]egulatory agencies have two separate functions to perform, investigative and adjudicative. … [T]he regulatory agencies have an obligation to keep those roles separate ….") . JSC does not cite any authority suggesting that Section 554(d) of the Administrative Procedure Act does not apply here.

In addition, it is undisputed that Order 33 is not "necessary." No party asked the Judges to enter Order 33. Even after Order 33 was entered, no party has contended it was "necessary."

[4] On the issue of admissibility, JSC acknowledges that the Judges are not permitted to admit evidence "without a sponsoring witness" unless there is "good cause shown." Opp. at 10. JSC does not articulate any "good cause"; it merely makes the conclusory assertion that the documents are "relevant." Opp. at 10-11. Given that neither the Judges nor any other party has ordered or sought admission of the NCTA Agreements into evidence, Public Television reserves its right to address those issues at an appropriate time, if necessary.

In sum, contrary to JSC's argument, Section 801(c) of the Copyright Act does not authorize the Judges to enter Order 33.

II. Adopting JSC's Proposed Rationale for Order 33 Would Be Arbitrary and Capricious.

Not only was Order 33 beyond the scope of the Judges' authority, it also did not explain its rationale. The *post hoc* rationale JSC urges the Judges to adopt would require every carriage and programming agreement to be filed in this proceeding, because on JSC's theory, they would be direct evidence of relative marketplace value. Specifically, JSC argues that if a broadcast station did not "charge for carriage" in connection with providing consent to retransmit a distant signal, all of the copyrighted programming on that signal had a value of "$0." Opp. at 8. JSC's theory is wrong, but if the Judges were to adopt it, they would have to treat the parties evenhandedly and order production of all carriage and programming agreements from all parties in this proceeding. *See* Mot. at 4-6.

For example, JSC does not dispute that evidence in the record shows that Tribune—the owner of superstation WGN and numerous commercial broadcast stations across the United States—forced cable operators to carry WGN distantly as part of a bundle in exchange for retransmission consent from Tribune's local stations. *See* Mot. at 4-5, 10. If Order 33 were premised on JSC's rationale, Public Television would be entitled to point to the WGN carriage agreements to demonstrate that the same theory would suggest that WGN programming had a value of "$0." And Public Television would be entitled to show that numerous other commercial television stations did not charge for distant retransmission consent, which on JSC's theory again suggests that programming was valued at "$0." As the FCC reported in 2005—the same year that the NCTA Agreement was adopted—"cash still has not emerged as a principal form of

consideration for retransmission consent," even for *local* carriage, and instead "virtually all retransmission consent agreements involve a cable operator providing in-kind consideration to the broadcaster," such as bundling. FCC, *SHVERA Section 208 Report to Congress*, ¶ 10 at 7 (2005), *available at* https://docs.fcc.gov/public/attachments/DOC-260936A1.pdf.

The only rationale JSC offers for why the Judges could enter Order 33 without ordering the filing of these other agreements is that "no other carriage agreement has been identified with specificity in this proceeding that contains terms that directly apply to the carriage of distant signals and is in the possession of a party." Opp. at 14. That is simply incorrect. Numerous other agreements have been "identified with specificity," including the WGN agreements. *See, e.g.*, Mot. at 4-6. More fundamentally, the "identified-with-specificity" rationale is a blatantly arbitrary *post hoc* rationalization that is inconsistent with the rationale JSC itself has suggested that the Judges should adopt as the basis for Order 33, as explained above. If all of the parties knew that they need only "identify with specificity" the other parties' carriage and programming agreements to force them to be produced and filed with the Judges, they would have done so. Adopting that *post hoc* rationale would be arbitrary and capricious, would violate due process, and would allow all parties to compel the production of all such agreements in all future proceedings, which is plainly contrary to the governing statute and regulations.

III. Order 33 Denies Due Process.

JSC argues that Public Television's due process rights were not violated because "PTV has been on notice that the NCTA Agreements were at issue since … July 1, 2022," when JSC submitted Dr. Majure's written direct testimony, and therefore "could have presented" testimony regarding the agreements. Opp. at 12, 2. But Dr. Majure cited only two publicly available press

releases (again, in only two sentences in his 72-page written direct testimony). *See* Ex. 7103 at 30-31 ¶ 58 & n.74 (Majure WDT). No witness reviewed or relied on the NCTA Agreements. Mot. at 3. If Public Television had known the NCTA Agreements would be filed in this proceeding, Public Television would have identified witnesses and presented testimony to address them and provide context. For example, JSC incorrectly argues that the NCTA Agreements [redacted] JSC also incorrectly suggests that Public Television stations had the right to "charge for carriage," but the communications laws do not give Public Television stations the right to withhold retransmission consent for cash payments, so JSC's arguments are premised entirely on mistakes of fact and law. *See* 47 C.F.R. § 76.64(a) (conferring retransmission consent rights only to "commercial broadcasting station[s]").

