In the Matter of	)	
	)	
1989-1991 Satellite Carrier	)	CRT Docket Nos. 91-1-89SCD
Royalty Distribution	)	91-5-90SCD
Proceedings	)	92-2-91SCD

ORDER

The Copyright Royalty Tribunal has determined that the Joint Network Parties (Networks) are not entitled to receive any of the royalties paid by satellite carriers to retransmit superstations and public television stations.

BACKGROUND

On October 15, 1992, Program Suppliers, Broadcaster Claimants, American Society of Composers Authors And Publishers, Joint Sports Claimants, Broadcast Music, Inc., SESAC, Inc., and Devotional Claimants (Certain Copyright Owners) filed joint comments reporting that although they had been able to negotiate a settlement among themselves, they had been unable to negotiate a settlement with the U.S. commercial networks (Networks), and Public Broadcasting Service (PBS). Therefore, they requested that the Tribunal declare that two Phase I controversies exist: (1) a controversy between

works which are owned by the Networks and works which are owned by Certain Copyright Owners; and (2) a controversy between works which are owned by PBS and works which are owned by Certain Copyright Owners. On October 21, 1992, PBS filed a pleading addressing the scope of the Phase I issues and proposing a two-stage Phase I proceeding. Specifically, PBS opposed Certain Copyright Owners' position that two Phase I controversies exist. PBS argued that Certain Copyright Owners "proposal contemplates a 'fee generation' or 'pay-in/pay-out' approach, under which the royalty award to PBS or the commercial networks would be limited to what satellite operators have actually paid as compulsory license fees for the retransmission of public television or commercial network stations." PBS alleged that the Tribunal has consistently refused to accept the proposition that the allocation of copyright royalties should be determined on a "fee generation" basis. Finally, PBS requested a bifurcated Phase I proceeding to permit the Tribunal to decide whether one or two controversies exist.

On October 23, 1992, the Certain Copyright Owners filed a "Motion For Partial Distribution," requesting prompt distribution to them of all royalties paid for carriage of independent superstations by satellite carriers for 1989, 1990, and 1991 (including interest earned). Certain Copyright Owners claimed that they own all the works contained in the retransmissions of independent superstations, and have agreed among themselves as to the division of royalties allocated to those retransmissions. Therefore, they conclude, with regard to those royalties there is

no controversy.

At the October 26, 1992 prehearing conference, the Tribunal granted PBS' request for a bifurcated Phase I proceeding. The Tribunal directed Certain Copyright Owners, PBS, and Networks to file briefs and reply briefs, addressing stage one of the Phase I proceeding; whether there exist one or two controversies in the satellite distribution proceeding. The Tribunal also deferred making a decision on the request for partial distribution until after the conclusion of stage one of the Phase I proceeding.

After the prehearing conference, but prior to the filing of the briefs, Certain Copyright Owners and PBS reached a settlement. Consequently, only Certain Copyright Owners and Networks filed briefs on stage one of the Phase I proceeding.

Certain Copyright Owners' Arguments

Certain Copyright Owners contend that "[t]he only issue currently before the Tribunal is whether the Networks (ABC, CBS, and NBC) may receive any of the royalties paid by satellite carriers to retransmit superstations -- even though none of the programs within the Networks' Phase I claim was broadcast on those superstations." Certain Copyright Owners believe that Networks are not entitled to any portion of the superstation fund because none of the Networks' copyrighted works appeared on superstations.

Certain Copyright Owners note that pursuant to the Satellite Home Viewer Act of 1988 (SHVA), satellite carriers pay different rates for carriage of network stations and superstations. Specifically, in 1989-1992, satellite carriers paid 3¢ for network stations and 12¢ for superstations. 17 U.S.C. § 119(b)(1)(B). This discrepancy in rates, they maintain, is due to the fact that the Networks made a conscious trade-off during the legislative process, opting to accept a lower rate in order to prevent the retransmission of any network stations to areas served by the Networks' affiliates. Consequently, network stations may be retransmitted by satellite carriers only to those geographic areas that are not served by any other station affiliated with that network (white areas). Certain Copyright Owners accuse the Networks of being disingenuous because "[h]aving sought the legislative restrictions which effectively reduce the total Section 119 royalties paid for network stations and having agreed to the lower (3 cents) rate for those stations, the Networks now seek to inflate their share of Section 119 royalties at the expense of Copyright Owners."

