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C O N T E N T S

<u>Witnesses:</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
DALE RHODES				
By Mr. Scheiner		9		
By Mr. Koenigsberg		11		
By Ms. Semo		30		
By Mr. Bechtel			40	
FRANK MANKIEWICZ				
By Ms. Hill	52			
By Ms. Divoll		64		
By Mr. Koenigsberg		76		
By Mr. King		80		
By Ms. Semo		88	97	
CAROL MOODY				
By Ms. Divoll	102	120		
By Mr. Koenigsberg		130		
By Mr. King		133		
By Ms. Semo		134		
By Ms. Hill			136	
<u>Exhibits:</u>		<u>Identified</u>		
NPR No. D		75		
NPR No. E		110		

P R O C E E D I N G S

1
2 CHAIRMAN BURG: Good morning. Mr. Bechtel, before
3 we get to your redirect, as I recall, Mr. Koenigsberg and
4 Ms. Semo had questions of the witness, but you have something
5 right now.

6 MR. BECHTEL: I do have something I would like to raise.
7 Yesterday, there were two matters raised during the course of
8 Mr. Scheiner's examination, and it was left that we would dig
9 out some underlying documents and come back this morning. And
10 I think we are in a position to announce stipulations that
11 would cover those two items.

12 Let me propose what I understand to be our stipulation
13 on one, and then Mr. Scheiner on the other.

14 One of the areas in issue was the underlying data
15 that we furnished to Mr. Wagner's company consisting of our
16 total hours of operation for the various stations, and one
17 of the documents that we had furnished to Mr. Scheiner indeed
18 had some omissions and some illegible entries. It turns out
19 when we got all of our files out last night that -- and this
20 was my fault -- I had not given him all of the documents that
21 were pertinent to this. The document I gave him did have these
22 omissions and entries which were not legible. There were
23 flags and checkmarks that we believe were put there by Mr.
24 Wagner's processing people. There was another document which
25 completed or provided this additional information, and as I say,

1 through inadvertence and through my inadvertence, I had not
2 given that to Mr. Scheiner earlier so he was proceeding on
3 examination on the basis of incomplete information, which was
4 as a result of my act.

5 I think we are now in a position to stipulate that
6 we will get all the documents together, that one way or another,
7 there is a complete listing or substantially complete listing,
8 legible, of the total hours of operation of all of our stations.

9 MR. SCHEINER: That was a very generous statement, and
10 I appreciate it. I join in it. We now have a complete listing
11 and as long as it is understood that I join in the stipulation
12 with respect to the completeness but not the accuracy of the
13 information furnished.

14 Second, Mr. Bechtel indicated that there was another
15 area of examination that was left open, and I will offer a
16 proposed stipulation with respect to that area, namely, with
17 respect to Appendix C to Mr. Rhodes' testimony. We at MPAA
18 considered the entry of \$1,221,049.01 listed next to WPBO,
19 Portsmith, Ohio, as an unreasonable number. Accordingly,
20 we made a comparison of the data in the MPAA cable system
21 data base and the figures in Appendix C for all 20 of the
22 listed stations. An exact comparison was not possible because our
23 data base was with respect to the first six months only; whereas,
24 this purports to be for both accounting periods. However,
25 based on that rough examination, we found a rather good

1 correlation between 18 of the 20 stations listed in Appendix
2 C to PTV Exhibit 3. However, with respect to WPBO, to the
3 best of our knowledge, we could not determine that that system
4 had been carried -- that station had been carried as a distant
5 signal by any cable system. Secondly, with respect to WLBT,
6 the MPAA data was, our estimate indicated some \$80,000; whereas,
7 there was an extremely higher number indicated for WLBT.

8 Mr. Bechtel was kind enough to furnish us with the
9 Wagner computer printout so that we could determine what the
10 underlying facts are. It was furnished this morning and with
11 respect to WPBO, let me read to you a sampling of what we got
12 from the Wagner computer printout as supporting data.

13 That little station in Portsmouth, Ohio, according to
14 the computer printout, was carried in Kodiak, Alaska, Pine
15 Bluff, Arkansas, Yuma, Arizona, Hawaii, Maine, Minnesota,
16 New Jersey, Texas, Wisconsin. We found that data simply
17 incredible, and in our view suggests a very strong inference
18 that the basic underlying material in the computer printout
19 simply has to be in error. I am not asking Mr. Bechtel to
20 join in that.

21 MR. KING. Excuse me. I would object to this. It's
22 argument and in the course of argument, it's attempting to
23 introduce evidence attacking the data base.

24 MR. SCHEINER: I will withdraw the argument.

25 CHAIRMAN BURG: Thank you, Mr. King.

1 MR. SCHEINER: I merely leave for such inferences
2 as the Tribunal wishes to draw from the facts that I have
3 recited, the reliability and credibility of the number listed
4 for WPBO.

5 Similarly, with respect to WLBT, the computer printout
6 carries -- Erie, Pennsylvania is carried in a half a dozen
7 systems in California, Louisiana, New York, and Texas. And
8 I submit that for such inferences that you may draw as to the
9 reliability of the underlying data.

10 CHAIRMAN BURG: Mr. Bechtel, am I incorrect, my
11 memory tells me that you were going to provide figures to
12 substantiate that \$1,221,000-plus for WPBO. Is that true,
13 and if so, do you have it?

14 MR. BECHTEL. It was to furnish the underlying data
15 upon which we got that figure, and we did so. And Mr. Scheiner
16 has accurately described the data that we furnished.

17 CHAIRMAN BURG: Do you have a new dollar figure?

18 MR. BECHTEL: We have not computed a dollar figure.
19 I think WPBO does have some carriage in Ohio and nearby
20 Kentucky. We have not computed a dollar figure. It will be
21 nothing in the range of a million-two. We can compute that.
22 I think it would be a good idea.

23 CHAIRMAN BURG: I wish you would. I will request it
24 for our sake, supply a dollar figure for that station and for
25 the Erie, Pennsylvania station, also.

1 MR. SCHEINER: Madam Chairman --

2 CHAIRMAN BURG: Mr. King.

3 MR. KING. Yes. I think I would like for the record
4 some indication of when this Wagner document was prepared, when
5 his data base generated, whether it was in the past several
6 months or last year or whenever it was.

7 MR. SCHEINER: We will furnish it if it's apparent
8 from the fact of this document.

9 MR. KING: Well, do we know?

10 MR. SCHEINER: I said we will examine it right now,
11 and let you know.

12 MR. BECHTEL: We know approximately, but if the
13 document --

14 MS. WEISS: On the cover.

15 MR. BECHTEL: May we have just one second.

16 CHAIRMAN BURG: Yes. I don't want to take too much
17 time with this this morning.

18 MR. SCHEINER: We will be very brief. While they are
19 checking to see whether there is a precise date, Madam Chair-
20 man, one comment that you made prompts a question to the
21 witness. Sir, would you turn to Appendix C and WPBO, in
22 particular.

23 Whereupon,

24 DALE RHODES,
25 having been previously sworn, testified further as follows:

FURTHER CROSS EXAMINATION

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BY MR. SCHEINER:

Q Do you have it before you?

A Yes, I do.

Q The right-hand column reads, "1978 Fees Paid by Cable System Carrying Station", and reading across from WPBO, we have this one million-two hundred-some odd thousand dollar figure; is that right?

A That's right.

Q It is not suggested, is it, that assuming the figure to be correct, that that represents fees paid by the cable system for carrying WPBO, is it?

A That's what the column says, I think, doesn't it?

Q Very unclear. I, too, read it that way when I first looked at it, and I think I was misled. Is that figure -- does that figure represent fees paid by whatever cable system for carrying PBO and other stations, or just WPBO?

A My understanding, Mr. Scheiner, is that that figure, as large as it is, is a result of the fees paid by cable systems for carrying WPBO.

Q Only?

A That is my understanding.

MR. BECHTEL: If it please the Tribunal, I should remain silent unless Mr. Scheiner is through testing the witness, because the answer is -- I think the answer is incomplete.

1 MR. SCHEINER: I think it is, too.

2 MR. BECHTEL: These, Dale, are gross figures. Any
3 cable system that carried one of these public television stations
4 distant, we just aggregated the entire dollar figures that they
5 carried. So, it is the reverse. The facts are as I have
6 stated.

7 MR. SCHEINER: I think that does help clarify a
8 misunderstanding. Just so we can nail this down, Mr. Rhodes,
9 you now do understand what that number is designed to indicate?

10 THE WITNESS: Yes, I do.

11 BY MR. SCHEINER:

12 Q And on that basis, sir, if the cable system had
13 carried WPBO on a limited time basis, intermittently and had
14 paid only \$500 for the carriage of WPBO, that would, assuming
15 the validity of the figure in the right-hand column, that would
16 not change that one million-two hundred-some odd thousand
17 dollar figure.

18 A That's right.

19 Q So, it might have paid \$500, \$100 for PBO, and we
20 would still have that extraordinary number of a million-two
21 hundred-some odd thousand dollars in the column for WPBO.

22 A That's right.

23 Q One final question, sir. What use, if any, did you
24 make of the numbers in this right-hand column in your analysis?

25 A None.

1 MR. SCHEINER: I have no further questions.

2 CHAIRMAN BURG: Thank you.

3 MR. BECHTEL: We understand that this document does
4 not bear the precise date. It is our recall that we received
5 the information from BI Associates in or about November, 1979.

6 CHAIRMAN BURG: But the figures were for '78.

7 MR. BECHTEL: That's correct.

8 CHAIRMAN BURG: You will check that number.

9 MR. BECHTEL: We will check the carriage on Ohio
10 and Kentucky.

11 CHAIRMAN BURG: Thank you. Mr. Koenigsberg.

12 CROSS EXAMINATION

13 BY MR. KOENIGSBERG:

14 Q Good morning, Mr. Rhodes. I am Fred Koenigsberg.
15 I am counsel for ASCAP. I want to ask you a few sort of
16 introductory questions.

17 On Pages 2 and 3 of your testimony, you list the
18 claimants who you and the PTV people represent, I guess. Now,
19 all of those claimants, sir, fall under the categories of
20 either broadcasters and/or program producers; do they not?

21 A Yes, SECA would also be a network, a regional network.

22 Q That would be a broadcaster?

23 A Well, no, not really. It doesn't own any stations.
24 It in fact distributes programs, but I think that's the only
25 exception. And PBS, of course, would not own any stations, either.

1 Q If we assume, sir, that the Tribunal is going to
2 allocate in phase 1 percentages to four groups of claimants,
3 music, sports, broadcasters, and program producers, if we
4 make that assumption, then the PTV claimants would all fall
5 under two of those categories.

6 A I believe so.

7 Q And in that case, the share that's to be allocated
8 to public broadcasting might be said to be a phase 2 question,
9 a question of division within those categories rather than a
10 phase 1 question, an allocation of fees to public broadcasting
11 as a separate entity; is that true?

12 A I think so.

13 Q You testified that you weren't quite sure why you
14 picked the weeks of February 13th to 19th, and November 6th
15 to 12th, 1978, for your test. Do you recall saying that, sir?

16 A I said we had several options of weeks. The first
17 reporting period and the second reporting period, yes.

18 Q Now, the week of November 6th to 12th included elec-
19 tion day, didn't it?

20 A I don't know. Did it?

21 Q I believe election day is the first Tuesday after the
22 first Monday in November, and if so, it would fall within that
23 week. I think the Tribunal can take official notice of the
24 calendar without anybody objecting to that.

25 MR. BECHTEL: I will object to that. I think we ought

1 to find out when election day was. It may have been that date
2 or it may have been changed. The Democrats have been changing
3 our holidays around. It's kind of hard to keep track.

4 CHAIRMAN BURG: Now, now, Mr. Bechtel. Anybody have a
5 calendar that goes back to '78?

6 MR. KOENIGSBERG: Mine, unfortunately, only goes
7 back to '79. I did some quick calculations. I think election
8 day is in that week.

9 THE WITNESS: No, sir, I think November 6th a --
10 well, November 6th, according to my calendar, was a Monday.
11 So the Tuesday, if Tuesday were the day, it would be in this
12 week.

13 BY MR. KOENIGSBERG:

14 Q Let's make the assumption that that week included
15 election day, subject to check. I only have one or two
16 questions. If that's the case, then would the public broad-
17 casting station have carried some election day specials during
18 that week, tabulating election day results, discussing the
19 issues on election day in their local communities and so on,
20 if you know?

21 A That's certainly possible. It does appear from my
22 quick look at the PBS program file for that week, however, that
23 there was an election special on and it was carried by three
24 percent of the stations, at least it was fed by PBS.

25 Q That's a PBS program.

1 A There could have been, certainly.

2 Q Well, is it normal for local public broadcasting
3 stations to put on special programming about a political event
4 of the most extreme interest to its local communities, as to
5 say, local elections? Do they normally put on programming of
6 that sort?

7 A Generally not in terms of reporting the election
8 results, no. That's done much better by the -- for the same
9 reason they don't do newscasts.

10 Q But do they do something else?

11 A Oh, yes, before the election, they have a lot of
12 programs about candidates and so on, generally.

13 Q That might occur the day before the election?

14 A Could, certainly.

15 Q And if it did, the last question on this line, sir --
16 if it did, then the amount of local programming on those
17 public broadcasting stations would be elevated in that week
18 beyond what might normally occur?

19 A That's possible, yes.

20 Q Yesterday, Commissioner Brennan asked you a question
21 I found intriguing, and I think it was one of the most intriguing
22 questions of this proceeding. He said suppose the Tribunal
23 decides that it doesn't adopt a single formula, but rather
24 takes a look at a combination of factors. And that led you to
25 your discussion about judging diving events and so on. Do you

1 recall that?

2 A I do recall it, yes.

3 Q What I would like to do with you, sir, is tease out
4 a couple of those factors that he mentioned and ask you some
5 questions about them. Let's first look at the factor he talked
6 about concerning time, duration of programming. Now, let's
7 assume a hypothetical, if we may. Suppose we have a cable
8 system that carries only two stations. One of them an
9 educational station and the other a network affiliate. And
10 suppose they each carry -- they are each carried for 100 hours
11 per week on the cable system. With me so far on this hypo-
12 thetical?

13 A Right.

14 Q Now, let's also suppose that the cable system pays a
15 total of \$1,000, for the sake of argument. Under your formula,
16 see if I am correct on this -- under your formula, the
17 educational station would get the total 100 hours as qualifying
18 hours, and the network affiliate would get 35 percent of its
19 hours or 35 hours, as qualifying hours; is that right?

20 A That's right.

21 Q So you have a total of 135 qualifying hours. The
22 educational station would have 100 of those hours, or 74
23 percent, and the network affiliate would have 35 of those hours,
24 or 26 percent; is that right?

25 A True.

1 Q And so, of the \$1,000 that was paid by that cable
2 system, the educational station would receive \$740 and the
3 network affiliate's programming would receive \$260?

4 A If the payout were somehow tied to the pay-in, which
5 I understand is not exactly established, that's correct.

6 CHAIRMAN BURG: Keep your voice up, please, for
7 the reporter.

8 THE WITNESS: Oh, I'm sorry.

9 A If the payout is tied to the pay-in, then that's
10 right, I think.

11 BY MR. KOENIGSBERG:

12 Q Isn't that the way your formula works?

13 A Ours works on the percentages of distant carried
14 hours, that's right, and the percentage of the total.

15 Q So that is the way your formula would work?

16 A That's right.

17 Q Okay. Now, sir, do you think it would be more
18 equitable to allocate those moneys as \$500 for each station,
19 so that the copyright owners of the qualified programs on
20 each station could share in the amount paid by the cable
21 systems for the use of their programs?

22 A I don't know.

23 Q If the allocations were made not on a system basis
24 as you are suggesting, but on a station basis, on the fees
25 generated by each station, do you think, sir, it would make any

1 difference in this phase of the proceedings if the educational
2 programs were deemed to be network or non-network?

3 A Do I think it would make a difference?

4 Q Yes, in the computation.

5 A Yes.

6 Q How so?

7 A Well, non-network programming doesn't qualify for
8 distant signal equivalent payment, isn't that right?

9 Q I guess so.

10 A I'm sorry. I don't understand.

11 MR. BECHTEL: If it please the Chairman, I am not
12 sure where counsel is going, but we are into a rather complex,
13 what can become a very complex analysis of the different
14 formulae that have been advanced in this proceeding, not all
15 of which this witness has heard. The formula of the MPAA,
16 I believe, doesn't make any difference whether PBS is regarded
17 as a network or not. The five percent fee generation is there,
18 and that is just a question of phase 2, who gets it. On the
19 other hand, one application of our approach would be that if
20 we were determined to be a network, our 12 percent might come
21 down to something like five percent, and we are really ana-
22 lyzing some complicated things. I can't keep them straight
23 in my head all the time, and this witness has not been here and
24 is not expert in the MPAA's fee-generated principles.

25 CHAIRMAN BURG: Mr. King first.

1 MR. KING: I would join in that. I think that we are
2 on a subject that can be certainly expressed in writing, and I
3 think that in the interest of time, we ought to move on to
4 something else. This can certainly be covered in briefing.
5 It's been covered at length in the earlier portions of these
6 proceedings. And I think in the interest of time, we can
7 just move on.

8 CHAIRMAN BURG: Mr. Koenigsberg.

9 MR. KOENIGSBERG: Madam Chairman, before Mr. King
10 spoke, I was going to say that I am done with this line of
11 questioning, and that I would like to move on to something
12 else.

13 CHAIRMAN BURG: Please do. Does that take care Mr.
14 Scheiner?

15 MR. SCHEINER: That's not the way I would like it
16 to come out. I think it would be appropriate for this
17 witness -- this witness is the only PBS expert to talk about
18 this formula, their methodology to respond to questions as to
19 how it would operate. We have no other witness from PBS, and
20 the question was please explain how this operates or the sense
21 of it. And I don't know why counsel should be answering that
22 question rather than their expert witness.

23 CHAIRMAN BURG: In that case, I am sorry I recognized
24 you, and I'm going to go back to Mr. Koenigsberg. Continue,
25 please.

1 MR. KOENIGSBERG: Thank you, Madam Chairman.

2 BY MR. KOENIGSBERG:

3 Q Sir, on the question of time, remember we are teasing
4 out the factors that Commissioner Brennan suggested to you,
5 and on the question of time, were you here, sir, when Mr.
6 Grossman testified that he did not believe that time was the
7 sole, or I believe he said major determinant of value of
8 programming?

9 A I was here for his testimony, yes.

10 Q Do you agree with that recap of his testimony? Do
11 you agree with the statement?

12 A Yes, I think quality was what he was talking about, as
13 a measure of quality, value, people value things different for
14 different reasons, and yes, in that context, I do recall that.

15 Q Let's turn to another of the factors Commissioner
16 Brennan suggested and that's the market value. Now, you were
17 here for Mr. Grossman's testimony. You will recall, sir, that
18 I asked Mr. Grossman what the overall share of ratings -- and
19 I don't mean to use the technical terms -- but I asked him
20 what percent of the audience public broadcasting gets as a
21 percentage of the total broadcast audience. And he responded
22 with five percent. Do you recall that?

