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COPYRIGHT ROYALTY TRIBUNAL

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In the Matter of:	:	
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1979 CABLE ROYALTY	:	Docket No. CRT 80-4
	:	
DISTRIBUTION PROCEEDING	:	
	:	
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2100 K Street, Northwest
Room 414
Washington, D. C.

Wednesday, April 15, 1981

The pre-hearing conference in the above-entitled matter commenced at 10:00 o'clock, p.m., pursuant to Notice

BEFORE:

- THOMAS C. BRENNAN, Acting Chairman
- DOUGLAS E. COULTER, Commissioner
- FRANCES GARCIA, Commissioner
- MARY LOU BURG, Commissioner

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APPEARANCES:

GENE BECHTEL, Attorney-at-Law
Counsel for PBS

JOHN MIDLEN, JR., Attorney-at-Law
Counsel for Oldtime Gospel Hour

PETER E. ROBINSON, Attorney-at-Law
Counsel for Canadian Broadcasting Corp.

JAMIE S. GORELICK, Attorney-at-Law
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I. FRED KOENIGSBERG, Attorney-at-Law
BENJAMIN L. ZELENKO, Attorney-at-Law
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PHILIP HOCHBERG, Attorney-at-Law
BOB GARRETT, Attorney-at-Law
JIM FITZPATRICK, Attorney-at-Law
Counsel for Joint Sports Claimants

JOHN STEWART, Attorney-at-Law
VICTOR FARRELL, Attorney-at-Law
BOB HALPERN, Attorney-at-Law
Counsel for NAB

JUDITH JURIN SEMO, Attorney-at-Law
Counsel for NCAA

ANN FORD, Attorney-at-Law
Counsel for Christian Broadcasting Network

PETER FEINBERG, Attorney-at-Law
Counsel for Super Station, Inc.

ARTHUR SCHEINER, Attorney-at-Law
Counsel for Program Syndicators

CHARLES T. DUNCAN, Attorney-at-Law
Counsel for BMI

P R O C E E D I N G S

1
2 CHAIRMAN BRENNAN: The meeting will come to order.
3 We are delighted to welcome back many old acquaintances and
4 we greet the new faces.

5 For the information of those present, I announce
6 that late yesterday the Tribunal issued another order on
7 partial distribution. The Tribunal adopted an order specify-
8 ing that the previous order for partial distribution be
9 stayed through April 30, 1981 subject to certain conditions
10 being met by NAB. There are two conditions:

11 a) NAB must file it's motion for stay with the
12 Court of Appeals under Rule 6(a) of the local rules of this
13 circuit and Rule 27(a) of the Federal Rules of Appellate
14 Procedure, so as to permit an orderly process for responses
15 to the NAB motion.

16 b) NAB must file it's motion on or before April
17 17, 1981.

18 The Tribunal has reviewed the joint submission of
19 a number of claimants proposing a structure and procedure for
20 the 1979 Cable Distribution Proceeding with the reservation
21 that we will, in all events, preserve a three week gap
22 between the following of the direct written cases and the
23 commencement of the hearings.

24 The Tribunal approves in principle, this schedule
25 and structure.

1 Before turning to more important matters, does
2 anybody desire to speak on any details of the joint submission?
3 Mr. Scheiner?

4 MR. SCHEINER: Mr. Chairman, I filed a pleading
5 indicating that the Motion Picture Association and its member
6 companies join and endorse the provisions of that joint
7 submission but noted one qualification. Namely, pointing out
8 that we had undertaken a very substantial effort with the
9 Neilson Company. Neilson had assured us that we would have
10 no difficulty in meeting the June 15th exchange date but it
11 is the fact that they've run into their own sweeps and
12 conceivably, we might encounter some delay, although I'm
13 hoping we will not.

14 Accordingly, I propose that in the event that any
15 party for reasons beyond its control, was unable to meet the
16 specified deadline or submission of exhibit and exchange of
17 material upon proper notice to the Tribunal and for good
18 cause shown, the Tribunal would extend the time for the
19 moving party as well as for all other parties.

20 CHAIRMAN BRENNAN: I believe that's understood
21 and we will act upon that as necessary.

22 Any further observations on that issue?

23 (No response.)

