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P R O C E E D I N G S

CHAIRMAN BURG: Good morning.

MR. KOENIGSBERG: Madam Chairman, if I may raise a preliminary matter very briefly, two points, and I might add I raise them now.

It has to do with the MPAA's brief concerning categories of claimants not fully represented. And I raise it now rather than earlier because of the problems of the mail, mail going up to New York and so on. I just saw the MPAA's brief late yesterday and then again this morning, so I apologize for raising it at this point.

There are two points. The MPAA's brief in dealing with music and, specifically, with ASCAP, says that music interests face the threshold question of whether any eligible claimants are before the Tribunal. And then it raises a problem with the filing that ASCAP made.

On this point, I'd like to point out that the Tribunal's order of December 19 said that evidence would be submitted in phase one in accordance with four points, and one of the points was that the performing rights societies are proper claimants, as I recall. I don't have a copy of the order with me.

The Tribunal's order issued just before these proceedings said that on May 22 and 23 the Tribunal would receive testimony by claimants on the basis of any theory or

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1 evidence excluded from presentation during phase one by the
2 terms of the Tribunal order of December 19, 1979. That
3 clearly was the point at which the MPAA should have raised
4 the argument that the Performing Arts Society generally, and
5 ASCAP specifically, were not proper claimants, and they did
6 not do so.

7 And therefore, Madam Chairman, I would move that
8 that portion of page 2 and page 3 of the MPAA's brief that
9 deals with this point should be stricken from the record. I
10 would ask for a ruling on that matter before moving to the
11 second point.

12 MR. SCHEINER: On the first point, I would suggest
13 that it would be more appropriate if Mr. Koenigsberg file a
14 pleading to that effect and afford me an opportunity to reply.

15 CHAIRMAN BURG: That strikes the Chair as being
16 an eminently good idea. Would you do that, please, Mr.
17 Koenigsberg?

18 MR. KOENIGSBERG: Certainly, Madam Chairman.

19 And the second point, and I don't think we'll have
20 a problem with this one either, the MPAA then goes on to
21 make some claims as to whether or not a hundred percent of the
22 music claimants are before the Tribunal. We would like to
23 have an opportunity to reply to those claims and I would
24 suggest that we be allowed to do so in the supporting
25 memorandum or briefs that will be filed with the proposed

js3

1 findings of fact and conclusions of law here.

2 CHAIRMAN BURG: That, too, is agreeable, Mr.
3 Koenigsberg.

4 Mr. Scheiner, as I recall, you had a question left
5 hanging yesterday afternoon.

6 MR. SCHEINER: Yes. It relates to an exchanged
7 exhibit filed by PBS. More particularly, it is entitled --
8 it's the second exhibit in their exchange. It's entitled
9 "PTV Exhibit" and bears the caption, "MPAA Members" and sets
10 out gross and net revenues of member companies of MPAA.

11 I object to the admission of this exhibit on the
12 grounds that, one, in my view it is clearly not of a rebuttal
13 nature. And, second, it is in my view wildly irrelevant to
14 any issues before this Tribunal.

15 CHAIRMAN BURG: Mr. Bechtel, would you care to
16 respond to that characterization?

17 MR. BECHTEL: Yes, if I may. I'm looking for my
18 list of exhibits to number these. I have two exhibits. May
19 I have one second?

20 There are two exhibits, and in a moment or two I'll
21 give to the court reporter copies. One exhibit is two pages
22 in length entitled "Data With Regard to MPAA Sample of Five
23 Public Television Stations." I would ask that that be marked
24 as PTV Exhibit 10. I have no rebuttal numbers. I have a
25 very tidy listing of numbers PTV-1 through 9 and now 10 and 11.

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CHAIRMAN BURG: 11 is the MPAA members.

MR. BECHTEL: 11 will be the MPAA members in question. With regard to PTV Exhibit 10, I would like to just clarify what that is.

CHAIRMAN BURG: Excuse me one moment. But no question was raised about that one.

MR. BECHTEL: No question was raised about that.

CHAIRMAN BURG: All right, fine. Go ahead.

MR. BECHTEL: And my clarification is simply this: MPAA studied the entire universe of Form 3 cable systems and came up with approximately 5 percent of the fees generated by one quarter DSEs of public television stations and this exhibit is not addressed to that. After the MPAA did that, they then structured a survey for other purposes that included five public television stations. This exhibit is addressed to the sampling of five stations that was employed in that survey.

PTV Exhibit 11 is the one in question. And the genesis of this exhibit lies in the testimony of Mr. Valenti. Mr. Valenti was the principal if only witness on behalf of the MPAA who testified concerning the economic harm that falls to syndicators and motion picture copyright owners by virtue of distant carriage on cable systems. And he gave testimony which was general and to the effect that distant carriage did have an impact upon the value of the product in distant

js5

1 markets.

2 Had he stopped there with the straightforward
3 presentation, I would have left the matter alone. But he went
4 on and volunteered some additional information, which I think
5 qualifies this as proper rebuttal material.

6 In his written testimony, following his discussion
7 of the impact upon -- of the nature of the impact, which I've
8 just summarized, commencing at page 11, he offered the
9 following information. I am reading commencing in the middle
10 of page 11.

11 "And, how have cable systems faired in the
12 exploitation of our programs? Their track record is literally
13 mindboggling. In the decade from 1968 to 1978 their sub-
14 scribers multiplied more than fourfold at an average annual
15 increase of some 16 percent, from 3 million to 14 million.
16 Based upon projections by the Department of Commerce and
17 securities analysts it is estimated that by 1981 total sub-
18 scribers will exceed 19 million. In the year 1977 cable
19 revenues exceeded \$1 billion. In 1978 its revenues exceeded
20 \$1,250,000,000. And the Department of Commerce predicts that
21 in three years cable revenues will exceed \$2 billion."

22 Then he goes on to say, "Until January of 1978,
23 these astronomical returns were realized without any payment of
24 any nature whatsoever by cable television systems to the
25 creators of the programs who made this impossible dream a

js6

1 reality; not a sou, not a farthing, not a peppercorn, not
2 even one deflated American dollar." And he continues on in
3 that vein and finally concludes with his prayer to the
4 Tribunal: "I pray that the Copyright Tribunal will decide
5 that the conclusion we have reached --

6 CHAIRMAN BURG: We heard that. We heard that,
7 Mr. Bechtel.

8 MR. BECHTEL: In light of his verification of
9 this I thought it appropriate -- I strike that.

10 I think it is appropriate to place into context
11 that sales effort and I stand second to no one in my
12 admiration for sales effort. I think it is quite proper to
13 place into context the information in PTV Exhibit 11, which
14 establishes that a number of the MPAA member companies are
15 individually as large as or in some instances substantially
16 larger than the entire cable industry as described by that
17 witness. So that is the essential purpose.

18 I think that it does go to the impeachment of
19 Mr. Valenti in the sense that he has the capacity to do a sales
20 job, and this establishes that. And if he had the capacity
21 to do a sales job and to perhaps overstate his case in this
22 particular instance, it is arguable that he may have done a
23 sales job a few pages earlier and in his direct testimony when
24 he asserted to you in a general way without specifics the
25 harm that was being caused to his industry by the distant

js7

1 carriage of cable systems.

2 MR. SCHEINER: May I engage in a brief reply?

3 CHAIRMAN BURG: Yes.

4 MR. SCHEINER: Apparently the point to Mr.
5 Bechtel, PTV Exhibit 11 is designed to rebut Mr. Valenti's
6 testimony that not a sou, a farthing or a peppercorn was paid
7 by cable for the carriage of the syndicators' programs. The
8 two just pass in the night. They have absolutely nothing to
9 do with each other.

10 The data that he has proffered in this exhibit are
11 financials with respect to some seven or eight major con-
12 glomerates and they deal in diversified areas and have
13 literally, absolutely nothing to do with anything before this
14 Tribunal.

15 I submit that if this paper has any purpose, it was
16 designed for whatever prejudicial effect it might have upon
17 this Tribunal. And I would like to enlarge my opposition
18 and ask that it be stricken. I think it unfair. I think it
19 unseemly to attempt to introduce evidence of this nature in
20 this proceeding.

21 CHAIRMAN BURG: Well, given the fact that we
22 started a half hour later than usual this morning and we are
23 not into our day yet, we will take this under advisement and
24 give you our decision a little later.

(PTV Exhibit Nos. 10 and 11

25 were marked for identification.)

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CHAIRMAN BURG: Mr. King, are you prepared with your next witness?

MR. KING: Yes, we are.

Whereupon,

JANE PERLMAN

a witness for the NAB, was called to the stand, and after being sworn by the Chairman, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KING:

Q You will have to speak up. Would you state your name for the record, please?

A My name is Jane Perlman.

Q And Miss Perlman, by whom are you employed?

A WPIX-TV, New York.

Q And what are your responsibility at WPIX?

A I am vice president of the Research Department at WPIX. I am responsible for the initiation, the analysis and interpretation of research data for management programming and sales.

Q Miss Perlman, have you been employed by the Nielsen Company?

A Yes, I have.

Q In what capacity were you employed by Nielsen?

A I was an analyst in the Special Research Department

js9

1 of the Nielsen Station Index for five years.

2 Q Now, in the course of your responsibilities at
3 WPIX, do you from time to time receive Nielsen studies?

4 A Regularly.

5 Q Would you describe for the Tribunal the nature
6 of those studies?

7 A Rating reports for special analysis generally about
8 the New York market but generally about television viewing.

9 Q Now, does the information that you ordinarily
10 receive from the Nielsen Company contain data or information
11 from which you can compute the confidence level?

12 A Yes. Always.

13 Q And how important is that information?

14 A Very important. In fact, it's imperative. Part
15 of my responsibility, as I mentioned, is initiating research.
16 One of the most important parts is to make sure that our
17 research methodology is correct and that our information will
18 be generally accepted by our clients and by the industry as
19 being valid.

20 Q Now have you studied the Nielsen study which
21 was commissioned by Kalba Bowen?

22 A Yes, I have.

23 Q And is there any way to determine from that study
24 information sufficient for you to compute the confidence level?

25 A No. No sample sizes, no margins of errors are

js10

1 shown at all.

2 Q Is there any way for you to determine the
3 statistical reliability of that study?

4 A Not from the information that I've been provided.

5 Q And what information would you need that you do
6 not find in the Kalba Bowen study?

7 A Information as to the sample sizes and the
8 confidence intervals.

9 Q Have you compared the Nielsen study commissioned by
10 Kalba Bowen with the Nielsen comparative viewing study for
11 1978?

12 A Yes. I was given --

13 MR. LLOYD: May I have the question again?

14 (The reporter read back the record.)

15 THE WITNESS: That is the name of the Kalba Bowen
16 study. I have looked at the material in the study commissioned
17 by Kalba Bowen from Nielsen and made certain comparisons
18 with individual market reports.

19 BY MR. KING:

20 Q And the individual market reports were furnished by
21 whom?

22 A They were furnished by Nielsen. As an employee
23 of WPIX, we subscribe to the Nielsen Station Index and we get
24 regular monthly, seven months out of the year, reports that
25 show audience levels for New York stations.

jsll

1 Q And have you compared that data supplied by Nielsen
2 for the months encompassed by the Kalba Bowen study?

3 A Yes.

4 Q And what months were they?

5 A The sweep months, known as the sweep months,
6 February, May, July and November.

7 Q And this was for the year 1978?

8 A For the year 1978.

9 Q And did you notice any discrepancies between the
10 Nielsen's Comparative Viewing Study that your station regularly
11 subscribes to and the Nielsen study commissioned by Kalba
12 Bowen?

13 A Absolutely.

14 Q And would you advise the Tribunal and the rest of
15 us here the results of your study?

16 A Working in the -- I've worked for WPIX for six
17 years and as such I consider myself an expert on the New York
18 market. And I am very familiar with the viewing levels to be
19 expected for the various stations.

20 Four of the stations out of the 24 stations that
21 were selected by Kalba Bowen for the Nielsen Comparative
22 Viewing Study are New York stations. They are WNEW, WOR,
23 WPIX, and WNJU. For illustrative purposes I'd like to refer
24 to the May, though the same story holds true for February,
25 May, July and November.

jsl2

1 In looking at the material I was particularly
2 surprised to see --

3 Q Could you just tell us what material you're
4 referring to?

5 MR. LLOYD: Excuse me. I'm not going to voice an
6 objection to this but I do want to point out for the record
7 the situation that we're placed in. Miss Perlman's testimony
8 was described as being aimed at pointing out the unreliable
9 of the diary sampling techniques used to gather information
10 and discussing the use, problems of using Nielsen ratings to
11 allocate shares of the royalty pool.

12 Had we been advised by notice properly given last
13 Friday that this witness were to present a comparison of the
14 New York City individual market data with the Nielsen data,
15 I would have been equipped to deal with it. I would have had
16 Mr. Harkness present in the room or I would I have had Dr.
17 Lemieux, who was here yesterday, present in the room.

18 This testimony comes as a complete surprise, no
19 prior notice, and I think it is a further example -- I don't
20 know number in what I regard to be a long list of them -- of
21 NAB taking advantage of other parties, playing fast and loose
22 with the rules, and doing things to suit it rather than to suit
23 the dictates laid down by this Tribunal.

24 CHAIRMAN BURG: That is not an objection.

25 MR. LLOYD: I think I'll object to the whole line

jsl3
1 of testimony. Yes, I do. At this stage of the game, on the
2 last day of the proceeding where I can't put my witnesses on
3 the stand, yes, I will. I object to the testimony and I object
4 to any further testimony on this point.

5 MR. KING: Madam Chairman, I think the information
6 that Miss Perlman is about to testify to was developed by her
7 just, I believe it was last night. It is an error that we
8 can clearly demonstrate in the Nielsen data furnished by
9 Kalba Bowen, and I don't see how any of us here can close our
10 eyes to it.

11 If we'd had it earlier, we would have done some-
12 thing about it. It just came to my attention last night and
13 the question is what to do with it.

14 Now, I think that if the witness can testify that
15 upon discovering this information she did in fact place
16 certain telephone calls to verify whether or not it was in
17 fact in error, and if it is necessary that testimony can be
18 developed. But I think that there is a major error which will
19 have, in my judgment, significant impact on the credibility
20 to be given to this particular study. And I think it's
21 simply foolish to close our eyes to it. It's there and I
22 don't think it can be ignored.

23 MR. LLOYD: Your Honor, I withdraw my objection.
24 If there is a major error that bears upon the credibility of
25 the Nielsen data, then by all means I think this Tribunal

jsl4

1 should hear about it. I really do, and I withdraw my
2 objection.

3 CHAIRMAN BURG: Thank you, sir.

4 Mr. Bechtel?

5 MR. BECHTEL: And I withdraw my hand.

6 CHAIRMAN BURG: Mr. King, then please proceed with
7 your witness.

8 BY MR. KING:

9 Q I think you were at a point where you were
10 testifying as to your familiarity with stations in New York.
11 And that'- where you were so why don't you just continue with
12 that?

13 A Okay. Since I am an expert in the New York market
14 and aware of expected viewing levels in this market, I
15 examined the four stations that I mentioned that were part of
16 the 24 stations selected for the sample by Kalba Bowen as to
17 viewing levels.

18 The four weeks of any survey period in this
19 particular Nielsen commissioned study relate to the same four
20 weeks of the general sweep reports for that market. The
21 general sweep report for the May, 1978 Nielsen report shows
22 that for an average quarter hour of viewing WNJU reaches
23 12,000 households in the New York market. That is station
24 total households, viewing wherever it occurs. The Nielsen
25 report also shows very clearly that a hundred percent of the

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1 viewing to WNJU is in that market's home DMA or, in other
2 words, the 12,000 average viewers are all in the New York home
3 market. There could be no viewing of a distant signal or
4 NJU could not be a distant signal.

5 However, in the A.C. Nielsen comparative viewing
6 study for May, 1978, it clearly shows that WNJU has 77
7 quarter hours --

8 Q Excuse me, Miss Perlman. You're referring now
9 to the exhibit.

10 A Kalba Bowen study, the segment for May, though
11 this holds up true for all of these various cycles. It shows
12 that 77 quarter hours of programming got an audience of
13 6000 viewing households, average viewing households. The
14 798 quarter hours of viewing got a viewing audience outside
15 the DMA of 21,000 households, and that 122 quarter hours
16 showed viewing of 13,000 average households. Or, if you
17 weight the percentages against the viewing households, I
18 think my figure was that on the average 19,000 viewers outside
19 the DMA, or outside the New York home market viewed WNJU on
20 cable, which is absolutely impossible since the Nielsen
21 report for May shows that 12,000 households totally within
22 the New York area viewed WNJU.

23 Now, the same material shows up for February.
24 The station's total audience for February was 15,000 households.
25 Yet the Kalba Bowen commissioned study shows that there were

js16

1 15,000 households outside the home market viewing area.

2 Impossible.

3 For July, it was 13,000 households averagely
4 within the whole market. The Kalba Bowen study shows 11,500
5 outside. And in November it's 17,000 inside, 8,400 outside.
6 But in all cases, a hundred percent of the viewing was
7 credited to the home market.

8 CHAIRMAN BURG: Miss Perlman -- excuse me, Mr.
9 King -- when you say these numbers with respect to outside the
10 DMA is impossible, would you explain, please, again carefully
11 and slowly why it's impossible?