23 A I do.

24 Q I was somewhat amazed at that, because I recall it
25 showed a marked increase. And he said yes, that was a market

1 increase from 1977, 1978.

2 Now, if the market value of broadcast programs is
3 measured in the broadcasting marketplace by ratings, then
4 public broadcasting has only five percent of the total; is that
5 true?

6 A I am a little concerned about the five percent figure.
7 When you ask people what the audience is for public television,
8 there are so many different ways of answering the question.
9 Even as a percent of the total, whatever that means, it is
10 very difficult for me to say five percent is reasonable,
11 because I don't know what that means, frankly. Mr. Grossman
12 and I have had these conversations occasionally, and it's
13 sometimes difficult for both of us to figure out exactly what
14 we mean about the size of the audience, but it is not an
15 absolute measure. I mean, there are a lot of ways of looking
16 at it, and I'm not quite sure what the five percent represents.

17 Q If we add up all the Nielsen ratings -- if we add up
18 all the people who are watching television over the course of
19 a week, and then we see how many of those people were watching
20 public broadcasting at any one time, compared to how many were
21 watching commercial broadcasting at any one time, do you know
22 percentage of the total we would get?

23 A Now, that's easier. About two to one.

24 Q No, sir, I don't think -- I don't think I have made
25 myself clear in my question.

1 A That is in the course of the week, if you want to
2 know how many people were watching public television, about
3 half of all U. S. television households watch public television
4 in the course of a week, about 98 percent watch a commercial
5 network during the course of a week.

6 Q At any given point in time, what is the average
7 audience that a public television program has nationally?

8 A Well, now, that's a function of what time we are
9 talking about.

10 Q I understand that. I am asking average.

11 A Average -- if I took 24 hours and for each minute
12 in the 24 hours came up with an average figure for that what
13 would it be, including 3 a.m., in the morning when there is
14 no one watching television?

15 Q Everybody's at home in bed asleep.

16 A We would not have many people. For this November
17 week, the answer is 600,000 U. S. television households, or
18 .8 percent of all U. S. TV households, for an average minute,
19 including 3 a.m.

20 Q And if we take a look at those average ratings, then--
21 I use the term ratings advisedly -- then the fact is that public
22 broadcasting gets a very small share of the market; is that
23 true?

24 A Based on the AA's, that is correct, average audience.

25 Q Now, let's turn to another factor that Commissioner

1 Brennan mentioned, and that's the question of benefit to the
2 cable system.

3 My understanding, and correct me if I'm wrong because you
4 are the person that knows this, I think. My understanding
5 of the way PBS programs are distributed is this: PBS sends out
6 its program on the interconnection; is that right?

7 A That is correct. Also by tape.

8 Q Or by tape. The local station -- let's focus on the
9 interconnection, I think it's the same for tape. The local
10 station then decides whether it wants to carry that at the
11 same time as the feed or whether it wants to tape it off the
12 interconnection and show it at some other time.

13 A Or not carry it at all.

14 Q Or not carry it at all?

15 A That's correct.

16 Q Now, you said 60 percent of the PBS programs were
17 carried at sometime; is that right?

18 A Well, nearly all of the PBS programs are carried at
19 sometime.

20 Q What was the 60 percent figure, then?

21 A Well, you have got a business, if they weren't
22 carrying the programs, I think. The 60 percent figure was
23 our analysis of the 20 stations that we did a thorough analysis
24 of their program schedules. It showed that for those 20
25 stations which were carried distantly, about 60 percent of

1 their schedule came from PBS' in one form or another.

2 Q Okay. Is it the general practice of public broad-
3 casting stations to carry those programs at sometime during the
4 week when they are fed by the interconnection service?

5 A Very variable, depending on what program and the time
6 of day is very crucial here. During this year, during the 1978
7 year, there was no agreement to carry any of the programs
8 ever at the time of feed. What you find is depending on the
9 individual station's needs, perhaps a live broadcast off the
10 feed, and then several repeats during the week, or a delayed
11 broadcast with or without repeats, or live and delayed, all
12 those combinations are possible and occur frequently.

13 Q I am not focusing on the percent that carried the
14 live feed, but I'm focusing on, really, on whether it's a
15 general practice to carry it at sometime during, oh, say a
16 week after the feed is made, whatever the time of the carriage
17 is.

18 A May I refer to one of my exhibits? I believe if you
19 will look at the carriage report, which is an Exhibit B, there
20 is a table, in fact, which I think will answer your question
21 in some detail. Let me refresh my memory.

22 If you will look at the first exhibit, which is under
23 Tab B, we are talking about the summary of station carriage of
24 PBS programs for the week of February 13th to the 19th.

25 Q Uh-huh.

1 A Are you with me there?

2 Q Yes, sir.

3 A If you will turn to, as you see from the cover memo,
4 Table 2, PBS programs ranked by number of user stations, I
5 think that will give you a very good idea -- well, it will
6 tell you exactly, in fact, how many stations used what. If
7 you follow me to Table 2, you will see the first program.
8 Does everybody have Table 2? The first program in rank order
9 is "Over Easy", and the number of stations carrying is 253, and
10 that represents 97 percent of the stations. And then you see
11 the rank order continues down the list. We cross the 50
12 percent point down about Program 34, "Infinity Factory", 54
13 percent, captioned ABC News, 51 percent, "Book Beat", 46
14 percent, with below half the stations. It continues on the
15 last page. The last program on the list is something called
16 "Coal Hearings", and it was carried by 54 stations during
17 that week.

18 Q So most of the PBS programs are carried by most of
19 the stations sometime during the course of a week. So that's
20 what your table says, right?

21 A Yes. You could certainly read it that way, yes. And
22 most of the programs are carried by -- let's put it this
23 way -- 35 programs at the top were carried by more than 50
24 percent of the stations.

25 Q 35 out of 50?

1 A Yes.

2 Q 70 percent. Now, we are focusing, you will recall,
3 on Commissioner Brennan's question of benefit to a cable
4 operator. Let's put ourselves in the shoes of the cable
5 operator. Is it reasonable to suppose that he says to
6 himself this, he says, "I would like to bring in a distant
7 public television station to augment my local public television
8 station. Much, if not most of the programming on that distant
9 station is going to be duplicative of the programming on my
10 local station, but it's going to be at different times, which
11 provides a service to my audience, and, therefore, I am going
12 to bring it in." Is that reasonable, sir?

13 A I am sure that's reasonable, yes.

14 Q Now, when we analyze benefit to a cable system,
15 would you care to assess the value of that sort of reasoning
16 as compared to the importation of a distant independent station,
17 commercial independent station which has, let us say, entirely
18 different programming from any station in the local market.
19 Which do you think would be more valuable to the cable operator?

20 MR. BECHTEL: Now, may I have a point of clarification.
21 Does this hypothetical assume that there is a local independent
22 station and a distant independent station, just as there is a
23 local public television station and a distant public television
24 station?

25 MR. KOENIGSBERG: Let's make that assumption first,

1 sure.

2 MR. BECHTEL: Can we further assume that all of the
3 programming on the local independent television station is
4 different from all of the programming on the imported inde-
5 pendent television station?

6 MR. KOENIGSBERG: That, I believe, was the assumption
7 I stated, yes.

8 MR. BECHTEL: Thank you.

9 THE WITNESS: I don't think that's a reasonable
10 assumption in the first instance. My experience is --

11 BY MR. KOENIGSBERG:

12 Q Well, we have got a couple of assumptions here.
13 Which assumption?

14 MR. BECHTEL: Excuse me. Let's get the answer and
15 then we will have another question.

16 A I think the assumption that there are two independent
17 stations, one local, one distant, which have completely
18 different programming is counter to any fact I know. Inde-
19 pendants generally have the same basic programs, which may be
20 on a different times. They are all for a limited number
21 of syndicators. Movie packages, Group W productions, Merv
22 Griffin productions, and so on.

23 BY MR. KOENIGSBERG:

24 Q Let's focus on that for a minute. Are you saying,
25 sir, that in the course of a week, one independent station

1 will show exactly the same movies as another independent
2 station?

3 A I don't know that to be a factor. I do know that they
4 purchase their programs from a limited number of syndicators,
5 and I don't know if one Merv Griffin Show is really different
6 from another Merv Griffin Show. I assume so. I don't mean
7 to be too facetious, but it is difficult for me to imagine
8 your example working in the real world. I just don't know of
9 any place where that happens.

10 Q Let's focus on "I Love Lucy" and "Masterpiece Theater".

11 A Okay.

12 Q If there's an independent station in the market that
13 carries "I Love Lucy" and we're bringing in a distant inde-
14 pendent station that carries "I Love Lucy". Is exactly the
15 same episode going to be shown during that week?

16 A It may.

17 Q Do you think it's likely that it will?

18 A I do not know. Depends on how many episodes of "I
19 Love Lucy" are in syndication.

20 Q If one PBS station is showing "Masterpiece Theater"
21 Upstairs Downstairs, and another PBS station is brought in
22 showing "Masterpiece Theater" Upstairs Downstairs, is it likely
23 it's going to be the same episode of Upstairs Downstairs?

24 A Depends on what day it is. Often you will be able --
25 you will find one station showing a Thursday first play and the

1 next station showing Sunday first play. So, you could in fact
2 watch segments one and two squeezed in the same week, if you
3 were lucky enough to have an imported signal.

4 Q As a general rule, I'm talking about the week that
5 we're covering. It would be the same episode, wouldn't it?

6 A And some repeats, perhaps.

7 Q Sure. A question on Commissioner Brennan's content
8 factor, I think. Public broadcasting carries many shows,
9 does it not, that feature music?

10 A We certainly do have shows that feature music, yes.

11 Q Can we name a couple of those shows?

12 A Well, I think the list that we were just looking at
13 might be instructive, since that's one of the weeks we have
14 been looking at. Would that be reasonable?

15 Q If you think so, sir.

16 A It's a complete listing of the programs in our week.
17 I think that's relatively useful. Let's look at that Table 2
18 again, under my Appendix B. And shall we just go down and
19 see which programs -- are you talking about primarily feature
20 performances of music?

21 Q Let's talk about that first, sure.

22 A The first one I see on the list that is a musical
23 program is number 13, "Evening at Symphony". "Classical Works",
24 "Boston Symphony Orchestra".

25 Q Sir, let me just interrupt you there for a moment.

1 When you say "Classical Works", do you mean works by such
2 as Beethoven, Bach, Stravinsky, Copland?

3 A Yes, I do.

4 Q What have you got next?

5 A Number 16 is "Live from Lincoln Center". Now, "Live
6 from Lincoln Center" -- let me check and see if I have a
7 subtitle here in the next set of tables. It could be a dramatic
8 presentation, as you probably know. "Live from Lincoln Center",
9 in fact, it was Pavarati.

10 Q Commissioner Brennan will be happy to hear that.

11 A Yes. So that would count as a music program. Again,
12 classical works, for the most part, opera and so on. The
13 next one I come to is number 20, "Sound Stage". That is popu-
14 lar music. Number 33, "Austin City Limits", which is country
15 music. That's all on that page, I believe. Number 41 is, in
16 fact, a program called "Music". And that is all.

17 So, how many is that, five, six?

18 Q Sir, we are talking about programs that from the
19 title indicated primarily, if not purely, music. Let's take
20 number 4, "Sesame Street". Do you know if there is a lot of
21 music on "Sesame Street"?

22 A There certainly is some, yes.

23 MR. KOENIGSBERG: I have no further questions. Thank
24 you, Madam Chairman.

25 CHAIRMAN BURG: Ms. Semo?

CROSS EXAMINATION

1
2 BY MS. SEMO:

3 Q Good morning. I'm Judity Jurin Semo, and I'm
4 representing the NCAA. Mr. Rhodes, is it PBS's goal to reach
5 as many people as possible with PBS programming?

6 A Yes.

7 Q You testified earlier with respect to damage, and
8 there have been a number of questions on that. Now, does
9 your system or your proposed method of allocation take account
10 of damage?

11 A No, it does not. Not directly.

12 Q Does it take account of it indirectly?

13 A It might, but I don't know. I can testify on the
14 face of it, and it's simply based on hours.

15 Q You said it might take account of it. Does it?
16 I'm not sure -- I would think that is a yes or no answer.

17 COMMISSIONER JAMES: He said he didn't know.

18 BY MS. SEMO:

19 Q Can you explain how the copyright owner of the "Coal
20 Hearings", which were carried in either the first or second
21 half of '78, was injured by cable carriage of those hearings
22 beyond the immediate broadcast area of the station originating
23 those hearings?

24 A Not in that specific instance. That was, as I recall,
25 a hearing of some sort.

1 Q Yes, it was, a House subcommittee hearing.

2 A Right. I am not sure that the carriage of that kind
3 of programming harmed the copyright owner, whoever that was.
4 Can you copyright a public hearing? I don't know.

5 Q Well, presumably, the broadcast of that, the rights
6 of that, would be in the program producer. I don't know with-
7 out seeing the contract.

8 A I don't know.

9 Q I believe that on direct you testified as to the value
10 of distant signal programming, and I am wondering again, does
11 your system or your proposed method of allocation take that
12 into account?

13 A It does not take into account, but the value -- hours
14 are a value, a given value of hours. So in that sense, yes.

15 Q Do you think that the quality of the programming is
16 a factor that the Tribunal should consider in making the
17 allocation?

18 A I'm not sure that I would tell the Tribunal how to go
19 about this very difficult task. I think value is something
20 that should be considered. I don't know beyond that what to do
21 with it. But yes, quality should be considered.

22 Q But your testimony is you are not sure how it should
23 be considered?

24 A That's correct.

25 Q I believe that on direct, you testified as to injury
to PBS in areas in which there are no public television stations,

1 and I believe you said that cable carriage impedes the
2 development of new cable system -- new PBS stations; is that
3 correct?

4 A That seems to be what has happened in some areas,
5 yes.

6 Q Is there any other way in which PBS is injured in areas
7 or communities where there's cable importation of the PBS
8 system and there is no local PBS system?

9 A Are there ways -- I'm sorry, I don't understand the
10 question.

11 Q I am asking you if there's any other injury -- impeding
12 development of new PBS stations, is the only type of injury
13 in those areas.

14 A In those areas where there is not a local PBS station,
15 right.

16 Q Right.

17 A I think that's the only injury, then, would be to
18 impede the growth of a new station or the creation of a station.

19 Q Does the injury that you are testifying to involve
20 the amount or the number of clearances of PBS-distributed
21 programming?

22 A Well, the injury goes to the program producer, I believe,
23 is the line that we were pursuing. That is, if a producer's
24 program is already available in the market, then where there is
25 a local public television station, then it is possible the

1 producer would suffer damage because the local public
2 television station would not be motivated to purchase the
3 program, and therefore, the producer might not be able to
4 aggregate enough funds together to either produce the program
5 in the first place, or to continue to produce the program
6 for the next year.

7 Q But you weren't talking about the number of clearances
8 or the number of PBS stations which would carry a PBS program
9 that's distributed over the interconnection?

10 A Well, one of the things that a station must consider
11 when it decides whether to carry or not carry a PBS-distributed
12 program, is whether the station has the rights to the program
13 and in our example, when we are talking about a local PTV
14 station not purchasing the rights to a program, because that
15 program is already available, imported on a distant basis from
16 their local cable system, then the station couldn't carry the
17 program if it hadn't bought it.

18 Q I think that answers my question.

19 I believe it was Mr. Dort who testified or during whose
20 testimony an exhibit was introduced discussing PACE, which is
21 a new pay cable system which is going to be featuring PBS-type
22 programming. Are you familiar with that proposed service?

23 A No, I'm not. I saw the Xerox from the T.V. Digest,
24 and that was the first time I had ever heard of that. As I
25 understand it from Mr. Dort, that was a leak to the press on

1 something that is about to be published; is that correct?

2 Q I believe so.

3 A So, that paragraph is all I've seen of that.

4 Q Can you tell me what significance PBS is attaching
5 to this new PACE system?

6 A No, clearly not.

7 Q With respect to your Appendix D and your different
8 categories of programming, I have several questions.

9 What is the difference between when PTV is an owner
10 of a program and when it produces and owns a program? I believe
11 that distinction was made in Appendix D.

12 A If you will recall, when we said about our content
13 analysis and the schedules and the categories were first set up,
14 three categories, those which were clearly PTV claimant
15 produced, and the second category which there appeared to be
16 some claim for PTV, and the third category, which counsel
17 determined there was no claim. That required reading of these
18 agreements between the producers and PBS and so on. I did not
19 do that. I did not do this classification, because I am not
20 a lawyer. But our counsel did, and it may be, Ms. Semo, that
21 they should answer that question because I do not know the
22 answer.

23 Q So I take it you are not familiar with the terminology
24 of whether or not they package it or what it means when the
25 package it jointly with someone else.

1 A I am familiar with the terminology, what that means
2 in terms of copyright holders and what compensation that
3 brings. That I do not know. That's a matter of contract
4 as I understand it.

5 Q But more specifically, some of the programs in
6 Appendix D were divided between two categories, for example,
7 "Masterpiece Theater" and "Live from Lincoln Center". They
8 were divided between categories one and two, some minutes in
9 one and some minutes in two. And can you tell me what the
10 basis for that division is. Is that based on the contract or
11 what?

12 A May I ask the counsel for help on that?

13 MR. BECHTEL: You may indeed. May I ask counsel for
14 help on that?

15 THE WITNESS: If you will wait just a minute, we
16 may get something.

17 CHAIRMAN BURG: I may have a more relevant question.
18 What has this line of questioning got to do with NCAA sports,
19 Ms. Semo? Are you going to make a connection?

20 MS. SEMO: No, I'm trying to understand what they
21 have done and what is in each category -- each of the three
22 categories.

23 CHAIRMAN BURG: Counsel, do you have an answer?

24 MS. WEISS : Yes. Within, let's say, a given two-
25 hour program like "Masterpiece Theater", there will be portions

1 of it maybe in the beginning or toward the end that are
2 produced by the station and the station owns the copyright in
3 that portion. The rest of it may be an imported program,
4 an acquisition or something like that. So, some of it went
5 into one category, which is called, "Other PTV Claimable", and
6 some went into clearly PTV claims. The portion that was clearly
7 produced by our station, so that you will have like maybe five
8 minutes out of two hours or ten minutes out of two hours in
9 Category 1, and an hour and 50 minutes in Category 2.

10 BY MS. SEMO:

11 Q For a program such as Dick Cavett, which is
12 Category 2, an entity named Daffney is listed as the copyright
13 owner, and I'm wondering on what basis that's included in
14 Category 2, PTV claimable?

15 A I know that Daffney Productions is the production
16 company of Dick Cavett, and that there is a joint production
17 arrangement between 13 New York, one of our stations, and
18 Daffney. The exact nature of that agreement, I would have to
19 turn over to counsel to answer.

20 MS. SEMO: Madam Chairman, the reason I am asking these
21 questions is that while this may go to Phase 2, this I under-
22 stand to be the witness who is sponsoring this testimony, which
23 includes these categorizations. And I'm not sure that we
24 understand why certain programs were included in Category
25 2 as opposed to Category 3, where there are non-PTV copyright

1 owners and why some of those programs were listed in 2,
2 Category 2 as opposed to Category 3.

