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In the Matter of: :
1979 CABLE ROYALTY DISTRIBUTION :
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CRT Docket No. 80-4

2000 L Street, Northwest
Conference Room 500
Washington, D. C.
Wednesday, May 26, 1982

The hearing in the above-entitled matter commenced at 2:02 p.m., pursuant to adjournment.

BEFORE:

- FRANCES GARCIA, Chairman
- THOMAS C. BRENNAN, Commissioner
- DOUGLAS E. COULTER, Commissioner
- MARY LOU BERG, Commissioner
- EDDIE RAY, Commissioner

1 APPEARANCES:

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A G E N D A

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PAGE

Partial Distribution of 1979 Cable
Royalty Fees, Federal Register 5-7-82

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1978 Cable Royalty Fees Distribution
Federal Register 4-27-82

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P R O C E E D I N G

1
2 CHAIRPERSON GARCIA: The meeting will come to
3 order.

4 The first item on this afternoon's agenda is
5 the consideration of a 50 percent Partial Distribution
6 of the 1979 Cable Royalty Funds. There is \$21,145,091.78
7 invested and available for distribution. The notice for
8 this meeting appeared in the Federal Register, 19731,
9 on May 7th, 1982.

10 Is there any Commissioner who wishes to speak
11 on this subject?

12 COMMISSIONER BRENNAN: Madam Chairman.

13 CHAIRPERSON GARCIA: Commissioner Brennan.

14 COMMISSIONER BRENNAN: I move that the Tribunal
15 grant a partial distribution of 50 percent of the 1979
16 Cable Royalty fees to the Claimant categories in the same
17 proportionate shares as the categories were allocated in
18 the Tribunal's notice of March 8th, 1982.

19 The purpose of my motion is to implement the
20 joint motion filed with this body on April 23rd, 1982,
21 by a number of the parties to the 1979 Cable Royalty
22 proceeding.

23 Madam Chairman, I was one of two Commissioners
24 who were unable to vote for partial distribution in the
25 1978 proceeding. Most of the reasons for my negative

1 vote are set forth in the joint minority views of Com-
2 missioner Berg and myself. Our objections were addressed
3 to both procedure and substance, with regard to procedure,
4 we expressed our concern at what we regarded as the
5 erratic track record of this body on acting on this sub-
6 ject during the 1978 proceeding.

7 As to substance, we said in part, and I quote
8 from the minority views, "The issues to be reviewed by
9 the Court are not frivolous, nor are the Appellants a
10 handful of disgruntled claimants. This is the first cable
11 distribution proceeding, the issues on appeal are many
12 and wide-ranging. No court has ever considered the
13 specific cable issue or the application of certain general
14 principles of law to the cable distribution functions
15 of the Tribunal.

16 "It is therefore quite appropriate in the
17 particular situation of the 1979 distribution proceeding
18 that no fees be distributed until the judicial review
19 process has been concluded", end of quote,

20 The D. C. Court of Appeals has now rendered an
21 opinion in the 1978 distribution proceeding. This opinion
22 has been described by many objective observers as a wide-
23 ranging and ~~soundly~~^{soundly} based ~~and~~^T ratification of the procedures
24 distribution criteria and royalty allocation justifications
25 of this body.

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1 I attach particular interest to the Court's
2 disposition of certain theories that were advanced in the
3 1978 proceeding. I refer the diligent readers of our
4 record to my colloques with counsel during the oral argu-
5 ment on those issues. Once this body rescued the control
6 of this proceeding from the hands of the lawyers, we
7 focused on the evidentiary and practical implications of
8 various theories that were advanced in the 1978 proceedings.

9 Because of the record developed in this body,
10 the Court of Appeals was in the position to judge those
11 theories not in a vacuum, but on the basis and together
12 with an evidentiary record.

13 It appears that the D. C. Court of Appeals and
14 this body are very much on the same wave length. On the
15 basis of the Court's opinion, and the record developed by
16 this body in the 1979 proceeding, I have no problems what-
17 soever in voting for a partial distribution.

18 Some comments have been submitted suggesting that
19 the pending motion cannot be reconciled with a rationale
20 advanced by the majority -- very small majority, in the
21 1978 proceeding. That may well be true, but even if it is
22 correct, merely because an argument that was found
23 expedient by the majority in the 1978 proceeding does not
24 or may not apply to the current situation, in no way
25 suggests that this body is restricted to the scope of the

1 rationale advanced by some members in the 1978 proceeding.

2 Surely if a gadfly claimant -- and I suspect that
3 each of my colleagues are immediately thinking of the name
4 that is in my mind -- were to file a claim stating that
5 he is entitled to 100 percent of the royalty fees, that
6 such a claim would not preclude this body in the exercise
7 of its discretion from voting for at least a partial dis-
8 tribution.