24 I would like to turn to some of the questions
25 raised in your submission. Possibly the most useful approach

1 would be to invite counsel for the claimants to make a brief
2 opening presentation in which you would identify the issues
3 that you feel should be resolved by the Commissioners, either
4 today or in the near future and possibly it would be appro-
5 priate for NAB to speak first on this issue.

6 MR. FARRELL: First, Mr. Brennan, I'd like to
7 respond to your welcome. It's a pleasure to join this small
8 and exclusive group.

9 CHAIRMAN BRENNAN: We're still working on the
10 CRT tee shirts. We have a problem. We have two Commissioners
11 who just want to have CRT. We have two Commissioners who want
12 to have CRT in a circle and we have one Commissioner who's
13 still considering the question.

14 MR. FARRELL: I'm a bit at a loss as to a particu-
15 lar set of issues that I feel need to be resolved today.
16 This is my first visit with you and I'm unfamiliar with your
17 procedures. Generally, as you know from our filings, NAB
18 has tried to share with you the concern that the record for
19 1979 be as full as possible both because of the new facts that
20 will be before the Tribunal, because of the impact of the
21 Tribunal's first decision and because of the pendency of the
22 Court of Appeals.

23 In general, Mr. Brennan, it's NAB's view that
24 parties in this proceeding are represented by counsel and
25 that they will be more than able to protect and assert the

1 interests of their clients and for that reason we would hope
2 that the Tribunal's approach to the 1979 proceeding would be
3 to make a full record and to avoid, to the extent possible,
4 prefact exclusionary proceedings.

5 That this is NAB's position I'm sure will come
6 as no surprise to you and the one other knot I'd like to get
7 off my chest and share with you right off the bat is I anti-
8 cipate with some trepidation, and I'm being reminded from
9 time to time during this proceeding that what I say was
10 different from the position of my client last year. My nerves
11 are steeled for that, so I can take it. You go ahead and
12 stick it to me.

13 COMMISSIONER BURG: Mr. Farrell, in your submission
14 of March 23rd you said that questions on copyright ownership
15 are mixed questions of law and fact and that the Tribunal,
16 as I recall, should resolve them after the case, not before.
17 Would you give us some examples of what you had in mind?

18 MR. FARRELL: Yes, Ms. Burg. The general question
19 of who owns something is inherently a question of fact, of
20 course, and the standards to be applied in judging ownership,
21 I feel, are affected by those facts. I'd also note before
22 I respond specifically to your question that as I understand
23 it we have, this year, the luxury, if you will, of being able
24 to follow a somewhat more orderly procedure.

25 I think one area where the Commission itself

1 recognized this last year was in the sports area. I think
2 too that there are many facts which bear not only on entitle-
3 ment issues but also on distribution issues. If, to take one
4 specific example, and I should note that we're in the course
5 of preparing our case so I'm not as fully prepared as I might
6 be. To take a hypothetical example, were the facts for 1979
7 to show that the syndicators, and I stress this is a hypo-
8 thetical, that the syndicators had extracted from their
9 property every penny of the monopoly rents to which they have
10 exclusive right and title and were the facts further to show
11 that the contracts between the syndicators and the broadcast
12 stations had express clauses with respect to exclusivity and
13 were the facts to show that without question a double payment
14 would occur if the monies collected by the Tribunal were
15 paid over, then it would seem to me not unreasonable for
16 the Tribunal to at least want to reconsider the question of
17 the bundling and disbundling of the copyrights by MBA.

18 Now, I'm a bit reluctant to give you these kind
19 of examples because I expressly don't want to suggest to you
20 that we're here to reargue the things you decided last year.
21 You made your decision and whether or not we agree with it,
22 it would be foolish and I think improper to just simply try
23 to bang at you on the same legal points.

24 But I do hope, generally, that by the receipt of
25 a full record that we'll be able to suggest to you some new

1 ways of looking at this, both from an entitlement and from a
2 distribution point of view. Sets of facts, I might add, that
3 I am now clear based on the work we've done today are not in
4 discreet packets or cubby holes.