3 MR. BECHTEL: We will be happy to develop this
4 information as and to the extent that the Tribunal wishes.
5 I can state as a general proposition under Category 3 that
6 throughout "Soccer Made in Germany", because the Tribunal had
7 made a ruling that you had to have certain fine print in the
8 agreement between the sports club and the broadcaster, and we
9 didn't have that fine print in our agreement that covered
10 "Soccer Made in Germany", the other three programs that we
11 have listed under Category 3 were produced by one or more
12 producers, and I recall Ms. Weiss read the fine print of the
13 licensing agreements and advised me that she thought to be
14 conservative and accurate, we ought not to lump that together
15 with the Category 2 items where we do have a claimant together
16 with some sort of tie to a producer or packager or some other
17 entity where we think that there's a legitimate claim for the
18 fees.

19 CHAIRMAN BURG: For that and other reasons, I am going
20 to ask you, Ms. Semo, to get on to another line of questioning
21 right now. This may well come up at some other point.

22 BY MS. SEMO:

23 Q Mr. Grossman had testified to the fact that PBS is a
24 not-for-profit organization. And do you think that that is a
25 factor that the Tribunal should take into account in making the
allocation?

1 A I don't know.

2 Q With respect to your Appendix C, if there were errors
3 that Mr. Scheiner points out for two of the 20 stations listed
4 in Appendix C, which was, we assume, a carefully-selected
5 sample, is it reasonable to assume that there would be similar
6 errors for about 22 other stations?

7 A Well, Ms. Semo, you must remember that the nature of
8 the error which Mr. Scheiner points out is a very technical
9 one and has very little to do with what we are about here. That
10 column is listed there because we wanted for our 20 stations --
11 one -- the most important factor for sample of the 20, all of
12 the PBS stations, was whether or not they were carried on a
13 distant basis. The data in this right-hand column which some
14 of it, when we put it in, we realized looked a little odd;
15 nonetheless, the error is only in the amounts here. It's not
16 whether or not the station is carried on a distant basis. That
17 has not been raised. That's all we used that list for. It's
18 irrelevant for any other purpose.

19 Q So, you are saying that if there are errors in this
20 Appendix C, a number of the stations would not have any effect
21 on your calculation in Appendix F?

22 A It would have no relationship on whether or not one
23 of these stations was chosen to be in the 20, all right? This
24 at this point was used in order to determine whether a station
25 was carried distantly. If so, then I proceeded with the analysis

1 of their program schedule.

2 MR. BECHTEL: If it please the Tribunal, I am a little
3 confused by the line of questioning. It's my understanding
4 that our stipulation is that two of the 20 stations in this
5 one particular column going to one side of the matrix of this
6 sample are in error, and we acknowledge that. The stipulation
7 is also that the other 18 of the 20 stations generally tie
8 to the MPAA observations an analysis. So, accordingly, for
9 that one side of the matrix to wit: that side of the matrix
10 that involves the selection of stations that were distant
11 carried, 18 of the pieces of data that went into that side of
12 the matrix are generally accurate and two are not. Now, with
13 that understanding, hopefully, that will help the line of
14 questioning and answering.

15 MS. SEMO: I have no further questions.

16 CHAIRMAN BURG: Are there any other questions of Mr.
17 Rhodes? If not, Mr. Bechtel, you may proceed on redirect.

18 COMMISSIONER COULTER: Excuse me. Mr. Rhodes, just
19 briefly, and I apologize because this is really what I was
20 trying to drive at yesterday, but in your Appendix F, the first
21 accounting period forms 2 and 3. You have for public television
22 claimable a total of 10 percent, and then for the second
23 accounting period, 9.6 percent. Now, given those figures, how
24 do you explain, then, that you are making a claim for 12
25 percent?

1 among the individual parties by agreement or by direction of
2 the Tribunal in a subsequent second phase of this proceeding.

3 COMMISSIONER COULTER: Thank you.

4 REDIRECT EXAMINATION

5 BY MR. BECHTEL:

6 Q Let's talk about the Coal Hearings. Can we go back
7 to this Appendix D, you had a Table 2, which showed that 54
8 stations carried the Coal Hearings. It's just a little below
9 "Soccer Made in Germany".

10 There was another table, Table 3, which, if I read it
11 correctly, indicated that of the 54 stations who carried that
12 program, 30 carried it live and 24 carried it on some sort of a
13 delayed basis. Am I reading these tables right?

14 A Right.

15 Q So, for the Coal Hearings, we have 24 stations, 30
16 stations that carried it live at the time of the feed, 24
17 stations that tape delayed, and about 225 stations that didn't
18 carry it at all; is that correct?

19 A That's right.

20 Q Now, let's take a cable operator that is carrying a
21 public television station distant, and let's ascertain the
22 value to that -- or let's discuss the value to that cable
23 operator of this particular program and the carriage of this
24 particular program. Now, we have one situation which is of some
25 frequency throughout this country, where there is no local

1 THE WITNESS: We broke down the total number of
2 hours and then we provided these breakouts based on the three
3 categories. The presentation is made on the basis of the
4 largest of those, of 12 percent. But the documentation is
5 provided for exactly the reason that you are asking the
6 question; that is, is it reasonable to say 12.2 percent or is
7 it reasonable to say 9.6 percent, or is it reasonable to say
8 7.0 percent. But we have given you the whole -- that's why
9 this is here, so that you can decide that. Do the people
10 who do not claim, for example, get compensated in some other
11 way or not? I don't know. But we made the case based on the
12 12 percent number, and then spelled out each of the categories
13 in this.

14 COMMISSIONER COULTER: Thank you.

15 CHAIRMAN BURG: Mr. Bechtel.

16 MR. BECHTEL: If it please the Tribunal, Commissioner
17 Coulter at Pages 5 and 6 of the text of this testimony, and
18 the passage which I think is acknowledged to have been pri-
19 marily the work of counsel, we state as to the third category
20 all other programs, with regard to these, counsel for PBS
21 advised me that the claim filed by PBS may be deemed to include
22 all other public television programs that were carried as dis-
23 tant signals during the year 1978. Also, that under the present
24 phase 1 of these proceedings, the Tribunal may determine to
25 allocate an amount of the royalties to all public television
programs as a group. Subject to a division of that amount

1 public television station; is that correct?

2 A That's correct.

3 Q And as to that situation bringing in the public
4 television station at all in its entirety is of value to the
5 cable operator, would you not conclude?

6 A Yes, indeed.

7 Q Now, supposing we do have a local public television
8 station that does not carry the Coal Hearings at all, and the
9 cable operator is bringing in a public television station that
10 does carry one of the 54 that did carry the Coal Hearings,
11 would that not have some value to the cable operator?

12 A I would think so, but depending on the composition of
13 the community, sure.

14 Q Let us suppose you have the local public television
15 station that's carrying the Coal Hearings on a tape delayed
16 basis, and the distant public television station is carrying
17 the Coal Hearings on a live basis. Would that distant carriage
18 also have some value to the cable operator?

19 A Certainly. Programs have value to the cable
20 operator or anyone only if they are watched. And if you happen--
21 these Coal Hearings, for example, and most of our Congressional
22 hearing coverage takes place during the day when many people
23 are at work. For the station that would be delaying it and
24 then being imported into the community, that means that people
25 could then watch the program. So, yes, I think that that's the
answer to your question.

1 Q I direct your attention to the first appendix to your
2 testimony, Appendix A.

3 A Yes.

4 Q Where we have listed the claimants who filed for fees
5 are -- a share of the fees in 1978, and I think we tabulated
6 this to be 183 stations plus some other entries.

7 A That's correct.

8 Q On cross examination, you were queried about the
9 remaining 90 stations or so.

10 A Right.

11 Q And I believe you indicated that some 56 of those
12 stations that did not file claims did not have any distant
13 carriage to our understanding?

14 A That's correct.

15 Q And then I believe you indicated that there were
16 about 42 stations which did have some distant carriage, but
17 did not file claims.

18 A That's right.

19 Q Now, the programs produced by those 42 stations
20 thus, as a technical matter, and in this analysis, were not
21 covered by a claim; is that correct?

22 A That's right.

23 Q Would there be likely other programs telecast by
24 those 42 stations as to which the programs were produced by
25 claimant stations, and if so, would you explain your answer?

1 A Well, certainly. If a station were being carried
2 distantly but did not file a claim, one of our public stations.
3 We know that all of our stations carry substantial portions
4 of their programming from the PBS interconnection or take bicyc-
5 ling or some way from PBS. And since by our list of programs
6 we know that most of them are either in Category 1, PTV
7 program -- I mean PTV claimant-produced or claimable, that,
8 yes, it would certainly be a reasonable and logical assumption
9 that those non-filing stations would have programs which -- for
10 which the copyright owners deserve compensation.

11 Q Address your attention, if you will, to JSC Exhibit
12 No. XX-1 and XX-2. I also draw the attention of the Court
13 and the counsel to those two exhibits. These were put in the
14 record yesterday by Mr. Garrett, and if I understand the
15 exhibits and hopefully, Mr. Rhodes, if you understand the
16 exhibits -- let's take Exhibit 1. We start out with PBX's share
17 of 12 and a half percent consisting of the two million total
18 distant hours of PBS public television program time over the
19 16,000,000 aggregate hours of distant carriage, PBS network
20 affiliates independent. We had 12 and a half percent. Then, the
21 thrust of this exhibit, or the purpose of this exhibit by Mr.
22 Garrett, was to factor in the situation should the Tribunal
23 declare ineligible PBS distributed programming as import
24 programming, what would be the effect on the percentage. And
25 we have here the use of a CPB statistic for a fiscal year, 71.6

1 percent. And on that basis, I think with the assistance of
2 your pocket calculator we arrived at and agreed with their
3 analysis that the PBS share, non-PBS distributed programming,
4 assuming 71.6 percent, PBS distributed programming, comes to 3.9
5 percent of the total.

6 Now, do you have that before you, and was my very
7 concise description of that exhibit clear?

8 A I do have the exhibit before me. We should point out,
9 Mr. Bechtel, that the CPB study which we talked about during
10 Mr. Garrett's cross examination not only is fiscal year which
11 started in July -- and this is computed for the first half of
12 the calendar 1978 -- so, on the face of it, the data are not
13 necessarily relevant. But the more important point is that
14 our analysis of our 20 stations which are heavily carried on
15 a distant basis showed a different figure of programming
16 supplied to those stations from PBS. And our figure was dif-
17 ferent from the first half and for the second half, but it was
18 just over 60 percent rather than the 71 percent.

19 Q In point of fact, wasn't it 62.7 percent for the first
20 half of the year and 61.7 percent for the second half of the
21 year?

22 A That is correct.

23 Q Now, what I want you to do is I want you to give us
24 the calculation that corresponds to JSC Exhibit No. 1 for the
25 first half of the year. But let's use results of our sample

1 and we are going to take out as PBS distributed programming
2 not 71.6 percent, but 62.7 percent. And to save time, we did
3 this this morning off the record. Could you tell us how that
4 figures out following along JSC Exhibit 1, but substituting
5 or so we can write in the margins the figures as they come
6 out.

7 First of all, if we take 2,007,000 total distant
8 hours, we are now going to take and deduct 62.7 percent of
9 that and you come up with a figure that is what?

10 MR. SCHEINER: I object to the question. I thought--
11 if I understand it, counsel is using a percentage of 62-some
12 odd percent, based upon his analysis of the 20-station sample;
13 whereas, my clear recollection of the testimony is that the
14 witness had accepted as valid a figure of 71.plus percent
15 as representing the amount that PBS distributed time during
16 the calendar year 1978. And I think if we go forward with
17 this little exercise, the record will be confused and misleading.

18 CHAIRMAN BURG: Did not the witness qualify that
19 figure yesterday? That's my impression, now. I may be mistaken.

20 MR. BECHTEL: I think he did, Madam Chairman, but
21 in addition, that was the question that Mr. Scheiner undertook
22 to pose to two prior witnesses but when he came to this
23 witness only asked him about instructional television program-
24 ming as a 14 percent figure.

25 MR. SCHEINER: Madam Chairman --

1 MR. BECHTEL: He did not ask this question of this
2 witness.

3 MR. SCHEINER: That's absolutely correct. I did not
4 because it would have been absolutely repetitive of the very
5 question put by Mr. Garrett. It had previously been
6 established by Mr. Garrett through the witness that the 71.6
7 figure was a valid and acceptable figure. And I did not
8 pursue it for that reason only.

9 MR. BECHTEL: I stand corrected.

10 MR. SCHEINER: Mr. Garrett did not go on to instruc-
11 tional television and for that reason, I supplemented the
12 record in that respect.

13 MR. BECHTEL: I stand corrected on my point. I still
14 think this is a very valid exercise. This witness has indi-
15 cated he doesn't think the CPB of 71 percent is the right one,
16 and we in our proofs have used 62 percent. His calculation is
17 consistent with our approach.

18 CHAIRMAN BURG: Mr. Bechtel, Mr. Scheiner, I am going
19 to overrule that objection.

20 BY MR. BECHTEL:

21 Q Listen to this quickly. State for the record the
22 figures and the results. I am taking too much time on this.

23 A Okay. If I may be permitted, the Chairman is correct.
24 I did in fact point out that the CPB figures are for all
25 television stations, whether they are carried distantly or not,

1 as I recall my testimony yesterday, and that therefore, it's
2 not the best kind of basis to use when the subject at hand is
3 carriage on a distant basis.

4 On that basis, let me proceed. Our analysis shows
5 for the first half of '78, following along now, on JSC Exhibit
6 No. XX-1, if we just drop down to their number 2 calculation,
7 if PBS distributed and so on, all we are really going to do
8 is change the 71.6 percent to 62.7 percent, and if you do that,
9 the hours distant signal carrying of qualifying PTV becomes
10 748,605 instead of the 569,996. Just jot that in. And the
11 percentage point there, right under the 2,007,000, instead of
12 being .716 is .627. You can do the arithmetic yourself, if
13 you want. The next line down where they subtract out the PBS
14 distributed programming, our figure now becomes, instead
15 1,258,449. And that equals, instead of the 146 figure,
16 14,797,551. And then doing the division indicated -- our
17 fraction looks different now. Ours reads: "For the numerator
18 748,605," and the denominator reads " 14,797,551. If you do the
19 division, it comes out to be 5.1 percent.

20 Q Now, if you will turn to your JSE Exhibit No. 2, you
21 have done a similar calculation for that exhibit.

22 A I have, and it's done exactly the same way. The only
23 difference is, again, instead of the .716 percent that you
24 see for the CPB number, we have used .617. And we proceed to
25 the calculation the same way, making those adjustments as we

1 go and the bottom line is 5.1 percent, again.

2 Q Thank you.

3 MR. BECHTEL: I don't have any further questions.

4 CHAIRMAN BURG: If not, that concludes this witness,
5 and the public television portion of this particular proceeding.
6 Let's have about a five-minute recess before we get into NPR.

7 (Whereupon, a short recess was taken.)

8 CHAIRMAN BURG: Miss Hill.

9 MS. HILL: Good morning, Madam Chairman. First, I
10 would like --

11 MR. GARRETT: Ms. Hill, you have been waiting a long
12 time, haven't you?

13 MS. HILL: Yes. I'm Janice Hill, Deputy General
14 Counsel for National Public Radio, and NPR is pleased to
15 finally get to present to you its general claim for a share
16 of the royalty -- cable royalties.

17 I would like to first point out that we have
18 distributed our Exhibits A, B, and C to members here in the
19 audience or participants here in the audience. In our filing,
20 we did not make that available to people, but have done so
21 during the recess there. And we did add to your copy of our
22 exhibits an addenda sheet, which lists the 1978 award winning
23 radio programming that was not in that should have been in our
24 exhibits, to our written statement of March 24.

25 I would first like to thank the Tribunal for permitting
NPR's president, Frank Mankiewicz, to be a co-witness today.

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1 Mr. Mankiewicz will be later on presenting that part of our
2 statement which deals with programs of both NPR and our member
3 stations. Carol Moody, the NPR coordinator for copyright
4 program rights, who was the original author of the statement,
5 will also be a witness and will be attesting to the statistics
6 and rationale that was contained in that statement.

7 I would first like to establish NPR's standing to
8 be here before you today. Our claim is based squarely on
9 the expressed language of Section 111D4C of the Copyright Act,
10 which I would like to read into the record with your permission.

11 Section 111D4, in subpart (c), "The royalty fees thus
12 deposited shall be distributed to those among the following
13 copyright owners who claim that their works for the subject of
14 secondary transmissions by cable systems during the relevant
15 semi-annual period --" and skipping now to subsection (c),
16 "Any such owner whose work was included in non-network
17 programming consisting exclusively of oral signals carried by
18 a cable system in whole or in part beyond the local service
19 area of the primary transmitter of such programs".

20 Now, our interpretation of oral signals is that
21 Congress and the Act speaks clearly that radio is a proper
22 claimant to these proceedings.

23 With your permission, I would like to briefly describe
24 the structure of NPR, and a little bit about the funding of
25 public radio and its stations.

1 NPR is a private non-profit corporation, incorporated
2 in the District of Columbia. We are not a government agency,
3 we're a membership organization. With at the time of the
4 Copyright Act taking effect in 1978, we had some 213 member
5 stations. Turning to the methods of funding, both stations
6 and NPR funding sources are diverse. Stations often receive
7 support from their licensees, especially if the licensees are
8 universities. Public support, as you probably are aware of,
9 having listened to the statements by Public Broadcasting, the
10 Public Broadcasting Service, public support is a large part
11 of a station's funding because it makes that station eligible
12 for more money through -- from the federal government. Often,
13 programming is directly funded and this is what is meant by
14 underwriting, when you have someone who directly funds a
15 program.

16 NPR, corporate NPR, receives funds from private and
17 corporate sources, just as the stations receive money from
18 state and private arts foundations, we receive some funding
19 from the National Arts Foundations, and, of course, NPR and
20 its member stations receive money from the Corporation for
21 Public Broadcasting. CPB, in fact, was created as a way of
22 providing government support to public broadcasting without
23 having government control or direct involvement.

24 In 1978, there was what's called a Match System, which
25 I think PBS covered pretty well, which made CPB eligible for

1 federal funds, \$1.00 of federal funds for every \$2.50 that
2 member stations could raise through other than federal sources.
3 And so the reason for this Match System is to keep public
4 radio responsive to the public. Now, that, by way of intro-
5 duction to sort of the corporate NPR, and the station and
6 NPR funding.

7 I would like now to present NPR's president, Frank
8 Mankiewicz, who will explain a bit about the programming. And
9 I don't believe he's been sworn in.

10 CHAIRMAN BURG: No, he has not.

11 Whereupon,

12 FRANK MANKIEWICZ,

13 called as a witness, being first duly sworn, testified as
14 follows:

15 DIRECT EXAMINATION

16 BY MS. HILL:

17 Q Would you state, please, for the record, your name,
18 position, and pertinent background for these proceedings.

19 A My name is Frank Mankiewicz. I am President of
20 National Public Radio. I have been the President of NPR since
21 August 1, 1977. Before that time, I had experience for about
22 10 years as a journalist, broadcaster, on both radio and tele-
23 vision, for American and Canadian and European stations and
24 networks. I have been involved from time to time in political
25 action, served on the staff of Senator Robert Kennedy as press

1 secretary, and on the campaign staff of Senator George
2 McGovern in 1972. I am a member of the state Bar of California,
3 and practiced law there for seven years.

