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1986 Cable Royalty) CRT Docket No. 88-2-86CD
Distribution Proceeding)

PROGRAM SUPPLIERS' REPLY FINDINGS
ON PHASE II ISSUES

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ATTORNEYS FOR PROGRAM SUPPLIERS

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PROGRAM SUPPLIERS' REPLY FINDINGS
ON PHASE II ISSUES

Program Suppliers, in accordance with the procedures established by the Tribunal, submit their reply findings and conclusions of law on the Phase II issues in the captioned proceeding. Findings, in addition to those of Program Suppliers, were submitted by Multimedia Entertainment, Inc. (Multimedia) and National Association of Broadcasters (NAB).

INTRODUCTION

Multimedia and NAB persist in a fundamental misunderstanding of the purpose and usefulness of the Nielsen study to the Tribunal's constant-sum determination. As they see it, the Nielsen study fails because it does not measure every single program appearing on every single distantly retransmitted television signal, and more particularly because it does not measure every airing of every one of their programs. Whether the Nielsen study examines every program on every distant signal is not the appropriate question, notwithstanding NAB's and Multimedia's persistence in raising this point.

Even if the Nielsen study measured all programs on all stations, it would still show 100% of distant viewing divided

into percentage shares among competing claimants. The appropriate issue in this constant-sum determination is whether the percentage shares in the present Nielsen study reasonably approximate the shares that would result if a complete census were done.

The 1986 Nielsen study, like the ones before it, does not pretend to be a census of all non-network programs on all distant signal stations. Rather, it rests on the premise that measuring the viewing on the most widely carried distant signals will result in a close match of the percentage share that each claimant would receive if a census of the entire distant cable universe were conducted. In other words, it assumes that the most heavily carried distant signals are the most important in establishing the respective contribution and value of individual programs in the entire distant cable market.

Multimedia and NAB reject this premise. They claim that their percentage shares would change if all programs on all stations were studied because many of their programs fall outside the measurement periods or are not carried on sample stations. The evidence does not support these charges. Their own station lists show that their programs are not broadcast by superstations and other widely available distant signals. The lack of availability to distant subscribers means that their programs have a minimal or a non-existent impact in the distant cable marketplace.

Program Suppliers addressed the limited availability of Multimedia's programs in a series of exhibits. P.S. Ex. 1-R to 6-R. These exhibits demonstrated the lack of correlation between widespread over-the-air availability and distant carriage. NAB's list of stations is, likewise, largely devoid of the most widely retransmitted distant signals. Without widespread availability, programs will have minimal, if any, impact or value in the distant cable market.

The negligible value and impact of NAB and Multimedia programs in the distant cable market contrast with the widespread availability and substantial value of Program Suppliers' syndicated series, movies and specials. Not only are Program Suppliers' programs available on superstations and the other most widely carried distant signals, but they are also available throughout the year on all the stations on which Multimedia and NAB programs are broadcast.

The key question in assessing the usefulness of the 1986 Nielsen study is whether the study reasonably matches the percentage shares that each party could expect if a census of the distant retransmission were undertaken. The widespread distant availability throughout the year of Program Suppliers' programs and the limited availability of NAB's and Multimedia's programs on distant signals indicates very strongly that the parties' present shares would likely be maintained under a census.

ARGUMENT

I. THE ATTACKS TO PROGRAM SUPPLIERS' CASE
ARE UNFOUNDED

A. Attacks On Program Suppliers' Settlement
Methodology For Distribution Should Be
Ignored

Lacking any means to attack Program Suppliers' non-sweep, non-sample station evidence (P.S. Exs. 8 to 10; hereinafter "non-measured programming evidence") on substantive grounds,¹ Multimedia and NAB argue that it should be ignored because the evidence is not a part of the settlement distribution methodology (MM Findings at 31-33 and see NAB Findings at 15 ("in an astonishing show of impudence, [Program Suppliers] would not pass on to claimants for those broadcasts" any increased royalties resulting from this evidence)).²

¹ NAB does contend the exhibits "are riddled with errors," (NAB Findings at 14 n. 11), but is unable to support this charge. The only problem mentioned by NAB is that subscriber-incidents "should be consistent between Exhibits 8 and 9," Id., but P.S. Ex. 8 (MEK-1) contains no subscriber counts. At hearing NAB used a non-record list of subscriber-incidents (tr. 627) to show that the data for one program were undercounted, so that Program Suppliers did not get full credit for all the subscriber-incidents in non-measured periods (tr. 628). A correction to this would make Program Suppliers' case stronger, not weaker.

² Multimedia argues that the non-measured exhibits were not drawn up with an "altruistic" motive. MM Findings, 31. There is no requirement in the Tribunal's regulations that exhibits be based on an altruistic motive. There is no indication that other parties have presented exhibits for altruistic reasons, rather than for the purpose of increasing the size of their awards at the expense of one or more of their adversaries.

These contentions assume incorrectly that the claimants whose programs appear in the non-measured programming exhibits will receive no benefit should the Tribunal increase Program Suppliers' award. This is not true: all Program Suppliers will receive their proportionate shares of the final award from the Tribunal (tr. 134-35). If the final award includes some recognition of the non-measured programming, all Program Suppliers will share in the resulting royalties.