Certain Copyright Owners maintain that Congress directed the Tribunal to consider its cable royalty distribution precedent in allocating the satellite royalties. Examining the cable precedent, they maintain that the present case is analogous to the 3.75 and syndex royalties rather than the basic cable royalties. Specifically, they state that the satellite carrier royalty "plan is comparable to the cable 3.75 and syndex plans because reporting

and payment calculations under all three are based on individually identified stations. Since 1983, the Tribunal has divided the cable royalties into three funds: basic, 3.75, and syndex. Citing the Tribunal's 1983 cable royalty distribution decision which created the three funds, and the Court of Appeal's decision which affirmed it, Certain Copyright Owners assert that the Tribunal has never permitted a claimant to receive any portion of a royalty fund comprised of fees paid for stations which did not carry any of its copyrighted works. 1983 Cable Royalty Distribution Proceeding Final Determination, 51 Fed. Reg. 12792 (1986); *NAB v. CRT*, 809 F.2d 172 (2d Cir. 1986).

Certain Copyright Owners differentiate the basic cable royalty plan from the satellite carrier royalty plan on the grounds that basic royalties are not divided by type of station for reporting, payment, or distribution purposes. They explain that basic cable royalties are calculated using a "distant signal equivalent" (DSE) factor, so that each type of station is assigned a DSE value: 1.0 DSE for independents and 0.25 DSE for network affiliates and public television. Larger (Form 3) cable systems pay basic royalties based on the total DSE value, using a sliding percentage scale which declines as the number of DSEs increase. 37 C.F.R. § 308.2(a) (1991); 17 U.S.C. § 111(d)(1)(B)(i)-(iv). Moreover, they state, Smaller (Form 1 and 2) cable systems pay either $28 per accounting period or a fee based on flat percentage rates irrespective of the number of distant signals, if any, they carry. 17 U.S.C. § 111(d)(1)(C),(D). Therefore, they conclude, the

assignment of any specific amount of royalties to a particular station under the basic cable payment plan is "problematic."

Certain Copyright Owners also distinguish the division of royalties into separate funds from the fee generation approach for distribution. Specifically, they rely on the Tribunal's 1983 cable decision, in which it rejected the argument that the division of royalties into separate funds was equivalent to a "fee generated" approach to distribution. 51 Fed. Reg. at 12807. This decision, they point out, was wholly affirmed on appeal. 809 F.2d at 178. They maintain that establishing eligibility to receive royalties is only the starting point of any distribution process. Eligible parties are then required to prove their entitlement to a specific percentage share of each fund, through evidence of the value of their copyrighted works. Certain Copyright Owners declare that historically, "time-plus-fee generation" has been presented to the Tribunal as a method for allocating value among programming types, not to divide royalties among station types so as to determine claimant eligibility.

With respect to the statements made by the Tribunal and the Arbitration Panel (Panel) regarding "pay-in/pay-out" during the recent satellite carrier rate adjustment proceedings, *1991 Satellite Carrier Rate Adjustment Proceeding,* 57 Fed. Reg. 19052 (1992), Certain Copyright Owners argue that they were directed only at the issue of rate-setting. They explain that there the "pay-in/pay-out" issue was triggered by the fact that, in the case of

satellite royalties, unlike in the case of cable royalties, owners of network programming are entitled to claim royalties. Consequently, in satellite, unlike in cable, all of the programming on network stations is compensable, not just the nonnetwork programming. According to Certain Copyright Owners, because "of this parity on the 'pay-out' side, it was argued, unsuccessfully, that the rates (or 'pay-in') for superstations and network stations should be equal." They conclude that the Tribunal and the Panel found that the SHVA requires the balancing of several competing factors, not just the fact that all programming on both types of stations was compensable, in setting a final rate for network stations. Certain Copyright Owners believe that such a ruling which concerns "the rate (or "pay-in") for network stations" has no precedential value where the issue is one of a claimant's eligibility to receive a share of a fund consisting of royalties paid for stations which never carried its copyrighted works.