9 In the exercise of our discretion I support
10 partial distribution. I move the adoption of the motion.

11 CHAIRPERSON GARCIA: Thank you, Commissioner
12 Brennan.

13 COMMISSIONER COULTER: I just have a couple of
14 questions.

15 CHAIRPERSON GARCIA: Please, go ahead.

16 COMMISSIONER COULTER: Just a couple of questions
17 to clarify.

18 You mentioned -- you used the word "expedient"
19 to describe the reasons the majority adopted a decision
20 for partial distribution for 1978. Is it your view,
21 Commissioner Brennan, that expediency was the only reason
22 that the majority at that time adopted their decision?

23 COMMISSIONER BRENNAN: Commissioner, I am not
24 in a position to discuss the views of the majority, I
25 will leave that to you.

1 COMMISSIONER COULTER: My question is whether
2 you felt that that decision was made merely as an issue
3 of expediency?

4 COMMISSIONER BRENNAN: I am saying that an argu-
5 ment was advanced which was helpful to the majority's
6 position in the 1978 proceeding. That argument may or may
7 not be helpful to the current matter.

8 COMMISSIONER COULTER: Then, is it your view
9 that if such an argument -- and I mean the argument used
10 in the 1978 partial distribution -- if that argument at
11 anytime in the future appears to be relevant, is it your
12 view that you would repudiate the use of such an argument?

13 COMMISSIONER BRENNAN: Commissioner, as you have
14 occasionally, from time-to-time complained about me, it is
15 not in my nature to commit myself prematurely.

16 COMMISSIONER COULTER: Am I to take that answer
17 as not repudiation?

18 COMMISSIONER BRENNAN: I am saying that if we
19 were to vote on the basis of whether or not one claimant
20 was asserting a right to a very substantial portion of the
21 royalty fees, and pursuing that claim in the courts,
22 I would not be disposed to deny partial distribution on
23 the basis of the theory advanced by the majority in the
24 1978 proceeding.

25 COMMISSIONER COULTER: All right. Then you

1 wouldn't offhand say that an argument might not be relevant
2 if sometime in the future it appeared to be?

3 COMMISSIONER BRENNAN: I was not impressed by
4 the argument last year; it is unlikely I would view it
5 with greater merit in the future.

6 CHAIRPERSON GARCIA: Any other questions?

7 COMMISSIONER COULTER: No.

8 CHAIRPERSON GARCIA: Commissioner Berg?

9 COMMISSIONER BERG: No questions.

10 CHAIRPERSON GARCIA: Commissioner Ray?

11 COMMISSIONER RAY: No.

12 CHAIRPERSON GARCIA: The Chair does not disagree
13 with what she has heard before her. It has always been
14 the Chair's belief and contention that this Tribunal had
15 wide discretion in distributing 50 percent of the distri-
16 butions, in addition to that, the Chair's concern is a
17 little more basic. In today's environment and economy,
18 where no longer are we concerned about the small guy,
19 but also the giant corporations, in their difficulty that
20 they are having, it is the Chair's desire and I will
21 support this motion, not only on the issues that have been
22 advanced before, but also the Chair believes that it is to
23 the best advantage of all the claimants to receive this
24 money as soon as possible to help them with the cash flow
25 and any other problems that they may be having in today's

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1 environment.

2 You have all heard the motion, the Chair is now
3 ready for a vote,

4 Commissioner Brennan?

5 COMMISSIONER BRENNAN: Yes.

6 CHAIRPERSON GARCIA: Commissioner Coulter?

7 COMMISSIONER COULTER: Yes.

8 CHAIRPERSON GARCIA: Commissioner Berg?

9 COMMISSIONER BERG: Yes.

10 CHAIRPERSON GARCIA: Commissioner Ray?

11 COMMISSIONER RAY: Yes.

12 CHAIRPERSON GARCIA: The Chair votes "yea", there
13 are five "yeas", the motion carries,

14 The investment originally made becomes due
15 tomorrow, May the 27th, the Chair has instructed the
16 Library of Congress to reinvest the funds through July 2nd,
17 1982. At that time there will be approximately \$10,573,000
18 available for distribution.

19 The second item on the agenda appeared in the
20 Federal Register 18020 on Tuesday, April 27th, 1982. The
21 question to be considered is does the record of the 1978
22 distribution proceeding support an award of .25 percent
23 to the National Public Radio, or shall no award be made
24 to National Public Radio, and the .25 percent be allocated
25 as provided in the Tribunal's final order?

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1 The Chair will recess for a few moments,

2 Christie, would you and someone else make pro-
3 visions to bring the podium forward so that Ms. Gorelick
4 can proceed before the Tribunal?

5 Do you need the podium, or would you rather go
6 from where you are seated?

7 MS. GORELICK: If the Tribunal has no objection,
8 I can present my argument sitting,

9 CHAIRPERSON GARCIA: Okay, fine. Please pro-
10 ceed, Ms. Gorelick,

11 MS. GORELICK: Thank you very much, Commissioners.

12 CHAIRPERSON GARCIA: You have 20 minutes for
13 your presentation, any questions by the Commissioners will
14 not be deducted from that 20 minutes.