The approach touted by NAB and Multimedia would improperly substitute their royalty distribution notions for the distribution process already agreed to by all Program Suppliers. NAB and Multimedia would allocate additional royalties directly to the non-measured programs, while Program Suppliers' approach spreads the benefit of any higher royalties among all claimants in the group. By arguing that the non-measured programming evidence cannot be used unless their distribution approach is followed, NAB and Multimedia seek to undermine the agreed-upon settlement. Such indirect attacks on settlements cannot be squared with the statutory provisions promoting voluntary agreements or the Tribunal's practice of encouraging settlements.

The non-measured programming evidence must be considered on its own merits without regard to how it fits into the settlement notions of NAB or Multimedia. This evidence cannot be treated differently from the way other evidence is treated. Neither

Multimedia nor NAB is required to show that their evidence accords with their royalty distribution before the evidence is accepted by the Tribunal. NAB, for example, has not been required to show that it distributes royalty payments based on the underlinings of television station call letters. Because no such requirement is made of other parties, there can be no special requirement that Program Suppliers meet such a test.

B. The Non-Measured Programming Evidence
Confirms The Nielsen Percentage Shares
As Reasonable For All Parties

NAB and Multimedia claim that the non-measured programming evidence does not satisfy the purpose for which they think it is intended. In their view, the evidence fails because it does not show Program Suppliers' "programs disproportionately fall outside of [the Nielsen] viewing study." (NAB Findings, 15.) But this evidence never attempted to make this showing. Instead, it addresses only a small fraction of the Programs Suppliers' programs, and is not intended as a comprehensive study of carriage inside and outside the measurement periods (tr. 123). The evidence is designed to, and does show, that even with the limited number of titles listed, the availability of Program Suppliers' programs in non-measured periods overwhelms the similar showing made by Multimedia in the 1985 proceeding.

This evidence demonstrates that Multimedia and NAB would receive the same low, if not even lower, percentage shares shown in the study if all periods and all stations were measured. Many more programs of Program Suppliers are carried in the non-measured periods on many more heavily carried distant signals, than either Multimedia or NAB have broadcast in these periods. Program Suppliers' edge in the non-measured periods assures that the same 99% plus share in the Nielsen study would also apply in the non-measured periods.

In sum, the non-measured programming evidence is not designed to show that Program Suppliers' programs are disproportionately undermeasured in the Nielsen study. Just the opposite, it shows that the Nielsen results reasonably represent the percentage shares that would result if all programs on all distant signals were measured.

II. MULTIMEDIA

Multimedia failed again to address the central problem of its presentations to the Tribunal -- the lack of an established connection between its local ratings, advertising revenues, and time studies and the value of its programs in the distant cable marketplace. Multimedia uses the 1985 proceeding as its starting point, and contends that its 1986 evidence shows it is entitled to a larger award (MM Findings, 4-6). Multimedia ignores the

evidence first presented in this proceeding that its programming is neither widely carried by nor of any particular interest to cable operators and their subscribers.

A. Multimedia's Evidence Of The Over-The-Air Performance Offers No Insight To Distant Cable Value

Multimedia recites the over-the-air performance of its programs as indicative of their distant value (MM Findings, 7 et seq.). Their performance in local broadcast markets does not provide, however, any reliable information about their value in distant cable markets (Ray, tr. 247). Multimedia contends that P.S. Exs. 1-R to 5-R support the proposition that its programs "were carried on hundreds of commercial television stations in both large and small markets, and retransmitted over thousands of cable television systems serving millions of subscribers throughout the United States." Id.

These exhibits do not support Multimedia's statement. The exhibits show that Multimedia programs are broadcast by stations not generally carried as distant signals. Of the 250 stations that carried the four most widely broadcast Multimedia programs, 94 (38%) were not carried as distant signals by any Form 3 system (Tr. 479). The remaining 156 stations were in total available to only 9.6 million Form 3 distant subscribers (P.S. Ex. 5-R). This contrasts to WTBS which by itself was available in 1986 to 39.3

million subscribers (tr. 1013). Thus all the 250 stations carrying Multimedia programs were available to only one-fourth the number of distant subscribers to whom WTBS alone was available. Clearly, the number of stations carrying Multimedia programs does not translate to widespread distant carriage. Far from supporting Multimedia's position, these exhibits (P.S. Ex. 1-R to 5-R) show how unimportant the stations carrying Multimedia programs are in the distant cable marketplace.

The lack of distant cable value is further confirmed by the extremely small portion of royalties attributable to these 250 stations. They account for only 3% of the 1986 royalties (P.S. Ex. 6-R). This is a significantly smaller amount of royalties than is attributable to WTBS or any other superstation. Again, the disparity between importance in over-the-air markets and importance in distant cable markets is apparent.

Multimedia points to the expansion of Sally Jessy Raphael as a "key 'changed circumstance' in 1986" (MM Findings 8). Sally's expanded over-the-air coverage was of no great import. Even though Sally was available to 20% more stations (70 in 1985 vs. 84 in 1986) (tr. 301), its daytime households and persons reached declined by approximately 15% during the course of 1986. MM Ex. 6. Thus, even on a local market basis, Sally was unable to hold an audience. As P.S. Ex. 2-R shows, Sally's distant carriage was likewise unimpressive. If this program's perform-

ance is the key evidence, then Multimedia's award should decline in 1986.³

Multimedia also relies on Donahue's local 1986 audience ratings and its advertising study as indicative of increased value of its programming (MM Findings, 11-14). Program Suppliers anticipated these arguments and refuted them completely (P.S. Findings, 15-23), and will not repeat that discussion. Only one point in Multimedia's discussion requires further response. Multimedia, apparently recognizing the serious deficiencies of its 1986 advertising study, attempts to sidestep the problem by indicating that reliance could be placed on P.S. Ex. 12-X (MM Findings at 14).