In their reply brief, Certain Copyright Owners reiterate the position that the only issue before the Tribunal in stage one of the Phase I proceeding is whether networks are eligible to receive royalties paid specifically for carriage of stations on which no network-owned programming appeared. They conclude that the answer to that question is no, because the royalties paid for network stations are all the monies available for distribution to the owners of copyrighted works which appeared on those stations.

That issue, they assert, is not addressed by the time-plus-

fee-generated approach, which has been proposed in the past as a method for determining the value of each of the claimant's copyrighted works. They further explain that Networks are incorrect in equating pay-in/pay-out with the time-plus-fee-generated methodology. Pay-in/pay-out, they allege, is merely the first step in the time-plus-fee-generated approach. Therefore, they conclude, the precedent which exists regarding the time-plus-fee-generated methodology is not controlling in the instant case.

Certain Copyright Owners differentiate the treatment of PBS in cable royalty distributions from the proposed treatment of networks in satellite royalty distributions. They restate their belief that it is not possible to precisely ascertain the amount that is paid into the cable Basic Fund for each station, including public television. They base their assertion on the methodology used to calculate cable royalty fees. Certain Copyright Owners point out that during the 1989 cable royalty distribution proceeding, testimony was presented to the affect that royalties in the basic cable fund can be assigned only by averaging the total royalties paid by a cable system, by the number of stations carried by that cable system. Accordingly, since it is not possible to accurately calculate the amount that was paid in by cable systems for carriage of public television, it is impossible to prove or disprove the Networks' claim that PBS received more than the amounts paid for carriage of public television stations by cable systems.

Finally, Certain Copyright Owners rebut Networks allegation

that the legislative history of the SHVA reflects the special value placed on network programming for satellite dish viewers. Certain Copyright Owners maintain that the statement of Chairman Kastenmeier, that "the bill takes affirmative steps to treat similarly" network and non-network programming relates solely to the fact that the SHVA directed the Federal Communications Commission to determine the feasibility of imposing syndicated exclusivity rules, similar to those imposed on the cable industry, on the satellite dish industry. 134 Cong. Rec H9664 (daily ed. October 5, 1988) (statement of Chairman Kastenmeier).

Networks' Arguments

The Networks, on the other hand, oppose what they perceive as the Certain Copyright Owners' attempt to apply pay-in/pay-out to the distribution of the satellite carrier royalties. The Networks allege that the Tribunal has consistently rejected a "pay-in/pay-out" approach for all programming. They cite as an example of the Tribunal's rejection of "pay-in/pay-out," its distribution of cable basic fund royalties to owners of programs shown on public television stations.

They explain that under the cable royalty distribution plan "users pay only 1/4 as much in royalties for public TV stations and network stations as independent stations." According to Networks, "the Copyright Office data make it possible to determine precisely how much money is paid into the cable Basic Fund for public

television programs." To support this proposition, they cite testimony introduced in the 1989 cable royalty distribution proceeding, which established that the amount of royalties paid by cable systems for carriage of public television had fallen over the past ten years. Networks rely on the fact that although in 1989, the royalties paid for carriage of public television stations amounted to 2% of the basic fund, the Tribunal awarded 4% of the basic fund to programs carried on those stations.

The cable basic fund distribution, they assert, "is the clear analogue to the distribution of the satellite royalty fund," because [i]n each case, every distributor must pay the royalty for carriage of a particular station, and in each case, network and public station royalties are one fourth those of independent stations." Networks distinguish the two cable specialty funds, the 3.75 and the syndex fund, on the ground that they were created in accordance with specific provisions of the Copyright Act, which apply only to cable proceedings. 17 U.S.C. § 801(b)(2)(B),(C).

Networks also refer to the Tribunal's two determinations addressing the SHVA: the 1991 Notice of Declaratory Ruling, 56 Fed. Reg. 20414 (1991); and the 1991 Satellite Carrier Rate Adjustment Proceeding, 57 Fed. Reg. 19052 (1992). They construe statements made by the Tribunal in both decisions, that the "pay-in" may not necessarily correlate to the "pay-out" in cable and satellite, as supporting their proposition that Networks should have access to royalties paid by satellite carriers for the carriage of

superstations even though Networks' copyrighted works were never carried by superstations. 56 Fed. Reg. at 20415; 57 Fed. Reg. at 19052. Citing a string of cases, Networks maintain that the Tribunal is bound by its precedent in the cable and satellite proceedings because "[a]s a general legal principal, an agency may not, absent a clearly articulated and logically defensible rationale, reach different results in cases with essentially the same facts."