12 THE WITNESS: Well, the same diaries are used to
13 construct the data for both studies. The New York market
14 report which shows the audience for WNJU relates that all of
15 the viewing to WNJU takes place within the New York DMA, or
16 the home market for all 12,000 households that report viewing
17 for WNJU are in the 28-county New York area. Therefore, there
18 could be no viewing by distant signal outside the New York
19 market.

20 However, the Kalba Bowen study, which shows viewing
21 to New York stations, as we're talking about here, outside the
22 New York market shows more viewing outside the New York market
23 than there is totally.

24 CHAIRMAN BURG: The DMA comprises 21 counties?

25 THE WITNESS: 28 counties.

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CHAIRMAN BURG: 28.

THE WITNESS: Right.

CHAIRMAN BURG: Why can't a cable system outside of that range pick up WNJU?

THE WITNESS: I don't know if they can or they can't. But there's no viewing reported to it. I mean the information that I have does not tell me whether cable companies are carrying the station or not. But there's a gross inaccuracy because the data reported by the Nielsen Company for Kalba Bowen is showing viewing beyond the area that the original Nielsen report shows the station to reach.

CHAIRMAN BURG: And that's showing commercial viewing?

THE WITNESS: Right.

CHAIRMAN BURG: Proceed.

COMMISSIONER COULTER: Excuse me. Are you sure those are the same diaries?

THE WITNESS: Yes.

MR. LLOYD: If it will be of any assistance to the Tribunal, I don't have the -- what do you have the New York VIP?

THE WITNESS: Right.

MR. LLOYD: I don't have the New York VIP. But if that reports that all of the total viewing was within the DMA, then it is correct that the depiction of the data here

js18.. 1 for WNJU as showing viewing outside the DMA is incompatible
2 with the VIP data. I will agree with that. The two cannot
3 be reconciled. And I will not in my interrogation of the
4 witness try to show that they are possibly compatible.

5 CHAIRMAN BURG: That leads me to another question,
6 as just an extension of that. What about the other stations,
7 were there any incompatibilities in those figures for PIX
8 or WOR? I forget the fourth one.

9 THE WITNESS: They were all within the range of
10 acceptable data. The other three.

11 CHAIRMAN BURG: So it's really one station we're
12 talking about.

13 THE WITNESS: However, I've looked at the other
14 markets and I cannot really comment on whether there are
15 mistakes in the other markets. That can be checked but I do
16 not have the available information.

17 CHAIRMAN BURG: I understand. You're restricting
18 your testimony to the New York market.

19 COMMISSIONER COULTER: Excuse me. Did you say in
20 answer to the Chairman's question that the other stations,
21 the correlation seems to be all right?

22 THE WITNESS: For the New York market, yes.

23 COMMISSIONER COULTER: Okay.

24 MR. KING: Could I go off the record for one
25 second?

js19

1 MR. LLOYD: For what purpose?

2 CHAIRMAN BURG: Let's find out the purpose.

3 MR. KING: I'm just raising this for whatever
4 help, if any. But upon discovering this area, Miss Perlman
5 telephoned Mr. Harkness. And if it's of any value, she can
6 relate this conversation.

7 MR. LLOYD: I will not interpose an objection.
8 I'll not interpose an objection, if you wish to interrogate
9 your witness.

10 MR. KING: I don't wish to. I'm just raising it
11 and if anybody wants to go into it --

12 MR. LLOYD: If you don't, I will.

13 MR. KING: Well, why don't we do it? Why don't
14 you --

15 CHAIRMAN BURG: Are we on the record or off the
16 record?

17 MR. KING: Well, let's go back on the record.

18 MR. LLOYD: I hope we were never off.

19 CHAIRMAN BURG: We weren't.

20 BY MR. KING:

21 Q Upon discovering this discrepancy, Miss Perlman,
22 did you call Mr. Harkness?

23 A Yes.

24 Q And would you just relate as best you can what you
25 said to him and what he said to you?

js20

1 A I explained my findings and I wanted to know if
2 there was any reason that he could find for the discrepancy,
3 whether there was any explanation. In my experience with
4 research I knew that this was not possible. I just wanted to
5 confirm with him that it in fact was what I was seeing.

6 I asked him to, you know, if there was any way of
7 checking the material. He said that the data would have to be
8 looked at and that the data, or the person who was responsible
9 for the study had already gone home from work and that he would
10 check with them and get back to me, or I would get back to
11 him at some point.

12 Q Miss Perlman, if the study commissioned by Kalba
13 Bowen came to your attention in the course of your duties,
14 and you were aware of the error which you've pointed out,
15 what credibility, if any, would you give that Kalba Bowen
16 study?

17 A I'd be very concerned about the reliability of the
18 remainder of the markets and of the bottom line results, which
19 are, of course, influenced by the mistake in the individual
20 markets.

21 Q Turning to another subject, does Arbitron provide
22 data showing the reach, covered reach of a given television
23 station?

24 A Yes, through a coverage study which an individual
25 station can subscribe to.

js21 1 MR. LLOYD: Excuse me. May I pose a qualifying
2 question of counsel, preparatory to a possible objection?
3 And that is, are you interrogating the witness respecting
4 Arbitron to tie in to the error that you have?

5 MR. KING: No.

6 MR. LLOYD: Then I object, that this is an
7 improper line of examination. We have not been provided notice
8 of it.

9 MR. KING: Well, the purpose of this -- there's
10 been questions raised throughout this hearing, I think, by
11 every witness for every one of the other parties. And the
12 purpose of the question is to show, I suppose, that there is
13 no interest in local programming in the distant market. And
14 the hypothetical generally given is that no one -- I mean
15 a sewage problem in Chicago is of little concern to anybody
16 in Peoria.

17 Now, the purpose of this next line of testimony is
18 to develop information from which it can be seen that distant
19 carriage of these stations is geographically not distant.
20 They're very close. They're in regional markets and the
21 purpose of it would be to show that locally produced program-
22 ming in 98 percent of the area reached by a given station
23 would be of interest.

24 In otherwords, it simply is not the case with
25 PIX, as an example, that that station carried as a distant

js22

1 signal is going to be going into some area that has no
2 reasonable connection with developments in the local market.

3 MR. LLOYD: Madam Chairman, my objection is not to
4 relevancy, materiality, or anything like that. I fully confess
5 that. My objection is much more fundamental. That is, I
6 don't think the other parties to this proceeding, and we're
7 only counsel speaking for the parties, but the other parties
8 to this proceeding should continue to bear the brunt of NAB
9 not getting to the matters that this Tribunal requires them
10 to get to on time.

11 Now, if Mr. King wished to put a witness on the
12 stand to testify about Arbitron data, if he wished only to
13 explore the subject of the nature of the distant viewing
14 given to the local programming, all he had to do was tell us
15 last Friday he was going to do this. He didn't tell us last
16 Friday he was going to do this. So we come in here today
17 expecting a witness, Miss Jane Perlman, to testify on two
18 topics that are outlined. We're on the second topic. This
19 is the second topic that bears no relationship to the notice.

20 I simply don't think it's fair. I particularly
21 don't think it's fair on the last day of the proceeding.
22 I particularly don't think it's fair then. In fact, I think
23 that is the most unfair time it could occur.

24 MR. KING: If I could be heard. We did designate
25 that we would be talking about the popularity of local

js23

1 programming.

2 MR. LLOYD: Where in the description of Miss
3 Perlman's testimony.

4 MR. KING: It's Mr. Hughes. But this is -- if I
5 can just make an offer of proof and show the point of her
6 testimony.

7 MR. LLOYD: I object to any offer of proof being
8 made. If we're going to open up this proceeding to offers of
9 proof, then I'll bring in those Shostick computer prints and
10 I'll explain for two hours. If you're going to entertain
11 offers of proof.

12 CHAIRMAN BURG: I'm going to entertain this to
13 make a determination on the overall question.

14 MR. KING: Arbitron provides information from
15 which the given station can determine the reach of its market,
16 I mean the reach of its signal. On the basis of that
17 information, WPIX has prepared what we call a coverage map,
18 which I will circulate. That map would show that 90 -- well,
19 almost 95 percent of PIX's distant coverage is within the
20 metropolitan market. It follows from that, we argue, that
21 locally produced programming of that particular station would
22 be of interest in that market.

23 Now, Mr. Hughes got into a little bit of this last
24 week. But inasmuch as Miss Perlman has prepared the maps, I
25 thought she would be the one to talk about it.

js24

1 MR. LLOYD: I don't back off from anything I've
2 said.

3 CHAIRMAN BURG: We're going to take a brief recess.

4 (A short recess was taken.)

5 CHAIRMAN BURG: Mr. King, the Tribunal has decided
6 that you may produce one witness with respect to this
7 testimony, and the decision is yours with respect to which
8 witness it will be.

9 MR. KING: Okay. The difficulty is this: the
10 witness who we produced is not responsible for preparing the
11 maps. He would know how they were prepared but he did not
12 prepare them. This witness has prepared them.

13 CHAIRMAN BURG: Well, I'll repeat what I said.
14 You may have one witness with respect to this testimony and
15 it can be either Miss Perlman or Mr. Hughes.

16 MR. KING: Okay.

17 CHAIRMAN BURG: What's your decision?

18 MR. KING: Mr. Hughes.

19 CHAIRMAN BURG: It will be Mr. Hughes?

20 MR. KING: Yes.

21 CHAIRMAN BURG: Then we'll continue with Miss
22 Perlman along the lines that were designated.

23 MR. KING: Fine.

24 BY MR. KING:

25 Q I believe, Miss Perlman, earlier in your direct

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1 testimony, you stated that if the Nielsen study commissioned
2 by Kalba Bowen came to you in the ordinary course of your
3 duties that you would have reservations about it. And I may
4 have cut you off and I want to give you the opportunity to
5 explain to the Tribunal what reservations you would have and
6 why.

7 A Well, I would have two reservations. One, that
8 there was no detailed information on confidence levels, and
9 sample sizes, the methodology was very brief so that I would
10 not know how much reliability to place upon the study. I mean
11 I have initiated studies, as I had mentioned before. This is
12 certainly something that I request with every study that I
13 initiate.

14 The second is I would have reservations finding
15 an error like that, because after all, most people that
16 receive research from Nielsen look at the results and accept
17 the results because they are Nielsen and Nielsen has a
18 reputation of being a very experienced company in research and
19 would not examine the individual details for errors. I
20 would be -- Nielsen attests, and I have worked at Nielsen, to
21 a lot of internal checks and editing procedures. And it
22 surprises me enormously that an error of this type should
23 get through their editing and checking procedures. And it
24 would shake my confidence in the research, generally speaking,
25 that the purpose -- that the way it was prepared was not up to

js26

1 standard.

2 Q Now, you indicated that the methodology employed
3 in this particular study was brief. Can you tell us what
4 you mean by that and why you say it?

5 MR. LLOYD: Object to the form of the question. It
6 assumes a fact not in evidence. She said the description of
7 the methodology was brief, not that the methodology itself
8 was brief.

9 BY MR. KING:

10 Q Do you recall what your testimony was? Did you
11 say the methodology was brief or the description was brief?

12 A I thought I said description of the methodology.

13 Q All right. Then I stand corrected. I'm sorry.

14 In what respect was that description brief?

15 A Well, there were references, you know, to -- they
16 followed general Nielsen procedures as detailed in their
17 methodological report, which is very detailed. They did not
18 state the sample sizes, they did not state the confidence
19 levels.

20 MR. KING: I have no further questions of this
21 witness.

22 COMMISSIONER COULTER: Miss Perlman, you stated
23 that with the other stations that you're familiar with there
24 didn't seem to be an inaccuracy. Is there any chance that
25 the one you did find was a typo?

js27

1 THE WITNESS: No, because it appeared in all
2 four cycles. If it had been in only one of the cycles, I
3 would have said it would be a typo. But the same error was
4 repeated in each of the individual parts of the report. And
5 as far as the other stations, I said they were possibly
6 correct in the sense that there was no glaring error. There
7 is no way that I can without looking at the complete data
8 check the accuracy of the other stations.

9 COMMISSIONER COULTER: Okay. My next question is
10 for my education. You said that in the study, in the Nielsen
11 study that you normally use all viewing of these stations
12 would be shown and that's the reason that you stated that
13 you found this discrepancy?

14 THE WITNESS: Right. The Nielsen methodology
15 shows station total viewing. In otherwords, what they do is
16 they search diaries in all 48 states for viewing to any
17 station, so that it would be -- that station total figure
18 would include viewing wherever it might occur within and
19 outside the home market.

20 COMMISSIONER COULTER: In Mr. Hughes's previous
21 testimony for us he said that when you are selling advertising
22 you can't sell to viewing outside your home market because
23 it's not compatible with a given company's marketing strategy.

24 How do you make a distinction between viewing in
25 your market and viewing outside if it only appears as one

js28

1 figure in the Nielsen study?

2 THE WITNESS: Well, that's one of the figures that
3 appears there. But most buying and selling takes place on
4 ratings rather than household figures. In the New York market
5 we get ratings on a daily basis. Now, a rating is a percent
6 of homes in the home market. So if you get a 15 rating,
7 that's generally the tool that's used in the buying and selling
8 process.

9 COMMISSIONER COULTER: But how you determine the
10 rating is ultimately based upon those diaries, isn't it?

11 THE WITNESS: Not in the New York market. It's
12 based on the metered measurement. The ratings books also
13 show ratings so that they would show a measurement of viewing
14 within the home market and also additional viewing outside the
15 home market in terms --

16 COMMISSIONER COULTER: So there is a breakdown
17 between the home market viewing and total viewing?

18 THE WITNESS: Yes.

19 COMMISSIONER COULTER: Thank you.

20 CHAIRMAN BURG: Are there any other questions of
21 Miss Perlman?

22 MR. LLOYD: Well, I'm going to have questions but
23 if Mr. Bechtel is going to have questions, rather than get
24 whipsawed by friendly cross-examination, as I did with NAB's
25 yesterday's witnesses, I'd just as soon Bechtel went ahead

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1 and then I'll follow when he's through.

2 MR. BECHTEL: I don't have any questions.

3 CHAIRMAN BURG: Mr. Lloyd?

4 CROSS-EXAMINATION

5 BY MR. LLOYD:

6 Q Miss Perlman, my name is David Lloyd and I repre-
7 sent the Joint Sports Claimants, which sponsored the Kalba
8 Bowen study of which the Nielsen Station Index Special Study
9 is a part.

10 I gather somewhere along the line you received a
11 copy of the Nielsen Station Index Special Study for Kalba
12 Bowen; is that correct?

13 A If we're referring to the four-cycle study that
14 I was talking about, yes.

15 Q This document has been made a part of the record
16 and it bears a cover on it which says, "Nielsen Station
17 Index Special Study for Kalba Bowen, Comparative Viewing of
18 Qualifying Program, 25 Signals, 1978 for Sports Programs,
19 Syndicated Programs, Local Origination Programs," and bearing
20 a reference to March, 1980 in the right-hand corner of the
21 cover.

22 A I have the inside part of it, yes.

23 Q Excuse me. Have you seen --

24 A I never saw the cover but I saw the inside.

25 Q Okay. Well, would you look at what's inside the

js30

1 cover, then, and tell me if you've seen that?

2 (Witness perusing document.)

3 THE WITNESS: Yes, I have.

4 BY MR. LLOYD:

5 Q When did you first see the material that I have
6 made reference to?

7 A In its entirety about a week ago.

8 Q And when did you first see a piece of it? Since
9 you answered my question you first saw it in its entirety a
10 week ago, that suggests that you saw a part of it longer ago
11 than a week. Is that suggestion correct?

12 A I saw part of it -- I'm not sure exactly when.

13 MR. KING: Late April I suspect.

14 BY MR. LLOYD:

15 Q And what part of it specifically did you see in
16 late april, Miss Perlman? Would you point me to the part of
17 it, please, and identify it for the record?

18 A Okay. I saw -- the charts for February, May,
19 July and November.

20 Q All right. And are you suggesting then by that
21 that you did not see the chart that gave the four-cycle
22 average?

23 A It was not included, nor did I see the qualifying
24 material.

25 Q But you did see the reports for each of the four

js31
1 sweep periods; is that correct?

2 A Yes.

3 Q And that was sometime in late April, to the best
4 of your recollection, ma'am?

5 A Yes.

6 Q Would you tell me how you came in late April to
7 receive those four pages?

8 A I was given it by David Polinger.

9 Q Who is David Polinger?

10 A He is the vice president of WPIX, assistant to
11 the president of WPIX, who is involved with the Copyright
12 Tribunal, or the NAB.

13 Q He's actually on an NAB --

14 A NAB.

15 Q -- committee that is involved in this proceeding,
16 is he not?

17 A Right.

18 Q And when Mr. Polinger gave you in April the four
19 sheets showing the individual sweep data for the 24 stations
20 included in the Nielsen study, one of which was WNJU, and
21 three others of which were located in the New York market,
22 what did he say to you?

23 A He said I'd just like you to look through this.
24 There was also some other material from the Sports but that
25 was the only part of the Kalba Bowen that I had gotten. It

js32

1 was an incomplete material from the Sports presentation.

2 He just asked me to read through it.

3 Q I see. Now, when approximately a week ago, and
4 would you search your recollection and see if you can tell me
5 the precise data where you were given the entire study?

6 A I believe it was Thursday. Thursday.

7 Q So it wasn't approximately, it was exactly a week
8 ago. And how did the entire report come into your possession
9 exactly a week ago?

10 A I was given it by June Gottschalk.

11 Q And when the report was given to you, approxi-
12 mately or exactly a week ago, Miss Perlman, what was said to
13 you?