This exhibit shows that Donahue's advertising share declined between 1985 and 1986. Multimedia seeks to overcome this problem by indicating that if the P.S. Ex. 12-X figures is added with Sally's advertising figures, the combined result for both programs is higher than Donahue's 1985 figure (MM Findings at 14). Multimedia's conclusion -- that advertising revenues for two programs will be higher than the advertising revenues for one of the two programs by itself -- appears to be self-evident, and of

³ It should also be recognized that Sally must replace several series, which jointly had 1983 and 1984 totals in excess of those obtained by Sally. See 1985 Final Determination, 52 Fed. Reg. 7132, 7137 (1988) (series named). To get back to its 1983 award level, Sally's audience would have to equal or be greater than the audiences for these dropped programs.

no use to the Tribunal. Under a changed circumstances approach, the proper comparison is whether Donahue's advertising figure changed from 1985 to 1986, not how some combination of figures compares to Donahue's 1985 result.

In attempting to find some relevance of local market performance to the distant cable market, Multimedia contends that "[t]he value of a program in the broadcast market gives an indication of its attractiveness to cable." MM Findings, 18-19. The value of programs in over-the-air markets is conclusively tied to the viewing for the programming. The logic of Multimedia's statements would lead to a conclusion that viewing is important to cable operators. Program Suppliers agree that viewing is indicative of distant cable marketplace value, but no evidence shows that over-the-air viewing figures translate to the same level of value to cable operators. In Multimedia's case, over-the-air viewing results from widespread coverage on affiliates, but these factors reduce the value of Multimedia's programs in the distant cable marketplace.

Multimedia contends that the numbers for its specials "remained level between 1985 and 1986" (MM Findings at 22). This is not supported by the record, as summarized in P.S. Ex. 10-R. This exhibit shows that the audience levels for Multimedia's specials between 1985 and 1986 went down even though the number of stations broadcasting them increased. As more stations air a

program, a larger audience should be expected (tr. 496). Yet, the opposite occurred for Multimedia's specials, as it did for Sally: they were aired on more stations, but their total audience declined. P.S. Ex. 10-R. On average, Multimedia's 1986 specials had almost 15% smaller audiences than Multimedia's 1985 specials received. Id. Likewise, the 1986 average audience per station was down by almost 17%. Id. These declines show continued erosion, not a leveling in 1986.

B. Multimedia's Claims Of
Underrepresentation On Nielsen
Are Unsupported

Multimedia again alleges that its specials were undermeasured in the Nielsen study (MM Findings 22-23). For this allegation, Multimedia relies on its Rebuttal Exhibits 1-R and 2-R, but these exhibits do not contain any data about, and therefore lack any connection to distant signal carriage. A comparison between Multimedia Exhibits 2-R and 3-R demonstrates the serious deficiency of Multimedia's claims. Exhibit 3-R shows that less than half of the stations carrying Multimedia programs are carried by distant signals. Multimedia did not take into account this lack of distant signal carriage in its calculation of undermeasurement shown in Ex. 2-R.

Multimedia contends, "Fewer than 4%, and only 9.5% of the instances of sweep retransmission were measured by MPAA." MM

Findings at 22 (footnote omitted). This statement fails to recognize that a large percentage of the stations carrying these programs were not available to any Form 3 distant subscribers, and thus do not meet the threshold requirement for obtaining royalties. Had this factor been considered, the results would have differed substantially. This can be seen by the following analysis of two programs, 6th Annual Song Award and 20th Annual Music City Awards, which are listed in both MM Ex. 2-R and in P.S. Ex. 3-R and 4-R. Eliminating those stations which have no Form 3 distant carriage changes MM Ex. 2-R results for these programs as follows⁴

	No. of <u>Airings</u>	No. of <u>Sweep Airings</u>	No. In <u>Nielsen</u>	% Airings <u>In Nielsen</u>	% Sweep Airings <u>In Nielsen</u>
<u>6th Annual</u>	89(137)	47(74)	7	7.9%(5.1%)	14.9%
<u>20th Annual</u>	97(156)	25(40)	8	8.25%(5.17%)	33%

The station lists for other programs in MM Ex. 2-R would have similar changes because many stations airing these programs were not carried as distant signals by Form 3 systems. Clearly, the results when the lack of distant carriage is factored into the exhibits differ substantially from those portrayed by Multimedia. For 20th Annual, approximately one-third (33%) of its sweep programs available on distant signals were measured by the

⁴ The numbers in parentheses are the figures shown on MM Ex. 2-R. The lower figures next to them eliminate from Multimedia's figures all stations which have no Form 3 distant carriage. The stations with no Form 3 carriage are identified in P.S. Exs. 3-R and 4-R.

Nielsen study. This confirms from yet another angle that the Nielsen study fairly measures distant signal availability and viewing. It also affirms that widespread local carriage does not translate to strong distant carriage.