15 MS. GORELICK: Thank you.

16 If questions come to mind as I am reviewing the
17 record, please feel free to interrupt me, I would rather
18 much prefer to respond to any concerns that the Commission-
19 ers have,

20 It is NPR's position that the record does
21 support an allocation of a quarter of a percent of the
22 1978 Cable Royalty Fee Fund to National Public Radio. We
23 believe that the Tribunal has discretion to make this
24 award, and that it would be fully justified in doing so,
25 both because of the content of the record and in view of

1 the larger policy considerations that are appropriately
2 considered by this Tribunal.

3 We have reviewed in some detail the evidence
4 before the Tribunal in our brief. I would like to go through
5 that now, so as to highlight the aspects of our case, as
6 it was presented in 1978, and respond to your questions.

7 The criteria established by the Tribunal are
8 abundantly familiar to the Commissioners and to all parties,
9 and we believe the record supports an allocation to NPR
10 based on those criteria.

11 The first was harm to the copyright owner, and
12 NPR introduced evidence that cable importation affords the
13 development of local public radio stations in communities
14 that do not have them, because an imported station diminish-
15 es the need of that particular community for its own
16 station. However, that community is then lacking a
17 station which really is responsive to that particular
18 locality and the mandate of public radio is to create a
19 system which is a system with locally based public radio
20 station.

21 In addition, there is, we believe, a specific
22 dollar-harm to public radio stations in their fund-raising,
23 a local station is much more effective in raising funds
24 from its listners than an imported one would be. And,
25 although we cannot give dollar figures in support of that,

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1 we believe that that is a concrete harm,

2 Moreover, the Tribunal itself presumed harm from
3 importation for other claimants before the Tribunal. And
4 we would ask the same presumption of harm, resulting from
5 cable importation be applied to National Public Radio. We
6 don't see that there would be any reason for distinguish-
7 ing NPR in that regard.

8 With respect to benefit, I think the Tribunal
9 followed a similar approach, that is it presumed that a
10 cable system was benefitted if it carried a particular
11 distant signal.

12 COMMISSIONER BRENNAN: Were these theories, also
13 Counsel, applied to our disposition on the American
14 Commercial and the Canadian Radio claims, where we made
15 no award?

16 MS. GORELICK: The theory of harm and benefit?
17 I think that they would, yes. And I think to the extent
18 that the presumptions apply, they would.

19 Now, with a particular type of harm, they would
20 not. A commercial radio station has a great incentive to
21 have its -- and benefit to having its signal carried by
22 a cable system.

23 As you may recall in the 1979 proceeding, there
24 was evidence to the effect that commercial stations paid
25 to have their signals carried, whereas non-commercial

1 stations did not.

2 So that with respect to the particular harm
3 suffered by public radio as opposed to the presumptions,
4 I think there are distinctions.

5 With respect to the particular benefit, I think
6 there are distinctions as well, and those stem from the
7 uniqueness of the public radio signal. There was extensive
8 evidence in the 1978 record, and quoted by the Court of
9 Appeals in the 1978 -- in its review of the 1978 decision
10 to the effect that National Public Radio programming is
11 unique and maybe of unique benefit to a cable system that
12 desires to import a distant public radio signal. It brings
13 something to a community that it might not otherwise have.

14 So, my response is in terms of presumptions,
15 the same presumptions could apply to any claim. When you
16 are looking at particular evidence, we think that public
17 radio is both harmed more than commercial stations, and
18 benefits cable systems more than commercial stations.

19 We also believe that the Tribunal itself, and
20 I am loathed to speak for the Tribunal since I am speaking
21 to it, seems to have found some value in public radio
22 programming, even in its decision to deny an award to
23 NBR. On the page, I think it is 63040, in which the
24 Tribunal announces that it would decline to make an
25 allocation to NPR, the Tribunal itself adverts to the

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1 uniqueness of public radio and that the value of carrying
2 a public radio station might be greater than transmitting
3 a commercial station.

4 The other aspects of benefit are reflected in
5 the costs that cable system must incur to carry radio and
6 the higher costs that cable systems must incur to carry
7 select signals. And one-third of the NPR claimant stations
8 were carried on a select signal basis, which is a very
9 high ratio.

10 The third criterion was marketplace value. Now,
11 NRR was under the same disability that PBS was, in terms
12 of putting a dollar value on the marketplace for its
13 programming. We don't sell our programming, we don't lease
14 our programming, we don't license our programming, but we
15 can show something of the quality of the programming,
16 something of the demand for the programming to demonstrate
17 its marketplace value.

18 And we would ask that the same thoughtful view
19 of how one determines marketplace value for a non-profit
20 organization that was applied to PBS, also be applied to
21 NPR.

22 Other indicia of market value are found in the
23 fact that audio origination is rare, or relatively rare
24 in the cable industry, compared to video. And, therefore,
25 there is greater value in the broadcast retransmission

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1 than there would be for television.

2 If I can turn now to what frankly troubled the
3 Tribunal, the extent of cable carriage of cable radio and
4 other radio, I suppose, I would like to address what the
5 record has in it about the extent of carriage.

6 I would like to note first that the Court of
7 Appeals did find that public radio had made a stronger
8 showing of carriage than commercial. But putting that
9 aside, I would like to address rather specifically what
10 the record does and does not show.

