BEFORE THE
COPYRIGHT ROYALTY TRIBUNAL
WASHINGTON, D.C.

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In the Matter of :
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1989, 1990, 1991 SATELLITE :
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CARRIER ROYALTY DISTRIBUTION :
: DOCKET NO. CRT 92-2-91SCD
PROCEEDING :
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Washington, D.C.

Monday, October 26, 1992

The above-entitled matter came on for pre-hearing conference, in the Offices of the Copyright Royalty Tribunal, in Room 921, 1825 Connecticut Avenue, N.W., Washington, D.C., at 10:00 a.m.

BEFORE:

CINDY DAUB	Chairperson
EDWARD J. DAMICH	Commissioner
BRUCE D. GOODMAN	Commissioner
LINDA R. BOCCHI	General Counsel

APPEARANCES:

On behalf of Certain Copyright Owners:

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P R O C E E D I N G S

(10:10 a.m.)

CHAIRPERSON DAUB: The Tribunal will come to order.

This pre-hearing conference was called by the Tribunal to determine a procedural schedule in the consolidated '89-'90-'91 Satellite Cable Royalty Distribution proceeding and any other preliminary matters which the parties would like to discuss. In fact, two preliminary matters have recently been raised by the parties, in addition to the resolution of the procedural schedule.

First, in response to the Tribunal's Order of September 17, Certain Copyright Owners which consist of Program Suppliers, Joint Sports Claimants, National Association of Broadcasters, BMI, ASCAP, SESAC, and Devotional Claimants, have stated that they have agreement among themselves and requested the Tribunal declare that two Phase I controversies exist. The first involves the allocation of the royalties paid for carriage of Network stations specifically between works which are owned by the U.S. Commercial Networks and works which are owned by certain Copyright owners.

The second involves the allocation of royalties paid for carriage of the Public Television Stations

retransmitted by Satellite Carriers, specifically between works claimed by PBS and those claimed by Certain Copyright Owners.

On Wednesday, October 21st, Public Broadcasting Service filed a reply comment opposing the Certain Copyright Owners' proposal. PBS opposes a fee-generation, or the so-called Pay-In/Pay-Out approach, under which the royalty award to PBS or the 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.

The second issue is the Motion filed by the Certain Copyright Owners for partial distribution, on Friday. They request the Tribunal to promptly distribute all royalties paid for carriage of the Independent Superstations by Satellite Carriers for '89, '90, '91. They contend that Certain Copyright Owners own all the works contained in the retransmission of Independent Superstations, and have agreed among themselves as to the division of royalties and, therefore, there is no controversy with regard to this portion of the proceeding.

At this point, I'd like to turn to the floor and ask each of the three opposing parties to give a brief statement identifying what they see the disputes are in this proceeding.

I'd like to call on the Certain Copyright Owners first, to make their brief statement. Have you folks elected who will be the lead counsel? Dennis is sitting up here.

MR. GARRETT: It was a split vote, Madam Chairperson.

(Laughter.)

CHAIRPERSON DAUB: Mr. Lane, would you state your name clearly, and the party that you represent and, if you have other lawyers accompanying you, perhaps you'd like to introduce them as well, since I do have new colleagues here -- Commissioner Damich, Commissioner Goodman, and our General Counsel Linda Bocchi.

MR. LANE: My name is Dennis Lane, of the law firm of Holland and Knight. I represent the Program Suppliers. With me today, to my left, is Robert Garrett, Arnold and Porter, representing the Joint Sports Claimants. Immediately behind me is Mike Faber, Reid and Priest, BMI. To my immediate right is Fred Koenigsberg, of White and Case, for ASCAP, and Bennett Lincoff, in-house counsel for ASCAP.

Behind them in the second row is Phil Hochberg, for the National Basketball Association. To Phil's right is Barry Gottfried of Fisher, Wayland, for the Devotional Claimants, some of the Devotional Claimants. John

Stewart, in the back row, of Crowell and Moring, for Certain Broadcasters, and Rick Campanelli, also for the Devotional Claimants, in the back row.

CHAIRPERSON DAUB: Thank you, Mr. Lane.

Would you give us a very brief statement as to what you see to be the controversy in this proceeding?

MR. LANE: Madam Chairman and Commissioners, we believe there are two controversies remaining in this proceeding. The controversies concern how the Tribunal should distribute the royalties paid for Network stations and for the Public Television Station that was retransmitted by Satellite Carriers.

As you can imagine, our programs appear on both the Network stations and the Public Television stations, and also our works -- I shouldn't say our programs -- our works, the music appears, plus, particularly on the Network affiliate stations, Program Suppliers have programs, Joint Sports Claimants have programs, I believe the Devotionals have programs, and I think certain local programs are also available on those stations.

So, in addition to what the Networks own on those stations, we have programs. So, we believe that right now there is a controversy a to how to divide that money.