Multimedia contends also that "its major series are dramatically ignored by MPAA's study." (MM Findings at 23.) This is another attempt by Multimedia to dredge up a controversy where none exists. According to MM Ex. 3-R, approximately 25% of the stations available as distant signals carrying Donahue were measured by the Nielsen study. Id. While Multimedia contends that 25% inclusion rate is too small, it has done no analysis of the average inclusion rate for programs in the Nielsen study (Argetsinger, tr. 104). Without such a study, it is impossible to determine whether a 25% inclusion rate is high or low. Moreover, the Tribunal has no way of knowing how many other programs have a 25% or less inclusion rate and thus may also "be dramatically ignored," as Multimedia contends (tr. 1040). It could well be that a 25% inclusion rate would be on the high side. Absent some basis for comparison, Multimedia's charges are meaningless.

Multimedia's charges that expanding the Nielsen study to include the January and October data "exacerbates" the alleged problem of underrepresentation. MM Findings at 29. According to Multimedia, use of these data exaggerates the value of programs on independents "while programs on affiliated stations below MPAA

arbitrary cutoffs are totally ignored." Id. at 30. Multimedia's position on this point is inconsistent with its position that individual programs are undermeasured because they fall outside the sweep periods. MM Ex. 2-R. If only four sweeps were studied as Multimedia now urges, fewer individual titles would be measured. This would then provide further grist for Multimedia's undermeasurement mill. Multimedia has not squared these two opposite positions.

This argument also shows a lack of understanding about how the Nielsen study works. Multimedia contends that Program Suppliers gained an additional 50 million viewing hours in the January and October cycles, which increased their royalties substantially. MM Findings at 30.⁵ Multimedia's contention tells only half the story. Awards to Program Suppliers are based on percentage shares, which are determined by comparing the viewing hours for individual programs (numerator) against the viewing hours for all syndicated programs (denominator). Multimedia's contention assumes that the 50 million viewing hours were added to the numerator without change to the denominator. This assumption tells only half the story. The denominator would increase also by the additional January and October viewing data

⁵ Ironically, Multimedia states that Perry Mason "gained 40% of all its viewing hours from the January and October sweep measurements." MM Findings at 30. The high percentage is due, no doubt, to the fact that the Goodwill Games preempted Perry Mason during July, as Mr. Thrall testified. Tr. 968.

for all programs. With the addition of January and October data increasing both numerator and denominator, the percentage share for Program Suppliers might not change from a four-cycle percentage share. Multimedia provided no showing that the four-cycle data would result in a different percentage share. Multimedia's contention, therefore, has no factual support, and inaccurately describes the calculation of percentage shares for Program Suppliers.

C. The Value Of Older Programs Remains Strong On Distant Cable

Multimedia again alleges that the harm to syndicated series from distant retransmission is less than that for first-run programs (MM Findings 24-25).⁶ This point has neither inherent nor demonstrated support: many older series still have significant value as do older movies (Ray, tr. 983). If stations are still willing to purchase these programs and subscribers still watch them, they clearly have market value. See tr. 992 (Andy Griffith is described by station manager as best show

⁶ Multimedia also maintained that first-run programming was "the most effective fare for over-the-air television stations, and by implication for systems retransmitting these signals." MM Findings at 10. This was not proven in the case of Multimedia's programs for their distant carriage. P.S. Exs. 1-R to 5-R. Moreover, Program Suppliers have many first-run programs (Ray, tr. 1052): just as one example, several programs produced by Turner Broadcasting (Turner Program Service), such as, Goodwill Games, National Geographic, Centennial, Portrait of America, and Cousteau are first-run properties (tr. 1105-06) with very high distant cable value.

station has aired and as a show that always works). There are no grounds for asserting that at some point, programs are no longer entitled to further license fees or cable royalties (tr. 1091). Sustained value in distant cable retransmission should be rewarded with appropriate royalties.

Multimedia again argues that proof of the allegedly lesser harm for "frequently rerun series [can be seen] by analyzing the diminishing contractual residuals paid to directors, performers and writers for such programs with each successive run." MM Findings at 25. This point was argued in the 1983 proceeding, id., to no avail. The successively lower residuals demonstrate not diminished value, but rather a risk-sharing under which the talent is paid more up-front, and the syndicator/producer must wait for later runs to recoup expenses, and possibly make a profit. If anything, the residual payment schedule demonstrates how producers/syndicators suffer greater harm if distant importation reduces their opportunity to syndicate the program at market prices beyond an initial syndication run.

D. Multimedia's Challenges To The Importance Of WTBS In The Distant Cable Market Are Unfounded

Multimedia claims that WTBS "inflate[d] the value of certain of its programs and reap[ed] unfair rewards." MM Findings 28. Multimedia used the scheduling of the Goodwill Games to raise

this serious charge of manipulation. There is absolutely no factual support for this charge (Ray, tr. 969). Moreover, the scheduling of programs is based on many more factors other than simply the royalty fees involved. Id. 968-69. This is especially true in this situation which involved negotiations with foreign countries.

Multimedia uses further groundless speculation to bootstrap this charge: "Scheduled during a July sweep, and airing on only a handful of stations, the program received credit for 100% of its airings in the MPAA study." MM Findings at 28. These statements are untrue: the Goodwill Games aired on approximately 66 stations, of which 9 stations were measured in the Nielsen study.⁷ This means that the program's inclusion rate was about 13.5%, or approximately half the inclusion rate for Donahue. Not only is Multimedia wrong that 100% of the Goodwill Games airings were measured, but under Multimedia's own terms, the Games were actually undermeasured. There is no basis for the allegation that this program received special treatment in the study or was overmeasured.