14 MR. KING: I would object at this point. I don't
15 know where Mr. Lloyd is going, but I don't think it's proper
16 to inquire as to the conversations between counsel and
17 witnesses before the proceeding.

18 MR. LLOYD: Well, of course it is. Does Coudert
19 Brothers represent you, Miss Gottschalk?

20 THE WITNESS: I'm Miss Perlman.

21 MR. LLOYD: I mean Miss Perlman. Excuse me.

22 Miss Gottschalk is with Coudert Brothers, is she not?

23 THE WITNESS: Yes.

24 BY MR. LLOYD:

25 Q Does Coudert Brothers represent you?

js33

1 A Or the NAB of which --

2 Q You're with WPIX?

3 A Yes, that's right.

4 Q You're a witness for the NAB?

5 A Um hum.

6 Q I'm sorry, I'm seeking to ascertain what your
7 assignment was. What did you understand your assignment
8 to be with respect to the complete report? I won't inquire
9 as to the conversation with counsel. I just want to know
10 what your understanding --

11 A To review the material, to comment on it.

12 Q Now, I gather that you used resources which you
13 had available to you in an effort to ascertain whether or not
14 there were inaccuracies in the data, is that correct?

15 A I noticed the inaccuracy -- as I stated, I work
16 with the New York data on a daily basis since I work for a
17 New York station, and in reviewing the data this appeared to
18 me as something that looked incorrect.

19 Q I understand.

20 A At which point I confirmed that by looking at
21 other source material that I work with on a daily basis.

22 Q I understand that. But what I want to know is
23 if you made an effort to determine whether there were or were
24 not inaccuracies in the data.

25 A I really wasn't looking for inaccuracies.

js34

1 Q Once you found the inaccuracies as to which you
2 have provided testimony respecting WNJU, did you seek to
3 determine further whether there were additional inaccuracies?

4 A I checked all the New York stations, as I said,
5 to see if there were consistencies there.

6 Q Did you seek to determine whether in the case of
7 the New York stations the component figures provided in the
8 Nielsen data for the three classes of programming for each of
9 the four sweeps were compatible with information which you
10 had?

11 A I did not look at it by individual program types.

12 Q You looked at it by homes?

13 A I looked at it by total viewing levels.

14 Q And looking at it by total viewing levels, what
15 did you find?

16 A I saw a figure for WNJU, as I said, that was
17 excessive for their general audience levels, as I know them
18 in the New York market.

19 Q You made that quite clear. What did you find with
20 respect to WPIX?

21 A That the reported outside viewing was possible.

22 Q What did you find with respect to WOR?

23 A That the reported outside viewing was in the
24 possible range.

25 Q What did you find with respect to WNAW?

js35

1 A That the reported outside viewing was within the
2 possible range.

3 Q In your testimony under the examination of Mr.
4 King, Miss Perlman, you suggested that you looked at data in
5 other markets as well. What other markets?

6 A I said I scanned other markets and there appeared
7 to be high viewing levels, higher than I would expect but I
8 could not -- I did not check or could not check. It would
9 lead me to want to look at other market data or to do that
10 kind of check.

11 Q I know. That's a terribly dangerous kind of
12 suggestion to make in that fashion. What particular markets
13 were there that you looked at, Miss Perlman?

14 A I scanned the markets. I can't --

15 Q Yes, which ones?

16 A All the markets.

17 Q Oh, each and every market.

18 A Well, I scanned a list of 25 stations and, as I
19 said, I am not totally familiar. I was surprised at the
20 large size of the audience for Atlanta outside, but I know
21 that they do have an extensive non-DMA audience. But I would
22 like to check that figure out as with other figures as well.
23 It led me as a researcher to want to look further.

24 Q Well, what did you look at? Did you look at
25 anything other than the Kalba Bowen-Nielsen data which is

js36

1 referred to?

2 A I did not. I did not have other information
3 available to me when I noticed the discrepancy on NJU.

4 Q Oh, I see. So when you said that you looked at
5 the other markets, what you meant is that you looked at the
6 stations on this report.

7 A That's what I did, yes.

8 Q And you looked at the numbers for them?

9 A Right.

10 Q But you didn't go to the Nielsen VIP report for
11 those markets?

12 A No, I did not.

13 Q Is that correct?

14 A That's correct.

15 Q Did you make any effort to ascertain -- let's
16 proceed from the assumption of this question, Miss Perlman,
17 that the figures for WNJU are completely in error and never
18 should have been there and that we wipe WNJU completely out
19 of the study. Just bear with me, with that assumption for
20 the minute. And I know that you said that as a researcher
21 you would want to verify the other data because now your
22 suspicions or your concern is heightened over the data. But
23 let's get beyond that point as well.

24 Did you make any effort to assay the impact which
25 WNJU's inclusion or exclusion from this data has on the bottom

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line?

A No.

Q Okay.

MR. KING: Excuse me.

MR. LLOYD: Excuse you?

MR. KING: Have you completed your answer?

THE WITNESS: I did not do the calculations involved in which, if we're eliminating that, how it would do. But I did notice that, you know, the audience to WNJU was very much inflated and that it would affect -- I did make the -- I did have make the observation that it would affect the bottom line.

BY MR. LLOYD:

Q Well, would it affect the percentages?

A I would have to work that out.

Q You don't know. You don't know.

A I would not have -- I would have to work it out, I don't know. I did not work it out, no. I did not have the correct figures for WNJU. I really couldn't.

Q Did you look at the four-cycle averages for WNJU as part of your work?

A Yes.

Q Do you have the report there?

A I do. Are you referring to the four-cycle?

Q Yes. I'm referring now to the four-cycle average.

js38

1 Now, in terms of the percentages which are provided, it shows
2 that for the four-cycle average the time devoted to local
3 programs was 12 percent and the audience 8 percent of the
4 total, does it not?

5 A Yes.

6 Q In the case of local programming, for movies it
7 was 82 percent of the time and 89 percent of the audience.

8 A Um hum.

9 Q And for sports it's 6 percent of the time and 3
10 percent of the audience, is it not?

11 A Um hum.

12 Q One of 24 stations. And it's your belief, did you
13 say, ma'am, that the exclusion of those would have an impact
14 on the percentages given --

15 A I don't know what the correct percentages would be
16 of viewing --

17 Q We're assuming that you wipe it out altogether.

18 MR. BECHTEL: I object to the form of the question.
19 She also said that other figures for other stations looked
20 unduly high. And that affects the bottom line as well.

21 MR. LLOYD: Well, you didn't listen to the
22 question then, Mr. Bechtel.

23 COMMISSIONER BRENNAN: Try again, Mr. Lloyd.

24 BY MR. LLOYD:

25 Q Is it your testimony, ma'am, that the elimination

js39

1 of those figures that we have referred to would alter the
2 bottom line totally?

3 A I would want to work out the actual mathematics
4 of it. I don't know.

5 Q So you're not prepared to say that today, are you?

6 A That's right.

7 Q When did you discover this error?

8 A Yesterday afternoon.

9 Q What time?

10 A Late afternoon.

11 Q What time?

12 A At about 4 -- 4 o'clock in the afternoon.

13 Q Who did you notify when you discovered it?

14 A David Harkness.

15 Q David Harkness of A.C. Nielsen Company?

16 A Right.

17 Q You notified him by telephone, did you?

18 A Yes. I called his office, he was in a meeting.

19 I said that it was important. I asked whether I could reach
20 him. His secretary said that he would get back to me. I told
21 her that I had another meeting after work and I would request
22 his return phone call as soon as possible.

23 Q And he did call you back, did he not?

24 A Yes, he did call me back.

25 Q You explained to Mr. Harkness during that

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1 conversation, which occurred last evening sometime after 5,
2 did it?

3 At about 5:30.

4 Q You explained to him that you had discovered
5 this error?

6 A I explained to him exactly as I explained to you
7 what I found and that I felt it was an error and whether there
8 was any explanation that he could offer.

9 Q Between the time that you discovered what appeared
10 to you to be the error and the time that you called or
11 actually reached Mr. Harkness, did you discuss the matter
12 of the apparent error with anyone else?

13 A Miss Gottschalk called me to confirm when I would
14 be coming to Washington and I did tell her what I had found.

15 Q Now, when you reached Mr. Harkness, you called
16 his attention, I gather, to the figures that were contained
17 in the Nielsen work for Kalba Bowen as well as the figures
18 that were contained for WNJU and I believe you said the May,
19 1978 VIP report for New York?

20 A Yes, I did.

21 Q Is that correct? And I gather you suggested to
22 him at that time that the two sets of data were incompatible.

23 A I did.

24 Q And Mr. Harkness, I gather agreed that the two
25 sets of data were --

js41
1 A Well, I tried to get him to acknowledge that and
2 he did say that he'd have to check it out with the original
3 data source. He really didn't take a position. When I
4 later spoke to him, he said well I really have no explanation,
5 the two don't agree.

6 Q Oh, you spoke to him twice?

7 A I spoke to him once, yes, and explained it to him
8 and then I called him a second time.

9 Q When was that?

10 A Well, I reached him at about 5 o'clock and then
11 I was leaving my office at 5:30 and I called him -- he said
12 he was going to check on the data, and I called him back a
13 second time at 5:30 to find out if he had checked on the data
14 because I had to leave my office.

15 Q I see. So you reached him first at 5 and told
16 him of your concern.

17 A Right.

18 Q And then you called him back at 5:30 to ask him
19 what he had done about it.

20 A I asked him -- he told me he was going to check
21 with his Dunedin office. And I had to leave my office before
22 expected, so he could not reach me after that. I called him
23 a second time to find out if in fact he had gotten any
24 information.

25 Q When you reached him the second time, he explained

js42

1 to you that he had not been able to check it out yet.

2 A Right.

3 Q Is that correct?

4 A Yes.

5 Q Now, Mr. Harkness did indicate that he would
6 follow up on the matter, did he not?

7 A Yes.

8 Q And is it not also true, Miss Perlman, that you
9 told Mr. Harkness that you would call him at ten o'clock today
10 to find out what he found out?

11 A I told him I would call him this morning. I didn't
12 tell him what time.

13 Q And you haven't called him, have you?

14 A No.

15 Q Did somebody tell you not to make that call?

16 A No.

17 Q You just haven't had a chance to make it?

18 A That's right.

19 Q I see.

20 Do you plan to make the call?

21 A Yes.

22 Q When do you plan to make it?

23 A As soon as I get back to my office.

24 Q In New York?

25 A (Up and down head shaking.)

js43

1 Q You do not plan to make the call prior --

2 A I hadn't really thought about when I was going
3 to make it until this moment.

4 Q You told Mr. Harkness you'd call him at ten
5 o'clock this morning, didn't you?

6 A I told him I'd call him this morning. I don't
7 believe I specified a time.

8 Q You don't believe you did. But you can't say for
9 sure you didn't, can you?

10 A I don't believe I specified a time.

11 Q Now, you said in your direct testimony, and I want
12 to come back to this, you said that you compared the Nielsen
13 data with certain individual market reports. You compared
14 the Nielsen data only with the New York market reports, is
15 that correct?

16 A That's all I said. I don't have the others
17 available to me in my office -- in my office, when I discovered
18 them, the initial New York error.

19 Q You worked at A.C. Nielsen, I believe you said,
20 for six years.

21 A Five years.

22 Q You're familiar with their procedures and efforts
23 to verify data.

24 A (Up and down head shaking.)

25 Q I believe that you testified, in fact, people

js44

1 accept the results and I gather even you in your work accept
2 the Nielsen results because they are a reputable concern?

3 A I review them because I have the expertise to
4 do so.

5 Q Given the situation which you have confronted
6 Nielsen with, Miss Perlman, what would you expect Nielsen to
7 do now?

8 A To review all of the data that they have produced.

9 Q And once they had done that, what would you expect
10 Nielsen to do?

11 A To issue a revised report.

12 Q And how would they go about checking all the
13 data?

14 A They would have to go back -- I would insist, if
15 I were the client ordering the study, that they go back to the
16 original specifications and redo the study from the beginning.

17 Q I think it's rather interesting that the testimony,
18 of this witness respecting the Nielsen data should follow on
19 the heels of Mr. King and Mr. Bechtel making an issue of my
20 seeking to put data which came to my attention, and which I
21 did see fit to exchange with the other parties, in that was
22 generated by the NAB computer experts in an effort to impeach
23 him. The main argument being that it was really unfair to
24 try to dump this in at the last minute with the witnesses not
25 around to explain it.

js45

1 I will tell you what the facts are. This is not
2 a matter of record. It's a report from counsel because, as
3 I said when this came up, I don't want this record to sit
4 with anything like this in it if we know it to be inaccurate.

5 This matter came to my attention this morning
6 at approximately 9:30. Mr. Garrett, my associate, learned of
7 it approximately a half hour before that. I was in another
8 meeting and Mr. Garrett began learning about it, I guess I
9 should say, a half hour before that.

10 A.C. Nielsen Company has 13 people working right
11 now in verifying the data. Mr. Harkness is prepared to come
12 to Washington. He cannot be here until in the morning, to
13 testify with respect to the data. If you don't want to hear
14 him, then I am prepared to tender a written report from
15 Mr. Harkness about the data. But A.C. Nielsen is going about
16 this just as I would expect them to do. It is an apparent
17 error. They regret the error. They have been unable to
18 provide me with an explanation of the error. But having had
19 the error pointed out to them, they want to make sure that
20 everything else is in good order.

21 Now, had Mr. Harkness been confronted when he was
22 on the witness stand with the VIP report from New York, and
23 with the Kalba Bowen report, as is common when a witness is
24 on the stand, we would have dealt with it.

25 I have been told that Nielsen has done a hand

js46

1 calculation omitting WNJU, and as I would expect, it has zero
 2 impact on the bottom lines of the report. But I think the
 3 Tribunal is entitled to know if this one error, and at this
 4 point I am prepared to concede there is an error, if this
 5 error contaminates the entire work. And I will gladly welcome
 6 the opportunity, if you will afford it to me, to bring Mr.
 7 Harkness back down. He'll conclude this process today.
 8 The 13 people will conclude their work. The result of that
 9 process may be that there are eight other errors and the
 10 Nielsen work ought to be thrown out altogether. It may be
 11 that they will confirm, as the preliminary indications are,
 12 that this is the only error that they have uncovered.

13 I beg your indulgence on this. I apologize.
 14 I did not know about it.

15 CHAIRMAN BURG: Mr. King, would you have any
 16 objection to a written report?

17 MR. KING: Madam Chairman, what I would like to do
 18 is address this specifically after I've had time to think about
 19 it. And if we could do that, upon resumption this afternoon
 20 just prior to Mr. Hughes's testimony, I'll address it
 21 specifically. But I would like time to talk to our people
 22 here and get a point of view that represents the NAB's
 23 position on it. I'm just expressing my own point of view at
 24 this time.

25 CHAIRMAN BURG: Mr. Scheiner?

js47
1 MR. SCHEINER: Madam Chairman, I was unaware of
2 of this development until it surfaced in the hearing room.
3 As the Tribunal appreciates, the Program Syndicators have a
4 very, very substantial interest in the Nielsen report. If
5 counsel is prepared to bring down Mr. Harkness, I think he
6 should be afforded that opportunity.

7 Alternatively, we could have the report and then
8 in the event that there were any lingering questions for the
9 Tribunal to reserve the designation of a further day to consider
10 oral testimony on it.

11 My preference would be, in the light of counsel's
12 statement, to have Mr. Harkness come in, get it over with
13 so that we can close the record on phase one at an early date.

14 MR. KING: One of the questions that this raises
15 is that I believe that, among all the claimants, the NAB
16 is the only one that has really opened up its data sources
17 for full exploration.

18 MR. SCHEINER: I object very strongly to that.

19 CHAIRMAN BURG: Let's restrict ourselves to what
20 we're talking about.

21 MR. KING: I mean in terms of supplying under-
22 lying data.

23 MR. SCHEINER: Madam Chairman, that is simply not
24 the case. I filed a request that was turned down cold.
25 And I don't think the --

CHAIRMAN BURG: The question before the house, if

js48

1 I will, if we will, is we do this by written form or do we
2 produce the witness.

3 Mr. King, you said you'd like to talk to your
4 people and give us your decision after the noon recess.

5 MR. KING: Yes, ma'am.

6 CHAIRMAN BURG: And we are certainly sensitive to
7 your position, Mr. Lloyd, and we will make our decision after
8 we hear from Mr. King.

9 MR. LLOYD: Let me say in case I may have mis-
10 spoken. I am not anxious to bring Mr. Harkness down here. He
11 didn't plan it as a part of his schedule. None of the people
12 in his room planned it as a part of his schedule. But if the
13 Tribunal would like to hear from him, I would welcome the
14 opportunity to bring him down.

15 I'm perfectly amenable to a written report. I have
16 undiminished confidence in A.C. Nielsen Company. I guess
17 sometimes I'm reminded that the bank has this facade of
18 efficiency they put forward and their errors that occur in
19 their backrooms, as the bid over the money supply a while
20 back illustrated, and these things happen. I apologize for it.

21 But on the other hand, I think from my standpoint,
22 we have presented a valuable, and I certainly know expensive,
23 piece of information and I don't want a lingering suggestion
24 that it's contaminated unless it's justifiable.

25 CHAIRMAN BURG: I understand that. And I knew

js49

1 that you would be amenable to bringing the witness down
2 and I assume that you would also be amenable to just submitting
3 a written report.