11 First, we had evidence of the particular claim-
12 ing stations carriage, each station that was a claiming
13 station for NPR submitted a form in which a station manager
14 or station engineer stated that his or her station was
15 being carried by a particular cable system, or cable
16 systems beyond their primary coverage area. That was the
17 instruction they received and the claims themselves recite
18 that the cable systems listed were beyond the primary
19 coverage area.

20 Now, I think it is well within the Tribunal's
21 discretion to take judicial notice of the FCC regulations
22 that were reviewed in the 1979 proceeding in some detail,
23 that define distant for radio stations, and FM stations,
24 in particular.

25 The basic idea of that definition is that

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1 a radio station is distant to a cable system if it is out-
2 side the area affectively served by that station. Now,
3 that is a concept which most stations understand. And the
4 legislative history indicates that Congress intended the
5 primary service area to be the one that a station directs
6 its advertising and its programming to.

7 There are disputes about the exact nature of the
8 boundary, but basically it is this common sensical idea,
9 and I think that it is one that the Tribunal did effective-
10 ly deal with in its 1979 opinions, or in its 1979 decisions.
11 So, it is not irresolvable.

12 So, we start off with the basic hard evidence,
13 if you will, of distant carriage by the claiming NPR
14 stations. There is also evidence in the record of the
15 general extent of radio carriage by cable systems, which is
16 an important predicate to understanding the extent of
17 radio carriage -- of distant radio carriage, and that is
18 basically found in the FCC cable radio report and order,
19 which found, first, that 73 percent of all cable systems
20 in 1975, carried radio.

21 And that in the larger systems -- in the larger
22 areas, 90 percent carried radio; 51 percent carried all-
23 band, FM transmissions; and in the larger areas it was
24 56 percent. Now, 22 percent carried select signals, which
25 the FCC indicated at page 501 of its opinion, were probably

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1 distant.

2 So, there is at least that, if you only look at
3 select, at least that indication of substantial distant
4 carriage.

5 The all-band carriage that was found was also
6 likely to include distant carriage. The FCC did note that
7 all-band means that you can take it off the air, but as
8 we learned in the 1979 proceeding, and as the FCC itself
9 indicates at Note 12 of that opinion, all-band is likely
10 to include some distant carriage.

11 So, in talking about the FCC report, you can see
12 that it establishes that there is substantial cable radio
13 carriage, and it also gives some indication that a portion
14 of that is distant carriage.

15 The NAB study showed that of 323 stations in
16 answer to a survey, and admittedly that survey was done
17 of radio stations in areas of the country that had a fair
18 amount of cable penetration -- 58 percent reported distant
19 signal importation.

20 Now, again, there is the problem of the definition
21 of distant use. But I would suggest that the NAB data
22 indicates that under any definition of distant that can be
23 adopted by this Tribunal, that study showed distant
24 carriage. For one, 48 percent of the stations polled
25 reported leap-frogging of stations into their area, which

1 means that a station in City A reports that a station two
2 cities away, City C, is being brought in to City A, while
3 stations in City B, in between, are not. Which gives a
4 fair indication that the cable system has gone to some
5 length, whether it is by erecting a very high antenna that
6 you can get lots of all-band signals from distant areas,
7 or by setting up a select signal antenna to receive distant
8 signals, has gone to some length to bring in a distant
9 signal.

10 Also, 34 percent reported that stations with the
11 same network service were being brought into their com-
12 munity. And, as we know, the networks will not license
13 their service to more than one station in the same locality,
14 or at least that is the assumption upon which the radio
15 stations operate. And 69 percent stated that radio
16 stations being carried over cable had the same format as
17 their own stations.

18 COMMISSIONER COULTER: Excuse me, are these
19 figures you are giving for '78, or '79?

20 MS. GORELICK: These were in the NAB study which
21 was part of the '78 record, the study itself was done in
22 1975.

23 COMMISSIONER COULTER: The leap-frogging that you
24 are referring to --

25 MS. GORELICK: It occurred in 1975 that we know

1 of and I guess we have made the assumption -- which I think
2 is probably a logical one -- that cable carriage of radio
3 probably increased, rather than decreased.

4 Lastly, NPR did its own study in which it looked
5 at 50 cable systems randomly selected and listed all the
6 NPR signals carried by those 50 systems. And found that
7 72 percent of those NPR stations were carried on the distant
8 basis. In the Court of Appeals opinion at Note 31.

9 So, there you have two basic pieces of informa-
10 tion, one that there is nationwide fairly extensive cable
11 radio carriage and that there is significant evidence
12 that a decent percentage of that carriage is distant.

13 Turning to the secondary factors, the record
14 I think amply demonstrates the high-quality of NPR's
15 programming, and I will not review that with the Tribunal.
16 I think you are quite familiar with NPR's programming at
17 this point. I think the Tribunal itself has noted the
18 uniqueness and value of NPR's programming in its descriptions
19 in both the '78 and '79 opinions.