Multimedia tries to use the poor local ratings for the program over its syndication network as a counterpoint for its

⁷ These numbers are derived from the Nielsen study detail tables and the Arbitron SPAs, both of which were provided to Multimedia on discovery. See also tr. 698 (Mr. Cooper indicates Games not on majority of sample stations).

distant viewing. The ratings "failure" related to the Goodwill Games is a problem that happens to many programs (tr. 1117). In fact, a similar problem occurred with the broadcast of the 1988 Olympic Games (P.S. Ex. 21-RX). The "failure" occurs because the predicted ratings on which advertisers buy time were higher than actual ratings turned out to be. When the predicted ratings fail to materialize, the syndicator must "make good" the promised ratings by either lowering advertising rates in the program or offering additional spots free of charge. The revenues foregone by the "make goods" constitute the loss. There is no indication in the record whether the projections for the Goodwill Games were unrealistically high or the programming had poor ratings. Nor is there any indication that WTBS's ratings, as opposed to the other 65 stations carrying the Games, were poor (tr. 1116). Because ratings are based on the entire coverage of a program (tr. 300), the ratings on WTBS could have been good, and the program's ratings on other stations poor.

Multimedia resurrected its 1983 claim, not accepted by the Tribunal, that WTBS pays license fees commensurate with its distant signal carriage. Multimedia argues the higher license fees are a bonus to the syndicators, which should be offset by lower royalties to Program Suppliers. According to Multimedia, new evidence presented in this proceeding "clearly establishes that a nexus exists between payments made by WTBS for programs

and its special position in the cable distant signal market." MM Findings at 34. No nexus was established in this record, and the license fees paid by WTBS are not out of line with the license fees paid by stations in comparable markets.

Multimedia's presentation of this issue is found in its Written Rebuttal Testimony at pages 10-16. The statements relied upon by Multimedia do not show a nexus between the licensing fees and the amount of distant cable carriage of WTBS. In 1986, the Atlanta market had 1.1 million households, but WTBS was available to approximately 39.3 million cable households (tr. 1057). Nothing establishes that WTBS's licensing fees were anywhere close to 39 times as large as those paid by other Atlanta stations.⁸ One example used by Multimedia related to the fees paid for the Three Stooges (Thrall Written Rebuttal 12-13). In 1973, WTBS paid \$19,000 for a five-year deal when its cable audience was less than 400,000. Id. at 10. In 1981, WTBS renewed for an eight-year deal at \$270,000 when its cable

⁸ Multimedia indicates that this comparison is invalid because it is unrealistic to think parties would set license fees for the entire potential market, rather than actual audience (tr. 1058). Two factors defeat this: first, WTBS's comments related price to the number of potential subscribers, not to actual audience (tr. 1059). Second, the ratio of 39:1, distant to local, would remain even if actual audience, not potential audience, were considered. In other words, WTBS's actual audience in Atlanta (where it is a weak UHF) would be about 1/39th of its actual distant signal audience. Thus, whether actual or potential audience is used -- the license fees for WTBS would have to be approximately 39 times larger than the Atlanta fees to establish a nexus.

audience was 12 million. Id. at 13. In this period, WTBS's cable audience went up 30-fold (3000%), but the license fee increase was only 1400% (tr. 1062). Moreover, the 1973 deal was for five-years, while the 1981 deal was for eight years. The fees for a longer deal would be higher than those for a shorter deal. There is no apparent nexus between distant subscribers and the license fees.

More important, Multimedia's evidence does not establish that WTBS's program costs rose any faster than those of stations in comparable sized markets, but without WTBS's distant carriage. Multimedia cited the prices paid for Andy Griffith in 1978 and 1986 as demonstrating increased fees due to distant cable carriage. Thrall Written Rebuttal at 13. But all stations experienced increased program costs between 1978 and 1986 (tr. 1063). As shown by P.S. Ex. 17-RX, WTBS's licensing fees increased less rapidly compared to the fees increase paid by comparable stations. Excerpting some results from that exhibit shows that WTBS increases were less steep than those of other stations:

	<u>WTBS Andy Griffith</u>	<u>Markets 11-20 Indies Only</u>	<u>Markets 1-10 UHF Indies</u>	<u>Nationwide Indies</u>
1978	\$836,000	\$1,182,000	\$1,335,400	\$1,329,200
1986	<u>\$2,490,000</u>	<u>\$7,249,684</u>	<u>\$8,240,958</u>	<u>\$5,041,688</u>
% Change	297.85%	612.87%	617.12%	379.30%

All these figures were obtained from the NAB's Financial Reports, and related to the cost of broadcast rights. Id.

The increased fee paid by WTBS was the lowest increase of any group. WTBS's increase in license fees was less than half that of independents in markets 11-20 (the markets to which WTBS compared itself, tr. 1067). WTBS's increases were not out of line with comparable stations; if anything they were lower during this period. Once again, the evidence does not establish a nexus between WTBS's license fees and its distant signal availability. Multimedia's evidence fails to show that Program Suppliers "have secured financial compensation directly from WTBS for its cable carriage," as Multimedia alleges (Findings at 35). Rather, the evidence shows WTBS's increases were below those experienced by other stations in the same time frame.