In addition, on the Public Television stations,

the Program Suppliers have works. There are movies that we own that are available on Public Television, I think a couple of series, in addition there is music on those Public Television stations. So, we believe that there is a controversy about how to distribute those royalties.

As our Motion for Partial Distribution makes clear, we believe there is no controversy remaining as to what we call the Independent Superstations, and by that, as you know, under Section 119, the Public Television station fits within the definition of a Superstation, but we are excluding that from our motion.

We, the Certain Copyright Owners, have agreed among ourselves as to division of royalties for all the programming on those Independent Superstations. Therefore, we believe there is no further controversy before you and, under the statute, you may distribute the royalties now, without waiting. Thank you.

CHAIRPERSON DAUB: Any statement from Public Broadcasting?

MR. HESTER: Yes. My name is Timothy Hester, with the firm of Covington and Burling, representing PBS. Let me introduce a few of the people in the room. With me is Sharon Whitesinger, the Associate General Counsel for PBS. Also in the back row is William O'Neil, another member of our firm, Covington and Burling.

In the second row is Charlene Vanlier, representing ABC/Cap Cities, and Mark Johnson, representing CBS.

CHAIRPERSON DAUB: So, the Commercial Networks are deferring to Mr. Hester?

MS. VANLIER: I have some additional thoughts that I'd be happy to add.

CHAIRPERSON DAUB: Fine, thank you.

MR. HESTER: We set forth our position in the pleading that we filed last week, to give the Tribunal some advance notice of how we were envisioning this proceeding, and not simply to spring the issue this morning during the pre-hearing conference.

We do feel quite strongly, and I believe the Networks feel as well, that to suggest an allocation scheme in which PBS could receive no more money than has actually been paid in by Satellite Operators for the carriage of Public Television Stations or in which the Networks could receive a royalty award no greater than that paid in for the carriage of Network stations is not consistent with either this Tribunal's past decisions in the cable area, or with the logic of a compulsory licensing scheme in which, admittedly, Congress set a series of rates that were not necessarily tied to marketplace evaluations in which it was clear that

Congress had devised a set of rates that would be paid in by Satellite Operators with the expectation that the Tribunal would exercise the judgment after-the-fact as to the appropriate allocation of that entire pool of royalties as between the different types of copyright owners.

I believe, in testimony submitted to the Tribunal in the arbitration proceeding held recently, Mr. Valenti described the 12-cent/3-cent rates as arbitrary, and I think that will be borne out by the legislative history. One cannot find a determination by Congress that this was the appropriate ceiling that could be placed on the royalty award ultimately available to PBS.

So, if, for instance, the evidence shows that the value of the PBS programming to the Satellite Operator, the harm to PBS interests, and other marketplace considerations, exceed what was actually paid in, we submit we would be entitled to a greater award than the money actually paid by Satellite Operators, and certainly in the cable regime that has been the consistent way that this Tribunal has made its determinations. It hasn't looked to how much money, for instance, was paid in for PBS carriage, in determining the appropriate award of royalties to PBS, out of the entire pool.

So, we would not accept the proposition of the

copyright owners that there's no controversy as to the appropriate distribution of the Superstation royalty fees. Indeed, in our view, it's one pot, and that one pot has to be allocated in a proceeding in which all parties have the right to argue for the relative benefits and detriments of their positions, but we don't think that by agreement among less than the whole, the Copyright Owners can carve out, in essence, the Superstation fees as not being part of the pot, and to limit the pool of available award to simply that which was paid in for PBS or for the Networks.

I would just add also, simply for the record, that it is not at all clear to us that PBS is considered a Superstation under the Section 119 language, but I don't think that's really an issue here before us today.

Our view is that, as we tried to summarize in our pleading that we filed with the Tribunal, that it would be most sensible to have a two-phase proceeding in which there would be an initial determination as to the standards that the Tribunal will apply in making its royalty awards in the Satellite area and, as part of that determination, the Tribunal would address this fundamental question of whether PBS or the Networks should be capped in their available royalty award according to what was actually paid in for carriage of either Public Television or Network stations. We believe once that threshold

question is decided, it will, first of all, significantly enhance the prospects that we can settle this proceeding in toto, not take up the time of the Tribunal with it, but also I would think it will make the presentation of direct cases all the more effective, if the parties know in advance what the ground rules are for a decision. Thank you.

CHAIRPERSON DAUB: Thank you, Mr. Hester.

Ms. Vanlier?

MS. VANLIER: Charlene Vanlier, with Capital Cities/NBC, representing the three over-the-air television networks.

CHAIRPERSON DAUB: Please proceed.

MS. VANLIER: Thank you. We believe that both parties have raised essentially the same issue, and that that issue should be resolved as a matter of law, before we go forward in the traditional process whereby we have witnesses. Since it's a question of law, it would be, we believe, best resolved through briefs and a more direct legal analysis.