20 Another aspect of NPR's case which appears to
21 have troubled the Tribunal was how to determine the magni-
22 tude of its claim. And NPR's witnesses agreed with the
23 Tribunal that there was an aspect of arbitrariness in
24 deciding the value of a radio claimant's claim versus the
25 value of a television claimant's claim.

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1 As I understand the question now before the
2 Tribunal it is whether or not an award, the magnitude of
3 which is already determined, which is a quarter of a per-
4 cent, should or should not be made. Now, we might -- and
5 we have in the past -- argued that NPR should receive more.
6 We think the record though amply demonstrates support for
7 an award of a quarter of a percent.

8 Moreover, the fact that the Tribunal on two
9 separate occasions has seen fit to assess the value of
10 NPR's claim at a quarter of a percent lends a good bit of
11 weight, I think, to the validity of that figure and the
12 supportability of that figure on the record.

13 I also believe that the Court of Appeals felt
14 that that level of award would be supportable, not neces-
15 sarily mandated, as we had argued, but supportable.

16 So, I think the questions over how one determines
17 with great specificity or by some formula what NPR's share
18 should be are in some respects by the boards. And I don't
19 think that it is necessary for the Tribunal to struggle
20 with that difficult question at this point.

21 Which I guess brings me to my last point which
22 is that I would be in a different position, if I were
23 here today arguing that you should, on the basis of the
24 1978 record, make an award to NPR of a quarter of a percent,
25 if the 1979 record contradicted the evidence produced in

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1 1978 to any extent. In fact, it did not; in fact the
2 evidence that we put forward I think confirmed whatever
3 inclination the Tribunal initially had to make an award
4 to NPR on that basis.

5 I am not saying that the 1979 record should be
6 considered in the 1978 decision. I am only saying that
7 as a practical matter it is obvious that there was carriage
8 in the 1978 period and NPR did its best in that proceeding
9 to provide evidence of harm, benefit, marketplace value,
10 quality, time based considerations and extent of carriage.

11 COMMISSIONER BERG: What do you perceive as the
12 distinctions or differences between the '79 record and the
13 '78 record?

14 MS. GORELICK: In 1978, aware that the magnitude
15 of our claim might be relatively small -- and I would say
16 since we got a quarter of a percent, it is small -- I
17 think NPR looked for the best available data, knowing that
18 the Copyright Office did not maintain data of the sort
19 that it maintains for television.

20 And, therefore, it looked for data available
21 in the public domain. I think that it put into the record
22 sufficient circumstantial evidence to support an award.

23 In 1979, not having received an award in 1978,
24 we went to the extra expense and it was an extraordinary
25 expense, both in terms of NPR's own economic viability and

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1 again, the magnitude of the award, to do a survey, which --
2 a sample, which I think clearly demonstrates the extent
3 of carriage.

4 So, in that regard I would say that would be the
5 most significant difference in the record. The other
6 differences are qualitative in nature.

7 I think that the Tribunal has quite legitimately
8 asserted for itself a policymaking role in this area and
9 in the new area of cable communications. And I think it
10 is perfectly appropriate for the Tribunal to consider, in
11 making its decisions, the state of the evidence that is
12 available to claimants.

13 Now, it is one thing to say that there is other
14 evidence that is available to a claimant, that it could
15 get at extraordinary expense. I think that NPR should not
16 be penalized for attempting to present a persuasive case
17 to the Tribunal without spending more money than it would
18 expect to receive in return. And I would ask the Tribunal
19 to review NPR's submission in that light.

20 Finally, I would say one further thing, NPR's
21 programming was carried in 1978, there is no doubt about
22 it on a distant basis by cable systems. The cable systems
23 are commercial enterprises which profited, we believe,
24 from making that service available. Public radio cannot
25 afford to give that away and very much needs those funds.

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1 And I would hope that the Tribunal would consider
2 that in its determination.

3 Thank you.

Tl/S1

4 CHAIRPERSON GARCIA: Questions by the Commission?

5 COMMISSIONER COULTER: Has there been any
6 voluntary agreement between you and PBS concerning this
7 quarter percent?

8 MS. GORELICK: I would prefer to defer to Mr.
9 Bechtel on that.

10 MR. BECHTEL: If it please the Court, we have
11 submitted a statement of position which calls the attention
12 of the Tribunal to the fact that in our brief and in the
13 1978 proceeding, as well as the 1979 proceeding, we asked
14 the Tribunal to allocate some portion of the award to NPR.
15 We further pointed out that if upon this remand of the
16 1978 proceeding you folks determined to reallocate one-
17 quarter of a percent of the fund to NPR, that we would have
18 no objection.

19 COMMISSIONER COULTER: But you haven't yourself
20 offered to give it to them?

21 MR. BECHTEL: I beg your pardon?

22 COMMISSIONER COULTER: You haven't yourself
23 offered to give it to them?

24 MR. BECHTEL: Not over and above what this
25 statement of position says.

1 CHAIRPERSON GARCIA: Commissioner Berg?

2 COMMISSIONER BERG: Ms. Gorelick, you talked
3 about the presumption of harm and you know as well as
4 everyone in this room that harm is a very intangible,
5 difficult handle to catch on to, both in '78 and '79.
6 So, I agree with your assumptions and comments on that.