5 COMMISSIONER BURG: In other words, Mr. Farrell,
6 this isn't going to be an exercise of compilation exclusiv-
7 ity and ownership revisited?

8 MR. FARRELL: Exactly right, although I'd give that
9 as another example to you. We're not going to come in and
10 make the compilation argument that NFP made last year. We're
11 not going to do that. But it may well be that facts relating
12 to the broadcast day offerings of television stations relate
13 to the harm and benefit criteria, for example, which you
14 enunciated.

15 I personally feel that the marketplace standard
16 which you enunciated is going to have some very substantial
17 consequences to the conduct of the procedure. If, to the
18 extent possible, the Tribunal is going to attempt within
19 reasonable bounds to replicate the marketplace, try and
20 accomplish what the marketplace would have accomplished
21 otherwise, then quite a different set of facts are going to
22 be important to you, I think.

23 CHAIRMAN BRENNAN: Mr. Fitzpatrick?

24 MR. FITZPATRICK: One of the issues of law that we
25 are interested in, I want to make our views as clear as I can

1 and I think the comments are prompted by Vicki's earlier
2 paper on the question of sports ownership. As a matter of
3 law, we think this Tribunal said and said and said on three
4 different occasions what the controlling legal standard is in
5 terms of sports ownership.

6 They looked at congressional intent. They noted
7 that no other issue had occupied as much of the Tribunal's
8 time in terms of the resolution of a legal issue and
9 concluded that royalty fees for sports programming should be
10 awarded to sports claimants except where there are contractual
11 arrangements specifically providing that such royalties shall
12 be distributed to broadcaster claimants.

13 That statement is now on appeal and it is now up
14 to the Court to determine whether the Tribunal's definition
15 of the legal rights as Congress intended was correct or not.
16 Until the Court reverses that legal ruling, we believe that
17 for these proceedings that ruling is res judicata and the
18 part of the Tribunal process that is open to the broadcasters
19 in the 1979 proceeding is to come forward with contracts that
20 would state what the Tribunal's ruling indicated, contracts
21 that specifically provide that such royalties shall be
22 distributed to broadcaster claimants.

23 So, where we see ownership issues, you have stated
24 what the controlling legal principle is and you have provided
25 an opportunity as a matter of fact, for the broadcasters to

1 come forward with such contracts. That was the same process
2 that we had last year and we think that that defines the
3 outer limits of the issue of sports ownership that we'll be
4 facint in this year's proceeding.

5 CHAIRMAN BRENNAN: Ms. Semo?

6 MS. SEMO: May I just note that the NCAA concurs
7 in the remarks of Mr. Fitzpatrick.

8 CHAIRMAN BRENNAN: Thank you, Ms. Semo.

9 COMMISSIONER BURG: May I address all of you as
10 you speak to address this particular issue of res judicata.
11 I know MCAA did, Joint Sports did, Christian Broadcasting
12 Network brought it up originally but some, PBS and others,
13 were silent on that particular fact.

14 So, as you go around the table and bring these
15 facts up would you address that, please?

16 CHAIRMAN BRENNAN: Any other requests for recog-
17 nition at this time? Mr. Scheiner?

18 MR. SCHEINER: My comments are principally addressed
19 to my good friend Vic Farrell. I think my difficulty with his
20 statement of his position stemmed only in part from an
21 inability to here everything he said. I would point out that
22 in the Tribunal's brief in the Court of Appeals it said very
23 clearly with respect to the broadcaster's claims based on
24 compilation and exclusivity that it was disingenuous to
25 concoct such proposals in light of the decisive history of

1 the act. Now, my question to Mr. Farrell is, as a matter of
2 law, is he contending, arguing to this Tribunal that its
3 position on compilation and exclusivity is in error or rather
4 is he foregoing that position in the new distribution pro-
5 ceedings?

6 CHAIRMAN BRENNAN: Do you want to respond?

7 MR. FARRELL: If you'd like me to respond, sure.
8 I think it's entirely conceivable that NAB will conclude,
9 after the presentation with full facts, that it thinks the
10 Tribunal was wrong so far as the 1978 decision was concerned.