In our view, there is nothing in the plain reading of the statute or the legislative history, to suggest that the funds collected to be divvied up in any way as a prerequisite to further discussions. In fact, the legislative history suggests that Congress left the

factors to be determined by the Commission -- by the Tribunal -- excuse me -- and, frankly, suggested that you look to what you've done in the cable proceedings. There's nothing in the cable proceedings to suggest that this pot should be carved up prior to any further discussion of the appropriate benefits or distribution -- other factors that you've considered in the distribution before, before any of those factors would be applied.

The first proceeding in 1980, you rejected a pay-in-pay-out concept as it was argued that should be applied to PBS consistently through the next -- of the other proceedings. It's not something that you've adopted. In fact, pay-in/pay-out was used last year when many of the Copyright Owners suggested that Networks programming should not be compensated at all and, again, you recognized that pay-in/pay-out is not a justification for not paying us, and recognized that pay-in/pay-out does not apply in cable -- in fact, there are inconsistencies in what is paid in in cable and what is distributed.

So, we would again say that under the same analogies that you used last year and in all the previous cable proceedings, the argument again fails.

We are very proud of our programming. We are very proud to be here and participate and be treated as Copyright Owners for the first time, in the sense of

distribution of these types of fees and, having made it this far, we only seek parity. We do not seek any special treatment. We want parity with all the other Copyright Owners and, for that reason, we dramatically oppose any suggestion that our very valuable Network programming should be awarded with a 75 percent discount.

And for those reasons, we make the following procedural suggestion. That would be under the flexibility that you are permitted in the CRT's Rule 301.41, that the Networks simultaneously submit briefs on this issue. We would suggest that those briefs could be due in two weeks, on Monday, November 9, with simultaneous reply briefs being filed a week later, on Monday, November 16th.

We are as anxious as everyone else to get this resolved, and we are very sorry that we couldn't settle this. And aside from this apparently serious legal dispute, I think all parties would have settled, and our hope is that with the resolution of this, that we can promptly resolve this.

CHAIRPERSON DAUB: You suggest November 16th to be the date to file direct briefs?

MS. VANLIER: No, reply briefs to this Motion.

CHAIRPERSON DAUB: Oh, okay. Thank you.

MS. VANLIER: Certainly. The direct cases, of

course, will depend greatly on the resolution of this preliminary issue, and we would suggest that three weeks after your resolution might be a good time to file direct cases and then, provided there is enough time, a couple of weeks or whatever is necessary for discovery after that, we are ready to go. But, again, with the resolution of this issue, we hope that a settlement will be the result. And if it weren't for this recognition that unless we were willing to accept a 75 percent discount in the value of programming, settlement was not possible, but for that we would have reached a settlement.

CHAIRPERSON DAUB: Of course, this Tribunal traditionally has always encouraged the parties to come to universal settlement, so we appreciate that.

With that, we will take a very, very brief recess.

COMMISSIONER DAMICH: Excuse me, Madam Chairman, before we do that, I have a question. Just for the record, I think I know the answer, but I'd like to ask Mr. Lane if the characterization of your position by the other parties is correct, or is accurate? Do you think, in fact, that what you're saying amounts to a pay-in/pay-out rule, or fee-generation, or distribution tied to fee-generation?

MR. LANE: I think, Commissioner Damich, that

the fee-generated approach that has been used in the cable is really a misnomer. It was really a time-plus-fee-generated approach that was rejected in the 1978 and following proceedings.

You have to recall that in the cable proceedings, when the fee-generated approach, the time-plus-fee-generated approach was first addressed, we're addressing different types of programming on the same station, so that you can't just take the fee-generated by a station and divide it, say, between Sports and us, or Sports and Music, or us and Local. You have to put another element on. And it was that additional element that was the time element.

We think this issue is much like, if not identical to, the division of the 3.75 and Syndex royalties in the cable proceedings, where the Tribunal divided it into three funds based on the royalties paid for each type of station, and then allocated the royalties differently because -- primarily because there are different types of ownership eligibility in the three categories. We believe the same applies here. There is no PBS programming on Independent Superstations, there is no Network-owned program, as we're using that term, on Independent Superstations.

So, it's sort of a long answer but, no, I don't

believe that the characterization is quite accurate.

MR. HESTER: May I respond to that, Commissioner?

Let me just clarify why we've focused on this notion of pay-in/pay-out. As we see it, the suggestion of the Copyright Owners is that PBS -- I'll focus on PBS, but I think the same point would apply to the Networks -- that PBS could receive an award no greater than the amount of royalties actually paid by Satellite Operators for the carriage of Public Television stations.

And if the evidence were to show that there was more value in the retransmission of that PBS programming than the three cents actually paid, I believe the suggestion of the Copyright Owners is we're out -- we're out. That's too bad. The ceiling is the 3-cent fee actually paid per subscriber.

And my suggestion would be that in the cable area, the Tribunal has consistently looked across all types of programming in allocating the pool, and has allowed the parties to make relative showings as against each other. And if we are able to show that there is more value relatively in our programming than the three cents actually paid, we would suggest we are entitled to more than our award. Of course, that has to be a relative showing, so we would be making that showing in relation to

the fees actually paid for carriage of Independent Superstations, but we think that's open to us in the same way it's always been open to PBS in the cable area.