4 MR. LLOYD: Absolutely.

5 CHAIRMAN BURG: Until we hear from Mr. King, at
6 that point the Tribunal will make the decision. But please
7 continue now with your --

8 MR. LLOYD: Well, let me review my notes because
9 I am not sure that I have concluded my examination of the
10 witness. But given her testimony about what Nielsen ought to
11 be doing, I thought I appropriately might interrupt the
12 presentation for this reason.

13 I have nothing further at this point of Miss
14 Perlman.

15 CHAIRMAN BURG: Does anyone else have questions
16 for this witness?

17 (No response)

18 CHAIRMAN BURG: If not, we'll recess until 2 o'clock
19 this afternoon.

20 (Whereupon, at 12:05 p.m., the hearing was recessed,
21 to reconvene at 2:00 p.m., this same day.)
22
23
24
25

AFTERNOON SESSION

(2:05 p.m.)

1
2
3 CHAIRMAN BURG: We will proceed with Mr. King's
4 next witness, unless I hear some other --

5 MR. LLOYD: May I have the floor?

6 CHAIRMAN BURG: Yes.

7 MR. LLOYD: As often happens when information is
8 being assembled over long distances and the like, some of what
9 I said this morning in the way of predicting what was going to
10 happen has proved to be in error.

11 I last spoke with the Nielsen people approximately
12 40 minutes ago. They have confirmed what I believe I tried to
13 make clear this morning, that the WNJU data is in error as it
14 appears in the Nielsen report.

15 At this point the Nielsen people have concluded
16 what they call a logic check. I can't say this is a great
17 deal different than the kind of check that Miss Perlman
18 testified led her to discover the error in the first place.
19 When we get a report of the whole thing, we'll get clarifica-
20 tion of that. But basically they have taken the Kalba Bowen
21 report, they have gone to the local VIP reports with which
22 they are concerned and looked at other information they have
23 available. The product of that exercise is that everything
24 else in the report appears at that level of information to be
25 in order.

js51

1 The Nielsen data base that we're concerned with
2 is physically located in a place called Dunedin, Florida. And
3 Nielsen does have a crew, they tell me, of 13 people who have
4 given this complete priority. They have preempted the
5 computer facilities and the like. And they are pulling the
6 tapes, that is the underlying data, and doing all the things
7 that these kind of people do to ascertain whether the data
8 which we have presented to the Tribunal is otherwise in error.

9 Now, I had the impression from my earlier
10 conversations with the Nielsen people that all of that work
11 would be concluded today. I'll take credit for having mis-
12 understood what I was told. I am now told that all the logic
13 check has been concluded. The actual computer runs will
14 probably not be concluded until sometime tomorrow, probably
15 tomorrow evening.

16 I asked the Nielsen people if I could have a
17 written report on this situation on Monday so that I could
18 provide it to the Tribunal and the parties. And I was told,
19 yes, but don't commit for first thing Monday morning. I said
20 I won't commit for first thing Monday morning but if we're
21 going to get it the last thing of the day on Monday, I'd
22 rather not do it in that fashion. They said we'll try to get
23 it to you by midday so that you can get it in everybody's
24 hands.

25 And whatever objection people may have to this,
I can't control. That is the state of affairs.

js52

1 Now, I have asked for some other items which may
2 be of information. The Nielsen data does, as has been
3 repeatedly pointed out, group these stations in terms of time,
4 which has nothing to do with audience, and in terms of
5 audience, that is, the program schedules of the stations are
6 divided as to time devoted to each of the three categories
7 and the audience.

8 The error that has been pointed out thus far is
9 respecting the audience figures for WNJU. I have asked them
10 to check specifically whether the programming information is
11 accurate, so that whether the mix as between sports -- and
12 it's a bad station for sports -- as between sports, local and
13 movies and syndicated is accurate.

14 I have told them that I want to know if there is
15 any way of ascertaining how this error occurred and what
16 accounted for it. They don't know if they'll ever know. But
17 I've told them if they do, whatever the answer is we want it
18 and we want an explanation.

19 I said, "May I make the following representation?
20 That you still have 13 people working on this project on a
21 priority basis to recheck all of the data?" And they said,
22 "Yes, you may make that representation."

23 I don't think under the circumstances it would be
24 an efficient use of the Tribunal's time for me to bring
25 Mr. Harkness down here tomorrow, but I will be happy to do so.

js53
1 I think if you want to hear from him firsthand, it would
2 probably be more productive use of your time if we brought him
3 down after the rechecking of the data is concluded.

4 If you want to say you're going to leave the
5 record as it is, that I can also understand. But I would very
6 much appreciate the opportunity to clear this matter up,
7 having had it sprung on me at the last moment, even though the
8 witness who uncovered the data testified she had had it in
9 hand since last April.

10 Thank you.

11 CHAIRMAN BURG: Mr. King, you were going to give
12 us your decision.

13 MR. KING: I have no objection to the procedure
14 outlined by Mr. Lloyd. I think that if we have the letter in
15 hand which we should have either Monday or Tuesday, we'll be
16 in a position to decide whether it will be necessary to bring
17 Mr. Harkness here at all. It may not be. But I think without
18 having that letter and knowing its contents, we're simply not
19 in a position to say what it is we want to do.

20 So I would go along with the procedure outlined
21 by Mr. Lloyd, as I understand it.

22 MR. LLOYD: To the extent that you are putting in
23 the hands of adverse parties the ability to say whether the
24 held open for additional testimony, if you want to do that,
25 I certainly have no objection and that's fine with me.

js54
1 I think that you're entitled to make a judgment
2 on this question, of whether you need to hear.

3 CHAIRMAN BURG: We are entitled and we will make
4 that judgment. And the judgment is as follows: we will have
5 the written submission and that, indeed, should close the
6 matter.

7 MR. KING: Excuse me. Then perhaps I was mis-
8 understood. I don't know what that written submission is going
9 to say. And it could well raise additional questions. I have
10 no idea what the contents of it will be. I think that if we
11 were to close the record at this time subject to the receipt
12 of that letter, would prejudice other parties to these
13 proceedings.

14 CHAIRMAN BURG: Well --

15 MR. KING: I mean they have offered to bring
16 Mr. Harkness here and it may well be that this letter will
17 resolve that so that it's not necessary to bring him here.
18 But without reading the letter and seeing what's in it, we
19 simply don't know.

20 CHAIRMAN BURG: Well, we reserve for ourselves
21 the right to change our mind at any time but as I see it now,
22 that letter should clear up any questions we might have and
23 the record as of now is closed.

24 If it points to some glaring omission or
25 inaccuracy, we would have no choice but to reopen it and to

js55

1 pursue it. But as of now, I'm being very optimistic, Mr.
2 King, and acting on that basis.

3 Mr. Scheiner?

4 MR. SCHEINER: This is only remotely related.
5 Joint Syndicators' exhibits in rebuttal, 2 and 3, appear to
6 contain some discrepancies in the light of the further
7 submission of Sports in reply to those exhibits. Mr. Lloyd
8 and I have had an informal discussion with respect to those
9 matters. And in the event, I'm hopeful that we can reach
10 agreement, I would ask leave to submit a paper with Mr. Lloyd's
11 consent with a view towards explaining differences and
12 apparent discrepancies.

13 MR. LLOYD: I have no objection to that.

14 CHAIRMAN BURG: And let me emphasize, Mr. Scheiner,
15 that the Tribunal has always been willing to accommodate any
16 agreement you people might have.

17 Now, Mr. King, would you continue with your witness.
18 And you were sworn previously, Mr. Hughes.

19 THE WITNESS: Yes.

20 Thereupon,

21 RICHARD HUGHES

22 resumed as the witness and, still under oath, was examined
23 and testified further as follows:

24 DIRECT EXAMINATION

25 BY MR. KING:

Q All right. Mr. Hughes, for the benefit of those

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js56

1 people in the hearing room who were not present last week,
2 I would simply ask you to state for the record your name and
3 by whom you're employed?

4 A My name is Richard Hughes. I'm employed by WPIX,
5 Incorporated in New York.

6 Q And would you state your responsibilities?

7 A Yes. I'm senior vice president of the corporation.
8 My principal duties are in programming.

9 Q Would you just briefly delineate those duties?

10 A Yes. I maintain the program schedule. I
11 negotiate and buy programs. I arrange the schedule in con-
12 sultation with others at the station. And maintain the
13 inventory.

14 Q All right. Mr. Hughes, you are here to testify
15 on three specific subjects, and one of which is the viewership
16 on independent stations as opposed to the viewership on network
17 affiliates. And would you state the relationship between
18 aggregate viewership of independent stations with the aggre-
19 gate viewership of affiliated stations' nonnetwork programming
20 time.

21 A You mean compare the total independent day with
22 that portion of the affiliated stations' day in which they are
23 carrying local programs?

24 Q Nonnetwork programs.

25 A Nonnetwork programs.

js57

1 Q Yes.

2 A And your question is how do those two compare?

3 Q Yes.

4 A I think they are probably just about equal.

5 Q Would you state the basis upon which you say that?

6 A Well, there is a relatively small number of --
7 number of half hours of the day when the affiliated stations
8 are into local programming and they do fairly well with those
9 time periods. Those are their news periods, which are normally
10 highly rated, and there are late afternoon fringe times which
11 are quite highly rated, and I believe that those high ratings
12 in those periods would put them in just about an even position
13 with the affiliated stations through the whole day, which are
14 substantially lower rated on average.

15 That's confusing to you.

16 MR. LLOYD: I think you used affiliated stations
17 when you intended not to.

18 THE WITNESS: Would you like me to begin again
19 and see if I get it right this time?

20 MR. LLOYD: You addressed a comment to me and I
21 was responding to it.

22 THE WITNESS: I come to that conclusion on the
23 basis that the affiliated stations have a relatively small
24 number of half hours that they program, which are rather
25 highly rated. Those include their news periods and their

js58

1 early fringe. When you compare those relatively high rated
2 periods on the affiliated stations with the overall performance
3 of the independents, which tend to be somewhat smaller, I
4 believe that on the total day they are about equal.

5 BY MR. KING:

6 Q All right. Would you compare the advertising
7 rates for locally produced programming between affiliate
8 stations, on the one hand, and independent stations on the
9 other?

10 A Well, that depends to a large extent on the
11 attraction. But as a general rule, the affiliated stations
12 are able to get much more money for their, or let us say a
13 10-rated program, than the independent stations.

14 In news, for example, it is not uncommon for
15 12-rated news on an affiliated station in New York to bring,
16 say, \$3500 for a 30-second announcement. A 7-rated news on
17 an independent may possibly get a thousand dollars, and so
18 there is quite a discrepancy.

19 Q That would cover one of the subjects about which
20 you are to testify and another has to do with the viewership
21 of locally produced programming in distant markets.

22 A Yes.

23 Q And do you have evidence as to the viewership
24 of locally produced programming in distant markets?

25 A Well, I think evidence is available. I don't

js59

1 happen to have it with me. But that would show up in the
2 rating books under the number of total homes that a station
3 reaches and that will vary from station to station. Those
4 stations which are carried in distant markets generally reach
5 more homes per rating point than affiliated stations which are
6 not. So from that standpoint -- from that standpoint I believe
7 that that evidence does exist.

8 MR. LLOYD: Excuse me. Would you mark that spot.

9 THE WITNESS: Beyond that we regularly receive
10 mail from those distant places in response to programs and
11 editorials and news material and so on.

12 BY MR. KING:

13 Q Mr. Hughes, I'm going to show you maps that were
14 referred to in testimony this morning and I don't have enough
15 for everybody.

16 I wonder if I could ask you to share these.

17 CHAIRMAN BURG: Sure. It looks like a map of
18 Ireland.

19 MR. LLOYD: I was thinking it was green like money.

20 THE WITNESS: More like Ireland than money,
21 actually.

22 BY MR. KING:

23 Q Would you tell me, Mr. Hughes, what this map
24 represents?

25 A This is a map of the coverage of WPIX. And the

js60

1 green counties are counties in which the station is regularly
2 received and viewed. The lighter green counties are counties
3 in which as of this date cable service was expected to begin
4 shortly.

5 Q This map reflects viewership, or rather coverage
6 for the year 1978, is that correct?

7 A Yes.

8 Q Would you tell us or describe the data upon which
9 the map is constructed?

10 A This material comes out of information which is
11 published in TV Factbook, which as I understand it comes from
12 the Arbitron reports.

13 Q And will you tell us what the data reflects?

14 - A As it indicates, the green counties show 5 percent
15 or more PIX net circulation. That means that 5 percent or
16 more of the homes viewed the station in a measured week.

17 Q Do you have any estimate of the amount of the
18 audience reached by WPIX on the distant signal? It is not
19 reflected by this map.

20 A Do I have any evidence of that?

21 Q Or idea.

22 A Or idea of it?

23 Q Yes.

24 A My understanding is that PIX is regularly seen in,
25 perhaps, 9 million homes of which something like 7 million

js61

1 would be in the home market; that is to say, in the New York
2 Metropolitan or New York DMA and the balance would be in
3 the outlying areas, in the cable areas.

4 Q And the outlying cable areas are those areas
5 delineated in the green coverage on this map?

6 A Some of them are. Some of the over-the-air
7 coverage is included here as well. Generally speaking, the
8 over-the-air coverage -- the over-the-air signal would be in
9 an area probably 60 miles from the city, although there is
10 some cable in that area as well.

11 Q Do you have an opinion as to the value of the
12 local programming received in these areas reflected on the
13 map?

14 A Value to whom?

15 Q The cable subscribers.

16 A I really couldn't comment on its value. I know
17 they watch the programs and from conversation with broad-
18 casters in those areas and from the mail that we get, I can
19 tell you that that happens and that on those instances when
20 they write to us or communicate with us, it is normally about
21 a specific issue where we have expressed an opinion or added
22 to the debate of an issue and things of that sort.

23 I think that in general terms the people on the
24 cable systems outside of New York do place a reliance on
25 stations like PIX which do a fair amount of public affairs

js62

1 programming, because we have the resources and the opportunity
2 to bring in the very best people to discuss these significant
3 issues wherein some of these distant counties those people
4 just don't seem to get there very often. So I think that
5 discussion of statewide issues, of regional issues, even of
6 some New York issues which figure very heavily in Upstate
7 New York are of significant concern to those people.

8 Q How about locally produced programs which are not
9 of what you would call a discuss or talk about regional
10 issues?

11 A Just general entertainment programs?

12 Q Yes, that are locally produced.

13 A Locally produced entertainment programs.

14 Q Yes.

15 A As opposed to syndicated material you mean?

16 Q Yes.

17 A We have relatively few locally produced entertain-
18 ment programs. We're really not into the business of
19 producing local entertainment programs. We have some, some
20 such as "Magic Garden," which is a program for preschoolers,
21 which is entertainment in its nature. But by and large, the
22 local programs which we ourselves produce are news and public
23 affairs.

24 Q Well, you do produce public affairs programming
25 which is not of a regional interest; is that correct?

js63

1 A Some of the public affairs programming is not of a
2 regional interest; yes, that's true.

3 Q And would that be of interest to the people in
4 areas outside your local DMA?

5 A Well, yes, as I said before, I think even those
6 programs which we do -- the public affairs programs which
7 discuss issues that relate to New York or the New York Region,
8 or the Tri-State Area, or the Northeast, are of interest almost
9 on an equal basis with all of these people, with everyone in
10 that area wherever they may be found. A New York State issue
11 is every bit as important in Watertown as it is in New York
12 City. So I believe that as far as New York State issues are
13 concerned, that would be of great significance to people
14 outside of New York City.

15 When we talk about the regional area, of the
16 Tri-State Area as it's called, when you add Pennsylvania to
17 that Tri-State Area there is a loose association of the
18 governors of those states to solve the energy problem. And
19 any time that we talk about energy, we are talking by
20 implication about a situation which all of those people are
21 interested in and the specific words that we would have to say
22 would relate to their life, because they do work together to
23 solve that problem.

24 Similarly, economic questions about the development
25 of New York as a tourist attraction is of major interest not

js64

1 only to New York but to New Jersey and to Pennsylvania as
2 well, because to some extent if they go to New York, they
3 don't go to the Poconos. So all -- essentially all of the
4 issues that we would deal with which go beyond whether or not
5 the physical plant of New York City is what it might be or
6 whether the potholes are bigger than they should be this year
7 will generally be of interest to a larger area.

8 Beyond that, in preparing our programs, in pre-
9 paring our news and preparing our editorials we are very
10 mindful of the fact that we are seen in something like 11
11 states on a regular basis. And in editorials, particularly,
12 we would tend to place more stress on national and inter-
13 national issues than any other New York station who would more
14 likely confine their comments and their issues to purely local
15 ones.

16 Q I think the final subject has to do with the
17 impact, if any, of the sweep weeks. And the impact of the
18 fact that networks are in reruns during several, or at least
19 two of the sweep week periods. When, Mr. Hughes, do the
20 networks generally go into reruns?

21 A Well, there are a number of times when that
22 happens. It happens normally about the 15th of December and
23 continues through the end of January. Then they go back into
24 first run material for the February book and generally in the
25 middle of April when the network season ends, they go back

js65

1 again to reruns. They're in reruns, essentially, half of
2 the year. They may save a few programs out for the May book,
3 which is one of the sweeps, but essentially from the middle of
4 May until the middle of September or early September they're
5 in rerun material, with the exception of a few specials.

6 Q Now, when the networks are in rerun, does that
7 have an impact on the viewership of independent stations?

8 A Yes. Generally speaking the independents do the
9 best against rerun programming. It puts us on a more even
10 basis because much of the programming that many independents
11 run is rerun as well.