7 But you also referred that there were certain
8 presumption of benefit, also with respect to that record,
9 and I think I have to take some difference with your view
10 on that. Would you explain a little more what you mean
11 by "presumptions of benefits"?

12 MS. GORELICK: I was referring to the statement
13 at page 63036 of your 1978 opinion in which the Tribunal
14 said that there is no readily available measure or gauge
15 in quantitative terms of the benefit derived by cable
16 systems from the carriage of particular programs. And then
17 it goes on to discuss how it is logical to assume that
18 the cable system would not carry programming, unless it
19 benefitted from it. And then the Tribunal reviewed the
20 evidence concerning carriage, and that is why I moved from
21 there to the discussion of carriage, to the extent of
22 carriage.

23 COMMISSIONER BERG: Would you agree that in all
24 of those instances there was a great deal more in the
25 record with respect to benefit -- it wasn't all done on

1 a presumption?

2 MS. GORELICK: Absolutely. Presumption is perhaps
3 the wrong word to use with respect to the question of
4 benefit. I think that the Tribunal proceeded from the
5 assumption that one has a difficult time quantifying
6 benefit. And, therefore, the Tribunal looked at the
7 nature of the programming, the particular appeal that the
8 programming might have to particular audiences the cable
9 systems wished to reach, and the extent of carriage for
10 a particular program.

11 And I think that it applied that quite sensible
12 rationale to each of the claims individually.

13 COMMISSIONER BERG: I am troubled in several
14 instances during your comments, you used words like "likely"
15 and there was some distant carriage, and again there is
16 the problem of definition, "distant uses" that was a
17 quote. "We have made the assumption", gives some
18 indication, I mean, it is sort of ephemeral, I mean it
19 is hard to grasp and I think that was the problem this
20 Tribunal faced in 1978 -- for the moment I am setting aside
21 '79.

22 Can you understand our difficulty in what might
23 be a subjective feeling, versus an objective feeling with
24 respect to this?

25 MS. GORELICK: If I have given the impression

1 that I think that the evidence is less than concrete on
2 distant carriage, I would like to make sure that -- I would
3 like to correct that impression.

4 I think that there is hard concrete data of,
5 one: distant carriage of particular NPR stations; two,
6 the extent of distant carriage of cable radio in general,
7 in the time period in question; and three, the proportion
8 of cable radio carriage that is distant. And I think all
9 three of those permit this Tribunal to find that there
10 was extensive cable distant carriage of NPR stations by
11 cable systems.

12 I think it is different than was submitted in
13 1979, and somewhat more circumstantial. But I think it
14 is nevertheless concrete and it is not speculative.

15 COMMISSIONER BERG: One final question, on
16 several occasions you quoted back from our final order
17 in which we used the words "uniqueness and value" in
18 describing NPR. I will just use the same words I used a
19 moment ago, do you think that was a subjective or an
20 objective view on our part?

21 MS. GORELICK: I think that -- well, I can't
22 speak for what you meant, I can only speak for how I read
23 it and how I think the record reflects. And I think the
24 record reflects concretely and objectively that NPR's
25 programming is unique and that it is of high quality, and

1 that it brings something of value to the communities to
2 which it is broadcast or retransmitted.

3 I think that the Carnegie Commission Study, which
4 was part of the record in 1978, attempted, and I think
5 successfully, to distinguish between formats of radio
6 stations and the different contributions radio stations
7 make to a particular community. And I think that it showed
8 that public radio stations were very different than the
9 commercial stations ordinarily found in a particular
10 community.

11 COMMISSIONER RAY: Excuse me, what you are
12 saying is they are very, very little different than in
13 commercial radio formats in Pittsburg than there are in
14 Washington, D. C., therefore, it would not have the unique
15 value or benefit to a cable system?

16 MS. GORELICK: That's right. And I do think the
17 record is fairly concrete on that, as concrete really as
18 one can get in the area of evaluating different kinds of
19 broadcasts.

20 I am troubled if I have given you the impression
21 that I think that the evidence of distant carriage is
22 ephemeral because I think that it is quite concrete. The
23 fact that it does not purport to survey all of the cable
24 systems in the country and determine what each one of them
25 carries and whether each one of them carried particular

1 distant signals, I don't think in anyway diminishes the
2 persuasiveness of evidence on the two crucial questions,
3 which is -- three crucial questions, which are, one, for
4 NPR stations carried on a distant basis, our claims answer
5 that question; were cable systems carrying radio, which I
6 think the answer, too, is clearly yes. And to what
7 extent, and I think that the FCC data does indicate to
8 what extent the cable systems were carrying radio.

9 And three, was a significant portion of that
10 carriage distant? And I think both the NAB study and our
11 own indicate quite clearly that the answer is yes.

12 COMMISSIONER BERG: I didn't mean to imply --
13 and forgive me if it sounded that way -- that you only
14 presented some questions about that. Obviously, those
15 questions are in our mind and have been in our mind since
16 we reviewed this case to begin with.