CHAIRPERSON DAUB: Commissioner Goodman?

COMMISSIONER GOODMAN: I think Ms. Vanlier wants to reply.

MS. VANLIER: The analogy, we think, that's appropriate between what we're talking about now and the cable proceeding, is the Basic cable fund, in which case, PBS participates and all parties are treated on equal ground. So, we would fundamentally disagree with the notion that you should just pretend that the Basic cable fund isn't there and go to the more specialized funds. We don't think that analogy works.

And Congress' effort to simplify its dealings with the satellite industry and what that satellite industry is able to pay, and the development of the satellite industry, and all of the special interests that go with that, are really separate issues from the distribution of the fund. And there is nothing in the legislative history to suggest that by addressing the satellite industry and what they pay into this fund, that Congress in any way was directing how the fund should be distributed.

COMMISSIONER GOODMAN: I think that while the

substantive argument as to whether we should have caps, fee-generation caps, pay-in/pay-out, is of interest, I think it's not appropriate at this time. And the only issue we really have before us is a procedural one, and that is how do we move, whether we have the bifurcated, two-stage proceeding that you've suggested, or what I suspect to be Mr. Lane's position that that might not be appropriate.

But just for the moment, what I'd like to do is, I'd like to crystalize what issues -- what the immediate issue is we have before us. So, I understand that both the Networks and the Non-Commercial -- how do you refer to yourself, as PBS or as Non-Commercial?

MR. HESTER: Public Television.

COMMISSIONER GOODMAN: Okay. Clearly, Public Television and the Networks position that we should have a two-stage proceeding and, because you believe that there is an issue on the rate caps, ipso facto, there is an issue and that can't be rebutted, simply because one party finds a controversy, that means there is a controversy.

So, I guess, Mr. Lane, the question I have for you is, strictly targeting the procedural question before us, do you agree that there should be a two-stage proceeding -- actually, let me go on for a second -- one, do you agree that there is a controversy regarding the

caps and, if so, do you believe that there should be a two-stage proceeding or a one-stage proceeding?

MR. LANE: I think, Commissioner Goodman, there is one issue before you that you haven't mentioned, which is our Motion for Partial Distribution, which is a motion before you. We've moved and that is a preliminary issue which is normally treated before the hearing starts. And we think that legally we are entitled to partial distribution at this time. So, I think that is a critical issue for us.

One of the things that sort of troubles me in the discussion this morning and the discussion in --

COMMISSIONER GOODMAN: I missed your answer to my question.

MR. LANE: I'm getting --

(Laughter.)

MR. LANE: I'm getting -- I'm first telling you that I don't believe that you've stated all the issues that are immediately before you. There is additional partial distribution, that's the first part --

COMMISSIONER GOODMAN: It wasn't my intention to do that.

MR. LANE: I understand that. I'm just trying to answer your question completely.

One of the aspects that trouble me about dealing

with whether this is a one- or a two-phase issue is that the Public Television and the Networks keep saying "this is a legal issue", and then they keep arguing facts.

Mr. Hester has argued the value of Public Television stations is greater relative value. Now, we have arguments that the relative value of our program is worth well more than 12 cents, but that's a factual issue. So, I am very skeptical that you are going to get a lot of legal arguments here, and that you need to have a separate issue.

We have felt all along that you should move to hearing on these issues. And what I'm hearing today and what I read in Mr. Hester's motion were factual arguments that are going to have to be supported on the record by evidence.

So, I am not clear that at this stage -- and I also believe in the Tribunal's hearing, the 1983 proceeding, which I believe is the most clearly analogous to this, where you had -- the first time that you had three separate funds, the Tribunal did not decide the issue before the hearing, but decided the issue as part of the hearing, and allowed parties to come in with their evidence.

So, my answer is, I am not at all sure that there is a need for two questions or, indeed, that you --

first of all, technically, I don't believe Mr. Hester's pleading is a motion, but assuming arguendo that he's moving at this time, I don't accept the notion that you have to deal with that before you start the hearing.

COMMISSIONER GOODMAN: I think I missed the answers. The first issue is, Mr. Lane, I'm not comfortable. I can't remember exactly how you stated it. Does that mean that you oppose the two-stage proceeding, you believe it should be a one-stage proceeding?

MR. LANE: I think you should -- there are two stages, but the first stage is our Motion for Partial Distribution, and the second stage is the hearing.

COMMISSIONER GOODMAN: You're opposed to the suggestion, whether it's a motion or otherwise, that we consider first rate caps and, having considered that go on to the overall issue? I'm just trying to clarify.

MR. LANE: I think the answer is yes, but we don't mind that you deal with our Motion for Partial Distribution first.

(Laughter.)