4 Q Would you briefly state why you believe that National
5 Public Radio's participation in this proceeding is important.

6 A Well, NPR, in addition to being a production organ-
7 ization, is also a membership organization. And in behalf
8 not only of the programs that NPR has produced that have been
9 used in the manner described in these proceedings, but also
10 for our member stations, we are seeking a return as a result
11 of the cable retransmission use of copyrighted public radio
12 programs produced not only by NPR, as I said, but also by, I
13 believe, 61 of our stations who are claimants in this proceeding.
14 We feel we have an obligation to pursue those claims in behalf
15 of our stations, as well as for the programs which were
16 produced and distributed by National Public Radio directly.

17 Q You have touched on one aspect of our claim; that is,
18 that NPR is a program producer, as is stated in the statement
19 filed by NPR on March 24th.

20 Would you describe briefly some of NPR's programming,
21 corporate NPR.

22 A We produce a number of programs and we distribute to
23 our member stations somewhere between 40 and 50 hours a week of
24 programming. I am inexact in that respect, because the amount
25 of programming varies from week to week, depending on the live

1 events which we broadcast. On a week in which there is a
2 substantial Congressional hearing, for example, or perhaps
3 a legislative proceeding even from another state, or a
4 Presidential press conference, variety of events that we cover.
5 The amount of programming would, of course, exceed 50 hours.

6 On the average, the programs that we produce and
7 distribute make up about 22 percent of the schedule of our
8 member stations. Our programming is divided roughly between
9 what we call cultural programs or non-news and public affairs,
10 and news and public affairs programming. We now do three and
11 a half hours of news programming a day, a two-hour programming
12 in the morning and an hour and a half in the afternoon,
13 although the time covered by this proceeding, 1978, we had
14 only the afternoon program, an hour and a half program called
15 "All Things Considered", which has won, and I think deservedly
16 so, every award available for broadcast news programming.

17 Q Could you describe other information in news
18 programming.

19 A We do have a variety of news and public affairs
20 programming, in addition to "All Things Considered". As I
21 say, we cover substantially public events, Congressional
22 hearings. We covered for 38 days in 1978, the debate in the
23 Senate on the Panama Canal Treaty, the first time anybody had
24 ever heard Senate debate outside of the Senate chamber. And
25 that attracted a substantial audience for the stations. Most

1 of our member stations which carried the debates. In
2 addition, we cover the speeches at the National Press Club,
3 a program put on at the Kennedy Center every other week
4 called, "National Town Meeting". We had a program called
5 "The Pauline Fredrick and Colleagues", which discussed foreign
6 policy for events in 1978. That program is now called,
7 "Communique". And I think other news and public affairs
8 programs, as they developed, including a number that come from
9 local stations.

10 Q Now, describe briefly some of the other NPR programming
11 which isn't news and public affairs.

12 A We do a substantial amount of music programming,
13 classical music programs from abroad and from within the United
14 States. We deliver to our stations 13 concerts a year from --
15 13 operas from the San Francisco Opera Company, produced in
16 San Francisco. We do the season of the Los Angeles Philharmonic
17 Orchestra. We do, in addition, the country's only network
18 jazz program, live jazz, the only program that's available to
19 radio stations of live jazz programming, on a regular basis,
20 called, "Jazz Alive". We also did in 1978, and now do in
21 different ways, a program called "Voices in the Wind", which
22 was, we thought, the only radio program devoted to the
23 creative process, not only music but in other performing arts,
24 as well.

25 We have a number of other jazz programs, folk music

1 programs, and we have a drama program called, "Ear Play",
2 a weekly, one of our original dramas which has attracted
3 considerable attention and substantial awards. In fact,
4 a production of "Ear Play" in 1978 received last year the
5 premiere international award for radio drama, I believe the
6 first American radio drama to win that award. And we do other
7 drama programs, as well. We distribute from Boston a
8 children's program called, "The Spider's Web", substantial
9 drama and music program.

10 Q Thank you. NPR, in its statement of March 24th, made
11 the point that NPR was akin to a syndicator in the way that
12 we distribute and license programs. Do you have any comments
13 on that?

14 A Well, in the sense that we create some programs and
15 we acquire others, and then we distribute them. We make them
16 available in 1978 through a telephone line interconnection,
17 and now by satellite. To our member stations, we distributed
18 music programs in 1978 because of the low quality of the
19 telephone line by tapes. But in that sense, I think we are,
20 as the statement said, like a syndicator in the sense that we
21 make these programs available. Stations are, of course, under
22 no constraints with respect to the program.

23 Q NPR then retained the rights and ownership in the
24 programming that it distributed?

25 A We do, and we give our stand, and we pass along to the

1 stations the rights that we acquired.

2 Q Does NPR tell its stations when to schedule the
3 programs that we produce or distribute?

4 A We don't. I was going to say I suppose we could, and
5 the response, I think, would be interesting. No, we don't. We
6 don't have that relationship with our stations. The stations
7 are members. They understand and we understand that they are
8 members, and they pay their dues in return for which they
9 receive these programs. They have a large say in what these
10 programs are going to be. We frequently consult with the
11 stations as to what kinds of programs they might want, what
12 sort of programming they like, what they don't like. But they
13 then take the programs and play them or not at times of their
14 own choosing. Now, the live programming, the news programs
15 are generally carried at the same time, because those are live.
16 And stations for the most part carry, for example, "All Things
17 Considered" at the same time. The rest of the programming
18 is as varied as the stations themselves, and the important
19 thing, I think, to stress is that radio is essentially a local
20 medium, and that we had discussion here for example about how
21 much of a local public television station's schedule came from
22 PBS, whether it was 60 or 62 percent or 70 or 71 percent. There
23 is no suggestion that that figure in public radio is any higher
24 than 21 or 22 percent. Radio stations generate their own
25 programs, and members of National Public Radio fill about 21

1 percent of their schedule, of their daily schedule, with NPR
2 programs. In fact, we impose for membership requirement that
3 a station be on the air 18 hours a day, a minimum of 18 hours
4 a day, seven days a week. That's 126 hours of programming
5 a week, and even in the maximum weeks when there are major
6 public affairs events, we don't out more than 50 hours.
7 So that even if a station took all the NPR programming there
8 was, that would still amount to substantially less than 50
9 percent, and none of them come close to that. And the reason
10 is because they are format stations, essentially; that is, a
11 station may stress jazz programming in which case it may take
12 all the jazz programming that we send out, but very little of
13 the classical music, or vice-versa. Or it may stress news
14 and public affairs more than music.

15 Q Getting on to a different topic, NPR -- are you famil-
16 iar with the Telecommunications Financing Act, and what that
17 mandate states for radio. Would you enlighten the Tribunal --

18 A Well, among other things, the Public Broadcasting
19 Financing Act of 1978 looks to the spread of public radio to
20 cover, I believe it says, the entire population, that far more
21 stations be established to provide the increased -- the local
22 service that the Act stresses. It places a limitation on
23 actions used for administration. It places a mandate upon nat-
24 ional broadcast -- national organizations of broadcast stations
25 to use the programs of independent producers, spend a minimum

1 amount of money for programming to involve advisory boards
2 in the conduct of the local stations and, in general, I think
3 speaks of the necessity to expand public broadcasting,
4 specifically public radio, precisely because of the local
5 character of its programming.

6 Q Couldn't it then be argued that cable is providing a
7 public service by extending the coverage area of public radio
8 stations in reaching more of the people?

9 A Well, in a narrow sense, I suppose that's right, that
10 there are people who are now served by public radio programs
11 who didn't used to receive it at all, and still don't except
12 for the cable series that might be available. But it's
13 available only at a price. In addition, as was discussed with
14 respect to public television, while a distant signal may be
15 better than no public signal at all in radio, it not only is
16 not a substitute for the Congressionally-mandated local public
17 radio service, but it may frustrate its development.

18 Q There may be harm, then, to the copyright owners?

19 A I think there would be not only harm in that sense,
20 but also to the intent of Congress.

21 Q Turning now to local stations, could you describe
22 briefly local public radio as a distinction from corporate
23 NPR? What are the goals of local public radio?

24 A Well, local public radio has the mandate and has
25 set itself the goal of providing an alternative radio service

1 in almost every community in which a public radio station
2 exists, it provides a service that is not otherwise available,
3 whether it's broadcasting in a local language as, for example,
4 we have in some of our stations in Alaska, in at least one
5 station the Navajo reservation in New Mexico. We have,
6 incidentally, the -- I believe, the only national news program
7 in Spanish on radio, which we send out every week. And the
8 stations that have a predominantly Spanish-speaking community
9 use that program and other Spanish language programming.

10 We provide a variety of local services at our local
11 stations. It might be a certain kind of music that isn't
12 otherwise provided. It might be a stress of certain kinds of
13 local news and public affairs programming that isn't otherwise
14 provided. We have some stations that do a good job of
15 providing, for example, local live jazz coverage, and in some
16 cases, local live classical music coverage. I think it depends
17 upon the community, but the local coverage is important. The
18 radio is essentially a local medium and our stations, I think,
19 provide, as I say in almost every case an alternative kind of
20 programming.

21 Q So, the programming you have described even the local
22 programming could have value or special appeal in distant
23 markets. For example, local jazz?

24 A I don't think there is any question of it. Boston
25 Globe Jazz Festival, for example, carried on WGBH in Boston,

1 is certainly a program that would be of considerable value
2 if broadcast elsewhere.

3 Q Okay.

4 MS. HILL: I have no further questions. Thank you.
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1 THE WITNESS: I would also refer, Madam Chair-
2 man, to the earlier statement submitted by National Public
3 Radio by Carol Moody, our Coordinator for Copyright and
4 Program Rights, submitted, I believe, on March 24.

5 CHAIRMAN BURG: In that statement of March 24,
6 on at least two occasions, you said that you hoped the
7 Tribunal would allocate substantial -- was the word you used
8 in at least one instance, substantial royalties to NPR.
9 Could you just briefly tell us what percentage, or what
10 dollar figure, you had in mind, Mr. Mankiewicz?

11 THE WITNESS: Well, we were reluctant to do so
12 then, Madam Chairman, and we are reluctant to do so now,
13 because of the paucity of the data. Without the expenditure
14 of substantial amounts of time and, I think, money -- there
15 is very little data available as to the amount of radio
16 retransmission by cable.

17 There seems to be a 1976 study by the NAB Cable
18 Radio Committee, which indicated a substantial amount.
19 Only 10 percent of the systems carried no radio signals,
20 and that was merely five years ago. 51 percent of all
21 cable television systems carry all band FM signals. In
22 the larger communities, 56 percent of the cable systems
23 carry all band FM signals; 27 percent carried selected
24 signals.

25 We think many of those signals -- we know many of

1 those signals are signals of our member stations, and we
2 believe that much of that programming is NPR programming,
3 but the effort required is substantial, and what we had
4 hoped to do was to establish our right to participate,
5 and then in phase two, to present it in a more detailed
6 way, we believe to be the appropriate amount that we would
7 claim.

8 CHAIRMAN BURG: I certainly sympathize with your
9 reluctance, but at least with respect to phase one, we
10 are trying to get an overall view of percentages from
11 the different claimants. Do you want us to just arbitrarily
12 pick a figure out of the air?

13 THE WITNESS: Well, our estimates are not just
14 picking figures out of the air, but they're not -- we don't
15 want the Tribunal to feel that this is based upon a detailed
16 and comprehensive examination of data that is very diffi-
17 cult to find, and indeed may turn out, in our ultimate
18 examination, hardly to exist at all, but I think we're
19 talking -- I'm sorry?

20 MS. HILL: I was going to say, Madam Chairman,
21 that NPR will participate in providing the Tribunal a
22 pie allocation by claimants as you have requested, and we
23 will attempt to substantiate that with data as best we can,
24 but at this time we have not.

25 THE WITNESS: I would be surprised if we had claimed

1 more than 5 percent.

2 CHAIRMAN BURG: I have never seen 100 percent
3 so stretchable and elastic as this 100 percent is, so be
4 our guest, and please do submit those figures at some point.
5 It would be helpful.

6 Who has questions for Mr. Mankiewicz? Ms. Divoll?

7 CROSS EXAMINATION

8 BY MS. DIVOLL:

9 Q. I'm Vicki Divoll representing the joint sports
10 claimants in this proceeding. Mr. Mankiewicz, your state-
11 ment on page 1 states that there were 900 non-commercial
12 FM stations in 1978. Do you know how many commercial
13 FM stations there were at that time?

14 A. FM stations?

15 Q. Yes.

16 A. I don't, really. I'm sure I've heard the figure.
17 There are about 8,000 or 9,000 radio stations. I don't
18 know how many of those are FM.

19 Q. Our understanding is that approximately 4,000
20 of those are FM.

21 A. I wouldn't be surprised.

22 Q. And 900 of those are non-commercial stations.

23 A. Non-commercial stations.

24 Q. And it was stated this morning that 213 of those
25 in 1978 were NPR stations, is that correct?

bd 4

1 A. That's correct. That number is now, I think, either
2 229 or 230.

3 Q. Do you know how many of that 213 were FM stations?

4 A. I think all but 20.

5 Q. In this proceeding, you're claiming on behalf
6 of 61 of the NPR stations, is that correct?

7 A. That is correct, and of NPR itself.

8 Q. So you're claiming for all of the programming
9 of those 61 stations?

10 A. Yes.

11 Q. And the NPR-produced programming that was distri-
12 buted to additional stations?

13 A. That's correct.

14 Q. Now, was that distributed to additional NPR
15 stations, or was it also distributed to other --

16 A. Well, the NPR programs were distributed only to
17 NPR stations, with some slight exceptions in our tape
18 distribution.

19 Q. Okay.

20 A. Non-NPR stations can obtain NPR programs through
21 our tape service, but not direct -- not over the line.

22 Q. Do you know the total number of radio stations
23 that carried this NPR distributed programming in '78,
24 beyond the 61 that you're claiming?

25 A. Well, all 213 stations certainly carried some

1 portion of NPR's programming, I'm sure.

2 Q. But in varying amounts?

3 A. That's correct.

4 Q. Do you know how many of the non-NPR stations
5 carried the programming in '78?

6 A. How many non-NPR stations carried NPR programming?
7 I would say very few.

8 Q. Do the stations pay for the programming received
9 from NPR?

10 A. No, they pay dues. They pay annual dues, and
11 for that, they are entitled to receive all the programming.
12 The annual dues are based on a sliding formula that includes
13 a base fee, and then a sliding fee, which roughly defines
14 the size of the station, in terms of the budget, and it's
15 based on -- almost exclusively on the non-Federal financial
16 support that the station attracts.

17 But the larger the budget, the higher the dues.

18 Q. Do you know whether all of the cable subscri-
19 bers of a typical system, in addition to television pro-
20 gramming that they receive, do they also receive the
21 radio signals carried by that cable system?

22 A. Well, the study to which I referred says that 10
23 percent of the systems did not provide a radio signal.

24 Q. But I'm talking about those that do provide a
25 radio signal. Do all the subscribers --

1 A. Do all the subscribers use a radio signal?

2 Q. Do all the subscribers automatically receive --

3 A. My understanding is that some of those systems
4 require a slight additional fee for the radio signal, a
5 very few of them. The rest of them provide it along with the
6 television signals, and I have no idea how many of these
7 subscribers use it. I would be surprised if some of the
8 cable systems knew how many of their subscribers used a
9 particular station, television station, or a particular
10 radio station.

11 Q. So in some systems, you believe that they auto-
12 matically receive the additional radio signals?

13 A. Most of them.

14 Q. And in others, they pay the additional fee?

15 A. I think there are some where you pay an addi-
16 tional dollar or two a month for radio. At least, I have
17 heard of one or two.

18 Q. Are you familiar with Mr. Wagner's testimony
19 on behalf of the NAB in this proceeding?

20 A. I don't think so.

21 Q. Mr. Wagner had some addenda to his written state-
22 ment that includes some information about radio carriage,
23 radio signal carriage by cable systems. I was wondering
24 -- I could show you the data that I'm referring to.

25 A. Would you?

bd 7

1 Q. There is some confusion whether I'm referring to
2 Addendum A or Addendum B. I have it marked as Addendum B
3 here. It's my understanding that this figure here, for
4 people in the room who have a copy of this, it's the
5 lines marked 37, over on the right-hand side -- this
6 number here represents the total number of subscribers for
7 this particular cable system, and that this number repre-
8 sents those that are subscribing further.

9 The total number here is 9,692, and the number
10 subscribing to the FM service is 27 of that number. Does
11 this -- is this consistent with your understanding of
12 how some of the cable systems operate?

13 MS. HILL: Do you know if this is a cable system
14 that paid additional --

15 BY MS. DIVOLL:

16 Q. Well, right here is the rate that --

17 A. Yes, there was an additional payment required.

18 Q. As I understand it, from this data, yes.

19 A. Yes.

20 Q. Down here there's another exaple, also, lines
21 marked 37 -- 11,606 total subscribers; 200 of them sub-
22 scribe to the FM service, and paid an additional rate of
23 \$1.80.

24 A. Well, I have no idea how many of those there are.
25 I assume those figures speak for themselves, and I have no --

1 I don't argue with the facts. But I would question how
2 many cable systems require extra payments for FM radio.
3 My understanding is that it is not very many.

4 Q. Thank you.

5 Could you turn to page 2 of NPR's statement? Do
6 you have that?

7 A. Uh-huh.

8 Q. In footnote 1 at the bottom of page 2, you have
9 cited to FCC Docket 19418, the proceeding on the regula-
10 tion of cable carriage of radio signals.

11 MS. HILL: Madam Chairman, might I point out that
12 we will have Carol Moody, who was the author of the state-
13 ment, and will be available to answer specific questions
14 about that document.

15 MS. DIVOLL: That's fine. We'll defer those
16 questions until that time.

17 BY MS. DIVOLL:

18 Q. On page 3 of the NPR statement, you also have
19 referred to some FCC data in that proceeding. Does the
20 same hold true, that I should defer those questions?

21 MS. HILL: Yes, she'll be speaking to those, too.

22 THE WITNESS: It's that proceeding.

23 BY MS. DIVOLL:

24 Q. Well, there was some data generated by the NAB,
25 and there was also some data that the FCC pulled together

1 in that proceeding, and both were relied upon in that
2 proceeding, and I understand that both are being relied upon
3 here.

4 MS. HILL: Yes.

5 BY MS. DIVOLL:

6 Q. How do you define distant radio signals, Mr.
7 Mankiewicz?

8 A. Well, I would define it, I guess, in the same
9 way as the Act defines it, and it's been defined here, which
10 is a signal that goes beyond the community of origination.