Networks allege that "[n]othing in the legislative history of the SHVA suggests that Congress intended that the distribution of the royalty fund to the various copyright owners to the payment of fees into the fund by satellite carriers." They assert that the legislative history indicates that separate legislative concerns motivated the pay-in and distribution provisions. They claim that "Congress meant to transplant into the SHVA the pay-in scheme from the cable compulsory license to...insure that the infant satellite home dish industry was not disadvantaged vis-a-vis the cable industry in its ability to obtain distant-signal broadcast station signals; to increase delivery system competition; to avoid cable dominance of the new home dish industry; and to avoid discriminatory home dish pricing."

With regard to the distribution of royalty funds, the Networks cite the SHVA Judiciary Report, in which the Judiciary Committee refused to impose "particular limiting standards for distribution" and recommended that the Tribunal "consider all pertinent data and

considerations presented by the claimants, and...take into account its royalty distribution determinations under the section 111 [cable] compulsory license." H. Rep. 887 (part 1), 100th Cong., 2d Sess. 14,23 (1988). Networks also rely on a statement made by Chairman Kastenmeier that, "the bill takes affirmative steps to treat similarly the measure of copyright protection accorded to television programming distributed by national television networks and non-network programming distributed by independent television stations," as support for the proposition that compensation to the copyright owners for the use of network programming should not be restricted to the royalty fees collected for carriage of network stations. 134 Cong. Rec. H9664 (daily ed. October 5, 1988) (statement of Chairman Kastenmeier).

In the reply brief, the Networks accuse Certain Copyright Owners of confusing the issue in stage one of the Phase I proceeding. They allege that what Certain Copyright Owners are, in fact, attempting to do in stage one is to create "an unfair and artificial ceiling" on the Networks' share of the royalty fund. They maintain that Certain Copyright Owners are trying "to confuse the pay-in/pay-out issue by suggesting that the statutory limitation of network station delivery only to 'white areas' is evidence that network compensation should be limited by the establishment of a separate network fund." The extent of subscription to network stations, they conclude, goes solely to the merits of the claim for network-owned programming in a Phase I distribution. They deny that it provides support for the

"preclusive pay-in/pay-out cap sought by Certain Copyright Owners."

The Networks reiterate their belief that the cable basic fund, rather than the 3.75 or syndex fund, is the appropriate analogy to the satellite fund. They disagree with Certain Copyright Owners' assertion that it is difficult to discern the precise royalty payment made for a specific station. To support their position they again cite to the testimony presented during the 1989 cable royalty distribution proceeding, regarding the decline of royalty fees paid for public television during the previous ten year period. They also reargue the proposition that the 3.75 and syndex funds are distinguishable from the satellite fund in that the cable specialty funds were created in response to specific statutory authority, which only applies to cable proceedings. 17 U.S.C. § 801(b)(2)(B),(C).

DISCUSSION

The issue is one of eligibility -- are the Networks eligible to receive royalties paid by satellite carries to retransmit programs which are not owned by the Networks?[1] Based on precedent, logic, and fundamental fairness, the Tribunal is unwilling to permit the Networks to share these royalties.

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[1] For the purposes of this proceeding, we will consider network-produced programming to have appeared exclusively on network stations. In fact, however, network-produced programming appears on independent stations. When network-produced programming appears on independent station, we will consider it "syndicated programming" and in the same category as all other Copyright Owners programming.

Precedent

As stated above, both the Certain Copyright Owners and the Networks assert that the Tribunal should adhere to past precedent. However, the parties would interpret and apply past precedent in a manner which would achieve diametrically opposite results.