Multimedia also contended that "programmers exhort [sic] a multimillion dollar bonus from WTBS," MM Findings at 36, which Multimedia contended amounted to "more than a \$10 million program premium." Thrall Written Rebuttal at 14. This charge is baseless. This figure was obtained by comparing the program production and news expenses for a typical station in 1983 (tr. 1075) against WTBS's 1986 expenses (tr. 1076). Multimedia did not explain the relevance of comparing 1983 costs against WTBS's 1986 costs, particularly when costs were rising throughout this

period. To make a valid comparison, it is necessary to use 1986 expenses for stations in comparable markets (tr. 1081).

When the proper comparison is made -- that is, WTBS 1986 program production and news costs against the 1986 program production and news costs for stations in markets 11-20 -- the alleged "\$10 million program premium" vanishes. This comparison was made at hearing through P.S. Ex. 17-RX, which contains a table showing 1986 station revenues and expenses for independents in markets 11-20. This is the proper comparison for WTBS (tr. 1067). This table shows that 25% of these stations had program production and news costs of at least \$12 million (tr. 1080) as compared to WTBS costs of \$15.2 million in 1986. This would by itself dissolve almost all the alleged \$10 million differential purportedly paid by WTBS. Because the \$12 million figure for the 11-20 markets independents is an average, some of these stations would have costs that would approach, if not exceed, WTBS's 1986 costs.

In short, Multimedia sought to use a comparison between 1983 figures for all stations with the 1986 WTBS figures to reach its purported \$10 million double-dip. When the comparison is properly made between WTBS's 1986 numbers and the 1986 costs for independents in markets 11-20, the difference between stations vanishes. The end result is that WTBS's costs are entirely consistent with comparable stations in 1986. No bonus payment

was made to programmers and no double-dip was present. It follows that there is no reason to adjust royalties to account for a non-existent bonus.

Multimedia again charges that the programming on WTBS has been broadcast repeatedly, and "has a lower marketplace value than current programming." MM Findings at 37 (citation omitted). This contention is theoretically and factually invalid. On one hand, there is no indication that old programming has little marketplace value on distant retransmission. WTBS has had the same programming strategy since 1976 when it first went on the satellite (tr. 1097). Both cable operators and cable subscribers were aware of the use of older programs, yet WTBS's distant carriage has grown substantially since that time. Id. If operators and subscribers did not find these programs attractive and did not view them, WTBS would be dropped by cable systems (tr. 1099). It follows that WTBS's widespread distant carriage reflects satisfaction with its programming.

In addition, WTBS offers many first-run programs. As shown by P.S. Ex. 18-RX, WTBS has incurred substantial production costs for its first-run production (tr. 1105). WTBS's first-run production includes such programs as Goodwill Games, National Geographic, Cousteau, Centennial, Portrait of America, and other attractive syndicated series and specials. Id.

III. NAB

Two factors stand out in reviewing NAB's case and its findings. First, the low name recognition associated with NAB-listed programs requires an explanation be given in many cases just to identify the programs. It is difficult to imagine how subscribers can be interested in programs imported from other markets which are not readily identifiable. In contrast, Program Suppliers' programs are widely known. In hearings as well as in the real world, the mere mention of the name of the top series, movies and specials in P.S. Ex. 6 triggers recognition of the program. The widespread recognition of and familiarity with Program Suppliers' programs gives them far greater value in attracting and keeping subscribers.

Second, NAB's emphasis on its "sports" programming is apparently done, in part, to shield the fact that a great number of its listed programs are the type of news and local affairs programs comparable to the local programs included in NAB's Phase I claim.⁹ Our count of NAB's list on NAB Ex. II-2 (amended) indicates that approximately 50 of these shows are listed, including such titles as Noon News (13), 5:30 News (14), 10 O'Clock News (15), 27 Newsfirst (28), Salmon Story (66). These news and local affairs programs comprise a group almost as large as NAB's

⁹ Program Suppliers do not challenge that these news and local affairs programs are syndicated, but we do question the worth of these programs.

ballyhooed "sports" programming. This type of program has been found to have very low value in the distant cable marketplace. The Tribunal reaffirmed in the 1983 Phase I proceeding that it "continued to hold that [local] programming is only of marginal value to cable operators." 1983 Final Determination, 51 Fed. Reg. 12792, 12811 (1986). The Tribunal went on to contrast the value of Phase I sports programs to Phase I news and local programs by noting that the evidence related to local programming "obtained over many proceedings from many different sources," id. confirms that their worth is less than their viewing.

To the extent NAB seeks to apply the Phase I findings to its "sports" programs (a point addressed later in these findings), consideration should also be given to the application of the Phase I findings about news and local affairs programs to similar programs which comprise a substantial portion of NAB's Ex. II-2. These programs -- which NAB also argued in Phase I had regional appeal -- have been found to be unattractive to distant subscribers. Because the Phase I local programs resemble very closely the type of local programs in Phase II, the Phase I findings about the lack of value of this type of program are pertinent to the lack of value of the same type of syndicated programs in Phase II. The lower value already ascribed to such programs requires that NAB's Phase II award be proportionately diminished.