11 I'm not clear that it will simply be NAB's view
12 that the Tribunal was wrong, per se, but rather more likely,
13 that there may well be other ways of looking at these facts
14 that the Tribunal didn't see. Now, this brings up a question
15 which I'm glad Jim raised and that is the significance of the
16 pendency of the appeal.

17 I think our view is exactly the opposite and that
18 is with this odd procedural posture we have with the judicial
19 review of the Tribunal's first decision coming down in all
20 probability well into the '79 distribution, if not after the
21 end of it. It's only common sense to try and have the
22 fullest possible record you can have so you don't have to
23 go back and do it over.

24 Res judicata was exactly the kind of exclusionary
25 legal thinking that I had in mind when I made my opening

1 remarks. There are a number of wonderful-- We yield to no
2 man in our respect for these traditional common law concepts
3 that have stood the test of time for hundreds of years. But
4 technically, they don't apply here and I'm not really sure
5 that that was the concept that underlay the creation of the
6 Tribunal.

7 The facts are different. The parties are different
8 and the issues are important.

9 Now, Art, can you hear me?

10 MR. SCHEINER: Yes.

11 MR. FARRELL: I have been guilty of violating
12 Hubert Humphrey's rule which was, "Listen while you talk, you
13 might say something good", and I've lost your question. Am
14 I contending what?

15 MR. SCHEINER: Are you asserting the proposition
16 as a matter of law that television broadcast stations are
17 entitled to share in the cable royalty fund by reason of
18 claimed rights stemming from compilation and exclusivity?

19 MR. FARRELL: I'm very sorry to try and be pinned
20 down at this early stage but I'll answer you as best I can.
21 In the sense that compilation was asserted last year by NAB,
22 no I'm not.

23 With respect to exclusivity, I don't know at this
24 point because I haven't finished looking at the facts.

25 MR. SCHEINER: So that the record may be clear, we

1 unlike Vic Farrell, did have the benefit of last year's
2 proceedings and I am in a position to state our view. This
3 Tribunal, in our view, has determined as a matter of law that
4 the television broadcast stations have no claim based on
5 assertions of compilation or exclusivity. I think that is
6 an entirely correct opinion. I don't think it is open to
7 challenge in this proceeding.

8 Further, I would submit that any attempted eviden-
9 tiary showings of the following nature ought be excluded in
10 light of the Tribunal's determination as to compilation and
11 exclusivity and the showings that I have in mind are as
12 follows:

13 With respect to compilation, if NAB were to offer
14 testimony and exhibits to the general effect, great inventive-
15 ness, artistry, originality, entered into the construction
16 of their broadcast day, I would say that proffer of evidence
17 ought be excluded because it is bottomed upon an asserted
18 claim stemming from compilation which this Tribunal has
19 properly rejected.

20 Secondly, with respect to exclusivity, if for
21 example, NAB should proffer witnesses, the thrust of whose
22 testimony would be that they suffer great harm by reason of
23 cable carriage of distant signals and that great harm con-
24 ceivably might drive them into bankruptcy and as a consequence
25 they are entitled to share in royalty payments on the grounds

1 of exclusivity, our position is you reject that because you
2 have rejected the basic claim as a matter of law.

3 So, these proffers of evidence which I hypothesize
4 would be improper, irrelevant and inadmissible. That is
5 our position with respect to compilation and exclusivity.

6 CHAIRMAN BRENNAN: Thank you, Mr. Scheiner.

7 I believe there was a request somewhere on this
8 side for recognition. Yes?

9 MS. GORELICK: I would like to speak to the other
10 issues.

11 COMMISSIONER BURG: Would you identify yourself,
12 please?

13 MS. GORELICK: I'm Jamie Gorelick. I'm with the
14 lawfirm of Miller, Cassidy, Larroca & Lewin. I'm assisting
15 Carl Lewin who is inhouse counsel in the 1979 proceeding. I
16 don't want to interrupt this colloquy.

17 COMMISSIONER BURG: Please do.

18 MS. GORELICK: If you're not finished with it I
19 would like to raise a couple of points of particular interest
20 to National Public Radio. Let me say first that we fully
21 intend to satisfy the Tribunal that National Public Radio is
22 entitled to a portion of the cable royalty fund and my remarks
23 this morning are addressed to that intent.