11 Q. Do you have any more specific information beyond
12 that, as to how you would define it?

13 A. Well, I'm not sure I understand the question.

14 Q. That's fine.

15 A. A distant, by my understanding, a distant signal
16 is one that is carried by reason of a cable system in a
17 community that would not otherwise be able to receive it.

18 Q. You have testified that NPR is claiming here for
19 all the programming on 61 NPR stations, plus the program-
20 ming on other stations that was produced by NPR. Do you
21 know how many of those were carried on a distant signal
22 basis by cable systems?

23 A. No, I don't think I know that now. Is the ques-
24 tion, which of the programs -- of the signals that were
25 carried, of the 61 stations whose signals were carried to

1 distant points, how much of that programming was provided
2 by National Public Radio?

3 Q. No, the question is, of the 61 stations that
4 you're representing here in this proceeding, combining that
5 with the other stations that carried NPR-produced programs,
6 so you have a larger number of stations, how many of
7 those stations were carried on a distant signal basis byu
8 cable in 1978?

9 A. I don't know the answer to that question. I
10 don't know -- maybe Ms. Moody may have that answer.

11 Q. I have a couple of questions on your Exhibit B.
12 I would also be willing to defer those questions.

13 A. What is Exhibit B?

14 Q. Exhibit B is your listing of stations, programming,
15 and cable systems.

16 MS. HILL: You would defer those questions?

17 MS. DIVOLL: I will also defer those, Madam
18 Chairman.

19 THE WITNESS: The sample retransmission list?

20 BY MS. DIVOLL:

21 Q. Yes. Mr. Mankiewicz, I'm deferring those ques-
22 tions to Ms. Moody, as requested by counsel.

23 A. Oh, all right.

24 Q. You have testified today as to the wide variety
25 and high quality of NPR programming generally. Do you have

1 any information that NPR programming has economic value
2 to cable operators?

3 A. Well, I assume that it does, because they use it.
4 I assume that if there is any value to a radio signal,
5 the NPR stations, the public radio stations, would be among
6 those with the highest value, because it seems to me that
7 there is very little value in transmitting most commer-
8 cial radio signals from one market to another, because they
9 are almost identical.

10 Almost all commercial radio systems, or radio
11 stations, have the same sound. I mean -- what I'm saying
12 is, I don't see the value to a cable system, a cable
13 operator, taking the signal of a rock and roll radio station
14 from Cincinnati, and sending it to, let's say, Detroit,
15 because there are other rock stations in Detroit, which
16 provide exactly the same sound.

17 But I just would venture to guess that in neither
18 community are there the sounds that can be heard on NPR
19 member stations.

20 Q. So you're assuming, then, that whatever amount
21 of distant signal retransmission there is, that the
22 largest portion of it would be NPR programming?

23 A. My -- your question was whether I thought it had
24 value to the commercial operator.

25 Q. Right, I'm just following up on what you said.

bd 12

1 A. I would say yes to both questions.

2 Q. Do you know that for a fact?

3 A. The question -- no, I don't, but I -- it seems to
4 me that there would be very little point, and these are
5 after all -- there are intelligent businessmen, and it would
6 seem that there would be very little point in transmitting
7 a signal from one market to another that's available in
8 the other market, in precisely the same way, whereas, as
9 I've said in my direct testimony, the NPR stations that
10 we're talking about here, and indeed all of them, provide
11 an alternative radio service in the communities in which they
12 exist, and would provide that service in almost every
13 community.

14 Q. But you don't have any studies or surveys that
15 show that this programming has value to cable operators,
16 and that it's carried more extensively than commercial
17 radio stations or other non-commercial radio stations,
18 other than NPR stations?

19 A. Well, the data we have looked at, where we have
20 been able to find the stations -- the radio stations that
21 are being retransmitted, there is a very high percentage
22 of public radio stations.

23 Q. What data is that?

24 A. Well, a lot of material in Exhibit B, for example,
25 refers to it.

1 Q Well, I'm not clear as to how Exhibit B was
2 prepared.

3 A Well, I think you'd be better off deferring your
4 questioning to Ms. Moody on it, but I'm saying that the --
5 just that the sheet you showed me, for example, which
6 admittedly you were using for another purpose, which was to
7 show that more people pay for television than will pay
8 for radio -- my eye caught any number of call letters for
9 public radio stations.

10 Q Well, but let me point out that that particular
11 exhibit does not distinguish between local and distant signal
12 retransmission.

13 A I concede that. If you want to let me look at it,
14 I will find a lot of distant transmission on it.

15 MS. HILL: For the information of the Tribunal
16 and participants, we do have a copy of a letter from the
17 Sylvan Valley CATV Company, the Pickelsimer letter, which
18 indicates, although we have -- we do receive inquiries
19 from cable systems requesting public -- even though they
20 don't have to request, they don't understand that they
21 don't have to request the use of public radio of their
22 signals, and so this is an example, although -- and we think
23 that this example is significant, because there really is
24 no reason for this to have come to our -- should have come
25 to our attention. This cable system should have been able to

1 go out and pick up a public radio station without having
2 contacted NPR.

3 We feel that it's inadvertence that this came
4 to our attention, and do submit it as evidence that cable
5 systems find it valuable.

6 CHAIRMAN BURG: This will be submitted as an
7 exhibit?

8 MS. HILL: An an exhibit, yes, please.

9 CHAIRMAN BURG: How are you going to identify that
10 exhibit?

11 MS. HILL: We could make it NPR Exhibit D, making
12 it consistent with our letter.

13 (NPR Exhibit D was marked for identification.)

14 MS. DIVOLL: Is this the only evidence you are
15 submitting as to the value of the cable?

16 MS. HILL: No, Ms. Moody will speak to that. But
17 it is an example.

18 MS. DIVOLL: Could I have one moment, Madam Chair-
19 man?

20 CHAIRMAN BURG: Yes.

21 (Pause.)

22 MS. DIVOLL: I have no further questions of Mr.
23 Mankiewicz. Thank you.

24 CHAIRMAN BURG: Mr. Koenigsberg?

25 MR. KOENIGSBERG: Thank you, Madam Chairman.

CROSS EXAMINATION

1
2 BY MR. KOENIGSBERG:

3 Q. Mr. Mankiewicz, I'm Fred Koenigsberg, counsel
4 for ASCAP.

5 Were you here yesterday, sir, when Commissioner
6 Brennan made that comment to the PBS witness about finding a
7 combination of factors for the Tribunal to consider?

8 A. I was not, but I have had it described to me.

9 Q. Let me ask you some questions about some of the
10 factors that Commissioner Brennan mentioned. First, benefit
11 to cable operators -- public television witnesses, as I
12 recall, said that 85 percent of the television audience had
13 access to off-the-air broadcasts of public television
14 stations. Is there a comparable figure for NPR?

15 A. I think it runs around 60 to 65 percent.

16 MS. HILL: Excuse me. In 1978, it was 50 percent.

17 THE WITNESS: I'm sorry. If we're talking only
18 about 1978, it was slightly over 50 percent, that's correct.

19 BY MR. KOENIGSBERG:

20 Q. And that, I suppose, is one of the reasons why
21 you say there would be a benefit to cable operators in
22 bringing in distant NPR stations, because half the radio
23 households in the country don't have access to those signals,
24 is that right?

25 A. That is certainly one benefit, yes.

1 Q You mentioned some of the appealing programming
2 that would benefit cable operators, and the example you
3 gave was local jazz. Do you include other types of NPR
4 programming having to do with music, as well?

5 A Well, we -- as I said, we provide our members
6 with a number of classical music programs, and a number of
7 jazz programs, and folk music programs -- a substantial
8 number.

9 Q When you speak of classical music, sir, just
10 so we're clear what you're talking about, are you referring
11 to works of composers of serious music, such as Copland,
12 Stravinsky, Bartok?

13 A More Cherubini, Vivaldi, and Buxtehude, I would
14 think.

15 (Laughter.)

16 CHAIRMAN BURG: Are you going to pursue that line
17 of questioning?

18 (Laughter.)

19 MR. KOENIGSBERG: Not at all. I know when I'm
20 licked.

21 BY MR. KOENIGSBERG:

22 Q Sir, let's turn to another of Commissioner Brennan's
23 factors, time. You discussed -- you also gave serious clas-
24 sical music and jazz programming as an example of the non-
25 NPR programming that public radio stations carried. Do you

1 have any idea, sir, what proportion of the time of non-
2 NPR programming is devoted to music?

3 A. The time of non-NPR programming by NPR member
4 stations that is devoted to music?

5 Q. Mm-hmm.

6 A. I don't have a precise figure of that. I'm not
7 sure if there is such a figure, for one thing, because our
8 membership changes fairly rapidly, but I would say confi-
9 dently that it is substantial.

10 Q. Sir, another of the factors Commissioner Brennan
11 mentioned was the quality of content, and you have put
12 in a document that awards one by NPR programming in 1978,
13 that lists, among others, the American popular song and
14 Peabody Award, Fascinating Rhythm, The Making of Lady Be
15 Good, Ohio State, 50 Years of Folk Festival Headliners --
16 sir, do you think that awards are a proper measure of value
17 for the Tribunal to take into consideration?

18 A. Well, I wouldn't want to presume on the Tribunal's
19 judgment of the appropriate elements that it will want to
20 consider, but I think awards are a fair indication of how
21 one's peers or one's colleagues, and particularly the
22 critics in radio and broadcasting, think about programming,
23 and the value that they place on it.

24 Q. Would that be --

25 A. We'd certainly rather win awards than lose them.

1 Q Would that be applicable to other claimants, as
2 well as radio?

3 A I think it's certainly a valid element, sure.

4 Q Would you weigh the awards given by industry
5 groups, such as Emmys for commercial broadcasters, equally
6 with awards given by people like the Peabody people for your
7 programming?

8 A Less so.

9 Q I suppose you would value something like Pulitzer
10 prizes for music highly in that case, wouldn't you?

11 A A Pulitzer prize for music?

12 Q Yes.

13 A I've always been suspicious, to tell you the
14 truth, of those off-Pulitzer awards, but I would give it
15 some value, yes. What is a Pulitzer award for music? There
16 is an award for a musical play, I think, isn't there?

17 Q Well, we can put in evidence on that. I think
18 there is an award for music, period, not for a musical
19 play, but let's move onto one other thing.

20 Sir, to your knowledge, when NPR or NPR member
21 stations broadcast music, and that music is picked up by
22 distant cable stations, do the NPR stations have a right to
23 claim the royalties the cable stations have paid for the
24 use of that music?

25 A I think they have a right under this Act to claim

bd 19

1 a portion of the money that has been paid for the retrans-
2 mission of those aural signals, yes.

3 Q. Do they own the copyrighted musical composition?

4 A. Probably not.

5 Q. Have they been given any right by the copyright
6 owners of the copyright musical compositions to claim the
7 royalties that those musical compositions accrue?

8 A. I would think probably in very few cases.

9 Q. Your answer, then, is for the most part, no?

10 A. I think that's correct.

11 Q. I have no further questions. Thank you.

12 CHAIRMAN BURG: Are there any other questions of
13 Mr. Mankiewicz? Mr. King?

14 CROSS EXAMINATION

15 BY MR. KING:

16 Q. Mr. Mankiewicz, my name is Gordon King, and I'm
17 with the firm of Coudert Brothers. We represent the NAB.

18 I believe you stated that, generally speaking,
19 21 percent of the programming of your member stations con-
20 sists of programming supplied by NPR, is that correct?

21 A. I want to be very precise about that. I believe
22 that is an average of all of our stations. I do not
23 think, for example, that if you took the aggregate amount
24 of programming, that it would come to 21 percent, but I --
25 so that I'm not sure that anybody is using 21 percent of its

1 time for an NPR program, but that's where the average comes
2 out, when you take all the stations.

3 Q. Again, on an average, that 21 percent would repre-
4 sent approximately what percent of the total programming
5 produced by NPR?

6 A. Well, let me see if I understand your question.
7 You're talking now about a station which is on the air,
8 between 18 and 24 hours a day, seven days a week, so that's
9 between 126 and 168 hours a week. That station, let's say,
10 devotes 21 percent of its program hours to the material
11 it gets from NPR, and you're saying to me, what percent of
12 all of the NPR material it receives, does that represent?

13 Q. Yes.

14 A. Well --

15 Q. Well, let me go back to --

16 A. On the low side, 21 percent of 168 hours is about --

17 Q. I think you misunderstood my --

18 A. Well, I can give it to you. Hang on. It's 30 --
19 about 36 hours. Is that right?

20 Q. I think perhaps I didn't make myself clear. I
21 understand that not every station takes all the programming
22 material that you produce.

23 A. I would say no station takes all the programming
24 material that we produce.

25 Q. But on the average, 21 percent of a local station's

1 time is devoted to NPR produced material.

2 A. Mm-hmm.

3 Q. And what I'm trying to determine --

4 A. All right, it's about 40 percent. Somewhere
5 between 40 and 50.

6 Q. What is the 40 and 50 --

7 CHAIRMAN BURG: Would you ask the question again
8 so the --

9 THE WITNESS: What portion of NPR material are
10 they using if they have 21 percent -- because if they used
11 all of our material, they would fill about 45 percent of
12 their schedule, so 21 percent is slightly less than half of
13 that. So I say it's about 40 to 45 percent.

14 MS. HILL: I'm sorry, but that isn't to indicate
15 that there's 45 percent of NPR material -- that's not being
16 used somewhere in the system.

17 THE WITNESS: No, no, but each individual sta-
18 tion looks at our programming as it comes down the line,
19 and selects slightly less than half of it for use on its
20 station in a given week.

21 BY MR. KING:

22 Q. That's what I was trying to get at. Would you speak
23 briefly as to how this programming is financed, how the
24 production is financed, the source of income?

25 A. For the production -- for the programs that are

1 produced --

2 Q. At NPR.

3 A. At NPR?

4 Q. Yes.

5 A. About 70 percent of it comes from the Corpora-
6 tion for Public Broadcasting. The rest comes from a variety
7 of sources, corporate underwriting, foundations, some indi-
8 viduals, member dues.

9 Q. Do all member dues go to -- is it allocated?

10 A. I withdraw that. Member dues do not go for
11 production.

12 Q. What do the member dues go for?

13 A. The member dues pay for all of the representation
14 functions that NPR performs.

15 Q. Could you just enlighten me a bit on that?

16 MS. HILL: Trade association.

17 THE WITNESS: The work that we do before the FCC
18 on behalf of member stations, work done with the Corpora-
19 tion for Public Broadcasting, Congressional legislative
20 representation, a lot of production workshops, various
21 activities that involve our member stations, conferences,
22 regional, national --

23 BY MR. KING:

24 Q. Is there any minimal amount of programming that a
25 member station must accept?

1 A. No.

2 Q. So the member station, if it wished, could
3 take as little as 1 percent of the programming?

4 A. That's correct.

5 Q. And although it's hard to think in theory that this
6 would happen, there could be a member station that takes no
7 programming at all?

8 A. Well, there could be, but I -- I'm not sure
9 they would remain a member for very long, because of --
10 usually, they're paying dues, and they're not getting very
11 much in return, at least in programming, but that is quite
12 possible, and certainly in a given week it's possible.

13 Q. You spoke, I believe, in your direct statement,
14 but programming -- NPR programming being fed to the member
15 stations by an interconnection.

16 A. Mm-hmm.

17 Q. Is there any other way of getting it to the member
18 stations?

19 A. Well, as I said, until very recently, we sent all
20 of our music programs by tape, by mail.

21 Q. But in 1978 --

22 A. 1978, all the music programming went by mail,
23 which struck me as odd, that a radio organization of this
24 kind would send out programs by mail, but we did.

25 Q. Of the programming fed on the interconnection,

1 approximately what percent is carried simultaneously
2 by your member stations?

3 A. I could give you that figure, but -- and I'll try
4 to get it for your later, but it is probably very close to
5 the total in a given week of our news program in the after-
6 noon, All Things Considered, which is carried live as it's
7 delivered by most stations, and the live events that we
8 might have carried in a given week, a Congressional hearing
9 or a Presidential press conference, or an event of some
10 kind like that.

11 Those are virtually the only programs that are
12 carried as they're distributed.

13 Q. As they're fed?

14 A. As they're fed, for one reason, because of time
15 differences. We do a second feed of our news program for
16 the West Coast at 8:00, so that that can be taken live.

17 Q. But within a given time zone, say, 60 or 70 percent
18 of the material being fed --

19 A. No, no, much less.

20 Q. Much less than 60 or 70 percent would be carried
21 simultaneously?

22 A. Mm-hmm. It would be in a given week, an hour and
23 a half a day only, plus whatever live events were carried.

24 Q. So, you're saying that essentially the only pro-
25 gramming carried simultaneously is live programming?

1 A. That was true in 1978. That's correct.

2 Q. And how about today?

3 A. Well, we have so little experience with satellite
4 distribution today that I can't answer that question. Many
5 of our stations are coming on line as we expect. The
6 system will be fully operative within another few weeks. We
7 now send all of our programs by satellite, or will within
8 a few weeks, including music programs, and it may be that
9 some of our stations, some of our member stations, have
10 changed their scheduling to make it easier for them to
11 carry some of that programming live. I don't know.

12 Q. I have one final question as to how your program-
13 ming is used in a distant market. Does it appear, if you
14 know, on the monitor, together with visual material? Do
15 you follow what I'm getting at? What I'm trying to do is
16 determine precisely how it's being used by the system opera-
17 tor in the distant market, and I'm trying to determine
18 whether it's being used --

19 A. I believe that it is separately connected to a
20 receiver, to an audio receiver.

21 Q. In the subscriber's home?

22 A. In the subscriber's home.

23 Q. Do you know that to be the case?

24 A. I know it to be the case in some systems.

25 Q. Well, perhaps in some systems.

1 A. I mean, the way it's connected to a television
2 receiver.

3 Q. So, in that particular --

4 A. It does not play through the television set.

5 Q. In those cases, does it play through the television
6 set?

7 A. No, sir.

8 Q. So that under no circumstances --

9 A. Well, there may be one somewhere, where it does,
10 but I would find it hard to believe that anybody would
11 want to play a high-class radio program through a television
12 receiver.

13 Q. Well, it could be background material, couldn't
14 it?

15 A. It's the opposite of the reason that there are
16 simulcasts.

17 Q. What I'm getting at, Mr. Mankiewicz, is that it
18 could well be that this music, whether it's opera, jazz,
19 whatever, is background material for news that appears in
20 visual print on the television monitor. That could be the
21 case, could it not?

22 A. It could be, but I would be surprised.

23 Q. Do you have any documentation or written evidence,
24 in whatever form, that suggests how these signals are being
25 used by subscribers in distant markets?

1 A. You mean that kind of technical question that
2 we just went through? No.

3 Q. Whether it appears on the television monitor or
4 whether it comes in on a separate connection.

5 A. I don't have that data. I'm not sure that data
6 is readily available, but we'll sure try to obtain it,
7 because I find it inconceivable that it's coming through a
8 television receiver.

9 Q. I have no further questions.

10 CHAIRMAN BURG: Ms. Semo?

tape 6

11 CROSS EXAMINATION

12 BY MS. SEMO:

13 Q. My name is Judith Semo, and I'm representing the
14 NCAA.

15 You mentioned that NPR provides the NPR-produced
16 programming for the radio stations as part of the dues
17 that the stations pay. Now, does NPR try to sell its pro-
18 gramming in other markets, or to other stations?