12 The very peak viewing for the affiliated stations
13 would be the November book, when the new season is just
14 underway, and the February book, the February-March book
15 when they pull out all of their programming guns, as they say.

16 Q In your opinion, would viewership reflected by the
17 Nielsen ratings taken during the sweep periods reflect viewer-
18 ship on a given station for a year-round basis?

19 A No, not possibly.

20 Q And would you just again tell us why?

21 A Well, because there are differences in every sweep
22 period. In the case of the summer sweeps, May and July,
23 there is an extraordinary percentage of reruns compared to
24 November and February and March. That would make quite a
25 difference.

MR. KING: I don't have anything more.

js66
1 CHAIRMAN BURG: Mr. Hughes, do you -- the dark
2 green area on that map, does that have some cable in it, did
3 you say?

4 THE WITNESS: Yes.

5 CHAIRMAN BURG: It does. And you're talking
6 about --

7 THE WITNESS: It's mostly cable. The over-the-air
8 portion would be a relatively small circle coming out from
9 New York City.

10 CHAIRMAN BURG: When you consider the whole dark
11 green area and the light green area, that takes care of, you
12 said, 11 states?

13 THE WITNESS: Yes.

14 CHAIRMAN BURG: Well, as a practical matter, some
15 of these areas certainly in the light green portion of this
16 map wouldn't have as much interest per se as the people
17 indigenous to that certain belt to New York State or that
18 area, would they, in your programming? I mean Youngstown,
19 Ohio, or Trumbell County, Ohio, or Morgantown, West Virginia?

20 A Well, interestingly enough, I think there are
21 two answers to that. In the first instance, I don't recall
22 the subject but I had done an editorial on some pending
23 legislation, and I received a letter from the Congressman from
24 Youngstown, Ohio. And that was unusual because I really didn't
25 think -- I didn't know at the time that we were in Youngstown.

67

1 And so I called on the phone and asked him how he happened
2 to respond to that and he told me that they'd just had cable
3 put in in their area.

4 I believe that those public affairs issues which
5 are larger than New York, and we try to give them as broad a
6 focus as we can, would be of interest to people in Youngstown,
7 Ohio. Perhaps in their way even more important than any other
8 part of the program because with all respect to Youngstown,
9 Ohio, I don't think that the level of political debate on
10 national issues is quite as high there as it would be in New
11 York.

12 But we're talking about a fairly narrow part of
13 our schedule when we talk about public affairs. When we
14 talk about entertainment programming, then I've no doubt that
15 the material which we provide would be of great interest to
16 them. I think that's why we're there, essentially. The
17 fact that our program day is made up of a variety of
18 attractive choices and provide a variety of attractive
19 alternates to the local service which they have, I think would
20 be of significant interest to them or they wouldn't be
21 interested in having us at all.

22 CHAIRMAN BURG: Oh, sure, I can understand that.
23 But by your own admission this is a narrower programming in
24 terms of quantity.

25 THE WITNESS: The public affairs is narrow. The

js68

1 entertainment is very large by comparison.

2 CHAIRMAN BURG: But public affairs, and then in
3 terms of the viewership interest in that narrower public
4 service or public affairs area, that would be a narrow portion.

5 THE WITNESS: Well, that is somewhat narrower.
6 However, it would be also fair to say that, and sad to say
7 that interest in public affairs programming generally is
8 substantially smaller than the interest in entertainment
9 programming. That would be true in New York City as it would
10 be in Youngstown.

11 COMMISSIONER COULTER: Mr. Hughes, please help me
12 in my understanding. You are comparing viewing between
13 independents and network affiliates, and if I understand --
14 let me state what I understand and if you could tell me whether
15 that's correct or not, I would be grateful.

16 Since the local programming by network affiliates
17 is restricted to just a few hours a day, and obviously an
18 independent has its local viewing the entire day, assuming
19 that a network affiliate produces local programming for two
20 hours, which is eight quarter hours, and the independent has
21 a 20-hour day, which is 80 quarter hours, what you said, if
22 I understand correctly, is that the eight quarter hours times
23 the households of a network affiliate is equal to the 80 times
24 the number of households of the independents.

25 THE WITNESS: Well, those are not quite the figures

js69

1 but that theory is correct, yes.

2 COMMISSIONER COULTER: No, I know, but I'm just
3 using those. Is that indeed what you were saying?

4 THE WITNESS: Yes. I believe the average network
5 probably runs something like nine half hours of local pro-
6 gramming between 7 in the morning and 1 the next morning.

7 COMMISSIONER COULTER: Nine half hours, which is
8 18 quarter hours. So it would be 18 times the number of
9 households per quarter hour as --

10 THE WITNESS: That's correct.

11 COMMISSIONER COULTER: -- compared with 200 times
12 the households per quarter hour of the independent. And those
13 multiplied figures would be --

14 THE WITNESS: If 200 is the figure. I'm not sure
15 it is.

16 COMMISSIONER COULTER: Say 60.

17 THE WITNESS: 200 would be 50 hours a day and it
18 would be hard to do that.

19 COMMISSIONER COULTER: Excuse me, I meant 80. A
20 20-hour day.

21 THE WITNESS: I was working on the basis of 7 a.m.
22 to 1 a.m., which would be 16 hours; right? 17 hours, and
23 comparing those 17 hours to the 9 half hours I believe that
24 you would find that they are about the same. Yes.

25 COMMISSIONER COULTER: Quarter hours.

js70
1 THE WITNESS: Quarter hour, half hour, whatever
2 division.

3 COMMISSIONER COULTER: No, but that's the way it
4 usually is calculated so I'll know?

5 THE WITNESS: Yes. All right.

6 COMMISSIONER COULTER: I'm simply telling you
7 how its established. So it's quarter hours times households
8 per quarter hour, and the multiplied figures would be very
9 comparable.

10 THE WITNESS: I would think they would be. I
11 didn't come to it on quite that basis. I did it on a rating
12 level basis. The independents would average, say, a 3 rating
13 from 7 a.m. until 1 a.m. and the rating level of the
14 affiliated stations in their local times would be high enough,
15 I believe, to roughly come to the same figure. So I come at
16 it slightly from a different standpoint, but we would be
17 essentially the same in our result.

18 COMMISSIONER COULTER: But to fit with the way
19 viewing is calculated, it would have to follow what I just
20 said?

21 THE WITNESS: Yes. I didn't happen to go through
22 those figures because I didn't have those figures in my mind.
23 The rating levels I have a fair idea of what they are.

24 COMMISSIONER COULTER: What would be the rating
25 level of the network affiliate?

THE WITNESS: In the morning time which they have,

js71
1 they normally each run about 90 minutes around 9 to 10:30,
2 something like that. That would run to probably a 3 rating
3 or something like that. The early fringe that they would run
4 from 4:30 until 6 would run in the area of 10. Their early
5 news would probably be about a 12. Their late news would
6 be about a 12.

7 COMMISSIONER COULTER: And for an independent
8 during the early news, during their early news or late news,
9 what would they get?

10 THE WITNESS: During the affiliate's early news?

11 COMMISSIONER COULTER: No, no, independent's.

12 THE WITNESS: During the independent's newscast.

13 COMMISSIONER COULTER: Yes, the evening, early
14 evening news.

15 THE WITNESS: We run probably 6 points with our
16 early newscast.

17 COMMISSIONER COULTER: I'm sorry, Mr. King.

18 MR. KING: I was just wondering if there was any
19 confusion between locally produced programming and nonnetwork
20 programming.

21 THE WITNESS: There's none in my mind.

22 COMMISSIONER COULTER: I hope I'm right in saying
23 there isn't in mine.

24 (Laughter)

25 COMMISSIONER COULTER: The discrepancy in ad rates

js72.

1 you mentioned between network affiliates and independents
2 is due simply and purely to these rating differences.

3 THE WITNESS: No.

4 COMMISSIONER COULTER: Audience?

5 THE WITNESS: No, it has nothing to do with that.
6 It has to do with the problem that independents fight all
7 over the country everywhere. The idea grew up many years
8 ago before independents became as successful and as innovative
9 as they are, that everyone who watched an affiliated station
10 was very affluent, very intelligent and probably a college
11 graduate and that everyone who watched an independent was very
12 poor, not very affluent, and probably even rather dumb and,
13 therefore, a less desirable target for advertising.

14 Beyond that, in the early days the network-
15 affiliated station's salesmen treated themselves as a great
16 gray eminence and entertained in New York at "21" and all of
17 those other marvelous places. And over the years an idea
18 built up that there was just a great element of class and
19 style and prestige associated with the affiliated stations
20 that just didn't exist as far as the independents were
21 concerned.

22 Over the years, I think it's safe to say that
23 virtually every independent station in the country that has
24 done any research at all has done a series of pieces which had
25 as its basic theme a rating point is a rating point. That is

js73

1 to say, if you take a rating point from an affiliated
2 station, that you will have the same number of smart people,
3 the same number of affluent people, the same number of dumb
4 people and the same number of poor people as you would have in
5 the counterpart, in the competitor.

6 But we've never been able to convince anyone that
7 that's true on a regular basis. There are advertisers who
8 for reasons which are known only to them will not buy
9 independent stations. They just will not do that. We have
10 had some cases, for example, with an airline, a number of
11 years ago, where we did everything we could to try and
12 sell them advertising time on the station and they refused
13 to buy it because of the environment. They didn't like the
14 idea that it was a rerun program.

15 Now the rerun that we were talking about in that
16 particular instance was one of the classics called "The
17 Honeymooners." So we took some people out to the airport and
18 we interviewed travelers, and we said do you watch "The
19 Honeymooners?" And it came out that some extraordinary
20 percentage of the people watched "The Honeymooners" over a
21 period of a week.

22 And we took the research back and said, "You see,
23 that's your audience." And they said, "Well, it couldn't
24 possibly be because only rich, affluent affiliated watchers
25 fly." And you know, that's a constant battle which we fight.
And that doesn't take very many of those to depress the

js74

1 rate.

2 As I told you the last time I was here, the
3 advertising sale business in television in New York and in
4 most of the major markets is an auction. And if any sizable
5 number of people withdraw from that auction, it removes pressure
6 from the inventory and adds a disproportionate pressure to
7 the inventory of the ones that they buy. As the pressure on
8 the inventory increases, the price goes up. As the pressure
9 falls, the price goes down.

10 So we are never able to get the same money per
11 rating point as the affiliated stations. As a general rule
12 of the thumb, in New York the affiliated stations will get in
13 the neighborhood of \$175 a rating point for a 30, and the
14 independent stations will get probably \$115 to \$120. There is
15 no rational reason for that; it is a longstanding habit which
16 we combat regularly, or try to.

17 COMMISSIONER COULTER: So the difference is based
18 more on aura than hard demographics?

19 THE WITNESS: Aura is a very good word for it,
20 yes.

21 COMMISSIONER COULTER: At one point, if I under-
22 stood you correctly, you said that independents are carried
23 more widely on distant signals than network affiliates.

24 THE WITNESS: I believe that's true.

25 COMMISSIONER COULTER: My understanding, and I

js75

1 keep on getting confused by viewing and rating, but that that
2 would automatically drive up the viewing of independents
3 as it's listed by Nielsen because Nielsen puts --

4 THE WITNESS: Well, it depends upon what figure
5 you're looking at. If you're looking at the total number of
6 homes, it would certainly increase the number of homes. If
7 you're looking at the rating, though --

8 COMMISSIONER COULTER: No, homes per quarter hour
9 related to viewing.

10 THE WITNESS: Yes. But if you're looking at the
11 rating of the station, it will have no affect at all. The
12 rating is only the DMA and the distant homes are -- the homes
13 figure, rather, includes all of the distant homes. So that
14 we get no credit at all as far as rating is concerned.

15 COMMISSIONER COULTER: I understand. But the
16 issue is viewing.

17 THE WITNESS: Yes.

18 COMMISSIONER COULTER: But that should -- would
19 you agree with me that if it's true that independents are
20 carried more widely on distant signals than affiliates, that
21 should increase their viewing, the viewing of independents?
22 Not rating but viewing.

23 THE WITNESS: Yes.

24 COMMISSIONER COULTER: Okay. One other thing.
25 You said that in the summer because of network reruns

js76
1 independents do better against network affiliates than they
2 do in the winter because programs are coming on for the
3 first time.

4 THE WITNESS: Yes.

5 COMMISSIONER COULTER: And you were indicating
6 that you felt that this would cause Nielsen not to reflect the
7 true patterns, either viewing or ratings.

8 THE WITNESS: No. As I understand the question,
9 it was would any one of those sweep books represent the
10 entire year.

11 COMMISSIONER COULTER: Well, okay, but since you
12 get the two sweeps in the winter and two in the summer,
13 wouldn't they balance out? If you're using them --

14 THE WITNESS: They would tend to do that. But I
15 think it depends on what use you make of them in the balancing
16 process whether they balance out.

17 COMMISSIONER COULTER: Well, if you just took
18 whatever number you've got in them and just took the average,
19 that theoretically should balance out.

20 THE WITNESS: Well, that certainly would. Now,
21 the conclusion that you draw from that might or might not
22 follow. Where do you go? What is your next step? And then
23 I can tell you whether I agree with that.

24 COMMISSIONER COULTER: Well, say that's an average
25 for the year. That would be the next step. If you took

js77

1 four figures, two winter figures, two summer figures, and
 2 average them, say that's the average for the year, wouldn't
 3 that on balance be a --

4 THE WITNESS: Might very well be. But if you were
 5 to take the next step, then, and say that therefore -- well,
 6 let's say, for example, therefore all -- let's use a
 7 hypothetical question. Let's say that there were 50 newscasts
 8 in the summertime and 5 newscasts in the wintertime, and
 9 the newscasts did better in the summertime because they're
 10 against lesser competition than they did in the wintertime.
 11 And you added that all together, you could not find an average
 12 for the audience of the newscast because there are more of
 13 them in the easy time than there would be in the hard time.

14 COMMISSIONER COULTER: Yes, but we're talking
 15 about aggregate local programming, by independents.

16 THE WITNESS: Yes, and my point to you is that
 17 there are fluctuations within that. Yes. Certainly it's an
 18 average. If you're talking about sign-on, sign-off or
 19 average quarter hour, that certainly may be true. But when
 20 you begin to draw conclusions from that, there is room for a
 21 great deal of misleading and I would want to point that out
 22 to you.

23 COMMISSIONER COULTER: Thank you.

end t5

jk 6-1
1 CHAIRMAN BURG: Questions for Mr. Hughes?

2 MR. LLOYD: You, Gene?

3 MR. BECHTEL: Is it my turn, Mr. Lloyd?

4 MR. LLOYD: Yes, it's your turn.

5 MR. BECHTEL: I have no questions.

6 MR. LLOYD: I have a few.

7 CROSS-EXAMINATION

8 BY MR. LLOYD:

9 Q The information which you have presented for the
10 record today both in response to Mr. King's questions and in
11 response to Commissioner Coulter's questions, about how
12 the non-network programming of the network affiliate compares
13 on the basis of audience gains independent stations is a mat-
14 ter of interest to me. Are you doing anything more than
15 depicting the situation which you find in rating reports
16 for the New York City Metropolitan area? I just want to
17 know what you're drawing on for this information.

18 A My frame of reference is New York City, principally,
19 and my understanding and familiarity with the audience that
20 we reach in the areas that we reach. Essentially I talk in
21 terms of New York when I talk.

22 Q Well, Mr. Hughes, let me be very careful because I
23 want to go from your generalizations to the specifics that
24 you draw upon in order to present for the record what have
25 been generalizations. You have characterized, both in

jk 6-2

1 response to questions from counsel and from questions from
2 Mr. Coulter, the comparative audience, if you will, achieved
3 by independent stations throughout the broadcast day and
4 achieved by network affiliates for those portions of their
5 broadcast day when they are not carrying network programming;
6 isn't that correct, sir?

7 A That's correct.

8 Q You recall the testimony to which I have made refer-
9 ence; do you not?

10 A Yes.

11 Q Now, in order to make such observations as you have
12 made with such specificities, I assume that you do so on the
13 basis of information which has come to your attention in
14 your position as a vice president of WPIX?

15 A That's correct.

16 Q Now, obviously, information comes to you as vice
17 president of WPIX about the audience achieved in the
18 New York DMA; that is, the ratings, if you will, of each of
19 the television stations which operate on that market?

20 A That's correct.

21 Q And is it that data which permits you to say, as
22 you have done, that the audiences achieved by network
23 affiliates in their non-network time segments are equivalent
24 to those achieved by independent stations on an overall
25 broadcast basis?

jk 6-3

1 A Yes. That is my impression from that data.

2 Q Is there any data in addition, any specific data
3 in addition to the New York rating reports which you've
4 already testified about, that you draw upon to make those
5 conclusions?

6 A No, there is not. I would add that in some markets
7 it may very well be that the independent share would be less.
8 It might be that in some markets it would be more. If you
9 had an area with a very weak independent station, then I think
10 it's fairly safe to say, and there are many of those markets,
11 I think it would be safe to say that the affiliated station
12 would be substantially ahead. On the other hand, if you have
13 a very strong independent structure in a city, it might be
14 a shade above but I think by and large in New York it's about
15 even. And I think, my impression, although I couldn't tell
16 you how I come to know this other than the fact that I
17 believe that it's true, that on an industry-wide basis, it
18 probably would be -- the affiliated stations probably would
19 be just a shade ahead, but I think it is a shade on an
20 industry-wide basis.