24 We now have the benefit of your opinion in the 1978
25 proceeding and that will be of tremendous assistance to us in

1 determining the kind of evidence that would satisfy your
2 criteria.

3 We also have a small disadvantage which is that at
4 the same time that those criteria were initially inhouse,
5 NPR was listed for a tentative award and then thereafter that
6 award was not included in the final distribution upon a
7 rather summary statement that the record is inadequate to
8 support the award to NPR. So, our job in speaking to you this
9 year is to determine what you would want from NPR in the way
10 of evidence.

11 We recognize that it is the obligation of claimant
12 to be creative and determine what kind of evidence will
13 satisfy you but because we are a radio claimant and because
14 we are noncommercial we have two peculiar problems that do not
15 necessarily affect the other claimants before you.

16 The first is that you have established a market
17 value standard. NPR does not generally sell it's programming
18 in the marketplace and that creates a problem for us in
19 determining the kind of evidence that would satisfy you as to
20 the market value. We have asked in our submission in response
21 to your request for comments concerning procedures various
22 questions about what kind of evidence would satisfy the
23 Tribunal as to market value.

24 We would be prepared to offer evidence concerning
25 the uniqueness of our program, the quality of our program, an

1 expert opinion on what the programming would fetch if it were
2 offered on the market but we cannot offer the kind of data
3 that commercial broadcasters and copyright owners can offer
4 as to the actual marketplace and we would respectfully ask
5 for some guidance from the Tribunal on that.

6 Secondly, as you know, the statements of account
7 filed with the Copyright Office by cable systems do not have
8 any listing of the distant retransmission by cable systems
9 of radio signals. That puts us at a tremendous disadvantage,
10 vis a vis your requirement and the statutory requirement for
11 demonstration of distant retransmission by cable systems.
12 We have no data base comparable to the television claimants.
13 We have, in our submission, asked you for some guidance on
14 this question. We would be prepared to offer expert testimony
15 that cable systems do, indeed, transmit radio signals on a
16 distant basis.

17 We would be prepared to offer a sample of cable
18 systems but we cannot come forward with the kind of evidence
19 available to television broadcasters. Again, we respectfully
20 request some guidance from you on that issue. The specific
21 questions are in our submission. I will not burden you with
22 them here and my colleagues with them here.

23 Thirdly, on the question of res judicata, I think
24 it's clear as a matter of law that res judicata cannot mean
25 that if the Tribunal decided that with respect to 1978, in the

1 1978 proceeding that a certain claimant was not deserving of
2 an award from the fund that unless that claimant can show
3 changed circumstances in 1979 that claimant cannot receive
4 compensation in 1979. That is contrary to the law. It would
5 also be a grievous deprivation of due process.

6 We believe that with the Tribunal's opinion at the
7 end of the 1978 proceeding, NPR had, for the first time,
8 concrete guidance on the Tribunal's standards. We believe we
9 are entitled to an opportunity to meet those standards and we
10 would not think it would be proper for the Tribunal to limit
11 the evidence in 1979 to change circumstances from 1978 as
12 was suggested by the Christian Broadcasting Network.

13 Our other comments with respect to the procedures
14 was suggested in the joint submission or in our response.
15 Our concerns as a very low budget claimant before you, a
16 public group without a tremendous amount of funding to put
17 into this kind of effort is that our presentation to you not
18 be encumbered by tremendous cost. I would raise one example
19 for your consideration.

20 The joint submission would require that no exhibit
21 be proffered for your examination and consideration without
22 a sponsoring witness. I don't know what that term means. It
23 is not a term of art in administrative law or in federal
24 litigation. But if you assume that it could mean that no
25 evidence could come in without the actual person who's best

1 qualified to speak to that evidence appearing before you,
2 that would be a tremendous burden on us.

3 For example, if we were to come before you with a
4 sample, we would like to have one person come and tell you
5 about how the sample was put together. We might have
6 consulted several people in determining appropriate sampling
7 techniques. We would not want to be put to the burden of
8 bringing before you, from wherever they may be, each of those
9 different people. That may not be the intention of the
10 drafters of the joint submission and it may not be the inten-
11 tion of the Tribunal in adopting those suggestions but we
12 would like to raise that problem for you and ask you to have
13 consideration for those claimants before you that do not
14 have the funds to bring before you many, many witnesses and
15 do not, frankly, have a claim of the magnitude of some of
16 the other claimants which would justify that expense.