MR. HESTER: Commissioner Goodman, I'd like to speak to that briefly. I hadn't meant to suggest by my paper or by my remarks today, that we envision a preliminary factual determination on relative values. I simply used that as illustrative of the reason why we

think the standards ought to be clarified up front, and the reason why we believe that if the standards are clear for all concerned, the direct cases on evidence will be much more useful to the Tribunal. At this stage, it's not clear to me how the parties would go about presenting direct cases. There would be a fundamental lurking issue as to the appropriate standards by which the decision will be made.

MS. VANLIER: To add, the motion that has been filed assumes that there is a pay-in/pay-out fee-generation decision. And if you were to grant that motion and distribute those funds, then the only thing left is the amounts of money that were paid in under the 3-cent formula. And in a sense, it will be decided before any attempt is made to discuss the legislative history, the congressional intent, the previous decisions made by the CRT, which we believe it is a legal question of whether this applies or not, but if you were to go ahead -- you know, if this motion is granted, it's done. The money is out and distributed before we have any attempt to convince you of the legal issue of our entitlement to it.

And for that reason, the Networks believe we are really talking about the same issue, and whether you want to go ahead and address it in the context of this motion or in the context of the flexibility that you have under

the rules, it is really the same thing, just put two different ways.

And we can be less illustrative, if that makes everybody feel better, but the idea is what is the legislative history, what was the congressional intent, and how does this fit with the experience of this Tribunal and its entire history. But to suggest that the money could be distributed before that issue is resolved is backwards. And that's why we suggested that everybody brief it simultaneously.

CHAIRPERSON DAUB: Before we proceed further on this discussion, in the interest of time for all lawyers, have you all set aside a full day to discuss this, as long as it takes?

MR. KOENIGSBERG: Two days, a week, whatever you like.

(Laughter.)

MR. GARRETT: My calendar is clear through Saturday.

CHAIRPERSON DAUB: Go ship Fred back to New York.

Okay. Commissioner Goodman has one other quick question.

COMMISSIONER DAMICH: I have a question, too, Madam Chairman.

MR. LANE: Excuse me, Madam Chairman, Mr. Garrett has asked me to --

MR. GARRETT: Well, if Commissioner Goodman has a question, go ahead.

COMMISSIONER GOODMAN: Perhaps you'll answer it.

MR. GARRETT: I feel very uncomfortable rising in support of my good friend and colleague, Dennis Lane, and I promise I will not make a habit of this in the future, but we do see the issues the same way in this particular matter.

I think all of the Copyright Owners feel uncomfortable with the notion proposed by PBS here, that there be this two-stage process where the Tribunal, in the first instance, decides what the criteria are going to be and considerations that it will consider relevant in the upcoming proceeding, and then goes to that proceeding. I think that's inconsistent with the way at least the cable proceedings have been held in the past where we have, in fact, developed the criteria and each party has been allowed to present evidence directed to what they believe are proper criteria in the course of the evidentiary hearings.

And for that reason, Mr. Lane and all of the other Copyright Owners have naturally opposed what it is that has been suggested here.

On the other hand, we have filed a Motion for Partial Distribution, and that motion contemplates that the Tribunal will distribute to all of the Copyright Owners the money that was paid for those Independent Superstations on which our works appeared, and the principle is a very simple one. All the parties whose works appeared on those Superstations have agreed to a settlement. We know exactly how much has ben paid for those Superstations, and we ask that that money be distributed to us.

I believe, in the course of resolving that Motion for Partial Distribution, that you will necessarily confront the issues that have been raised by Mr. Hester and Ms. Vanlier and, to that extent, we have no objection to the Tribunal considering those narrow issues.

CHAIRPERSON DAUB: Let me pose a question to Mr. Hester and to Ms. Vanlier. Would you have any objection to discussing pending motion filed by the Certain Copyright Owners with respect to partial distribution first, and in discussing that particular matter, perhaps the fee-generation capping matter may come up, and discuss it in one full -- would you have any objections to that?

MR. HESTER: No, I believe we would not have an objection to that. As I see it, I agree with the way Ms. Vanlier has put it, that it does raise, as I see it,

exactly the same issue as is raised by the proposal of the Copyright Owners for a proceeding limited to two issues, namely, how much does PBS get out of the fees actually paid for carriage of Public Television, and the same for the Networks.

So, I think it raises the same issue, and I think it would have to be resolved in deciding on the Motion for Partial Distribution. And we received that paper late Friday, so we haven't obviously put in a response to it yet, but we do, for the record, oppose it for much the same reasons as are reflected in our comments we filed last week.

CHAIRPERSON DAUB: Would you prefer perhaps filing your reply comment to their motion, in writing --

MR. HESTER: Yes --

CHAIRPERSON DAUB: -- and defer to a later time?

MR. HESTER: I would appreciate the opportunity to file a paper.