21 Q I think that the Tribunal can fairly draw some
22 conclusion as to what you have said in the way of speculation
23 and what you have said based on information. I won't pursue
24 that.

25 Q But what is important, I think, to underscore, sir,

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and I would ask you again so that the talk unrelated to the question I asked doesn't confuse the issue, is that you are drawing on rating data for the New York Metropolitan area?

A That's true.

Q And when you speculate as to what rating data might show in other markets for which you have no specific data, you are speculating as to what the rating data for the Metropolitan area would show; isn't that true?

MR. KING: I would object to the form of the question. Just simply the word "speculate."

MR. LLOYD: That's fine.

THE WITNESS: I --

BY MR. LLOYD:

Q Do you have any information, Mr. Hughes -- I'll withdraw the question.

Do you have any information, Mr. Hughes, about the comparative audiences of WPIX and WCBS and WABC and WNBC and WNEW and WOR when those signals are all carried as distant signals on cable television systems?

A I don't have any information about that.

Q Do you know, sir, from your experience as vice president of WPIX, whether the FCC has any regulations that restrict the distant signal carriage of network affiliated stations?

A My understanding is that network stations may not be

jk 6-5

1 carried if there is a local network station on a cable
2 system.

3 Q Do you have any knowledge, sir, of any network
4 affiliated station in the New York City Metropolitan area
5 that claims a coverage as extensive as your station claims
6 coverage?

7 A I believe that ours is the most extensive. I think
8 that WOR probably is quite close. I think WNEW is quite
9 close. But I think we're a little ahead.

10 Q And my question, sir, was do you know of any network
11 affiliated station that operates in the New York Metropolitan
12 area that has coverage that it claims as extensive as this?

13 A No.

14 Q Now, it is true, I believe, you may have testified
15 in response to Chairman Burg's question, that once you get
16 about 60 miles out of New York City, you're fairly safe in
17 saying that your coverage in these areas is by virtue of
18 cable; is that correct?

19 A Yes, I believe that's true.

20 Q Now, do you have any information once you get out
21 in that 60-mile -- 60 miles outside of New York and start
22 talking about cable coverage of the average audiences that use
23 the various categories of programming that WPIX TV presents?

24 A No, I don't have. I think that's ascertainable. I
25 don't know what it is offhand.

jk 6-6

1 Q You don't know what it is. Were you here this
2 morning when Ms. Perlman testified?

3 A Yes.

4 Q And she pointed out that last April Mr. Polinger had
5 given her certain information that was made a part of the
6 record?

7 A Yes.

8 Q Including information that shows on a distant market
9 basis or purports to show, you don't have to accept the data,
10 the relative numbers of households viewing the various
11 categories of programs on WPIX?

12 A I was here when that exchange took place. I didn't
13 hear that definition of the report. I've never seen that
14 report, so I don't know what it is.

15 Q Never have seen it?

16 A No.

17 Q Never before have you seen this report?

18 A Not even once.

19 Q Or any part of it?

20 A Only at a distance.

21 Q Or any part of it.

22 A As far as I know, any part of it.

23 Q Okay. Now, do you know whether that reports to
24 show -- this is a tentative question. Strike that.

25 You've said you're not familiar with the report.

1 There was one reference that you made, Mr. Hughes,
2 in the course of your testimony that confused me. And
3 confused me because I didn't listen hard enough, I'm afraid,
4 but you made a reference to nine half-hour periods in which
5 network affiliates are carrying something other than network
6 programming and I'm not sure how broad or how narrow you
7 were describing that nine half hours. Would you be kind
8 enough to repeat that?

9 A I don't understand your question. How broad --

10 Q What did you say about it?

11 A I said that in the course of the day, from 7:00 a.m.
12 until 1:00 a.m., there are about nine half hours when the
13 affiliated stations present non-network programs.

14 Q Now, what is the basis for that little jewel of
15 information?

16 A I don't think of it as a little jewel.

17 Q Oh, I do.

18 A And the basis, I guess, was your question.

19 Q What is the basis for your testimony in that respect?
20 On what data do you draw to tell us that between 7:00 a.m.
21 and 1:00 a.m. network affiliates carry nine half-hour non-
22 network programs?

23 A My familiarity with the broadcasting schedules of
24 the three flagship stations in New York City.

25 Q So, your testimony has reference to those three
stations?

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A Yes.

Q What are the broadcast days, or more to the point, sir, in 1978, search your recollection a little bit -- what were the broadcast days of those three stations?

A In 1978?

Q Yes, to the best of your recollection and I understand.

A Which network would you like to talk about?

Q Those three stations was my question, sir.

A Pick one and we'll start with those and I'll go through them.

Q Sir, what I asked you and it's a fairly simple question, to the best of your recollection, in 1978, what were the broadcast days and by that I mean what was the sign-on time and what was the sign-off time for the three network affiliated stations in New York City?

A I thought you meant the specific programs they carried through the day. I was going to run through those for you. I believe that they would have signed on at 6:00 and signed off variously from 3:00 until 4:30 or so in the morning. The day that I was talking about was from 7:00 a.m. until 1:00 a.m., and I think I specified that when I made that comparison.

Q By all means you did. I was trying to find out how much of the day we were missing.

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A That's what you're missing.

Q And that is, then, that each of them, to the best of your recollection, signed on at 6:00 in the morning?

A Yes.

Q And signed off anywhere from 3:00 to 4:30 the following morning?

A Yes. I could identify those nine half hours for you if you would like to know what they are.

Q Oh, I'm sure you could, sir, but that's not necessary, at least to my area of interest. Maybe someone else will ask you to do so.

A Fine.

Q Do you find that the ratings achieved by your local programming is fairly constant throughout the year?

A No, they're not constant. They go down substantially in November. They come up a little in February. They normally come up above that in March, get stronger in April, are strongest in May, June and July.

Q And here again, when you're talking about ratings, so that it's always clear, we're then talking about the New York Metropolitan area or in the case of Nielson, the DNA; correct?

A Yes.

Q So that in your local market, your local programs are weakest in November and strongest in the summer; is that

jk 6-10

1 correct generally?

2 A The audience levels are weakest then. The programs
3 stay the same. Their attractiveness changes.

4 Q Excuse me. But the ratings, the ratings that you
5 achieve.

6 A Yes.

7 Q Now, as a general proposition, isn't it also true
8 that viewership itself declines in the summer time?

9 A It declines but not significantly. It rearranges
10 itself. It certainly declines in what we call early fringe.
11 It's relatively unaffected in late fringe.

12 Q So the, if that is the case, it is your relative
13 performance versus the other stations that accounts for the
14 shift in your ratings rather than just a general loss of
15 viewers?

16 A That's correct.

17 Q I mean, the viewers are going elsewhere in November;
18 is that right?

19 A They're going to other stations, yes.

20 Q Now, included in your local programming, which you
21 say is strongest in May, June and July, are telecasts of the
22 New York Yankees; isn't that correct?

23 A That's correct.

24 Q And do they contribute to the strength?

25 A They're certainly part of it, of course.

jk 6-11

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Q And --

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A They're part of the factor might be that college kids are home more in the summer than in the winter and tend to watch television later at night so that area would go up a little higher. Our 7:30 news usually does better because it gives people an extra half hour to be outside before they see the news. There are many factors involved.

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Q What is your regularly scheduled evening newscast?

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A 7:30. 7:30 Action News. We have another one at 10:00.

10

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Q Was that the case in 1978?

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A The 10:00 news that was the case. I would have to think when we started the 7:30 -- yes, that would have been the case in '78.

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Q What were the, roughly, the rating shares achieved by your two newscasts in comparison to the rating shares achieved generally by your Yankees telecast?

18

A The early news -- at that time or this time?

19

Q No, at that time.

20

A At that time. The early news in '78, that half hour probably averaged about a 5, 5 rating. The Yankees in '78 was probably about a 7, a 6 or a 7. Probably a 7.

21

22

Q Overall, you're saying, all the games that were telecast?

23

24

A Yes.

25

jk 6-12 1

Q Day time, night time, weekends and the like?

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A Yes.

3

Q If one would look -- what I'm trying to find out, is it possible to make one generalization about viewership in the New York Metropolitan market in terms of ratings? If one generally looked at prime time ratings, would it be the case that the three network affiliates would almost always have the three highest rated programs?

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A Yes, on a year-round basis almost always.

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Q Well, I was trying to bring in much more territory than that and really say that would that be the case of virtually time you wanted to stop and take a picture throughout the broadcast year.

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A There are numerous exceptions to that but that probably is more often -- it certainly is more often true than not. Most of the time that would be the case.

15

16

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Q Is it possible for you, Mr. Hughes, to generalize on the exceptions? I mean, would it be, for example, when --

18

19

A Of course. Of course.

20

Q -- the networks were simultaneously carrying a news conference of a prominent elected official of the United States, would an independent in that circumstance likely outrank any one or possible all three?

21

22

23

A It doesn't usually happen in that instance. There are other instances, political conventions, the independent

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jk 6-13

1 stations will often outrank. They will outrank if they put
2 on some special programming of some kind.

3 Q For example?

4 A Our operation prime time specials quite often will
5 outrank some of the networks, sometimes two.

6 Q This is the thing you do in May that you testified
7 about before?

8 A No, we do this several times a year. These are
9 original programs which we have produced by the same producers
10 who do the material for the network at more or less the same
11 scale, so they compete on an equal basis and we promote them
12 properly and schedule them properly, we can compete on a
13 fairly even basis on that.

14 Q And frequently will beat one of the three?

15 A Often. Not frequently, but often. There's a
16 difference. Frequently is most of the time. Often is less
17 than that.

18 Q And you do it often or frequently?

19 A We do it often.

20 Q The lesser?

21 A The lesser, yes. Other cases would be if there is a
22 sensational local program which is being presented. Public
23 broadcasting recently put on "The Death of a Princess," which
24 was a spectacular success. I think it defeated -- it was
25 number one in the time period. A number of years ago, there

jk 6-14

1 was a program called "Scared Straight", which depicted Rah-
2 way prison. And that beat all three.

3 Q Excuse me, sir, you may continue but I was wondering
4 if you could generalize as to when the exceptions occurred,
5 and I can understand that any particular program --

6 A As to when, what time of the year?

7 Q Or as to types of programs.

8 A I see. Well, the types of programs are entertainment
9 programs, sports programs, occasional news specials.

10 Q And what types of sports programs? Live professional
11 events?

12 A Live, yes. Yes.

13 Q But, generally, if you stop and take a picture at
14 any point, what you're likely to capture is the three networks
15 getting 1, 2 and 3 in the ratings for that particular time?

16 A Yes.

17 Q About what percentage of the audience in the
18 metropolitan area would the three network generally capture,
19 60, 70 percent, in their prime time?

20 A Yes. Generally speaking, the three networks will
21 divide 60 percent of the audience and the three affiliates
22 will divide 30 percent. The three independents, rather.

23 Q The three independents?

24 A Yes.

25 Q And, here again, of course we're talking about the

jk 6-15

1 New York Metropolitan market --

2 A Yes.

3 Q -- and the ratings there?

4 Do you have information today, sir, and I may have
5 asked you this and you didn't have an answer the other day,
6 you testified that WPIX -- let's clarify a couple of things.
7 Net weekly circulation of five percent means that five percent
8 of the net weekly circulation means that five percent of the
9 homes in that particular county turn you on once a week for
10 at least 15 minutes?

11 A That's correct.

12 Q And they may turn you off right after 15 minutes but
13 they count net weekly circulation?

14 A Yes.

15 Q Now, you have testified that WPIX is regularly
16 viewed in 11 states.

17 A Yes.

18 Q Now, I did a hurried count and I see dark green in,
19 I think, 5 or 6 here.

20 CHAIRMAN BURG: There's 11. Not including Rhode
21 Island, I discovered.

22 MR. LLOYD: The dark green is actually in 11?

23 CHAIRMAN BURG: West Virginia, New Jersey, Ohio,
24 Maryland, Vermont, New Hampshire, Massachusetts, Delaware,
25 Connecticut, Pennsylvania --

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COMMISSIONER COULTER: He's talking about the dark green.

CHAIRMAN BURG: I'm sorry. The dark green is different. Yes.

BY MR. LLOYD:

Q Well, let's get to the difference between the dark green and the light green. Is the dark green or is it not reflecting the CATV coverage?

A As of 1978, that was the case. I think it's substantially different from that now.

Q All right. When did this map come into existence?

A No way of telling.

Q All right. Well, it refers to 1978 data.

A That's true.

Q What is the distinction between dark green and light green?

A It says here that the dark green demonstrates counties showing five percent or more of PIX' net weekly circulation based on a 1978 Arbitron County Coverage Study.

The light green are referred to as additional counties carrying or intending to carry PIX by cable system in the 1978 TV Fact Book, Edition No. 47. Carrying or intending to carry.

Q Okay. So that does not mean that your net weekly circulation in the dark green counties was not achieved by

jk 6-17

1 cable, does it? Rather it means that you have not yet achieved
2 five percent -- you had not then achieved five percent net
3 weekly circulation, even though you were or were going to be
4 carried by cable in the light green counties?

5 A I think that's a fair judgment, yes.

6 Q Now, in 1978, how many cable systems was WPIX
7 carrying?

8 A I have no idea.

9 Q You don't know?

10 A I don't know today. It's ascertainable. I just
11 don't happen to know.

12 Q How would one -- if you had an interest in such sub-
13 ject, sir, how would go about ascertaining it?

14 A Call Jane Perlman.

15 Q That is the luxury of being a vice president.

16 A No, actually the luxury is if she weren't there, I
17 could ask one of four other people.

18 Q You assume that that's ascertainable but you don't
19 know how.

20 A I know how they would do it. If there were none of
21 those people, I would know how to do it.

22 Q All right. That's what I want to know.

23 A I would go to the TV Fact Book and look up all the
24 ones that are listed.

25 Q Do you know whether WPIX is carried on cable systems

jk 6-18

1 WPIX is carried on cable systems which are not depicted on
2 this map?

3 A I don't know.

4 Q I mean that are located in areas not depicted on
5 this map. You don't know that from your correspondence or
6 other information that's come to your attention?

7 A I don't know that.

8 MR. KING: Do you have a frame of reference in what
9 we are -- are you talking about today or 1978, '79?

10 MR. LLOYD: It doesn't make any difference. The
11 Witness understood the question, I gather.

12 COMMISSIONER BRENNAN: While Mr. Lloyd is pondering,
13 I'll ask you a question, Mr. Hughes.

14 You mentioned WOR TV earlier in your testimony. Is
15 this the same WOR TV concerning which Senator Bradley earlier
16 this month proposed to transfer the license from New York
17 City to New Jersey?

18 THE WITNESS: I was not aware of the fact that he had
19 made that proposition, but I wish him well and I hope he
20 succeeds.

21 (Laughter)

22 COMMISSIONER BRENNAN: You are generally acquainted
23 with the reasons why Senator Bradley --

24 THE WITNESS: Yes. Yes.

25 COMMISSIONER BRENNAN: Thank you.

jk 6-19

1 MR. LLOYD: That's all I have.

2 CHAIRMAN BURG: Mr. Faber?

3 CROSS-EXAMINATION

4 BY MR. FABER:

5 Q My name is Michael Faber, Peabody, Rivlin, Lambert &
6 Meyers, representing Broadcast Music, Inc.

7 A Yes, sir.

8 Q I just have a few questions, Mr. Hughes.

9 In connection with your responsibilities as Vice
10 President of Progrmming, are you generally familiar with FCC
11 policies relating to service responsibilities, programming
12 responsibilities?

13 A Yes, I am.

14 Q Is it correct to state that you, as a licensee, as
15 with other licensees, are obligated to serve primarily your
16 city of license?

17 A Yes, that's true.

18 Q And that you owe the secondary responsibility to your
19 service area, the area in which the signal is used off the
20 air?

21 A That is correct.

22 Q And do you owe any obligation to any community
23 located outside those areas?

24 MR. KING: I would object to that. I'm not sure
25 what is meant by "owe a responsibility." I just don't

jk 6-20

1 don't understand.

2 MR. FABER: I don't know if the Witness has any
3 trouble understanding the other question. It's the same as
4 the other.

5 MR. KING: You framed it in terms of FCC require-
6 ments.

7 BY MR. FABER:

8 Q Is there an FCC requirement, to your knowledge, that
9 imposes any obligation on you to program on matters of interest
10 to any communities other than your city of licensing and
11 services area?

12 A I don't believe there is.

13 Q Thank you.

14 In addition then with respect to your news and
15 public affairs programming, would it be safe to say that
16 in conformance with those obligations, you programmed those
17 materials primarily for your city of license and your service
18 area, as opposed to that --

19 A That would certainly be an incomplete way of
20 answering the question, yes.

21 Q Pardon me?

22 A One could answer the question incompletely in that
23 way, yes.

24 Q Feel free to answer it anyway you wish.

25 A Fine.

jk 6-21

1 New York is, I believe, a unique market in that it
2 has a wide diversity of population and as the home of the
3 United Nations, probably has more of an interest and focus
4 in significant national and international affairs than
5 smaller communities located in isolated places. So, while I
6 think it is true that we primarily program to that audience,
7 we are mindful of the fact that the station is seen in 11
8 states. And if we had to choose between covering a minor
9 issue in New York City and a major issue on a national level
10 and we could only do one or the other, we might very well go
11 with the national issue, realizing tht that would be a
12 greater service to New York even though it was a national
13 issue, than covering the local issue.