17 Thank you, very much.

18 CHAIRMAN BRENNAN: Let's focus for a moment on the
19 points raised by NPR including the suggestion that we ought
20 to give additional guidance prior to the presentation of
21 the direct cases. Are there any comments or responses on that
22 issue?

23 MR. MIDLEN: Yes. I'm John H. Midlen, Junior on
24 behalf of Oldtime Gospel Hour. In our submission we basically
25 said much of what NPR has said in terms of the issues of fact

1 and law should be set forth at least to the extent possible
2 by the Tribunal for the purpose of giving the claimants the
3 standards to look at so that they could put an intelligent
4 case together.

5 Now, we're significantly helped by your decision
6 of last year in what those standards are and to that extent
7 the '79 proceeding should go a lot better and a lot faster
8 than the '78 ones did.

9 One point we raised that had to do with cross
10 examination and we pointed out that cross examination is not
11 necessarily a due process right and I would just as soon not
12 be here for the month of August or whenever while there is
13 extensive and unnecessary cross examination which I believe
14 was the case last year. The wealthier claimants, in that
15 circumstance, can bring to bear their resources and those of
16 us who are not quite so well fixed find it extremely burden-
17 some.

18 CHAIRMAN BRENNAN: Thank you, Mr. Midlen.

19 Mr. Koenigsberg?

20 MR. KOENIGSBERG: I'm Fred Koenigsberg representing
21 ASCAP. I'd like to address one point that was raised and
22 that is the point of distribution of cable royalties on the
23 basis of radio distant carriage. We, at ASCAP, are and I think
24 were last year, fully prepared to show the Tribunal what
25 portion of radio share music should get and ultimately what

1 portion of that share ASCAP should get. We had incredible
2 difficulties as I believe NPR did as well in determining,
3 however, what portion radio accounts for and those difficul-
4 ties arise as Ms. Gorelick has correctly pointed out, from
5 the statements of account that were submitted from the
6 reporting requirements that are in place.

7 Guidance, I think, on how we can satisfy you,
8 something we were unable to do last year but something that
9 we have much want to do this year would be welcome. Thank
10 you.

11 CHAIRMAN BRENNAN: Thank you, Mr. Koenigsberg.

12 Any comments from the drafters of the joint
13 submission on the other point about the sponsoring witnesses?

14 MR. FITZPATRICK: One can look at the sixth para-
15 graph of the joint submission which I think is responsive to
16 concerns which says, "No direct or rebuttal exhibit should be
17 received without a sponsoring witness or if the Tribunal
18 determines that no sponsoring witness is needed, without an
19 opportunity for the parties to object to it's admission."

20 I think that this provision emerged from the
21 practice last year at the beginning of the process some of the
22 parties had dumped into the record a massive amount of data
23 and exhibits at the very beginning of the proceeding and
24 thereafter no witness ever came forward to identify or to
25 sponsor.

1 We don't have any concern about leaving it just the
2 way that it is which is if we are in a situation where there
3 is an exhibit, it's going to come in where there is a solid
4 case to be made that it is difficult or necessary to have a
5 sponsoring witness that that issue would go to the Tribunal
6 for resolution.

7 But we think that this rule of the road is a useful
8 rule that, in the first instance, you have a sponsoring
9 witness. If you don't, you come to the Tribunal and those
10 who might object have an opportunity to object at that point.
11 So, I think that the concern is covered by the submission as
12 tendered.

13 CHAIRMAN BRENNAN: Thank you.

14 MS. FORD: I'm Ann Ford and I'm representing
15 Christian Broadcasting Network and I have not seen the joint
16 submission comments but Christian Broadcasting would like to
17 say for the record that we would like to preserve our right
18 for a written case only for the same reason that Mr. Midlen
19 was saying that for smaller claimants it's not cost effective
20 for us to bring forth several witnesses and we would like to,
21 therefore, reserve that right.