CHAIRPERSON DAUB: I'd like to confer with my Commissioners on that point. Why don't we --

COMMISSIONER GOODMAN: Madam Chairman, what concerns me -- and I'm anxious to hear a comment from anybody on that -- is that if we address the issue of the partial distribution, that goes right to the heart of the cap. At the same time, we have what I certainly interpret

to be a motion for a two-stage proceeding. And as I interpret that motion, stage one would be a consideration of the same issue that comes up under the partial distribution, namely, the cap.

There is, it seems to me, another way of handling also, and that is to have a one-stage proceeding -- that is, that we defer decision on the partial distribution, we have a one-stage proceeding in which we invite the parties to submit their briefs on global issues before us and, in reviewing those briefs and listening to the testimony of the parties, then we'll come back and we'll unpeel the onion and we'll answer it bit by bit. I think those are the procedural issues before us.

Mr. Lane?

MR. LANE: I would disagree, Commissioner Goodman. I think as Mr. Garrett has suggested, and I think if you look at the history of the cable proceedings, clearly, the criteria to be used in distribution have been developed as part of the hearing because they are legal factual issues. It is not a legal issue, are you going to use quality, for example, ass one of the criteria. You have to look at the evidence and weigh that along with any arguments made.

For you to say "these are the criteria" in a vacuum, I think, is very meaningless because we could come

in the next day and give you tons of evidence saying "Oh, you overlooked this", and then it would be a waste of time.

I believe that the only proper motion in front of you at this time is our Motion for Partial Distribution, which has statutory basis, has been done in every Tribunal proceeding in the past, before the hearing is held. And it's a legal issue.

COMMISSIONER GOODMAN: And you believe that is a strictly legal issue?

MR. LANE: I believe that's a legal issue.

COMMISSIONER GOODMAN: Mr. Hester, do you believe it's a legal issue?

MR. HESTER: The question of the appropriateness of a partial distribution? Yes, I do see that as a legal issue. Let me clarify the reason why I think a two-stage proceeding is appropriate.

The Tribunal has a long history, of course, in the cable regime, of announcing its criteria and applying those criteria to different evidence. At this stage, in relation to cable proceedings, there's a quite well defined set of criteria that guide the parties' submission of direct cases. Of course, that is not to say that it is not open to parties to argue in any particular case, for different criteria, but I would submit that having the

criteria announced in the first cable proceeding have surely focused and guided the parties in their presentation of cases to the Tribunal since that time, and that's what we're proposing. We wouldn't necessarily mean to preclude any party from arguing based upon evidence or other considerations, that the Tribunal ought to take account of other factors, but I do think, at this point, it's not even clear whether the Tribunal will be applying the same criteria as it's applied in cable. I would submit it should, but that's not been established, and that's what we're envisioning for the first stage.

What we see as a disadvantage in having the parties present everything in one fell swoop is that you eliminate the opportunity for settlement, as we see it. The major impetus to settlement is avoiding the cost of going forward with a hearing and with the presentation of evidence and all that entails.

If nothing is decided until we get further down the road, if the parties don't have a threshold reading on the pay-in/pay-out issue, I believe that prospects for settlement are significantly reduced and, as we see it, settlement will save time for the Tribunal, will also make it possible to move forward more promptly on the cable proceeding.

CHAIRPERSON DAUB: Thank you. Mr. Lane?

MR. LANE: Madam Chairman, I'd like to point out, for those of us who were in the 1978 cable proceeding, which was the first proceeding, the criteria were not set before the hearing. They were set in the final decision after the full briefing, after the full evidentiary proceeding. So, that is the most analogous situation to what we are now.

It's true, over the years, we know what the five criteria are in the cable proceedings. We have structured our cases toward those five, but if you go back to the 1978 proceeding you will see there was no preliminary decision about that.

I would also question very seriously -- and my colleagues on the Certain Copyright Owner group agree with me on this -- whether it will be easier or harder to get a settlement depending on your decision on Mr. Hester's first question, should you choose that route. So, I don't believe it will make it necessarily easier. I can imagine circumstances, in fact, where it will be much harder.

COMMISSIONER GOODMAN: Let me ask the question, do the parties -- well, we're going to recess -- do the parties believe that -- what is the first procedural issue we should be discussing. Do you believe that it is partial liquidation, or is it the issue over --

MR. LANE: Distribution.

(Laughter.)

COMMISSIONER GOODMAN: They may be the same -- the partial distribution, or is it the two-stage proceeding? Which is the first one we should --

MR. HESTER: Well, Commissioner, I would suggest that the Motion for partial Distribution being filed on Friday isn't ripe for resolution yet. We haven't had the opportunity to submit a paper, which we would like to do, before any decision is made on that. It's a very important motion. It seems to me it came fairly late in the day to expect the Tribunal to address it on Monday morning, so I would certainly urge you not to resolve or reach that yet.

I do think the notion of a two-stage proceeding is consistent with the thrust of a pre-hearing conference where we decide how we'll go forward. And our feeling is, and we certainly agree with the Networks, we'd be prepared to submit briefs on a very timely basis to get this threshold issue resolved. I do think it necessarily will resolve as well the Motion for Partial Distribution, but I think it would push forward more reasonably with the standards that should guide this satellite proceeding.