14 Q In terms of issues selected during any period, would
15 you say that the majority of those issues all related to your
16 service area?

17 A I think, with the exclusion of who may or may not be
18 the Utica, New York, or other local issues for any one of
19 those communities, the affairs that interest New York,
20 interest that entire area.

21 Q Do you also have an obligation, again, under FCC
22 rules to ascertain the needs and interests of your community
23 of license?

24 A Yes.

25 Q And would that ascertain the effort and involve any

jk 6-22

1 kind of showing regarding the 11 states you're carried in?

2 A No.

3 Q And are you not also obligated to program in order to
4 meet the needs and interests that you have ascertained?

5 A Yes.

6 MR. KING: Excuse me. Had you completed your answer
7 to the last question?

8 THE WITNESS: Well, I was going to add that we do
9 talk with people in those other states as well, while we have
10 no specific obligation to do that. We have people in the
11 station quite often who take part in programs and while we are
12 not required to include them in our ascertainties, we do
13 quite often do that.

14 BY MR. FABER:

15 Q Just one further line of questions, if I may.

16 Is my recollection correct that WPIX was subject to
17 a rather protracted license renewal proceeding in the late
18 '70s?

19 MR. KING: I would object to that. I don't see what
20 bearing it has on anything we do in here today.

21 MR. FABER: If I just may be heard for a second. It
22 is also my recollection, assuming the Witness has any knowledge
23 of that proceeding, that one of the major issues in that
24 proceeding was the paucity of news and local affairs programming
25 carried on WPIX.

MR. KING: I'm sorry. I don't --

jk 6-23 1

CHAIRMAN BURG: I don't really see the connection there either, Mr. Faber.

MR. FABER: It was represented that this station produces a considerable amount of local public affairs news broadcasts that are of interest --

CHAIRMAN BURG: Well, we're talking about, for our purposes, the year 1978.

MR. FABER: That's correct.

CHAIRMAN BURG: Is that what you're talking about?

MR. FABER: That's it exactly. That is the time period of the proceeding, as I recall.

THE WITNESS: No, that is not a fact.

MR. KING: Excuse me. I just would renew the objection.

CHAIRMAN BURG: If it is not a fact, then I will again sustain the objection.

THE WITNESS: I could be specific and say that that related to a period between 1966 and 1969.

MR. FABER: I will withdraw the question. I have no further questions.

CHAIRMAN BURG: Anyone else?

(No response)

CHAIRMAN BURG: Mr. Hughes, how would you characterize WPIX in the New York market? Is it very successful station, reasonably successful, give me some help in trying to get a

jk 6-24

1 mental picture.

2 THE WITNESS: I think that we're a very successful
3 station. I think we are thought of as being one of the
4 leading independents in the country --

5 CHAIRMAN BURG: That was my next question.

6 THE WITNESS: -- if not the leading.

7 CHAIRMAN BURG: You obviously are more successful
8 in all that is considered than the other independents in
9 New York; is that a fair statement?

10 THE WITNESS: I believe it's safe to say that except
11 for money, we don't make as much as one other station; we
12 don't take in as much as one other station, we are the most
13 successful.

14 CHAIRMAN BURG: And in terms of the country, WPIX
15 rates --

16 THE WITNESS: I would think we would be right up
17 there with the --

18 CHAIRMAN BURG: -- highly?

19 THE WITNESS: Yes.

20 CHAIRMAN BURG: Would there be any independent
21 stations that would be more successful around the country?

22 THE WITNESS: Well, success is hard to define. Do
23 you mean revenue or --

24 CHAIRMAN BURG: Well, revenue, a combination of
25 standing, revenue, ratings.

JK 6-25

1 THE WITNESS: My personal believe is that with the
2 possible exception of revenue and in very limited cases
3 there, that we are perceived to be the leading independent
4 in the country. I can probably bring five people in here who
5 would dispute that but that is my believe.

6 CHAIRMAN BURG: Well, my perception would be along,
7 if not the number one, certainly among the top two in the
8 country, which suggests then that you can attract superior
9 talent. You can buy, perhaps, movie packages and program
10 packages that are perhaps more expensive than other independent
11 stations?

12 THE WITNESS: Yes, that's true.

13 CHAIRMAN BURG: When you were answering Mr. Coulter's
14 question about the relevance of ratings between and inde-
15 pendent and a network at various times during the day, were
16 you talking about your station generally?

17 THE WITNESS: Yes.

18 CHAIRMAN BURG: But you were not talking about other
19 independents who might not enjoy that rating success?

20 THE WITNESS: Oh, no.

21 CHAIRMAN BURG: Either in New York or --

22 THE WITNESS: You mean the differentiation between
23 the affiliated -- that generally is a rule that would apply
24 to almost all independents. The difference in the independents
25 would be the level of the rating that each one had achieved.

jk 6-26

1 But essentially, that difference between dollars per point
2 would stay about the same with most stations.

3 CHAIRMAN BURG: Well, let me see if I can ask this
4 another way.

5 It seemed to me, as I recall your testimony, that in
6 New York with respect to PIX and the other network stations,
7 that you were closer in ratings than those, I think we were
8 talking about early news and late news and that sort of
9 thing.

10 THE WITNESS: Oh, I see. Yes, that's true.

11 CHAIRMAN BURG: But that was singularly New York
12 but it might not be applicable to an independent against a
13 network station in any other part of the country?

14 THE WITNESS: Yes, that's true. On the other hand,
15 I think I mentioned that it might be higher. It might be
16 lower, depending upon that station's circumstances. If you
17 have a very weak independent then it might do less well than
18 the affiliated stations. On the other hand, if you had a
19 very strong independent and it was the only independent, it
20 would do substantially better.

21 CHAIRMAN BURG: I agree. I think what I'm getting
22 at is that there are, in numbers, there are weaker independents
23 there are more weaker independents than stronger independents.

24 THE WITNESS: As in life, yes.

25 CHAIRMAN BURG: Yes, I know, life is not fair, but

6-27
1 generally, that works -- perhaps to have a built in mechanism
2 going for them. So you were really only talking about
3 WPIX?

4 THE WITNESS: Essentially, yes.

5 CHAIRMAN BURG: How it applies to New York.

6 THE WITNESS: Yes.

7 CHAIRMAN BURG: Thank you very much.

8 COMMISSIONER COULTER: Mr. Hughes, if I may just, you
9 stated that your judgment on the question of network
10 affiliate and independent viewing was based upon your knowledge
11 of ratings in the WPIX local DNA; is that correct?

12 THE WITNESS: Yes.

13 COMMISSIONER COULTER: And you agreed that ratings
14 are not the same thing as viewing in that they do not reflect
15 distant viewing.

16 THE WITNESS: Yes.

17 COMMISSIONER COULTER: Are you aware that the viewing
18 as Mr. Corn was representing it, and which I believe your
19 testimony is intended to rebut, is related entirely to
20 viewing outside the local service area?

21 THE WITNESS: I'm completely at a loss as to
22 Mr. Corn's testimony. I don't know what you're referring to.

23 COMMISSIONER COULTER: I asked that only because
24 it's stated here that your testimony is intended to rebut his
25 assertions about the qualifying -- it says here on page 10

1 of your rebuttal statement. "Mr. Hughes will rebut the
2 assertion of Mr. Corn that qualifying programming of that
3 network affiliates has 25 percent of the viewership of the pro-
4 gramming of independent stations."

5 THE WITNESS: Well, I do rebut --

6 MR. KING: Commissioner Coulter, if I may, please.
7 I don't have the same understanding of Mr. Corn's testimony
8 as you do. I've read the transcript and I do not believe that
9 Mr. Corn was relating to viewing outside the local DNA.
10 That's not the way I understood it.

11 COMMISSIONER COULTER: Well, excuse me, but the only
12 applicability of any comparison within independent and
13 network affiliate viewing as concerns this proceeding has to
14 concern the viewing outside the local service area.

15 MR. KING: I think for the purposes of Mr. Corn's
16 testimony, he was using that as a reason why Congress rated
17 independent stations 4 and affiliated stations at 1. And
18 wanted the factors he introduced was in addition to the
19 differences between network and non-network programming
20 viewership. And my understanding of Mr. Corn's testimony is
21 that viewership related entirely to viewership in the local
22 DNA.

23 COMMISSIONER COULTER: But according to the statute,
24 it has to -- that factor of one to a quarter was developed
25 only as it concerns any -- and I'm quoting from the definition

1 of distant signal equivalent, lllF -- the excerpt, "The
 2 value assign a secondary transaction of any non-network
 3 television programming carried by the cable system in whole
 4 or in part beyond the local service area of the primary
 5 transmitter of such programming, it is computed by assigning
 6 a value of one to each independent station, a value of one-
 7 quarter to each network station," and that the area -- that's
 8 where --

9 MR. KING: That's true, and that's one of the prob-
 10 lems we had with Mr. Corn's testimony. Mr. Corn is, as I
 11 understand his testimony, was talking about viewership in the
 12 local DMA. It did not make sense to us and -- I mean, we
 13 have the same problem with it. My understanding is that the
 14 Congress had no information as to the difference in viewership
 15 between networks and independents outside the DMA so we did
 16 not understand Mr. Corn's testimony, but on the assumption,
 17 and it is our assumption, that his testimony related to the
 18 local DMA, that is why we have Mr. Hughes testifying in this
 19 fashion. It simply -- our recollection is that his testimony
 20 related to the local DMA, the local market and not distant
 21 market.

22 MR. SCHEINER: Madam Chairman, I am prepared to rest
 23 the record. The notification that we were furnished with
 24 advised us that Mr. Hughes would be testifying in rebuttal of
 25 Mr. Corn. It has been elicited by Commissioner Coulter that

jk 6-30

1 Mr. Hughes is unaware of Mr. Corn's position and has
2 testified further only with respect to the New York City
3 Metropolitan area and such data and information as he draws
4 upon is limited to that area. And I do think it inappropriate
5 for counsel to now attempt to summarize, characterize, the
6 testimony of Mr. Corn that is a matter of record and we can
7 properly address that in proposed findings.

8 MR. KING: I discussed Mr. Corn's testimony simply
9 because of the question that you raised, Commissioner Coulter.

10 CHAIRMAN BURG: Was that an objection?

11 MR. SCHEINER: It was a little spin-off.

12 (Laughter)

13 CHAIRMAN BURG: It's getting harder and harder to
14 tell, may I say.

15 MR. LLOYD: Arthur wanted to be sure to have the
16 last word.

17 CHAIRMAN BURG: Well, let's take -- for the
18 reporter's sake, if not for mine and anyone else's, it's
19 time for a break.

20 (A short recess was taken.)
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CHAIRMAN BURG: Are there any other questions of this witness before I go to Mr. King?

MR. KOENIGSBERG: No, it's Mr. King's turn.

CHAIRMAN BURG: Fine. Thank you.

REDIRECT EXAMINATION

BY MR. KING:

Q Mr. Hughes, you have had discussions with us in which the purpose of your testimony was discussed; is that correct?

A Yes. I didn't ever hear the name Korn. The issue that you're speaking about, when you explained what the Korn situation is, yes, I know about that.

Q All right. In response to a question by Commissioner Coulter, which had to do with the tendency of the sweep weeks to balance out -- in other words, if I recall, the thrust of the question was, what difference does it really make, inasmuch as the two sweep periods measure periods of network programming, and two sweep periods measure periods of non-network programming, and wouldn't it have the tendency to balance out?

Now, if I recall your testimony, you said it may or may not, and one of the examples you gave had to do with the differences in programming. The sweep weeks, would they not have a tendency to balance out if you assumed that the programming is in all respects the same?

bd-7-2

1 A That's correct.

2 Q If, for example, you had baseball in one sweep
3 period, and hockey and basketball in the other sweep weeks
4 period, you could not draw the same comparison, could you?

5 A That's correct.

6 Q And would you tell us why?

7 A Well, first of all, there are more baseball games
8 put into that six-month period than there are hockey games
9 in its six-month period, so that if you have more well-
10 rated baseball games in the six-month period, clearly, it
11 would distort the year, if you had a smaller number of
12 lower-rated hockey games in the other six months of the
13 year. You would have to have a like number, and have them
14 equally attractive, in both of the six-month periods.

15 And the fact is that soccer has been a disaster
16 on television, and basketball is really not all that success-
17 ful, although it's a very big spectator sport, and hockey
18 is really not that good a franchise. So that when you
19 lump them all together and say, well, you have sports in
20 the summer and sports in the winter, and therefore it's
21 representative, it simply isn't so.

22 Those other sports, the winter sports, are
23 against the very heaviest part of the network's schedule,
24 and don't do very well. Baseball is essentially against
25 rerun programming, and it does relatively better. So the

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fact that there are more baseball games against weaker competition than there are hockey games or basketball games, will distort that completely. The baseball experience is by no means representative of the sports experience on television. That is unique, because of its time period and because of its competition, and because of the number of games.

MR. KING: I think that concludes the redirect.

CHAIRMAN BURG: Thank you. Thank you, Mr. Hughes.

MR. KOENIGSBERG: I'm sorry -- if you have no questions, Commissioner --

COMMISSIONER COULTER: I do. Mr. King, you're not presenting any witness to present the first point of your rebuttal?

MR. KING: No, that's legal argument, Commissioner Coulter.

COMMISSIONER COULTER: That's legal argument.

MR. KING: Also, we are not preparing a witness on the final paragraph at page 11, and we are withdrawing that entire issue in the exhibit. We would just like to have the whole thing withdrawn.

COMMISSIONER COULTER: Pardon?

MR. KING: We have made reference on page 11 to an exhibit relating to ASCAP.

COMMISSIONER COULTER: Yes?

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MR. KING: We now wish to withdraw that exhibit, and will put in nothing at all on that issue.

MR. KOENIGSBERG: Madam Chairman, if you will allow me, Commissioner Coulter, to interrupt for a second -- that was why I had risen to my feet, and if in fact material is going to be expunged from the record, I can sit down.

COMMISSIONER GARCIA: Please do.

MR. LLOYD: When we get to a point -- I don't think it's now, I would like to address myself to that, but I don't want to intrude upon this witness' time, because it's unrelated to that.

COMMISSIONER COULTER: I have some more questions, if I may, with the indulgence of my colleagues, if I may just ask you a couple of questions on this, Mr. King.

MR. KING: Please.

COMMISSIONER COULTER: You cite a number of cases here, to start with, on page 3. Could you please just briefly indicate what those cases were about, starting with the first one, Columbia Broadcasting System versus the National Democratic Committee. What was that case about, just very briefly?

MR. KING: Commissioner Coulter, what I would love to do -- I have not expected this, and if we could do this even tomorrow morning, I would be delighted to do it.

1 I have not read them in some time.

2 COMMISSIONER COULTER: Then let me just ask you
3 generally, then. Right now, you don't know -- and I'm not
4 sure we want to --

5 MR. KING: I would not -- if this is going to be
6 any kind of detailed discussion, I would prefer that I have
7 some opportunity to prepare for it.

8 COMMISSIONER COULTER: All right, then, let me
9 just ask you a general question. Maybe you would know that.
10 Are any of these cases cited here related to the distri-
11 bution of money?

12 MR. KING: No.

13 COMMISSIONER COULTER: They're not? Well, I
14 think it has been established that the formula you propose
15 is not one just of time, but is also weighted by the royal-
16 ties paid?

17 MR. KING: True. That's the royalties paid by
18 each system.

19 COMMISSIONER COULTER: Now, the way royalties
20 are paid, according to rates, the .675, et cetera, that
21 were established as part of the compulsory license, those
22 rates, I believe it was said by either counsel of MPAA, or
23 one of the witnesses yesterday, were arbitrary rates, and
24 that's certainly my understanding of their -- it was a
25 settlement, and they were arbitrary rates.

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Mr. Valenti has used expressions much more colorful than "peppercorn" in his reference to them. Under the terms of the compulsory license, and the rates that are commonly agreed were arbitrary, is there any freedom of expression concerning the payment of those royalties?

MR. KING: I'm not sure that I understand the question.

COMMISSIONER COULTER: The issue here, I believe, is the First Amendment and freedom of expression, and my question is, under the terms of the compulsory license arbitrary royalty rates, is that in any form freedom of expression?

MR. KING: Yes.

COMMISSIONER COULTER: You think it's freedom of expression?

MR. KING: I'm sorry, someone was talking. Let's have it --

COMMISSIONER COULTER: This is just a very general statement, and that's because a major point you raise is one of the First Amendment and freedom of expression --

MR. KING: Yes.

COMMISSIONER COULTER: -- whether a system of compulsory licensing which requires cable systems to pay royalties, doesn't allow them to choose, and to impose arbitrary rates in doing so is one that involves any sort of

1 freedom of expression.

2 MR. KING: I think it does, and I think that the
3 very fact that you have a compulsory license in itself
4 suggests that factors such as the other interested parties
5 would have us consider, should in fact not be considered. I
6 think that once you have a system of rates which are con-
7 sidered arbitrary, it is inconsistent with that to intro-
8 duce factors such as other interested parties would have us
9 consider.

10 COMMISSIONER COULTER: Would you agree, though,
11 that the termination of the royalties is certainly less
12 within the choice of a given cable system than is, say, the
13 programming time of a television station, within its choice?

14 MR. KING: Yes.

15 COMMISSIONER COULTER: You would say --

16 MR. KING: I would say that -- if I understood
17 your question, that the royalty fees paid by a cable system
18 do not involve any discretion or selection.