A. NAB Has Not Established Special Appeal
Or Substantial Marketplace Value For
Its Listed Programs

NAB asserts that programs listed in its exhibits have substantial marketplace value based on the number of "sports" programs, their regional availability, and their first run nature (NAB Findings, 3-4). These repeat past NAB claims, and offer no new insight to the programs at issue.

NAB overstates Mr. Ducey's applicable qualifications. While it may be true that he is a "frequently published expert in telecommunication marketing and policy research" (NAB Finding, 4), the record shows that he published just two articles that apply to cable (tr. 360). Neither article directly addresses the issues found in his testimony. One of the two articles, P.S. Ex. 17-RX, addresses subscriber interest in pay cable, not basic cable, and, according to Mr. Ducey, what subscribers value in pay does not translate to what they value in basic (tr. 450). He specifically stated that the research did not make a comparison between the different types of programs available (tr. 449). Yet, such comparisons are the key to the Tribunal's decision-mak-

ing. All in all, Mr. Ducey's research provides precious little support for his testimony.¹⁰

Likewise, his cable experience of less than a year while he was in graduate school in 1979 hardly gives him first-hand knowledge of the value of programming to cable operators in 1986. Moreover, his experience did not show that the type of programs on NAB's list would displace Program Suppliers' programs. Instead, he indicated that such comparative questions "would be answered empirically, possibly by looking at viewing data -- how many viewers -- how many subscribers make the decision to view one kind of program versus another kind of program." (Tr. 393.) The Nielsen study provides these viewing data for 1986.

Mr. Ducey did not wholeheartedly endorse viewing because he claims it fails to measure the intensity of preference (tr. 386). NAB's case is, however, devoid of any information about the intensity of preference for the NAB-listed programs. In fact,

¹⁰ NAB asserts the rather unremarkable proposition that cable subscribers value access to a variety of programs (NAB Findings, 4). Assuming no need for better reception, it is difficult to imagine that subscribers would be willing to pay for cable unless they could get something beyond stations already available locally. The most heavily carried distant signals do not carry the localized, regional programs that dominate NAB's list, but rather offer the series, movies, and specials of Program Suppliers. It is this variety of Program Suppliers' programs that is most attractive to subscribers. NAB asserts that the value of this variety cannot be measured merely by viewing. Id. Again, it would be difficult to imagine what value a program has to subscribers unless they watch it. In addition, Mr. Ducey stated NAB focuses on viewing in its own marketing research (tr. 820-21).

the only concrete evidence of viewer intensity in this case is found in P.S. Ex. 20-RX, and it relates to Andy Griffith. This exhibit relates the statement of a viewer who watches the program three times a day in order to "reproduce that peacefulness in your own life." Id.¹¹ This evidence reaffirms that intensity of interest is not the exclusive domain of first-run, regional, or "unique" programs, as NAB implies, but extends to entertaining, durable syndicated series, movies, and specials. It also highlights a neglected point -- the vast majority of cable subscribers watch programs to be entertained.

NAB's attempt to tie its "sports" programs to the marketplace value ascribed to live professional and college major sports programming in Phase I is unavailing. The difference between NAB's coach's shows or high school games and Phase I sports programs is vast. None of the Phase I evidence on sports programming -- be it Nielsen viewing or attitudinal surveys -- addressed coach's shows or the type of high school sports included on NAB's list. The value placed on live professional or collegiate major sports cannot be transferred to NAB's programs. Moreover, particularly in the cases of coach's shows or high school sports, these programs are widely available over-the-air in their areas of interest, P.S. Ex. 16-X, so distant cable

¹¹ Another viewer, also referring to Andy Griffith, stated, "You can see them [individual episodes] over and over again and can always pick up something different." Id.

importation is of minimal value to a relatively small number of subscribers.¹²

NAB points to INN Evening News as "a fresh, timely program with broad distribution." NAB Findings at 6. As NAB's own exhibits (NAB Ex. 11-RX to 22-RX) show, however, nearly half of the INN Evening News telecasts in 1986 occurred after midnight and before 6:00 a.m. (tr. 945). Broadcasts in early morning hours do not represent a successful "news counter-programming strategy" (NAB Findings at 6), nor can yesterday's news shown in the wee hours of the next morning be considered fresh and timely. The value of INN, as judged by the significant shift away from its original evening time slot, has diminished substantially. Because this program is the bellwether of NAB's list, its reduced value reverberates throughout NAB's case.

B. NAB's Charges Against Nielsen Viewing Are Lacking In Merit

NAB's claim that "the MPAA viewing study disproportionately and significantly undermeasures NAB-represented programs" (NAB Findings, 7-8) is not supported by Mr. Ducey. Mr. Ducey agreed that if NAB Ex. 9-RX is used, the Nielsen study no longer under-

¹² NAB cites a program available "only on a distant basis to residents of Kalispell and Williston, Montana" (NAB Findings at 6). The cable system in Kalispell has approximately 12,000 subscribers 1987 Television and Cable Factbook p. B-635. Availability to such a small number of subscribers contrasts to the millions of distant subscribers who receive Program Suppliers' programs.

states viewing to NAB programs (tr. 830) and that this exhibit is a fair statement of the viewing for the identified programs (tr. 831).