So, we would urge that the issue presented here today be the one of whether there ought to be a two-stage proceeding.

CHAIRPERSON DAUB: Thank you. Mr. Stewart?

MR. STEWART: I haven't discussed this with Mr. Lane and Mr. Garrett, but I would offer the following observation. It seems to me that the first item of business ought to be our Motion for Partial Distribution because the question there is a question of entitlement. That's a legal issue that can be determined.

If the Tribunal grants our motion, as we think they ought, it seems to me not to preclude the raising of the issues that have been suggested by the Networks and PBS because the funds then remaining would be a culmination of funds paid in for the PBS stations and funds paid for the Network affiliated stations would still be available to either PBS or the Networks to persuade the Tribunal that more than the amounts paid for their particular station should be awarded to them because there would be more than either one of those funds individually left over.

Further, it seems to me that even if you granted our motion, I think that they would still be entitled to argue that in the context of the proceeding. I agree also with Mr. Lane that the simple argument that as an absolute matter we can show that our programming has more value than was paid in for the PBS stations or for the Network affiliates is one we probably all would agree to because

we think that under the statutory royalty scheme, less was paid in for the Independent station programming than their absolute value. But this is a relative value distribution question and that, I would emphasize, as Mr. Lane has already said, is a mixed question of fact and law and ought to be looked at by the Tribunal in the context of a full presentation of factual information.

So, from my perspective, the Motion for Partial Distribution ought to be resolved first. Whichever way it goes, it wouldn't necessarily preclude the kinds of arguments that have been suggested by PBS and the Networks and, further, those issues ought to be raised in a single proceeding involving presentation of facts and law and not bifurcated thereafter.

CHAIRPERSON DAUB: One more response from your side, and we'll take a brief recess -- I mean very brief -- and we'll be right back and continue to discuss it.

Go ahead, Mr. Hester.

MR. HESTER: Let me simply clarify why we think there needs to be a resolution on this as we've styled it. The first phase of the proceeding, namely, the issues as framed by the Copyright Owners, presuppose that PBS and the Networks would be capped out at the rates actually paid in for carriage of their stations. And we would certainly be concerned with a proceeding in which the

Tribunal accepts the Copyright Owners formulation of the issues that ought to be decided and, at the same time, doesn't address at the threshold our question about whether pay-in/pay-out can appropriately cap PBS and the Networks in their royalty awards because I really think their formulation of the issues presupposes that a pay-in/pay-out regime will cap our awards.

CHAIRPERSON DAUB: Okay. We may have an answer after our recess, or we may not, but we'll be right back.

(Whereupon, a short recess was taken.)

CHAIRPERSON DAUB: Back on the record.

The Tribunal sees that there are two motions. Although PBS has not stated their reply comment to be a motion, the Tribunal has decided to treat it as a motion. Motion one being the bifurcation of the proceeding, one being deciding on rate caps and entering into the royalty distribution being the other.

The other motion before us is partial distribution suggested by the Certain Copyright Owners. The Tribunal has decided to bifurcate the proceeding. We would like to invite all parties to file briefs on rate cap issue, and we will defer the Motion for Partial Distribution issue until after we decide the rate cap issue.

Dates for briefing of pay-in/pay-out will be as

suggested and proposed by Charlene Vanlier -- is that correct -- a brief will be filed on November 9th and reply a week later on November 16th.

Now, I would like to ask the Joint Copyright Owners if those dates are acceptable?

MR. LANE: We would prefer sooner dates than that.

COMMISSIONER GOODMAN: Why don't you suggest a date.

Mr. Lane, would you like to take a break and talk to the other parties and come up with a date?

MR. LANE: We would propose the 2nd for the date that the briefs be filed, and the 9th for the reply. Our concern is that if we're going to hearing, if we put it off until the 16th, and then you have a decision, we're into the Christmas-New Year holiday, and we're going to have the hearing next year. And we would prefer at least to have direct cases this year, if at all possible.

CHAIRPERSON DAUB: Ms. Vanlier, Mr. Hester, would the 2nd and the 9th be acceptable to you?

MR. LANE: You don't have to do anything. You just sit there and it comes to you.

MR. HESTER: Madam Chairman, that would be acceptable to us. I think we can do that. Could I ask for one clarification, if I might. Would you expect the

briefs also to address the general criteria by which allocation should be made in the satellite proceeding, or should we be limiting the briefing to the question of pay-in/pay-out or fee-generation?

CHAIRPERSON DAUB: My understanding is pay-in/pay-out.

MR. HESTER: Thank you.

COMMISSIONER GOODMAN: Could I suggest some of the things I would like to see in the briefs?

CHAIRPERSON DAUB: Surely.