19 A. You mean to commercial stations?

20 Q. To anyone, actually.

21 A. No. No, the way it works is that we have a --
22 the stations apply to join NPR. We then look to see if they
23 meet the membership criteria.

24 Q. Right. My question is -- you mentioned that the
25 NPR provides the programming to its members, and I'm wondering

1 whether or not NPR tries to sell this programming to
2 other than these member stations?

3 A. No, we're a non-profit organization. We make
4 our programming available at cost to non-member stations
5 who want to buy the tapes, but that's not a very brisk
6 traffic.

7 Q. You mentioned some damage caused by the cable
8 carriage of NPR programming in stations where there --
9 excuse me, areas where there are no NPR stations. Now, in
10 areas where there are NPR stations, can you tell me whether
11 or not NPR is harmed by the cable carriage of NPR material?

12 A. I think harm is a very difficult thing to assess
13 when you're dealing with a non-profit organization. I think
14 it is possible that programs -- that NPR programs delivered
15 in a different environment, a different sound environment,
16 might possibly make people think less of a program --
17 that's possible.

18 And I think -- I suppose it's possible that a
19 station might not want to carry a particular program
20 because it's being carried by a cable system from another
21 city, brought into that community by a cable system.

22 Q. How would that --

23 A. Well, a station -- NPR station, for example, might
24 feel constrained to change its format, which might be a
25 jazz format, because a couple of jazz programs were coming in

1 on a cable system, which I suppose would disrupt its pro-
2 gramming.

3 I can see ways in which the Congressional mandate
4 and the tasks that we have set ourselves, as a public
5 radio system, might very well be frustrated or inhibited by
6 that. But I would hesitate to talk about harm, in the
7 sense that a commercial station might suffer harm.

8 Q. So you're not talking about economic damage?

9 A. In that situation, probably, only very slight.

10 Q. To what extent is there economic harm?

11 A. Well, I don't -- the question of economic harm
12 is related, I suppose, to the question of expansion of
13 the public radio system. If the system does not expand,
14 if the resources that would go with expansion are not forth-
15 coming, then there are a lot of things we're not going to
16 be able to do. We're not going to be able to fulfil the
17 charge that has been laid upon us.

18 Q. What specific Congressional mandates did you say
19 -- are you thinking of when you say --

20 A. If you look in the Public Telecommunications
21 Financing Act of 1978, you will see that it falls upon --
22 it talks about the policy of Congress, it talks about the
23 policy of the United States to expand public broadcasting,
24 radio and television, to cover the entire population, to
25 make available to the entire country, programs of excellence,

1 quality, and the various other ways which it describes the
2 programming of public broadcasting for television and radio.
3 And we take that very seriously.

4 Q So wouldn't cable importation of distant NPR
5 signals actually further that Congressional mandate?

6 A No, I don't think so. I don't think so, because
7 they're not talking about programs of a national type.
8 They're talking about local stations that have the same
9 relationship to NPR that, say, other local stations do.
10 That is to say they do most of their programming locally,
11 and provide most of their programming in other ways than by
12 getting it from NPR, but which nevertheless have those
13 national assets that NPR provides -- to give them, for
14 example, a good news and public affairs program.

15 Q But to the extent you testified that NPR provides
16 programming which is not just local, and which does have
17 appeal in other, distant markets, then cable importation
18 of those NPR signals would further the Congressional goal?

19 A Well, as I said, it is better, I think, on
20 balance, for people in the community to be able to obtain
21 from a cable system, certain kinds of programming that is
22 not otherwise available. It is better to have that than to
23 have nothing at all. I think that's right.

24 But the downside of that is that that, then,
25 is a handicap, I think, to the formation in that community

1 of a full-service public radio station.

2 Q. Going back to the community where there is a
3 full service public radio station, and there is also a
4 cable system which imports a distant public radio station --

5 A. Well, in many communities there are more than
6 one public radio station. Los Angeles, for example, has
7 five.

8 Q. But going back to that kind of area where there is
9 a public radio station, there is a cable system importing a
10 distant one, the kinds of harm that you say might result
11 from that importation of the distant public signal, would
12 be the disruption of the --

13 A. Well, no, it's the same, only slightly less, as
14 though there were no station at all. I mean, the fact
15 that there is a public radio station doesn't mean that
16 all kinds of programming are provided -- is provided. There
17 may be a public radio station in a community that is a
18 classical music station, and provides that service that
19 nobody else provides.

20 But that community remains unserved, let us
21 assume, as to jazz, as to quality, in-depth news and public
22 affairs, as to a variety of other things that public radio
23 stations provide, so that in a sense it is an unserved
24 station -- it is an unserved area, just as an area where
25 there was no public station would be, except that there is

1 one slice of programming available that is not available
2 elsewhere. But the damage is still as great in terms of the
3 other kinds of programming. There might be, very well,
4 the possibility of putting on the air, in that community,
5 a public radio station that would be devoted, let's say, to
6 jazz, to drama, when those signals come in in some degree
7 from other stations, because of a cable system, that inhibits
8 the growth of another public radio station in that community.

9 Q. So impeding the growth is the main harm, or
10 damage, that you see, and again I'm trying to clarify --

11 A. It is certainly a leading element of --

12 Q. Of economic damage.

13 A. That's right.

14 Q. Do you think the fact that NPR is a non-profit
15 organization should be taken into account by the Tribunal
16 in making the allocation?

17 A. Not if the implication is, therefore, they need
18 less money, no, I don't, because I think the -- whether an
19 organization is profit or non-profit, it presumably pro-
20 vides a service, and that service has a value. If the
21 service didn't have a value, the cable operators would not
22 be using it. They would not be charging for it.

23 There is a certain damage that exists -- but, in
24 addition, the Congress has made it very clear that the
25 transmission of those signals should be provided for from this

1 fund, and I don't think it matters very much whether those
2 aural signals are provided by a profit or non-profit organi-
3 zation.

4 I would think the value to the cable system opera-
5 tors is the same. And I really don't think it should be
6 taken into account, if what we're talking about is the
7 amounts of money that are ultimately going to be distributed
8 here, because the money that will come to NPR, if any does,
9 will be used for valuable purposes.

10 It will be used to fulfill our continuing mandate
11 to provide quality programming, particularly in areas where
12 it is now not available. And I think we have a strong
13 obligation, perhaps even stronger because we are a non-
14 profit organization, to pursue that award.

15 Q. Well, do you think that the fact that you are a
16 non-profit organization, the fact that you could use the
17 money to develop your programming, is a factor that should
18 be taken into account by the Tribunal?

19 A. Well, I assume that's a factor that's going to
20 be taken into account with respect to all the claimants.

21 Q. And one thing that you mentioned in response to
22 one of my questions was the fact that there is a charge
23 for the service indicates that public radio is of value to the
24 cable systems, so I take it you are saying that the fact the
25 cable operators charge for a particular service, is one

1 indicator of the value of the service to the cable opera-
2 tors, is that correct?

3 A. Well, it is at least an indication that they
4 place a value on it, yes. I don't think there are necessary
5 connections between price and value, but I think that the
6 fact that someone charges money for something indicates that
7 he or she at least believes that it has a value.

8 MS. SEMO: I have no further questions.

9 CHAIRMAN BURG: Any other questions of Mr. Mankie-
10 wicz?

11 COMMISSIONER COULTER: Mr. Mankiewicz, just a
12 brief one. I'm not sure how familiar you are with the NAB
13 brief, but because of the lack of information about radio
14 transmission, they suggested a cost comparison way of arriving
15 at radio's share, and the figures I believe they used
16 were a cost of running a television station of 100, and
17 a radio station of 7.9 percent of that.

18 Would you endorse the use of some kind of cost
19 comparisons, in some form or another, as a means of arriving
20 at NPR's share?

21 THE WITNESS: I wouldn't rule it out, Mr. Coulter.
22 But it's -- it has to be very, very carefully developed.
23 The budgets, I think, are not a very adequate -- are not
24 a very adequate guide. I think, because I think a lot of the
25 elements that require -- that make television cost so much

1 more than radio, are not necessarily the elements that ought
2 to be stressed in making these comparisons. There are many
3 things that cost the same in television and radio -- adver-
4 tising, travel, construction, all kinds of things, where
5 the costs are the same. Production costs often, of course,
6 run far higher in television, but the fact that there are
7 a lot of one-lung radio stations around, and that it is
8 impossible to run the equivalent on the television side,
9 ought not to be the governing comparison. That's what
10 troubles me, is people say, well, television costs more than
11 ten times as much as radio, so therefore that ought to be
12 the appropriate ratio.

13 I think not, because you have to look at the eco-
14 nomics. You have to look at the economics of what are
15 essentially two disparate industries. After all, you're
16 talking in radio about a medium in which a station, for
17 example, if it can pick up 3 to 4 percent of the market in
18 its community, can be quite profitable, whereas a tele-
19 vision station that gets anything less than 20 or 25
20 percent is heading for bankruptcy.

21 You're talking about a wholly different way in
22 which people use these two media, so I would think those
23 raw cost differentiation -- I have not seen them, but my
24 guess is that they're talking about what it costs to run a
25 station, that that is not a very -- that's not a valid basis

1 of comparison, but having said that, I am not prepared to
2 say there is no valid basis of comparison, or ratio, that
3 could be developed. And we would be happy to try to
4 cooperate in an attempt of that kind, but I think you have
5 to keep in mind, also, that these are two different indus-
6 tries, and that people use them in two totally different
7 ways, and just because they fall under the same general
8 rubric of broadcasting, doesn't mean there are not serious
9 difficulties when you start comparing them.

10 COMMISSIONER COULTER: Thank you.

11 CHAIRMAN BURG: Ms. Hill?

12 REDIRECT EXAMINATION

13 BY MS. HILL:

14 Q Frank, let's refer back to an example that Ms.
15 Semo posed to you on economic harm. I think the situation
16 was there is a locale that has a local public radio station,
17 and then a cable system imports a distant public radio
18 station, and you were speaking very well of the difference --
19 the fact that in some markets we do have differing public
20 radio stations with different formats.

21 What if the local station is a classical music
22 station, and the imported station is also a classical
23 music station. Would there not be some economic harm,
24 fractionalization of the market?

25 A Well, the economic harm, I suppose, in the sense

1 that its local fund-raising would probably be affected.

2 Q. And how would that translate --

3 A. That's not, I think, sort of the standard kind of
4 economic harm that commercial stations think about, but it
5 is unquestionably dollar harm.

6 Q. And that dollar harm is further translated into
7 the amount that that station is eligible in Federal funds --

8 A. That's correct. As we said earlier, the amount
9 of non-Federal funds that a station is able to raise, is an
10 important factor in determining the community service
11 grant that that station gets from the Corporation for Public
12 Broadcasting, under the terms of the Public Broadcasting
13 Financing Act.

14 .So I suppose that's certainly true, that if a
15 public radio station is, for example, the only classical
16 music station in its community, as many, many, many public
17 radio stations are, and similar signals, similar format, is
18 then brought by a cable system, it would then be much
19 more difficult for that station, at the time of its annual
20 fund-raising drive, to be as successful as it had been,
21 which would not only inhibit its programming capability,
22 but also its budget for the following year, that's correct.

23 Q. Now, if we could -- moving backwards into your
24 cross-examination, ASCAP -- Mr. Koenigsberg of ASCAP brought
25 up several of NPR's award-winning programming -- he mentioned

1 the American Popular Song, and Fascinating Rhythm. Are
2 you familiar with those programs?

3 A. Yes, I am.

4 Q. Are they principally music programs, or are they
5 critical -- is there talk? Are there portions --

6 A. American Popular Song has a lot of talk. It is a
7 discussion of the development of the American popular song,
8 using, of course, a lot of early historical material.

9 Fascinating Rhythm was a documentary, based on
10 the production of Lady Be Good. We did a co-production with
11 European Broadcasting in 1978 of Lady Be Good.

12 I don't like to draw invidious national stereo-
13 types, but the Belgian chorus did not do all that well with
14 some of the livelier Gershwin rhythms. But it was an
15 interesting program, and we then made a documentary, based
16 on the production of that program, using Lehman Engel
17 and others, and it turned out to be a very lively documen-
18 tary -- Fascinating Rhythm was the title of it, but it was
19 really not a musical program. A few excerpts here and
20 there from the -- from Lady Be Good.

21 Q. We've discussed the classical music station. A
22 lot of that music is public domain music, as you understand
23 it, isn't it?

24 A. That was really the point I wanted to make, in
25 answer to Mr. Koenigsberg's question, when I referred to

1 other composers who have been dead more than 56 years.

2 Q. That's all, thank you.

3 A. Well, I think it's true that most classical music
4 stations, the music that most of them play is public domain
5 music.

6 Q. That's all.

7 CHAIRMAN BURG: All right, thank you.

8 Is anyone else in this room hungry? All right, we
9 will recess until 2:00. Thank you, Mr. Mankiewicz.

10 (The witness was excused.)

11 (Whereupon, at 12:45 p.m., the hearing was recessed,
12 to reconvene at 2:00 p.m. the same day.)

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A F T E R N O O N S E S S I O N

2:20 p.m.

1 CHAIRMAN BURG: On the record.

2 MR. BECHTEL: May it please the Tribunal --

3 CHAIRMAN BURG: Yes?

4 MR. BECHTEL: We have two items. We have tabu-
5 lated the royalty fees listed for cable systems carrying
6 WPBO in the States of Kentucky and Ohio. Since WPBO is
7 located in Portsmouth, Ohio, which is right near the border,
8 and the combination -- well, Kentucky is \$19,624, Ohio is
9 \$55,426, the total is \$75,050.

10 We have the same thing for WLVT, Erie, Pennsyl-
11 vania. Erie being close to Ohio, we checked Ohio as well
12 as Pennsylvania, although Ohio only had a total of about
13 \$2,500 all told, the grand total for Pennsylvania and --
14 including that little bit from Ohio, for WLVT, is \$130,076.

15 So I report that, and I think Mr. Scheiner has a
16 statement or a motion.

17 MR. SCHEINER: I've made a request of Mr. Bechtel
18 earlier this morning for the Wagner computer printouts, on
19 which this report and other information submitted this morn-
20 ing has been based. And Mr. Bechtel and I have agreed
21 to disagree on that request. He turned me down, and I am
22 now requesting that he be directed to furnish the computer
23 printouts that are sitting on the desk.
24
25

1 CHAIRMAN BURG: Mr. Scheiner, would you put that
2 request in writing, please?

3 MR. SCHEINER: Yes, I will.

4 CHAIRMAN BURG: Thank you.

5 MR. BECHTEL: That concludes our preliminary mat-
6 ters.

7 CHAIRMAN BURG: Ms. Hill has --

8 MR. SCHEINER: Madam Chairman, I will do so, but
9 can I expect a ruling on that motion prior to -- at an early
10 date, and well prior to the submission of any rebuttal
11 testimony?

12 CHAIRMAN BURG: Yes.

13 Ms. Moody, have you been sworn?

14 MS. MOODY: No, I have not.

15 Whereupon,

16 CAROL MOODY

17 was called as a witness and, after being first duly sworn,
18 was examined and testified as follows:

19 CHAIRMAN BURG: Ms. Hill, you may direct.

20 MS. HILL: Thank you, Madam Chairman.

21 DIRECT EXAMINATION

22 BY MS. HILL:

23 Q. Would you please state for the record your name,
24 title, and your pertinent background in these proceedings?

25 A. Yes, my name is Carol A. Moody. I am the Coordinator

1 for Copyright and Program Rights at National Public Radio.
2 My background includes being a teacher of history and
3 government, and coordination with the Kentucky Educational
4 Television Network.

5 I'm also a certified legal assistant, and I
6 specialize in legislative research. I have been a researcher
7 at the Library of Congress, which includes the United
8 States Copyright Office.

9 While I worked at the Copyright Office, I was
10 eligible for attending numerous seminars and training
11 sessions for implementation of the new laws, and these
12 were offered to the registrars, legal staff, and general
13 office people, and certain selected people. In addition to
14 that, I was assigned to a special task force to determine
15 the Copyright Office's liability under the Administrative
16 Procedures Act, and I participated in many revision policy
17 meetings, discussing that very issue.

18 Also, I cased, briefed, and researched all the
19 copyright and ancillary area of case law of regulations
20 and legislations for biweekly circulation to the Register
21 and her legal staff. In addition to that, I worked on
22 publications, which included a compilation of pre-1909
23 case law, and the Register's Report to Congress on the per-
24 formance rights in sound recordings.

25 Q. Would you elaborate on your duties for National

1 Public Radio?

2 A. As a coordinator, I still coordinate information
3 and provide it to management in making policy decisions, and
4 to our producers, both within NPR, in production of our
5 own NPR programs, and to our stations who are very concerned
6 about what they should be doing under the new copyright
7 law.

8 The copyright law before 1978 did not subject
9 public broadcasters to the copyright, so there is a lot of
10 confusion and questioning, and a lot of educating still to
11 be done. So I coordinate information, and I also assist
12 in compliance under our compulsory music licenses. I help
13 negotiate individual licenses for literary works or for
14 dramatic works, operas -- to get sound tracks for use in a
15 program; I also assist in getting talent releases and
16 acquisitions for producers.

17 Q. You also helped prepare, did you not, the NPR
18 and the local station claims that are being presented here
19 today for the Tribunal. Would you share with us some of
20 your experiences in compiling those claims?

21 A. Yes, I did. I was not at NPR until late 1978,
22 so I inherited some of the claims that were filed in
23 the summer of '78 before arriving at NPR. So I worked on
24 the July '79 filing, which was for the supplemental filing
25 of the first half of '78, and the second half of '78 filing.

1 In so doing, I sent out to the stations the notice
2 that they could be eligible for royalties, in these proceed-
3 ings, and I asked them to try to identify, according to
4 the Copyright Royalty Tribunal's regulations, at least
5 one distant signal carriage of at least one of their pro-
6 grams, which was theirs, and I had to do a bit of educating
7 again, as to explain that this had to be their own program-
8 ming, and it had to be a distant signal carriage.

9 I got a lot of questions from managers, from
10 engineers, from programming folks, as to what this meant,
11 and how they could determine just how they were getting
12 carried, because it was a very confusing issue to them.
13 While a lot of them know that they had been carried, in fact,
14 they had gotten calls from cable systems about carrying
15 them -- they did not know, or have records, of how the
16 time was spent, to actually find information on this.

17 Q. You assisted them -- you helped them, using
18 several indicators of cable coverage like the Cable Fact
19 Book and TV Digest?

20 A. Yes, I sat back on my telephone and asked them
21 to name the communities, say, about 50, 60, miles away,
22 and I would open up the book and I'd say, this is one, and
23 so on and so on, and they'd say, yes, they say they are
24 carrying radio, or they say they're carrying all-band --
25 why don't you give them a call and see if they carried you

1 in '78? Sometimes they got cooperation, and sometimes
2 the cable system operator had to scratch their heads and
3 think back to 1978 -- were they still doing the same thing,
4 and that sort of thing. It was a very frustrating experience.