NAB overstates slightly its percentage share of viewing. (NAB Findings at 8). This occurred apparently because NAB measured its viewing hours against Program Suppliers' viewing hours along rather than against the viewing hours for the entire category. See P.S. Findings at 31 (chart listing 1986 percentage shares). Even with this overstatement, the best NAB can state is that its share "is comparable to" the 1984 Nielsen viewing share for NAB-listed programs. Id. Of course, in the 1984 proceeding NAB received an 0.7% award, not the 0.8% it now requests. Because NAB's starting point share in 1986 is lower than its 1984 starting point, a further reduction from the 1984 award is justified.

NAB represents the producers of six programs for which Program Suppliers represent the syndicator (NAB Findings, 9). NAB contends that the Tribunal could award royalties to a producer rather than a syndicator where both claimed. While theoretically this may be possible, the Tribunal has already decided that the royalties should go to a syndicator in such circumstances. It would create considerable confusion if the Tribunal were now to reverse that position. NAB's contention that the Tribunal has not addressed this issue where "the

syndicator would receive no compensation from MPAA, while NAB would still compensate the program's producer," id., is not grounds for reversing the prior ruling.¹³ The Tribunal's ruling in favor of the syndicator rested on its interpretation that the legislative history favored giving royalties to syndicators. 1984 Final Determination, 52 Fed. Reg. 8408, 8411 (1987). The intent expressed in the legislative history should not be casually brushed aside because in a few cases a "producer" seeks to gain an indeterminate amount of money.

NAB asserts that the program Breast Cancer: My Body, My Life "was mistaken for an MPAA-represented program with a similar title, and the 'certification' executed by the syndicator was therefore false. Tr. 604-10 (Kessler)." NAB Findings, 9 n. 5. The transcript citations do not support this assertion. Ms. Kessler was specifically asked if this was a case of mistaken identity, she replied, "No, it doesn't suggest that to me at all

¹³ In the case of Group W, which is both syndicator and producer of five programs for which dual representation exists, the fiction that NAB's representation of Group W as producer overrides Program Suppliers' representation of Group W as syndicator is transparent. Group W agreed to representation for all its programs as part of its agreement with MPAA, and to the use of the Nielsen results to set its award for all its programs. Now, having accepted the Nielsen results for most of its programs, Group W decides to try for a little extra cash by having NAB make a claim for these programs with Group W as the producer. Clearly, this is not a legitimate dispute between two different parties, as was the case for Little House, but rather a simple ploy to gain more money. This situation presents no reason for the Tribunal to override its decision involving real competing claims between two separate entities.

because I do not know the process by which Fox was credited with the program." (Tr. 609.) The identification begins with use of the BIB code listed for the program identified in the Nielsen study. The BIB code for Breast Cancer in the Nielsen program listing differed from the BIB code in the BIB book for the program on which NAB rests its claim of mistaken identity (tr. 608). Because the BIB codes are different for the two programs, it would be unlikely that an initial sort based on BIB codes would have mistakenly credited the program to the wrong party.

NAB argues that its specials were either not measured or were significantly undermeasured. NAB Findings at 11. NAB uses a detailed arithmetical exercise to support this point. Id. Two major problems prevent attaching any weight to this exercise. First, NAB relies on a measurement "of all programming during the calendar year" to compare with the measurement of specials. Id. This is not an apples-to-apples comparison because a measurement of all programming will include stripped daily and weekly series which will make the inclusion percentage higher than if specials alone were studied. To match this rate against specials alone (as NAB does) will certainly lead to a lower percentage for

specials.¹⁴ In order to make a valid comparison, it would be necessary to match specials against specials. It should be noted that NAB's witness could find no particular bias against any one party by use of sweeps nor could he generalize that small parties would be hurt more than large parties by their use (tr. 400-01).

Second, NAB's calculations of the inclusion rates for its specials is only the first, and less important, step in proving alleged undermeasurement. As noted by the Tribunal, for a party to prevail on this issue, it must show "the amount of [its] programs on broadcast stations, when they were aired, whether the programs aired inside or outside of a sweep period, which cable systems carried them, and their subscribership." 1984 Final Determination, 53 Fed. Reg. 7132, 7136 (1988). NAB provided none of the required information in its presentation. NAB's calculations are based, instead, on the proportion of underlined but not boldface stations in its list. NAB Findings 11 n. 8. NAB cannot prevail on this inadequate showing.

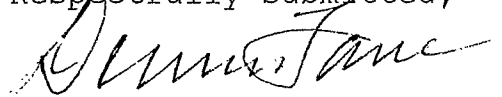
14 The mismatch is the same as would be created if a study was done to measure how much broadcast time was occupied by all syndicated programs on a group of stations and then a second study was done of how much time was occupied by specials. Clearly, the rate for specials will be lower than the rate for all programs.

CONCLUSION

For the reasons stated in this reply and in our Findings, Program Suppliers urge the Tribunal to set these percentage shares:

Program Suppliers	:	99.3%
NAB	:	0.38%
Multimedia	:	0.32%

Respectfully submitted,



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ATTORNEYS FOR PROGRAM SUPPLIERS


Dated: March 31, 1989

CERTIFICATE OF SERVICE

I, Dennis Lane, certify that I have, this 31st day of March, 1989, served a copy of the foregoing "PROGRAM SUPPLIERS' REPLY FINDINGS ON PHASE II ISSUES" by first class mail, postage prepaid, to the parties listed below:

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