COMMISSIONER GOODMAN: Before I get there, let me just note for the record that I dissent from the decision of my colleagues to have a bifurcated hearing. I do so for the following reasons. I think that there is a time-sensitive matter before us and, even though I appreciate the speed with which the parties are going to submit their briefs, I think that there will be a substantial delay in our finally resolving the issue.

Secondly, I believe that the issues are, to a large extent, made of the same cloth, and I think that in considering the value of Public Television programming, the value of Network programming, that inherent in that is going to be a consideration of the fee caps and that it could have all been done in one hearing, which leads me to my third point, and that is that I prefer to be able to

consider an issue with a full record before us. I agree that we are looking at a legal issue. I would have been more comfortable if I could have heard evidence on the issues.

I'm concerned also about the bifurcation as a precedent-setting decision, and that is that I don't suggest in any way either Public Broadcasting or the Networks are using the bifurcation as a method of being an advantage or to help their side in a settlement procedure. I always fear that after we've given the parties adequate time to reach a settlement and they come back in a piecemeal fashion asking us to decide on discrete issues, it, to me, is counterproductive to the general settlement process. I always hope that the parties will have resolved all their issues before they come before us. Those are essentially the reasons why I dissented.

If I also may just comment on what I personally would like to see in the briefs at the first stage, as the Chairman indicated, I would like to see the comments on pay-in/pay-out, of course.

Secondly, I'd like the parties to address the comments that we've made in the satellite carrier rate adjustment proceeding in which we have a comment regarding pay-in/pay-out. I'd like you to specifically consider that. I'd like you to consider specifically the comments

made by the Arbitration Panel on the same issue, the pay-in/pay-out.

There was some reference to legislative history. I think that's very important also. I'd like you to address the effect of comments made in Congress as to whether there should be these kinds of caps.

I'd like you to address the applicability of precedent in the cable distribution proceedings, to our hearings in satellite. I think that's also been briefly discussed orally, but I would like to see that in writing also.

I also would like to see your comments on generally the applicability of precedent before us. One of my thoughts is that we do have two new Commissioners, and I'd appreciate your thoughts as to the extent to which precedent is binding even -- and I guess I'll emphasize this -- even without regard to the change in circumstances. Earlier, when I talked to the precedent of cable vis-a-vis precedent of satellite. Obviously, there are some discrete differences which you'll address, but I'd just like to hear a general comment as to what are a requirement as to stare dicisis.

And the final comment is, there also was a brief colloquy or, I guess, a brief mention of some statements made by witnesses for the parties during the rate-setting

procedure in the satellite. I'd be interested in your comments as to what the relevant applicability and materiality of those comments are, particularly when they are now going to be probably admissions against interest.

Those are all the comments I had on what I'd like to see in the briefs.

CHAIRPERSON DAUB: Thank you. Commissioner Damich, do you have any comments or questions?

COMMISSIONER DAMICH: No.

CHAIRPERSON DAUB: Linda, any questions of the parties?

MS. BOCCHI: No.

CHAIRPERSON DAUB: So, November 2nd, 1992 will be the set date for filing of briefs with respect to the pay-in/pay-out matter, and November 9th will be the date set for the reply by the parties and, after receiving those documents, the Tribunal will decide whether or not we need to -- we will entertain answering the motion by the Copyright Owners with respect to the partial distribution.

Thank you, and --

COMMISSIONER GOODMAN: Excuse me -- I just had a couple comments, a couple questions. One is I'm still not sure I understand -- Ms. Vanlier, are you representing the three Networks today?

MS. VANLIER: Yes, sir.

COMMISSIONER GOODMAN: And in the filing of briefs, will there be one brief filed on behalf of the three Networks, or three, or do you know?

MS. VANLIER: There will be one on behalf of the three Networks and, in fact, we may -- we have to talk, but we may file one on behalf of the three Networks and PBS, in this instance, since our interests are so similar.

COMMISSIONER GOODMAN: In this instance means stage one of the bifurcated hearing?

MS. VANLIER: Yes, sir, and the briefs due on the 2nd and the 9th.

COMMISSIONER GOODMAN: And, Mr. Lane, do I understand correctly that there will be one brief filed on behalf of all other parties other than Networks and Public Television?

MR. LANE: There will be one brief filed by the same Copyright Owners that filed the Motion for Partial Distribution.

CHAIRPERSON DAUB: Any other comments, questions?

(No response.)

Thank you. The meeting is adjourned.

(Whereupon, at 12:48 p.m., the pre-hearing conference was adjourned.)

C E R T I F I C A T E

This is to certify that the foregoing transcript

in the matter of: 1989, 1990, 1991 SATELLITE CARRIER ROYALTY DISTRIBUTION PROCEEDING (DOCKET NO. CRT 92-20 91SCD)

Before: THE COPYRIGHT ROYALTY TRIBUNAL

Date: OCTOBER 26, 1992

Place: WASHINGTON, D.C.

represents the full and complete proceedings of the aforementioned matter, as reported and reduced to typewriting.

Phyllis Young

PHYLLIS YOUNG