5 Q. That does sound frustrating.

6 Commissioners and others here may be wondering
7 why NPR did not come up -- it's already been asked of
8 Mr. Mankiewicz, why NPR did not come up with the particular
9 percentage claim, or why we didn't use statistical data
10 or consultants and that sort of analysis. Would you elab-
11 orate on that, please?

12 A. To add to the frustration, I knew, coming from
13 the Copyright Office, just what state the statement of
14 accounts were in. Many of them were incomplete,
15 especially when it came to radio. There was not a space
16 for checking off what signals were actually carried
17 distantly.

18 In addition to that, when I checked off the fil-
19 ing that had been made before I came to NPR, and did some
20 spot-checks and checked back with the stations to see if
21 they were actually being carried, I found statements of
22 account that had absolutely no carriage of radio listed,
23 and yet in the Cable Fact Book, they would claim to be
24 carrying all-band FM or certain radio stations.

25 So I knew that the collection of data could only

1 be as good as what was on record, and so, therefore, I
2 went on and checked with the FCC to see what they had. I
3 will talk about what I did use that they had later.

4 I checked with the Corporation for Public Broad-
5 casting, which surveys our stations and keeps certain
6 statistical information on public radio stations, and
7 carriage, and so on, and they did not have any information on
8 this kind of carriage.

9 I checked with the NTIA, which had gotten the
10 bi Associates report on the public broadcasting -- supposedly
11 for television and for radio, and found out that their
12 radio statistics, according to the NTIA, were useless --
13 they could not be accessed by radio call letter, and did
14 not show distant signal carriage.

15 So, as much as I would have loved to have had
16 some hard and fast statistics and to come in here with a
17 percentage that I could justify with all kinds of confidence,
18 I could not find such.

19 Q. Okay, could you now, then, describe the data that
20 you did use to support NPR's claim?

21 A. Yes, I would also like to see that that is handed
22 out. This is an exhibit that we will have as Exhibit E,
23 I believe. What this exhibit is, is the FCC's report and
24 order, which I footnoted in the general testimony, and
25 I have attached to that NAB data, which the FCC referred to as

1 the only hard data in the proceedings. I thought that was
2 significant, since these proceedings went on for six years.

3 Q. Could you briefly tell us what the purpose of
4 this FCC study was?

5 A. Yes, with the growth of cable, many broadcasters
6 of television and radio became concerned about the growth
7 of the industry, which had very little overhead, and was
8 making, I guess, a great deal of profit on subscriptions,
9 and did not have the regulations that the broadcast industry
10 had.

11 This particular proceeding is concerned with
12 radio carriage by cable systems. Many radio broadcasters
13 were concerned about harm that the cable industry might
14 cause to public service, to economic background and so on --
15 to the entire radio universe, so the purpose of this
16 report was to determine if FCC should adopt regulations
17 of general applicability to the entire -- that would affect
18 the entire radio broadcasting universe.

19 For my purposes, I found that the statistics
20 of actual cable carriage for copyright purposes, I could
21 narrow that universe.

22 Q. So what did the FCC conclude?

23 A. The FCC concluded that there was no reason to regu-
24 late the whole universe of cable carriage of radio,
25 because there are so many radio receivers per individual in

1 the United States, and a radio receiver, or a television
2 set that may have a drop line cable connection, does not
3 harm the reception of all those other receivers, including
4 car radios and transistors and so on.

5 Q. Would you summarize for us, and for the Tribunal,
6 the data that led you to conclude -- and I think this is
7 an accurate statement, that the cable carriage of radio is
8 expensive? I believe that's a quotation from your
9 statement.

10 A. Yes, everybody has a copy -- I can go to the page
11 numbers, that might make things simpler.

12 Q. That would be helpful, I think.

13 A. First, I'd like to make some clarification on
14 the testimony. On page 3, I first talked about the NAB
15 report that the FCC later deemed to be the only hard data
16 available. It looks as if there was a sentence left out
17 here, as I start, "Approximately 70 percent of those" --
18 well, there was a sentence before that.

19 CHAIRMAN BURG: Where are you?

20 THE WITNESS: I'm at the second line from the top
21 of page 3.

22 CHAIRMAN BURG: Okay.

23 THE WITNESS: The NAB -- I'll just start with an
24 explanation -- the NAB did a survey of certain stations,
25 and 85 percent of those stations responding claimed to have

1 at least one cable system operating in their market --
2 that fact is left out here, and when I say 70 percent of those,
3 I mean 70 percent of those 85 percent claiming carriage
4 -- then reported importation of distant signals into their
5 local markets.

6 I think that is significant, first of all. Then
7 I went onto the FCC statistics that they collected from
8 their annual report and the cable report. On page 11 of
9 this exhibit --

10 MS. HILL: Madam Chairman, will the record reflect
11 that this is Exhibit E of NPR?

12 (NPR Exhibit E was marked for identification.)

13 THE WITNESS: Going onto their statistics, they
14 showed that 51 percent of all cable television systems in
15 1977 -- by the way, the NAB study was in 1976, so we can
16 only assume that it was at least as much in '78 as it was
17 in '76, and probably more.

18 Going onto the FCC statistics on page 11, they
19 show that 51 percent of all cable television systems in
20 '77 also carried all-band FM signals. In a footnote on page
21 12 -- it's note 8, and I apologize for the unclear repro-
22 duction here -- it says, "Although nominally 22 percent of
23 all systems appear to be carrying signals selectively,
24 this figure is somewhat inflated."

25 But I think I picked out, later -- I think it's

1 important to show how many systems were actually selectively
2 carrying a radio signal. So I think I will later show
3 that there were some averages from the FCC studies that
4 show other select signal carriage, and I think this is
5 important to note, because a cable system has to go to con-
6 siderable amount of trouble and expense to selectively
7 carry an FM signal.

8 They can set up one tower to collect all of the
9 FM band signals that are in the air and generally receiv-
10 able, but if they have to -- if they want to carry just one
11 signal, they have to go to at least as much expense, and
12 usually two or three times as much, according to this
13 study in 1977, to selectively carry one signal.

14 So I find that that data, in this report, is even
15 more interesting. I further went on to show what larger
16 cable communities, which we were concerned with at NPR,
17 the amount of coverage, and that's on page 13, paragraph 15.

18 BY MS. HILL:

19 Q. Are you finished?

20 A. I'm sorry, I'm afraid I've gotten the wrong --
21 it starts at the bottom on page 12. It's paragraph 18,
22 larger cable communities having between 10,000 and 50,000
23 persons, or 56 percent of all-band carriage, and 27 per-
24 cent indicated carriage of selected signals.

25 I went farther to extrapolate from what I would call

1 the medium-sized markets and the small markets that they
2 show on page 13, and I averaged the percentage of select
3 signal carriage, and I came out with 15.3 average, so if
4 you went between what I came out with and what they show
5 as select signal carriage, and what they showed in the
6 footnote number 8 on page 12, the 22 percent -- we could
7 assume it was something in between that in 1977, and that
8 does, to me, show some kind of an importance to the cable
9 system operators carrying certain radio signals.

10 Q. In the larger market, what percentage showed no
11 radio carriage?

12 A. Only 10 percent showed no radio carriage at all.

13 Q. So your discussion of the select signal carriage
14 is to indicate that cable systems are willing to expend
15 resources to go to the trouble of putting up a tower
16 to selectively take one radio, one particular radio signal
17 -- and therefore, they're willing to expend resources;
18 then the carriage must have value?

19 A. Well, that's what we would have to assume. I
20 don't believe that the cable system operator would pay,
21 according to this data in '77, \$500 to \$1,000 and above, if
22 they did not feel that it would be of some use to them,
23 and their subscribers.

24 Q. Turning now to National Public Radio, Inc., in
25 their program service claim, would you please summarize that

1 for the Tribunal?

2 A. Yes, it's already come up. I think that the
3 Commissioners and other claimants are distressed that we
4 have not come forward with a percentage claim, and we can
5 only, at this point, because of the paucity of data, point
6 to the fact that we have certain programming that we think
7 is specialized -- something that is an alternative to
8 what else is in the marketplace, and by that, then, we
9 can talk about what is accessible to cable operators, and so
10 I pointed out that in 1978, we had 1,470 hours of actual
11 broadcast programming, of the type that Mr. Mankiewicz
12 has already explained, actually available and accessible by
13 cable system operators for distant signal transmissions.

14 Q. Mr. Mankiewicz did mention the Congressional
15 mandate for the expansion of public radio. Could you --
16 and I think there was some discussion of the coverage --
17 could you reiterate and describe the coverage of NPR mem-
18 ber stations in 1978?

19 A. Yes. In 1978, according to the latest Carnegie
20 Commission report, and the Census Bureau's Standard Metro-
21 politan Statistical Area studies, we only had 50 percent
22 coverage of member stations.

23 Q. Your member stations could only reach 50 percent
24 -- so that means that any NPR programming, even one that's
25 carried by most stations, could not have a nationwide

1 distribution?

2 A. Only if cable systems made it nationwide.

3 Q. If we could now turn to the claim of the NPR
4 member stations, would you please outline that claim that you
5 worked so diligently on?

6 A. Yes. Altogether, for both halves of 1978, we
7 had 61 member claimants who were able to identify at least
8 one cable system carrying their signal, outside of their
9 primary coverage area.

10 This is pretty difficult for them, because the
11 primary coverage area for radio differs according to
12 what the FCC definition is. There are certain classes for
13 radio stations, and so, a primary service area may be one
14 kind of area for one station, and it could be different
15 for another.

16 I think this is another reason why cable systems
17 may have a difficult time in determining on the statements
18 of account as to what signals are distant, and which ones
19 are not.

20 But anyway, getting back to our member stations'
21 claims, we did have 61 of our member stations claiming,
22 21 identifications of select signal carriage were made,
23 although they were not required to do that, and it's very
24 difficult to find such an identification. They did identify
25 at least 21.

1 And then I'd like to point out that the average
2 access to cable systems of their own originated programming
3 for all NPR stations is 59 percent. Our stations pride
4 themselves in producing as much local programming as pos-
5 sible, and that 59 percent average is an average for all
6 local stations.

7 Q. This was the programming that Mr. Mankiewicz
8 described to us earlier?

9 A. Yes, the type of specialized format programming,
10 and they have to respond to the needs of the community.
11 They have to be representative of the community needs to
12 actually become a public radio stations. They must get
13 public support; otherwise, they do not become a public radio
14 station.

15 It's a specialized format, it shows --

16 CHAIRMAN BURG: Jan, would you speak a little
17 louder so everyone can hear you? Thank you.

18 MS. HILL: I have no further questions.

19 CHAIRMAN BURG: Ms. Moody, you said in your
20 testimony that there was a paucity of information available,
21 which prevented you from bringing in a percentage or a
22 dollar figure at this time. What material, or what infor-
23 mation, will be available to enable you to do it at some
24 future time? Bear in mind that future time has to be some-
25 where in the calendar year, prior to September 11.

1 THE WITNESS: Well, I got a light bulb a couple
2 of days ago, and I must say it probably was because of
3 these hearings. Not having the resources to go into all of
4 the research that other claimants have been able to have
5 thus far, we assumed, in hopes that the Tribunal would
6 make some kind of percentage claim -- and then we were
7 glad to hear that you had asked the claimants to come for-
8 ward with a pie, and everyone showing what the various
9 claimants sought; and I think this helps us to fit into the
10 realm of what the other claimants are saying, with the
11 kind of information that they have brought forward.

12 And I think that we will be able to do some
13 sampling of actual carriage and channel selections by
14 cable systems, to be able to show, again, a percentage, at
15 least. I don't think that we will ever be able to supply
16 -- at least, as long as the statement of accounts are no
17 more specific than they are, some really hard data.

18 I think it's also already been shown that you
19 can take all kinds of data, and cut it, as people have
20 said, any number of ways, to support your position. We
21 came forward honestly to say that we were not going to
22 start with a percent and go backward with some kind of data
23 that may or may not be useful to these proceedings.

24 But we will come forward with our pie, and some
25 kind of justification.

1 CHAIRMAN BURG: Are you saying that this whole
2 area in these proceedings in particular are a good example
3 of imprecise scientific methods? Is that what you're saying
4 -- or imprecise art?

5 THE WITNESS: Yes, I think that's why we have
6 five human beings here on the Commission, rather than a
7 computer.

8 CHAIRMAN BURG: Well, let me say that conclusion
9 has occurred to me on one or two occasions.

10 Let me, with your forgiveness, Ms. Moody, while
11 we're talking about it, as long as you've been talking about
12 that pie, let me add one -- I think I listed eight group-
13 ings, and I really list them -- but I want to specify one
14 additional area that was not included.

15 I listed MPAA, the broadcasters, sports -- and
16 the breakdown of sports would be the joint sports and
17 college sports -- music, public broadcasting, NPR, cartoon
18 characters, and then I had a miscellaneous category.
19 There's an obvious omission here, and that is radio in
20 general, so if you would add that to your list, I would thank
21 you.

22 I have no more questions right now.

23 ta 8 COMMISSIONER COULTER: Ms. Moody, I'm going to
24 ask you a question that is purely for educational purposes.

25 I have seen a cable television. I have never seen

1 a cable radio.

2 CHAIRMAN BURG: You mean hear it.

3 (Laughter.)

4 COMMISSIONER COULTER: I'm talking about the radio
5 itself. I don't even -- please excuse me. I don't really
6 fully understand how the --

7 THE WITNESS: Well, I didn't know, either, until
8 I started asking a lot of questions, and then found a lot
9 of helpful engineers out there. A cable system is connected
10 through the antenna to your household. Television, they
11 can provide a drop wire to your receiver.

12 COMMISSIONER COULTER: To the radio?

13 THE WITNESS: Yes. A stereo receiver, usually.
14 Audiophiles are very concerned about their receivers,
15 rather than, say, a table radio or some such thing.

16 COMMISSIONER COULTER: Oh, I see, but it would come
17 off the regular television drop?

18 THE WITNESS: It can.

19 COMMISSIONER COULTER: It would be just a part of
20 the television --

21 THE WITNESS: You could jerry-rig one if you
22 wanted to.

23 COMMISSIONER COULTER: I wouldn't say that here.

24 (Laughter.)

25 COMMISSIONER COULTER: No, seriously, they don't

1 have another wire? It's just coming off the television
2 wire, and they just attach it to the wire that would nor-
3 mally hitch it to the television, when they hook that to
4 your receiver? Is that --

5 THE WITNESS: That's my understanding. It's a
6 main wire running into the house, and it can be just to
7 the television. There can be an audio under the television
8 portion, say -- I think what Mr. King was getting at
9 earlier -- there's a news and weather report, say, just a
10 visual origination from the cable system, then they could
11 play a radio signal underneath that, and that could come
12 on the television set.

13 But you can also ask, or have, a drop wire from
14 that connection into your household for your receiver as
15 well.

16 COMMISSIONER COULTER: Thank you. You were
17 talking about, as I understand, 80 percent of the program-
18 ming on the NPR stations, approximately, in total -- 21
19 percent, 59 percent, is that correct?

20 THE WITNESS: Yes. Other sources provide the
21 other percent.

22 COMMISSIONER COULTER: And you're talking now about,
23 as I understand it, 213 stations?

24 THE WITNESS: We had 213 member stations in
25 1978. However, not all of those were able to file claims.

bd 59

1 Only 61 of them actually filed claims, and asked us to
2 represent them.

3 COMMISSIONER COULTER: So you're representing the
4 59 percent of the 61, and then you're representing the
5 21 percent of the 213? I'm sorry -- I just want to --

6 THE WITNESS: Yes.

7 COMMISSIONER COULTER: And that's out of 900 FM
8 non-commercial total stations, approximately?

9 THE WITNESS: That's -- according to '78 figures,
10 there were about 900 non-commercial -- doesn't necessarily
11 mean public in our definition.

12 COMMISSIONER COULTER: Okay. Thank you.

13 CHAIRMAN BURG: Ms. Divoll?

14 CROSS EXAMINATION

15 BY MS. DIVOLL:

16 Q. Ms. Moody, I'm interested in the reason why you're
17 only representing 61 of the 213 stations here today.

18 A. I think that I made that clear. The 61 stations
19 were the only ones who felt that they had the time or the
20 information to provide for these claims.

21 Q. So the rest of the stations didn't know whether
22 or not their programming was carried on a distant signal
23 basis? Is that basically what you're saying?

24 A. I really can't account for their various reasons.
25 Some that I heard for -- you know, this is something that

1 we don't have time -- we're interested in programming --
2 you administrative people out there at NPR, take care of these
3 things -- we're programmers. That's part of the member-
4 ship at NPR. They expect us to take care of business and
5 they take care of programming and production.

6 Their reasons -- we cannot tell them that they
7 had to file. We can ask them to. I suggested that, as
8 I say, in '78, before I got to NPR, quite a few had already
9 filed, and they did not see any precedents, yet, in these
10 proceedings, as to whether that's of value to them, it's
11 worth taking somebody away from programming to seek this
12 kind of information out.

13 If I were to say, hey, I can find the information,
14 you just authorize us to represent you -- sure, they
15 would do that. But when I was asking them to find the infor-
16 mation, they were not as interested.

17 Q. You testified a little while ago about working
18 with the stations to develop this information. You talked
19 in terms of whether or not their signals were carried by
20 cable systems 50 to 60 miles away -- is that the criterion
21 that you gave them to go by?

22 A. Well, I told them at least that, because usually
23 the primary coverage area is about 35 miles.

24 Q. So they basically tried to determine whether or
25 not a cable system that far away was carrying their signal?

bd 61

1 A. Oh, yes. I told them that they would be outside
2 of their primary coverage area.

3 Q. Were you working with engineers at these stations,
4 or --

5 A. I got calls from engineers, from managers who
6 their engineers had said to tell -- to ask this, to say
7 that, and so on. It depended.

8 Q. I'd like to ask you a few questions about the NAB
9 survey that you said you relied upon here, although I'd
10 like to --

11 A. Excuse me, that is attached -- the NAB survey
12 is attached to the back of the FCC report.

13 Q. Right. The information that I have about the NAB
14 survey, I have taken from the FCC report, which I read
15 prior to today, so most of my questions will be directed
16 to the information that I was able to obtain about the sur-
17 vey from the FCC report.

18 A. Are you familiar with the FCC characterization
19 of the NAB survey?

20 A. Oh, certainly.

21 Q. Are you aware that the NAB surveyed six of its
22 17 districts?

23 A. Yes, as I referred back to the universe analogy --
24 their universe was quite different than ours here.

25 Q. Do you know why they selected six, and why those

1 particular six districts?

2 A. Because they thought that they would be most likely
3 to be penetrated by cable, those particular districts.

4 Q. So that means that the other districts were
5 less likely to be penetrated by cable; is that what you're
6 saying?

7 A. I presume that's what the report is. I don't
8 believe the FCC would have deemed this hard data if it
9 thought it was not a representative sample, and it was tried
10 out before they actually did the complete survey, and pro-
11 vided it to the FCC.

12 Q. Are you aware that less than half of the stations
13 in the initial sample, or approximately 323, responded to
14 the survey?