JSC now asserts that it "served discovery requests asking that PTV produce the NCTA Agreements." Opp. at 3. That is incorrect. In fact, JSC requested "all non-privileged documents and data relating to [the NCTA Agreements] … **that were relied on or considered by any witness in preparing his or her written rebuttal statement.**" White Decl. Ex. 1 at 2 (emphasis added). The NCTA Agreements were not encompassed by JSC's request because no witness relied on or considered the NCTA Agreements. The request concerned the two press releases. JSC knew that Public Television did not produce the NCTA Agreements, and it never argued

that Public Television was required to produce them. JSC understood, and still does not dispute, that the NCTA Agreements were beyond the bounds of permissible discovery. *See* White Decl. Ex. 1 at 1 (citing 37 C.F.R. § 351.6).

JSC emphasizes the Judges' questioning about the agreements, but that only highlights the lack of due process: The Judges did not ask any *Public Television* witness about the NCTA Agreements (and in any event, none had reviewed them). And as JSC concedes, "Order 33 does not contemplate any post-hearing expert testimony." Opp. at 13. Contrary to JSC's suggestion, that is not a basis for distinguishing *Cowart v. Schweiker*, 662 F.2d 731 (11th Cir. 1981); rather, it underscores the unfairness of Order 33's lack of opportunity for testimony, which was recognized in *Cowart*.

IV. The NCTA Agreements Do Not Contain Materially Relevant Information.

Before Public Television filed its motion for reconsideration, JSC argued that the relevance of the NCTA Agreements was that "PTV … argued to the FCC that the Must Carry rule should apply to multicasts," and that "[b]efore the issue was fully resolved, PTV entered into an agreement with NCTA," purportedly "treat[ing] these multicasts under the must-carry rule." Opp. at 3, 4 (quoting Dr. Majure and JSC's opening statement). In its motion, Public Television demonstrated that this chronology was wrong: In fact, years before the NCTA Agreements, the FCC ruled that the must-carry laws did *not* apply to multicasts, and cable operators subsequently entered into a *voluntary* agreement to carry Public Television multicasts. Public Television also demonstrated that *commercial* television stations similarly argued to the FCC that must-carry rules should apply to commercial multicasts. JSC's opposition does not dispute any of these facts.

JSC now offers a new theory: that a distant station's carriage agreement that does not include cash compensation reveals the value of all copyrighted programming on that station to be of "$0" value. That theory is incorrect for numerous reasons. Among other things, Public Television stations lack the right to "charge for carriage." *See supra* at 6 (discussing 47 C.F.R. § 76.64(a)). And as JSC itself previously acknowledged, amounts charged for carriage provide compensation to broadcasters "only for carriage of their signals — not for the copyrighted programming on those signals." *Supra* note 1. In its report to Congress regarding this issue, the Copyright Office agreed:

> The Office finds that retransmission consent is essentially a statutorily created 'right' given to commercial broadcast stations. Copyright owners of the programs carried on such stations do not benefit financially from agreements between broadcasters and cable operators or satellite carriers. As such, it is not an appropriate benchmark by which to compare statutory royalty rates. Further, retransmission consent is part of a thicket of communications law requirements aimed at protecting and supporting the broadcast industry. The value assigned to the carriage of a station, apart from the performance right of the programming retransmitted on a signal, cannot be parsed out because of this regulatory entanglement.

U.S. Copyright Office, *SHVERA Section 109 Report*, at 65 (2008), *available at* https://www.copyright.gov/reports/section109-final-report.pdf. JSC's new theory would suggest that all copyrighted programs on the vast majority, if not all, commercial and noncommercial distant signals had "$0" in value because no cash compensation was paid for distant retransmission consent. That makes no sense and is contrary to Section 111.

Moreover, contrary to JSC's arguments, to the extent the NCTA Agreements have any relevance, they strongly demonstrate the value of the copyrighted programs on the applicable Public Television multicasts, from Sesame Street to Frontline. It is undisputed that cable

operators were under no obligation to carry Public Television multicasts, yet they carefully negotiated for [redacted]

CONCLUSION

The Judges should reverse Order 33.

Proof of Delivery

I hereby certify that on Tuesday, May 23, 2023, I provided a true and correct copy of the [PUBLIC] PTV Reply in Support of Motion for Reconsideration of Order 33 to the following:

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