In enacting Section 119, Congress directed the Tribunal to consider its precedent in allocating cable distribution royalties under Section 111. The 1983 Cable Royalty Distribution Proceeding is most instructive in interpreting this precedent.[2] As in the instant proceeding, the Tribunal faced a novel issue regarding the allocation of royalties in the context of a new royalty structure. In 1983, the cable royalty fund differed significantly from the previous cable royalty funds considered by the Tribunal. From 1978 to 1982, cable royalties were paid into a single "Basic Fund" derived entirely from payments made by cable systems according to the rates set by Congress in Section 111 of the Copyright Act of 1976. In 1983, for the first time, additional royalties were collected based upon: (i) the 3,75% rate for newly-permitted distant signals; and (ii) the syndicated exclusivity ("syndex") surcharge, following the repeal by the FCC of the syndex "blackout" rules. In the Phase I proceeding of the distribution proceeding, the Tribunal concluded that

> "there are different factors underlying the royalties which derive from the statutory rates, the 3.75% rate, and the

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[2] 51 Fed. Reg. 12, 792 (1986).

syndicated exclusivity surcharge, and that this justifies dividing the 1983 cable royalty fund and making three separate allocations" from: (i) the "basic fund", (ii) the "3.75% fund", (iii) and the "syndex fund" (emphasis added).

Because non-commercial educational stations were carried on unlimited basis prior to FCC deregulation and no cable operator paid the 3.75% rate to carry any non-commercial stations, the Tribunal concluded that PBS was not entitled to any allocation from the 3.75% fund. Because only the program suppliers and music claimants owned any copyrighted programming for which syndex royalties were paid, all other claimants were excluded from sharing in the new syndex fund.

Accordingly, the precedent set forth in the Tribunal's 1983 Cable Royalty Distribution Proceeding is abundantly clear -- the Tribunal may make separate allocations from separate funds where the claimants are not all eligible to share in the allocation of all the royalties. And claimants, whose copyrighted works were not carried by a particular type of station, will be excluded from the distribution of the royalty fund comprised of fees paid for carriage of such stations.

Notably, the United State Court of Appeals for the Second Circuit gave its imprimatur to the Tribunal's decision to divide royalties into three separate funds in making its Phase I

allocations.[3]

> "Moreover, the establish of the 3.75% and syndex royalty rates made new distribution criteria imperative. Certain claimants are, in fact, ineligible to receive royalties at the new rates, and distribution of royalties from a single fund would require complex adjustments of awards. The Tribunal thus reasonably concluded that its task of distributing royalties would be facilitated by making separate allocations of the royalties collected at the three separate rates."

In alleging that a mechanical pay-in/pay-out approach has been repudiated, the Networks make much of the assertion that the Tribunal has awarded a higher percent of the Basic Fund to public television stations than is warranted based on the royalties paid for the carriage of these stations. However, the question of allocating royalties from within a single fund is clearly distinguishable from the question of allocating royalties from separate funds. In the former, the possibility of error is remote. In the latter, the certainty of error is inevitable, in that it envisions, and possibly encourages, payment of an amount to a claimant from a fund comprised of royalty fees paid for the carriage of stations which did not carry any of the claimant's programming.

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[3] *NAB v. CRT*, 809 F.2d (2d cir. 1986) (emphasis added) (footnote omitted).

Furthermore, without passing on the appropriateness of allocating a greater payment *from* the Basic Fund than the amount allegedly paid *into* the Basic Fund and without prejudging the issues which we must consider in Phase II of this or any other proceeding, we note that it is difficult and, perhaps, impossible to ascribe a value to the carriage of any station in the Basic Fund with sufficient specificity to guarantee that we will not exceed the appropriate payment. Under Section 111, basic cable royalties paid by the larger (Form 3) cable systems (which contribute the overwhelming majority of the royalty payments) are determined by using the "distant signal equivalent" (DSE) formula. But there are no statutory or technical mandates, nor even an industry-wide policy, for determining which station will be accorded the higher rate for the "first" DSE vis-a-vis the lower rates for the second through fourth DSEs or the yet-lower rates for the fifth and additional DSEs.

There are additional considerations which preclude accurate calculation of the value of each station. For example, smaller systems pay a flat rate without regard to the number of distant signals. And the larger systems pay a minimum fee of .893% whether they carry one or no DSEs. Thus, royalties may be paid into the fund (or the denominator to be used in calculating the percent of the station's share of the royalty fund) even if there are no DSEs (and, therefore, no station can add this payment to its numerator). Consequently, any attempt to calculate the specific value of the royalty fees paid by cable systems for the carriage of a particular

station is fated to be imprecise.