15 A. Yes, I'm aware of that. I'm talking about those
16 who responded.

17 Q. On page 3 of your statement, you referred to this
18 earlier -- you stated that approximately 70 percent of
19 those stations surveyed reported cable importation of dis-
20 tant radio signals into their local markets, and you said
21 that that 70 percent of the 85 percent that said they had
22 cable at all?

23 A. Yes.

24 Q. How did the NAB define distant radio signal for
25 those respondents?

1 A. Well, as the report shows, the NAB didn't -- the
2 FCC construed that to be somewhat sketchy as to whether
3 they -- you know, whether the stations knew, and that's
4 why I attached the NAB report, because it shows, if I can
5 find the page -- it's on page 3 of the NAB report, that
6 those stations reporting importation of distant radio
7 signals into their local market, 69 percent said that a
8 distant station had the same format as that of a local
9 station; 34 percent indicated that a distant station
10 offered the same network service -- now, that to me would
11 indicate that they were indeed distant stations.

12 Also, further, it says, 48 percent believe that
13 a distant station is being leapfrogged into the market.
14 Again, that would indicate to me that they knew what was
15 distant and what wasn't.

16 Q. It would indicate to you that 48 percent of them
17 might have known what was distant and what wasn't, not
18 that all of the respondents knew; is that correct?

19 A. Not that all --

20 Q. 48 --

21 A. Those 48 percent, I think, certainly knew. Yes,
22 I believe that 48 percent ~~knew~~ what a distant signal was,
23 and I think that that 34 percent also, claiming that another
24 network carried into that market, would also.

25 Q. Why is that?

1 A. Because the network -- there wouldn't be another
2 network in that market. The network affiliate in that mar-
3 ket.

4 Q. Do you know how many of the -- at least, as the
5 respondents were defining it, distant radio signals
6 carried into their markets were non-commercial radio sta-
7 tions?

8 A. No, I do not.

9 Q. Do you know how many were NPR member stations?

10 A. No, I do not.

11 Q. I assume you also do not know how many of them were
12 among the 61 NPR stations for which you are claiming here?

13 A. No, I do not.

14 Q. Or among the stations -- the other stations
15 carrying NPR programming?

16 A. No.

17 Q. On page 3 of your statement, you rely on the FCC
18 data taken from the 1977 Cable TV Annual Reports, is that
19 correct?

20 A. That's correct.

21 Q. You state on page 3 that the FCC data shows that
22 51 percent of the cable systems carry all-band FM?

23 A. Yes.

24 Q. What is all-band FM?

25 A. As I described earlier, that's a tower set up that

1 can collect all of the signals that are generally receiv-
2 able in the air.

3 Q. Would these generally be distant signals?

4 A. Not necessarily. It depends on how far the cable
5 then transmits it by common carrier or microwave, or what-
6 ever.

7 Q. So you don't know what percentage, if any, of
8 those signals would be distant?

9 A. No. Again, I say that there is no information.

10 Q. On the FCC report, paragraph 20 -- I don't have
11 the same pagination as your report does, but I think the
12 paragraph number should be the same -- you state -- I think
13 it might be page 14, "As indicated above, approximately 78
14 percent, 51 percent carrying all-band FM, and 27 percent
15 carrying no radio signals, did not appear to be signifi-
16 cantly above in the matters of principal concern in this
17 proceeding, either because they were carrying all locally
18 available FM signals, and no more, or because they were
19 carrying those signals at all."

20 This just leaves the 22 percent that may have
21 been carrying -- may have been carrying some distant signal
22 -- distant radio signals in '77, is that correct?

23 A. I don't know if that's true, because I think they
24 had to carry all locally available signals, in addition
25 to distant signals.

1 Q I don't understand. Could you explain what you
2 mean by that?

3 A Well, I think the FCC -- and I'm not sure, we
4 didn't have this subject to check -- I think at that time
5 FCC had interim regulations, which required the systems to
6 carry at least -- to carry the local signals as well as any
7 distant signals, so as not to harm the local market.

8 Q But doesn't the sentence that I have read from the
9 report indicate that the FCC concluded that at least the
10 vast majority of the 51 percent carrying all-band FM,
11 were carrying local signals as opposed to distant signals?

12 A I suppose it could be construed that way. I
13 really have not --

14 Q Looking at the 22 percent that's left over, that
15 could have carried distant signals, do you know how many
16 of the stations in that 22 percent, carried by those 22
17 percent of the cable systems, carried NPR member stations?

18 A No, if I did -- that 22 percent is the percent
19 of distant carriage, that is our universe, and that's
20 what I would love to have to find, but I did not have that
21 definition.

22 Q Do you construe the 22 percent as including local
23 signals, as well as distant?

24 A That is your 22 percent. It is not mine. I don't
25 construe it at all.

1 Q Well, taking the 78 percent that the FCC appears
2 to think is mostly local signals, leaving the 22 percent
3 that may be some distant signals, do you think that that
4 22 percent also includes local signals?

5 A No.

6 MS. HILL: I object. It seems to me that the
7 reading of this could also be that they were carrying all
8 locally available FM signals -- does not mean that they
9 were not carrying the distant signals, and that's another
10 interpretation of the language; and so the 22 percent -- if
11 they were required to carry all local signals available,
12 the FCC was not concerned with the copyright in this pro-
13 ceeding, and the fact that they were carrying all locally
14 available signals does not mean --

15 CHAIRMAN BURG: I'll sustain that objection.

16 THE WITNESS: Yes, as I said, our universe here
17 is quite different from this universe. We're only con-
18 cerned about distant signal carriage.

19 BY MS. DIVOLL:

20 Q I understand. I'm through with this line of
21 questioning, and you can debate the language of the FCC
22 order at a later time.

23 Do the statements of account -- you've already
24 alluded to this earlier, filed with the Copyright Office by
25 the cable systems, reflect distant signal carriage?

1 A. No. I want to qualify that now. I can look at a
2 statement of account and see that there are signals being
3 carried from such and such community, which is obviously a
4 distant community, if it's obviously far enough away.
5 But there is no checkoff, as in the television signal
6 carriage for whether that is distant or not.

7 On the statement of account for television sig-
8 nals, there is a column to be checked off, as to whether
9 that's distant or not. That relies on the cable system
10 operator's knowledge, but, as I say, that may be -- is a lot
11 more difficult, I think, when it comes to radio distant
12 signal carriage, and maybe that is why that column doesn't
13 appear. I don't know.

14 Q. So you can sort of look at it, and sort of apply
15 your definition that it's pretty far away, therefore, I'm
16 going to conclude it's distant? Is that what you're
17 saying?

18 A. Well, I wouldn't do that. I didn't do that, for
19 that very reason.

20 Q. I have one final question, Ms. Moody. Do you
21 know how many of the stations for which you are claiming
22 were carried on a distant signal basis by cable in 1978?

23 A. No. I have not even said that. Our argument
24 rests on the fact that we know how much programming of ours
25 and our stations is eligible, at least, an average. We're

1 going to have to go on percentages, so far, of what was
2 eligible, what was accessible to system owners, and the
3 fact that in this statement by the FCC, there were several
4 system owners who responded and argued against regulation --
5 they wanted to carry radio, and they specifically mentioned
6 specialized formats being offered to their subscribers,
7 and that's what we feel. We offer -- obviously, it's an
8 alternative, by mandate, to what's already generally receiv-
9 able in the marketplace.

10 Q. Thank you, Ms. Moody. I have no further questions,
11 Madam Chairman.

12 CHAIRMAN BURG: Mr. Koenigsberg?

13 MR. KOENIGSBERG: Thank you.

14 CROSS EXAMINATION

15 BY MR. KOENIGSBERG:

16 Q. Just a few questions, Ms. Moody. We have heard
17 much talk today about public domain materials. When NPR,
18 in one of its programs, carries a performance of a public
19 domain musical composition, let's say, is NPR claiming a
20 share of the cable royalties for that carriage?

21 A. No, we're only claiming for our programs which
22 we claim a copyright on our programs, as a total composition.

23 Q. Let me return to that in a moment.

24 Let me ask you, do you know if there exist copy-
25 righted arrangements of public domain musical compositions?

bd 70

1 A. Yes.

2 Q. On Exhibit B that was handed out, which contains
3 the list of the NPR member stations, station program
4 cable systems that were carried, I gather, on a distant
5 basis, are the programs listed NPR distributed programs,
6 or are they, in some or all cases, programs that are not
7 NPR, but broadcast by NPR stations?

8 A. Well, these are programs owned by the station
9 listed, under the column "call letter, city and state."
10 These are the programs that they produce.

11 Q. So they are not NPR programs?

12 A. They are not NPR-distributed or produced. They
13 are station-produced.

14 Q. Let me return to that comment you made before,
15 about your claiming for programs, and give you a hypo-
16 theoretical example, and ask you to comment on it.

17 Let's assume that an NPR station has a program
18 called Afternoon Concert, once a week, and let's assume
19 that the program transpires in this way -- it's an hour-long
20 program, I should add. On the hour, the program comes on
21 the air, and the announcer says, "Good afternoon, this is
22 Station WNPR's Afternoon Concert program. Today we're
23 going to hear the New York Philharmonic perform Vivaldi's
24 Concerto" -- and they put the record on, and there's the
25 performance of Vivaldi's work, it runs for, I don't know,

bd 71

1 59 minutes, comes off, the announcer says, "That was the
2 New York Philharmonic performing Vivaldi's New Concerto.
3 Tomorrow, we're going to present a performance of Debussy's
4 Afternoon of a Faun," or whatever -- "thank you for listen-
5 ing to us, we'll go off the air."

6 Now, that work -- we're assuming in the public
7 domain, musical composition -- is NPR, or NPR stations,
8 claiming for that program?

9 A. Well, I hope our stations don't do that kind of
10 programming. That is not what we're about.

11 (Laughter.)

12 COMMISSIONER BRENNAN: Pardon me, did you say
13 you hope they don't do that kind of programming?

14 THE WITNESS: Yes. I don't call that programming.
15 Our stations --

16 COMMISSIONER BRENNAN: You're not criticizing
17 the musical taste displayed by --

18 THE WITNESS: No, I'm criticizing the lack of
19 information in that program, to just put on a record and
20 play it for an hour. That's not the sort of programming that
21 our stations offer. There is a great deal of discourse
22 about the composer, a great deal of educating going on to
23 the public about the music. Just a great deal of the
24 music programming that we do, both at NPR and the station
25 level, is live, it's not a needle drop.

1 So our music programming is not just the music.
2 There is a great deal of creative input by our people on
3 that.

4 BY MR. KOENIGSBERG:

5 Q. But do you know for a fact that such programming
6 does not exist?

7 A. No, I don't.

8 MR. KOENIGSBERG: I have no further questions.
9 Thank you.

10 CHAIRMAN BURG: Does anyone else have questions of
11 this witness? Mr. King?

12 CROSS EXAMINATION

13 BY MR. KING:

14 Q. Let me go back to what Mr. Koenigsberg was talking
15 about. If you have a program of one hour, which consists
16 of any number of public domain selections, are you claiming
17 copyright in that one hour of programming?

18 A. In that program.

19 Q. In other words, you are basing a claim of copy-
20 right upon the selection and arrangement of the musical
21 pieces and that type of thing?

22 A. Not if you're talking about the scores. That's
23 not what we're claiming.

24 Q. No, but in the selection of the recordings and
25 the arrangement of them, does that enter into your claim

1 of copyright at all?

2 A. Not unless we're doing the actual arrangement of
3 the music, and that would require -- say, if it's public
4 domain material, and we provide a new arrangement, you could
5 say yes, but that's not done very often.

6 We're claiming for the creativity which we add
7 in the matter of scripts and so on, additional commissioned
8 works and that sort of thing, to put a program together.

9 MR. KING: I have no further questions.

10 CHAIRMAN BURG: No further questions?

11 Ms. Semo?

12 CROSS EXAMINATION

13 BY MS. SEMO:

14 Q. On page 11 of the FCC report, upon which you are
15 relying for some of your information, and actually the
16 discussion begins on the very bottom of page 10, the
17 Commission discusses the comments that had been filed, which
18 discussed possible loss of radio services to the public
19 from cable carriage, and on the top of page 11, the
20 Commission says, "Missing from the records to date, how-
21 ever, are facts indicating that present cable carriage of
22 local or distant radio signals harms anyone, radio broad-
23 casters, cable subscribers, or members of the general public."

24 And I'm just wondering if you have any comment
25 on that statement, in light of Mr. Mankiewicz' earlier

bd 74
1 testimony concerning harm.

2 A. Well, as I've already said, this particular
3 proceeding had to do with the whole universe of radio
4 broadcasting, of whether cable carriage should be regulated,
5 and rules of general applicability; and because, as I've
6 already described, the sort of connection that goes to
7 the receiver, the FCC came to these conclusions.

8 Now, if you're talking about what Mr. Mankiewicz
9 said earlier in the light of what possible harm could come
10 to NPR programming -- is that what you're saying?

11 Q. Yes, his general testimony.

12 A. I have to think back, now. I think our feeling
13 is there could be some harm of system expansion -- to sys-
14 tem expansion, or an already existing station. You see,
15 since our stations depend upon specialized formats that meet
16 certain community needs, there are boards within the
17 community which they are responsive to -- then another
18 station, say, here in Washington -- we have two, WETA,
19 which has a definitely distinct format from WAMU -- they
20 cannot be alike.

21 Otherwise, there would be no reason for them
22 existing. They also cannot be like the other commercial
23 stations in the market, otherwise they would not get public
24 support.

25 Now, if you bring in a distant signal on that

1 audiophile's receiver, FM receiver, that has the same kind
2 of format as WAMU or WETA, then you're going to fraction-
3 alize the audience's support.

4 MS. SEMO: I have no further questions.

5 CHAIRMAN BURG: Any questions here?

6 Ms. Hill, would you like to redirect?

7 REDIRECT EXAMINATION

8 BY MS. HILL:

9 Q. Just a few questions, Carol.

10 CHAIRMAN BURG: Speak up.

11 BY MS. HILL:

12 Q. Back before you came to NPR, the original claims
13 for stations were filed for the first portion of '78. Do
14 you know when that filing occurred?

15 A. Yes, I believe I was still at the Copyright
16 Office, and I believe that happened -- I remember the regu-
17 lations came out in July, because I was reviewing the regu-
18 lations then.

19 Q. So the claims were filed by the stations in July?

20 A. Yes.

21 Q. When were the statements of account for the cable
22 systems first filed with the Copyright Office, are you
23 aware?

24 A. It was, I believe, after that, because I remember
25 they were coming in up until the time I came to NPR, and I

bd 76

1 remember going back to the office and checking to see what
2 kind of information they were getting, and it was not very
3 good.

4 Q. Could this not have been a factor in your con-
5 fusion and the difficulty that stations had at the beginning,
6 in learning when and if they were carried by cable systems,
7 or whether they were carried at all?

8 A. Indeed. I could not promise to them that I
9 would be able to substantiate or be able to go out and re-
10 search on their behalf, to come up with --

11 Q. And that's another important factor, I think,
12 we need to bring out. What is the average size of an
13 NPR local station -- you say that when you told them they
14 had to come up with the information, that that was a burden
15 to them. How many professional staff is a minimum in the
16 stations?

17 A. Professional staffs, since a lot of these
18 stations take maximum resources with volunteers and students
19 and so on, they must have a professional staff of five.

20 Q. And so this is a professional staff of five to
21 run an operation that's seven days a week, minimum of 18
22 hours a day? And so, when you told these stations that
23 they needed to help you find the information, you were not
24 surprised that they could not invest the time?

25 A. No.

bd 77

1 Q You were disappointed, but you were not surprised?

2 A No.

3 Q A further question on the claims filed. When you
4 were advising stations to come up --

5 A Could I just go back a minute? I know Mr.
6 Mankiewicz testified this morning about the Telecommuni-
7 cations Financing Act, and what that mandated us to do, and
8 that -- it emphasized over and over again the legislative
9 history that we were to maximize our resources into pro-
10 gramming, and to cut down on administration, and to tell
11 our people that we needed X thousands of dollars to do re-
12 search, and what have you, and to use production. I
13 don't believe they would have seen that as a requirement,
14 and I didn't even bring that up.

15 CHAIRMAN BURG: It might be noted here that the
16 Congress feels the same way about the Copyright Tribunal.

tape 9

17 BY MS. HILL:

18 Q When you were helping stations file their
19 claims, you were aiming to locate, not only the programming
20 that they had created, but also cable systems that were
21 carrying them in distant markets, as best as you could
22 determine? You made your best efforts to determine that
23 these cable systems were distant carriage?

24 A Yes, and I had gotten guidance from the House
25 Report -- it's the statute constantly relied upon. While

1 the House Report clearly shows the liability of cable
2 system owners, it never, in my opinion, tries to confuse
3 that with the eligibility of copyright claimants, and on
4 page 97 of the House Report, I relied on our case, though
5 we don't have hard data and we don't have specific percents,
6 in the very last full paragraph on page 97, it says,
7 "The Copyright Royalty Commission should consider all
8 pertinent data and considerations presented by the claim-
9 ants."

10 And so that's what we feel that we brought, per-
11 tinent data that we have, that we feel is available.

12 MS. HILL: I have no further questions.

13 CHAIRMAN BURG: Well, ladies and gentlemen, it
14 looks like we have come to the end of this phase of the
15 first phase of the evidentiary hearing.

16 We will notify you of when the rebuttal time will
17 be. Are there any questions? Yes, sir?

18 MR. KING: Do you have any idea when that rebuttal
19 time might be?

20 CHAIRMAN BURG: I don't right now. In terms of
21 our schedules, from here on in we'll be in hearings on a
22 Tuesday-Wednesday-Thursday basis, and we have to allow
23 some time, initially, for the jukebox proceeding rebuttal.
24 My guess is that some time, possibly in June, I guess --
25 it's a guesstimate, but I doubt very much that it would be

bd 79

1 this month. That's almost a certainty.

2 Yes?

3 MS. WEISS: Madam Chairman, can I infer from that
4 that rebuttal will not be limited to written testimony?

5 CHAIRMAN BURG: Don't infer anything right now.
6 We will duly notify you when we have made some decision
7 on that, along that line.

8 Yes, sir?

9 MR. SCHEINER: Madam Chairman, sports has a long-
10 pending request that you take official notice of certain
11 materials. On behalf of the producers, I had opposed
12 that request, and those pleadings have remained pending before
13 you for some time. I'm not particularly urging that you
14 hear argument at this time, but would you contemplate
15 argument prior to a decision, or would you issue a decision
16 without argument?

17 CHAIRMAN BURG: Mr. Scheiner, that is still
18 under advisement. We, again, in this particular instance,
19 will notify you and all parties concerned with ample lead
20 time.

21 MR. SCHEINER: Very good.

22 CHAIRMAN BURG: Thank you very much. I can't
23 tell you how much of a pleasure this has been. Our offices
24 are right across the street at 1111 20th Street; in case
25 anyone wants to plea-bargain, you know where to find us.

bd 80

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(Laughter.)

(Whereupon, at 3:35 p.m., the hearing was concluded.)