19 COMMISSIONER COULTER: No, do they involve -- do
20 they permit as much discretion as the amount of programming
21 time of a station?

22 MR. KING: I think I just missed the question.

23 COMMISSIONER COULTER: Does the amount of royalty
24 fees paid by a cable system involve as much discretion by
25 the system as the amount of programming time involved in a

1 television station?

2 (No response.)

3 COMMISSIONER COULTER: I still didn't make myself
4 clear -- I apologize.

5 MR. KING: Right. I think the people --

6 MS. GOTTSCHALK: If I could speak to your question,
7 I think the arbitrariness of what a cable system has to pay
8 under the compulsory license system is really not at issue.
9 What is at issue is the fact that there is a compulsory
10 licensing system in existence, and that system was actually
11 developed by Congress to permit greater dissemination of
12 information in all types of programming.

13 And, for that reason, copyright liability is not
14 fully imposed on cable systems. We have a compulsory
15 licensing system which does impose a flat rate, and which
16 in no way takes into consideration or makes a differen-
17 tiation among different types of programming carried by
18 cable.

19 COMMISSIONER COULTER: That wasn't quite my ques-
20 tion, I'm afraid.

21 MS. GOTTSCHALK: I understand, but the pay-in
22 fee schedules, although they may be arbitrary, still in
23 effect grants greater freedom to cable systems to use copy-
24 righted materials, and by the same token encourages that
25 sort of use.

1 COMMISSIONER COULTER: Yes, but I'm afraid that is
2 not related to my question.

3 MS. GOTTSCHALK: Okay, perhaps you can give me
4 your question one more time, then.

5 COMMISSIONER COULTER: The question is, since
6 your formula is related also to royalties, not just time,
7 the --

8 MS. GOTTSCHALK: I understand your question, I
9 think.

10 COMMISSIONER COULTER: The question is whether
11 the royalties paid -- is whether the station exercises more
12 discretion as concerns its programming time than a cable
13 system can exercise in the payment of its royalties.

14 MS. GOTTSCHALK: I think our idea is that the
15 larger cable systems, if you analyze on a cable system
16 by cable system, the larger cable systems actually pay more
17 for their programming.

18 COMMISSIONER COULTER: You're not answering my
19 question, I'm sorry. My question is unrelated to the
20 general philosophy of the different formulas. Let's put it
21 this way -- a television station does exercise discretion
22 as concerning its programming, is that correct, its program-
23 ming time?

24 MS. GOTTSCHALK: And the amount it carries every
25 day; yes.

bd-7-10

1 COMMISSIONER COULTER: Yes, it does. Does a
2 cable system exercise discretion on the amount of royalties
3 it pays?

4 MS. GOTTSCHALK: Based on the number of distant
5 signals it carries, yes.

6 COMMISSIONER COULTER: But not on the rate?

7 MS. GOTTSCHALK: It can lessen the rate, if it
8 doesn't carry any distant signals, or if it carries a certain
9 number of distant signals. The more distant signals it
10 carries, the greater the rate. So, by the same token
11 that a station would increase the number of broadcast hours
12 of its day, according to the economics involved, a cable
13 system will carry more distant signals, if it's economically
14 to its advantage to do so. And for that reason, it pays more
15 for royalties, so it does determine it to a certain extent.

16 COMMISSIONER COULTER: And do you think the
17 cable system has exercised as much discretion in the payment
18 of its royalties as a television station does in establish-
19 ing its programming time?

20 MS. GOTTSCHALK: I would think that it's somewhat
21 analogous. The more distant signals carried by a cable
22 system, the more it pays for the right to do so, the
23 greater the fees, and completely different schedules also
24 used, according to the gross revenues; and the same is true
25 for stations, too. Stations pay more, according to the

1 number of hours of programming a day that they have to pay
2 for in licensing fees, and to produce.

3 COMMISSIONER COULTER: I just want to make one
4 other observation, though, as concerns the freedom of
5 expression. It strikes me that under the compulsory licensing
6 aspects of the Copyright Act, the freedom of expression
7 -- the only forum for freedom of expression happens to be
8 right here. This is where the freedom of expression
9 occurs, on these issues, because of the compulsory license
10 -- but I'm simply making a -- make any comment you want on
11 that.

12 MR. KING: I think the only response I would have
13 is that we understand that the function that you people
14 have -- and our arguments are addressed to the factors
15 that you should or should not take into consideration.
16 That's the only --

17 COMMISSIONER COULTER: I realize that.

18 CHAIRMAN BURG: All right. I believe, then, we
19 are finished with Mr. Hughes. Thank you, sir.

20 THE WITNESS: Thank you.

21 (The witness was excused.)

22 CHAIRMAN BURG: And now just a few housekeeping
23 matters. I believe it was Mr. Scheiner who, yesterday or the
24 day before, suggested to us that, in order to avoid con-
25 fusion on the various cases before us, that we assign docket

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1 numbers to these cases, so if you will kindly get out your
2 pencils, we have assigned docket numbers.

3 For the 1979 cable royalty distribution proceed-
4 ing, the docket number will be CRT Docket Number 79-1.
5 For the coin-operated phonorecord players royalty adjust-
6 ment proceeding, parentheses, (Jukebox), that docket number
7 will be CRT Docket Number 80-1. And I really think that's
8 -- the only other one would be compulsory license for
9 secondary transmission by cable systems royalty adjustment
10 proceeding, will be CRT Docket Number 80-3.

11 COMMISSIONER BRENNAN: Madam Chairman, Arnold and
12 Porter has suggested the mechanical royalty -- perhaps
13 Mr. Lloyd could pass that along --

14 CHAIRMAN BURG: For compulsory license for making
15 and distributing phonorecords mechanical royalty adjust-
16 ment proceeding, that will be CRT Docket Number 80-2.

17 MR. LLOYD: Madam Chairman, the first docket
18 number you gave was -- you gave us CRT Docket 79-1, but you
19 described it as for the 1979 proceedings.

20 CHAIRMAN BURG: Right.

21 COMMISSIONER BRENNAN: Which is '78 fees.

22 MR. LLOYD: Okay, it's this proceeding?

23 CHAIRMAN BURG: It's this proceeding, right.

24 MR. LLOYD: I wouldn't have asked the question,
25 but Garrett told me to.

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(Laughter.)

MR. GARRETT: Scheiner passed it on to me.

MR. SCHEINER: They're both lying.

(Laughter.)

CHAIRMAN BURG: Now, as I recall, we have an objection on the part of Mr. Scheiner to PBS -- PTV Exhibit Number 11. The Tribunal will overrule the objection, and include the exhibit.

(PTV Exhibit Number 11, having been previously marked for identification, was received in evidence.)

CHAIRMAN BURG: In accordance with the Tribunal's rules and regulations, Section 301.54, we will require findings of fact and legal conclusions, and we will require that they be submitted to us in writing by Monday, July 7.

Furthermore, on that same day, Monday, July 7, you will at that time submit, with appropriate rationale and support, the allocation, in percentage terms, for the total cable royalty distribution for the year 1978. These submissions must be limited to evidence already in the record, and all parties must give a division for the following: I have enumerated them before, but I will go over them again, so that there is absolutely no question -- motion picture, or MPAA, and program syndicators, that's one; broadcasters, with a separate breakout for the Canadian

1 Broadcasting Corporation; sports, with a separate breakout
2 for NCAA; number four, music; number five, PBS; number six,
3 NPR; number seven, cartoon characters; number eight,
4 radio in general, and if you can think of anything else,
5 that would fall under number nine, miscellaneous.

6 This is in response to a question -- there will
7 be no reply briefs demanded by us, and if the Tribunal
8 should deem it advisable that there be legal or oral argu-
9 ment by counsel, we will so advise you, when we make that
10 decision.

11 MR. LLOYD: Will replies be permitted? You said
12 they would not be demanded.

13 CHAIRMAN BURG: I don't think they will be per-
14 mitted, sir.

15 The last item of business I have here is, I would
16 like, if I can, to get a status report from Mr. King and
17 Mr. Lloyd, with respect to the sports contracts.

18 MR. KING: We have all the contracts here, and
19 are prepared to meet with Mr. Lloyd tomorrow morning. We
20 have all those upon which we will be basing claims in
21 our possession, here in Washington, and I think the
22 Tribunal's announcement was last Thursday or Friday, and we
23 simply haven't had time to get together during the three
24 days that we have been here, but we have the contracts
25 here, and are ready to proceed tomorrow.

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1 CHAIRMAN BURG: Well, all I'm asking for is a
2 status report. Mr. Lloyd?

3 MR. LLOYD: There were two items, Madam Chairman,
4 and one, I said at the time, NAB announced that it was not
5 going to tender a document that it had exchanged. I
6 said I wanted to be heard, but I wouldn't --

7 CHAIRMAN BURG: Oh, yes.

8 MR. LLOYD: -- want to be heard when Mr. Hughes
9 was here. The second one, on this report that Mr. King has
10 just provided, I guess a week ago today, we said that if
11 he had let us know what he was claiming, we would deal
12 with them, and then on Friday at the bench conference they
13 made it clear that that was up to him, and that same day,
14 when I exchanged the testimony, I said that we would be
15 willing to work with him, once he had identified the
16 areas of controversy, provided he did so in an expeditious
17 fashion.

18 Now, I don't think he has done so in an expedi-
19 tious fashion. I think --

20 CHAIRMAN BURG: Mr. Lloyd, if I may, I'll disagree
21 with you to the extent that we have been otherwise occu-
22 pied during the last several days, and I think we wouldn't
23 be stretching the word "expeditious" if we could do it
24 in the next few days.

25 MR. LLOYD: I tend to have developed, over the

1 years, a healthy understanding of how these processes
2 work, and I think it ought to be abundantly clear at this
3 point that it is incumbent upon Mr. King to let us know for
4 which of the sports items it is claiming the revenues; and
5 at that point, when that is done, we will then sit down
6 with him and see what we can work out.

7 But that is the first step, and I am not going to
8 undertake to do one thing, unless you tell me to, until
9 that last step is taken.

10 CHAIRMAN BURG: That, indeed, is my understanding
11 also --

12 MR. LLOYD: Okay.

13 CHAIRMAN BURG: -- that that is the first step, and
14 I assume that is his understanding.

15 MR. KING: We will have that in his offices tomor-
16 row morning.

17 CHAIRMAN BURG: Are there any other --

18 MR. LLOYD: I still have a matter, and I don't --
19 I would hope that the lateness of the hour would not make
20 us give this item short shrift, because I am really adrift
21 in an area about which I know very little, but about which
22 some things have raised a great deal of concern, and I
23 think it's a matter of some importance, and this has to do
24 with the claims that music has made in the case.

25 The Monday trade press, or broadcast trade press,

1 reported that, out at the NBC affiliates' meeting, that
2 a dispute, or discussions, occurred about the payments that
3 are made to ASCAP and BMI, and the press report was affiliates
4 now pay ASCAP and BMI fees for network music, and want
5 the networks to take over the payment. And, that same day,
6 we got from NAB, or I saw from NAB -- I guess it wasn't
7 the same day, this information about the way that the
8 broadcasters report music license payments to ASCAP.

9 I went through that, and that certainly suggested
10 that network affiliate stations were including in the cal-
11 culations of the revenues on which they pay royalties,
12 revenues received from the networks, as well as revenues
13 received from adjacencies to network programs.

14 And I then went to the -- ASCAP's direct statement,
15 I guess, which Dr. Fagan ended up endorsing, which had
16 some statements in it that the certain figures were sub-
17 tracted from the affiliates' payments that they had used,
18 because the affiliates pay the network's share. And then
19 I went to the FCC data, that the ASCAP people drew on, the
20 1978, and saw that the O and O -- the owned and operated
21 network stations pay something like \$11 million in per-
22 formance rights fees; the networks themselves, a mere \$12
23 million; and the local affiliates -- the other local
24 affiliates, something close to \$50 million.

25 And it struck me that maybe we were being presented

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1 the proposition that the network affiliates are paying
2 music license fees for their performance, and it is a per-
3 formance, of network programming, but that that network
4 programming may nevertheless not be qualified programming;
5 and I've raised the question, because I really am adrift,
6 and I want to know what ASCAP's position is on this score,
7 and I think we're all entitled to know.

8 MR. KOENIGSBERG: Madam Chairman, I did not want
9 to interrupt Mr. Lloyd. I really wonder about the nature
10 of what he's talking about here, and the question is, is
11 this testimony -- is this something that's proper to raise
12 orally before the Tribunal? I think the record is clear
13 on these matters.

14 As Dr. Fagan testified, we license the networks
15 at a particular rate, and the networks charge back their
16 affiliates, and have the affiliates pay them some share of
17 it. That's not our doing. We don't care where the money
18 comes from -- we get a check from the networks.

19 As far as the local stations go, the ASCAP license
20 is the key document. That license is, as I recall, a
21 matter of record before the Tribunal. It was in the desk
22 book that we gave you at your orientation hearings. I
23 would think you would be able to take notice of your own
24 records.

25 And the license says, to network affiliates as well

1 as independent stations, that what is being granted is a
2 license to perform publicly, by television broadcasting,
3 on licensed local television programs. And local television
4 programs is defined in the license as a program broadcast
5 from the station, other than a network television program.

6 Now, the fees that are paid by the local stations
7 are fees that are attributable to local revenues, revenues
8 the local station earns from selling its own spots, not
9 revenues that the network earns by selling its spots.

10 That is the way that the broadcasting industry
11 and ASCAP have fixed the value of the performing right for
12 broadcasts on local television programs only. And I think
13 that answers the matter, and if there is any further
14 answer that the Tribunal wants on that matter, we will put
15 it in writing and give you all the details in any area
16 that you want, but I think the record is clear on it, and
17 indeed Mr. King had withdrawn his statement on that part --
18 it's not a part of the record, so for Mr. Lloyd to now
19 come in and start asking questions about something that
20 Mr. King has withdrawn, and is not part of the record, seems
21 to me to be quite out of order.

22 MR. BECHTEL: In support of Mr. Lloyd, the TV
23 Digest article that he referred to was published only two
24 days ago, and it does, on its face -- maybe TV Digest don't
25 know what they're talking about -- on its face, it talks

1 about the affiliates paying the network fees. And that,
 2 on its face, is inconsistent with the testimony in this
 3 proceeding, ASCAP pays fully -- and out of curiosity, when
 4 I saw the article, I did some figuring, and even on --

5 MR. KOENIGSBERG: Madam Chairman, I must object.
 6 This is not a part of the record, Mr. Bechtel is not a
 7 witness, and it shouldn't be going on.

8 MR. FABER: I would like to join in that objec-
 9 tion.

10 MR. KOENIGSBERG: And I have explained the nature
 11 of the networks charging back the local stations. The
 12 local stations don't like it, that's their business with
 13 their networks.

14 MR. KING: We were trying -- we would join Mr.
 15 Koenigsberg, as well.

16 CHAIRMAN BURG: Well, are there any other questions,
 17 or any other matters to be brought before -- all I can say
 18 is --

19 MR. BECHTEL: Yes, I had another independent
 20 matter. I was in the middle of a phrase, and perhaps I
 21 would be permitted to finish that, or did you wish to
 22 terminate this discussion? I do have another substantive
 23 issue to raise.

24 CHAIRMAN BURG: I wish to terminate this discus-
 25 sion. If you would want to initiate another one -- the only

1 thing I was going to say is when Mr. Lloyd was quoting
2 all those figures -- \$12 million here, \$11 million there, it
3 reminded me of Ev Dirksen one time, in a committee meeting,
4 and he said, a billion and a billion there, and before you
5 know it, it begins to add up.

6 (Laughter.)

7 MR. LLOYD: And he was a Republican.

8 CHAIRMAN BURG: That's right. So, please, Mr.
9 Bechtel, if it's another -- we'd be delighted to entertain
10 another issue.

11 MR. BECHTEL: I want to address the matter of
12 reply briefs. This is a rather complex record, and my
13 own thought -- and I don't know how wedded you are to your
14 position of no replies to the briefs -- my own feeling is
15 that a reply brief has a lot to be said for it, because it
16 forces the lawyers to be a little tighter in their advocacy
17 going in, and if there is no reply brief, you're likely to
18 have temptation, from many of us, to see something in some-
19 one else's proposed findings that we just simply have to
20 try to respond to; and you're likely to receive some
21 unauthorized pleadings with requests that you hear them,
22 and --

23 CHAIRMAN BURG: I'm sure of it.

24 MR. BECHTEL: And things can -- you could limit
25 the page numbers to seven, or ten, a small amount, and force

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us to be real selective in what we submit in reply, and you can give us a short period of time, but I think it's going to be more expeditious and helpful to you if you do give -- set some sort of a reply brief.

CHAIRMAN BURG: Mr. Bechtel, if we change our minds, you will be among the first to know. Thank you.

MR. BECHTEL: Is there any page limitation on the opening briefs?

CHAIRMAN BURG: No. I would hope you would keep it within reason.

Mr. King?

MR. KING: I would like to mark as an exhibit --

CHAIRMAN BURG: Yes, I was going to ask you about that.

MR. FABER: Will he furnish copies to counsel?

MR. KING: Yes, I will have copies made.

CHAIRMAN BURG: This will be NAB Exhibit, NAB Rebuttal Exhibit 3.

(NAB Rebuttal Exhibit 3 was marked for identification.)

CHAIRMAN BURG: Is there anything else?

If not, we are adjourned.

(Whereupon, at 4:15 p.m., the hearing was adjourned.)