Unlike Section 111, Section 119 of the Act permits clear and unequivocal evaluation of each station transmitted. During the time period at issue, cable operators paid the fees of 12¢ per subscriber per month for independent stations and 3¢ per subscriber per month for network affiliates and public television station. These two categories (of 12¢/sub/month and 3¢/sub/month) permit accurate evaluation of the royalty fees paid by satellite carriers for carriage of the stations within each category. These categories are analogous to the basic, 3.75%, and syndex categories. Since 1983, we have consistently found the basic, 3.75, and syndex categories to be sufficiently distinct and identifiable to warrant denying a copyright owner, whose works have appeared on stations for which only one category type of royalties were paid, a share of a distinct category fund.

The Basic Fund is comprised entirely of stations for which the cable operator pays the same rate, unlike the SHVA royalty fund which, during the period in issue, consisted of two rates. Clearly, the Basic Fund under Section 111 is analogous to only one of the funds under Section 119; and the three Section 111 funds (Basic, 3.75%, and syndex) are analogous to the two SHVA funds (12 cents and 3 cents).

Finally, we note that the Networks do not allege that the Tribunal has ever allocated royalties to a copyright owner from

within a fund comprised of royalties paid for stations which never carried any of the copyright owner's works. Instead, the Networks contend that the "basic cable fund is the clear analogue to the SHVA royalty fund" and that the 3.75% and syndex funds "are not relevant".

Accordingly, we are not persuaded that the payment of royalties to a copyright owner which allegedly exceed the amount that is paid in by copyright users for the use of the copyrighted work, and *which are from within a single fund* is sufficient precedent to support the Network's claim, or is sufficient to rebut clear precedent for the validity of separate allocations from separate funds.

Logic and Fundamental Fairness

The Networks seek to blur the 12¢ Independent and 3¢ Network/public television categories and commingle the royalty payments for an obvious reason - it is the only way they can tap into the larger stream of revenues from independent stations and avoid the reality that the Networks seek to share royalties they did not earn, based on royalty fees paid by stations that did not carry their programming. Payment to the Networks from a fund which categorically, demonstrably, and unambiguously excludes any Network programming is neither logical nor fair. Not only would the Networks receive royalties for which they were not eligible and to which they were not entitled, but, because it is a zero sum game

within each category, the other program owners would be deprived of royalties to which they were entitled.

Moreover, having gained eligibility for royalty payment, the Networks are now trying to get through *indirection* from the Tribunal what they could not get - or did not seek - through *direction* from Congress - parity with the copyright owners which furnish programming to independent stations. But their effort to seek a subsidy from the owners of programming furnished to independent stations is misguided. The opportunity for increased revenues lay in their effort to increase the size of the Network royalty rates at the legislative and rate adjustment stages.

In fact, a one-category-royalty fund for the distribution of royalties paid by satellite carriers would not only enable the Networks to achieve virtual parity, it would give them a practical competitive advantage over other program owners. Initially, in negotiating with a satellite carrier, the Networks could emphasize the low (3¢/subscriber) cost of carrying a Network station vis-a-vis the higher (12¢/sub) cost of carrying an independent station. Subsequently, having gained entry and widespread carriage due to a cost advantage of almost 400%, the Networks could ask the Tribunal for a substantial allocation of royalties from the pool (based, in part, on widespread carriage), which includes the more expensive independent station programming. This is analogous to buying a general admission seat in the bleachers, then demanding to be seated in a reserved admission seat behind home plate.

In order to minimize the possibility of over - or underpayment to the owner of copyrighted programming appearing on stations

distributed by the satellite carriers, we have adopted the straightforward formula of dividing satellite carrier royalties into four distinct and inviolate categories: (i) independent stations; (ii) independent stations which are syndex-proof; (iii) Network stations; and (iv) public television stations. Royalties paid into a fund representing one of these categories shall not be available to any copyright owner which has not furnished programming into that category.

WHEREFORE, in view of the foregoing, and the fact that all of the copyright owners, except Networks, have negotiated a settlement, the Tribunal finds that one Phase I controversy exists between Certain Copyright Owners and Networks.

With regard to Certain Copyright Owners' request for partial distribution, the Tribunal invites the parties to file comments on the motion no later than _____ [within 10 days of the issuance of the order].

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Cindy Daub

Chairman

Dated:_____