22 CHAIRMAN BRENNAN: Thank you, Ms. Ford.

23 Any other requests for recognition?

24 MR. ROBINSON: Mr. Brennan, I'm Peter Robinson
25 of Canada Broadcasting Corporation. I'd just like to join

1 what NPR said with respect to our radio network which is some-
2 what similar to there's in that all our stations are non-
3 commercial and I'd just like to support their position.

4 CHAIRMAN BRENNAN: Thank you, Mr. Robinson.

5 Are there any questions from Commissioners at this
6 point? Commissioner Coulter?

7 COMMISSIONER COULTER: I'd like to ask Mr. Farrell
8 a question. You mentioned that you wanted to, in the course
9 of your presentation, bring out both issues of law and fact,
10 I believe.

11 MR. FARRELL: I didn't mean to say that, Mr.
12 Commissioner. I meant precisely to say the opposite. I want
13 to present facts to you and facts only. The reason for my
14 discussion of the legal issues was because Ms. Burg put the
15 question and because I'm concerned that we start out this
16 procedure by trying to find limits on it rather than trying
17 to start out by finding out how we can get the fullest set
18 of facts existant without wandering off the map and having an
19 unweildy proceeding.

20 It's my view that the Tribunal is entirely capable,
21 with the assistance of counsel here, to keep the thing in
22 reasonable limits and I'm troubled by the notion of trying
23 to sit down now and lop off corners that we will say without
24 seeing the direct cases that we don't want to look at that.

25 COMMISSIONER COULTER: Then you would be, in your

1 understanding, raising issues of fact only and they would not
2 be issues of law?

3 MR. FARRELL: In the direct case?

4 COMMISSIONER COULTER: Yes.

5 MR. FARRELL: Absolutely. Indeed that was my
6 understanding of the procedure you followed last year. I
7 think maybe if you boiled down my position to it's very
8 essence it's simply to not try to decide now what you're going
9 to keep out, to decide it when you see what it is that you've
10 got before you. I would trust Art with my life to find any
11 flaws that may exist in any facts I would present to you and
12 to call them to your attention respectfully.

13 MR. SCHEINER: I heard you.

14 CHAIRMAN BRENNAN: Commissioner Burg?

15 COMMISSIONER BURG: Mr. Acting Chairman, I trust
16 we're not going to make any decisions today?

17 CHAIRMAN BRENNAN: That is correct, Commissioner.
18 I think what we will do is we will take all these issues
19 under advisement. We will, at an early date, publish an
20 order which would certainly include the points presented in
21 the joint submission and possibly a response by the Tribunal
22 on other issues presented in separate pleadings and the
23 debate today.

24 COMMISSIONER BURG: I'm not sure. I'll have to go
25 over the transcript and make sure everybody did answer the

1 question I wanted them to address but short of that I was
2 encouraged to note that everyone made a point of saying that
3 they fully expect to give full attention to the criteria that
4 we enunciated last year in the application, that criteria to
5 direct their cases to the evidence of the parties. At this
6 time that's encouraged and I underscore that.

7 CHAIRMAN BRENNAN: Thank you Commissioner.

8 If not, I think we're off to a promising start.
9 I observe that the prehearing conference this year has been
10 more harmonious and much briefer than the one last year.
11 Let's hope this proves to be an auspicious omen for the entire
12 thing. Mr. Zelenko?

13 MR. ZELENKO: Is there an official list prepared
14 by the Tribunal of all the parties in this proceeding?

15 CHAIRMAN BRENNAN: I believe that one of the
16 requests we have is to publish that as part of the order and
17 we shall do so.

18 We are adjourned.

19 (Whereupon, the prehearing conference was adjourned
20 at 10:50 o'clock, a.m.)

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CERTIFICATE OF REPORTER

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I, Brenda R. Pearson, Stenotype Reporter, do hereby certify that the testimony appearing in the preceding pages was recorded by me by stenotype, and thereafter reduced to typewritten form at my direction.

I further certify that the testimony as it appears in the preceding pages contains a true and accurate transcription of my stenotype notes taken therein.

Brenda R. Pearson
Brenda R. Pearson
Stenotype Reporter