17 Thank you very much.

18 CHAIRPERSON GARCIA: Commissioner Coulter?

19 COMMISSIONER COULTER: Just two, in spite of the
20 itemization of arguments that you just gave to Commissioner
21 Berg, would it be fair to say that your arguments, in
22 essence, are really contained in your final paragraph on
23 page 11 of your brief? In other words, the policy con-
24 siderations, would that be fair to say, what you feel is
25 your strongest argument?

1 MS. GORELICK: I think the policy considerations
2 are strong, but I think that --

3 COMMISSIONER COULTER: Well, can I just inter-
4 rupt you here?

5 MS. GORELICK: Certainly.

6 COMMISSIONER COULTER: I don't want to get caught
7 in the phraseology policy considerations, I am talking
8 less about whatever term "policy considerations" may have.
9 In fact, I deliberately don't want to use that term, than
10 I am about the content that you mention here.

11 MS. GORELICK: If I can ask you what about the
12 content disturbs you, I would be happy to address it?

13 COMMISSIONER COULTER: In other words, despite
14 the perhaps circumstantial nature of your evidence, you
15 feel that everybody knows some distant signal retransmission
16 did take place?

17 In other words, the common sense argument?

18 MS. GORELICK: Well, for one thing, I must say
19 I am not relying on evidence outside of the record. What
20 I am saying is this, that I think that the record provides
21 sufficient evidence to support an award. I would be
22 troubled in making that argument if anything that we knew
23 outside the record brought into question that assertion,
24 but it doesn't. That is what I am saying.

25 And I think as a matter of policy, you have in

1 your control money that has been paid by cable systems to
2 compensate copyright owners for the use of their program-
3 ming. And to the extent that there is decent evidence,
4 substantial evidence that cable systems used our program-
5 ming, I think that you should compensate NPR for that
6 usage. And that is what I am talking about in terms of
7 policy considerations, when I say that I mean to focus on
8 what I believe to be this Tribunal's role, which is to
9 exercise control over compensatory programs.

10 I really do not mean to be coming in here and
11 saying everyone knows there is public radio carriage,
12 therefore we need make no showing, I don't mean to say that
13 at all.

14 If I might say one other thing, I was asked
15 what, if any, differences time, if you will, has made,
16 what differences there were in 1978 and 1979. I think
17 one other difference is that there is a clearer articula-
18 tion of the definition of distant, but that is not some-
19 thing that you must ignore or can ignore.

20 In other words, that is something that is in
21 the regulations. I don't think it was clearly adverted
22 to in the 1978 proceeding, but you could take judicial
23 notice of matters in the regulations -- even though it
24 was discussed in the 1979 proceeding.

25 CHAIRPERSON GARCIA: Any more questions?

1 COMMISSIONER BERG: Madam Chairman, I have no
2 other questions, but I would like to make a few comments
3 for the record, if I may?

4 CHAIRPERSON GARCIA: Certainly.

5 COMMISSIONER BERG: Let me say, first of all,
6 that I am sensitive to and sympathetic with the difficult-
7 ies and the burdens placed upon ^{All} radio claimants with
8 respect to discovering, identifying, verifying the re-
9 transmission of distant radio signals by cable systems.

10 I believe it was within this past year that Frank
11 Mankiewicz, the President of National Public Radio, made
12 a statement before the Castmyer (phonetic) Subcommittee,
13 in which among other things he said -- and I will quote,
14 "One way to ease these practical difficulties might be
15 to require that cable systems identify on the statements
16 of account all radio signals carried on a distant basis",
17 end of quote,

18 I want to go on record as saying I agree whole-
19 heartedly with Mr. Maniewicz in this instance, and that
20 as a matter of fact, expressed and raised the same issue
21 myself when recently the Copyright Office ~~listened~~ ^{solicited} to the
22 views of the Tribunal regarding interim amendments to
23 portions of Section 111 of the Copyright Act of 1976.
24 I still feel that way and favor that approach, however, the
25 question before us today is the 1978 cable distribution

1 proceeding. And I strongly believe that that record is
2 insufficient and inadequate as a basis upon which to grant
3 an award to National Public Radio.

4 I, therefore, Madam Chairman, move that no award
5 be made to National Public Radio for the year 1978, and that
6 the .25 percent allocation provided in the Tribunal's
7 final order of September 23rd, 1980, be allocated as it
8 was.

9 Let me say one other thing, I think there is a
10 marked contrast between the record of '79 and the record
11 of 1978.

12 CHAIRPERSON GARCIA: Thank you, Commissioner
13 Berg.

14 You have all heard the motion, is there any
15 discussion?

16 COMMISSIONER COULTER: It is your view that we
17 do not need to take anytime to reflect on the observations
18 of Ms. Gorelick?

19 COMMISSIONER BERG: That is my view, it is based,
20 Commissioner, on the fact that we have reviewed the state-
21 ment which she referred to today. I presume we have
22 already reviewed the original order and the basis of that.
23 We have restricted this proceeding to -- or limited it to
24 evidence that had already been considered, and allowing
25 no new evidence.

1 I don't like doing it today, I think it might
2 be cleaner and I have no difficulties with it, I don't
3 think that -- speaking for myself, that my view would
4 change given what was introduced in the record today,
5 in addition to what has already been in the record.

6 COMMISSIONER COULTER: Okay.

7 CHAIRPERSON GARCIA: Is there any other dis-
8 cussion?

9 COMMISSIONER BRENNAN: Madam Chairman, I intend
10 to vote for the motion of Commissioner Berg. When I
11 initially reviewed the 1978 Phase I record and the pro-
12 posed findings, I came to the conclusion that the record
13 did not support an award for any of the radio claimants.

14 I recognized that there were certain problems
15 or potential problems with my position. One of these was
16 the Copyright Act required us to make an award to a party
17 that had a valid claim before us. Another potential
18 problem was whether my assessment of the record evidence
19 was arbitrary or capricious and whether it was a reasonable
20 conclusion, based on the record evidence.

21 From my perspective I believe these questions
22 have been fully answered in the opinion of the Court of
23 Appeals. I very seriously doubt that we would be here
24 today if this matter had been finally disposed of as part
25 of the Phase I determination.

1 I appreciate the procedural concerns of the
2 Court of Appeals and, therefore, I join with my colleagues
3 in having a direct vote on this occasion based solely on
4 the merits of the issue. I wish the record to reflect,
5 however, that I believe if we had gone back to the Court
6 of Appeals on the procedural decision, it would likewise
7 have been sustained.

8 CHAIRPERSON GARCIA: Thank you.

9 COMMISSIONER COULTER: You also don't feel that
10 there is an necessity to reflect upon the remarks by
11 Ms. Gorelick, is that correct?

12 COMMISSIONER BRENNAN: Commissioner, I have
13 reviewed the record, I am prepared to vote. I have no
14 way of knowing whether or not you have reviewed the record,
15 that must be your decision.

16 COMMISSIONER RAY: I, also, am ready to vote,
17 even though I was not a part of the original proceeding,
18 I have reviewed the documents from the proceeding and the
19 written statements. I am ready to vote, also. I don't
20 think it is necessary for us to delay the vote.

21 CHAIRPERSON GARCIA: Thank you.

22 We have a motion before us, you have heard the
23 motion. We will proceed to the vote.

24 Commissioner Brennan?

25 COMMISSIONER BRENNAN: Yes.

1 CHAIRPERSON GARCIA: Commissioner Coulter?

2 COMMISSIONER COULTER: Present.

3 CHAIRPERSON GARCIA: Commissioner Berg?

4 COMMISSIONER BERG: Yes.

5 CHAIRPERSON GARCIA: Commissioner Ray?

6 COMMISSIONER RAY: No.

7 CHAIRPERSON GARCIA: The Chair votes "yes", the
8 vote is three, yes; one, present and one, nay. The motion
9 carries.

10 The meeting is adjourned -- I'm sorry.

11 This is Fritz Attaway, from MPA. Would you
12 please identify yourself for the record? Come forward
13 so that the Court Reporter can hear you?

14 MR. ATTAWAY: My name is Fritz Attaway, I am
15 from the Motion Picture Association of America.

16 Madam Chairman, in light of the decision reached
17 on the issue and in light of your comments on the
18 importance of cash flow in today's economy, why it is
19 necessary that we wait an additional month and 10 days to
20 receive the partial distribution?

21 Is there anyway that we could accomplish that
22 tomorrow when the existing notes are due?

23 CHAIRPERSON GARCIA: It is the Chair's opinion
24 by the advice of her general counsel, that this ruling by
25 the Tribunal is subject to the 30-day wait in case there

1 is an appeal. And having talked to the Library of Congress,
2 the funds could either become due on June the 24th or
3 July 2nd. The Chair felt that in the interest of the
4 parties that it would be better if the decision is appeal-
5 ed not to have -- or if it is not appealed, not to have
6 the funds uninvested at this large amount for two days,
7 so therefore, the next day, July 2nd.

8 It is the Chair's intention, if this is carried,
9 to have the checks ready for distribution on that day.

10 MR. ATTAWAY: One further question, could you
11 give us the amount that you anticipate will be available
12 on that day, again? The amount that I wrote down only
13 showed \$5,000 of interest in the intervening month, and
14 that can't be correct.

15 CHAIRPERSON GARCIA: It was an approximation,
16 \$10,573,000. I am sure it will be more, it will depend on
17 what the interest rate for the 30-days is. The Chair
18 did not break it down -- it would probably be about
19 five or \$6,000 interest, the Chair is not sure, I'm sorry.

20 MR. HOCKBERG: Madam Chairman, for the record,
21 my name is Philip Hockberg and I represent the Joint
22 Sports Claimants. Just to follow-up on Mr. Attaway's
23 question, I note that July 3rd is a Saturday, is there
24 any chance that we are going to see this on the prior day?

25 I note that July 4th falls on Sunday, Monday is

1 yet another holiday.

2 CHAIRPERSON GARCIA: Well, it is the Chair's
3 intention to have the checks for you Friday, July -- so
4 that you will have the interest for the weekend.

5 MR. HOCKBERG: July the 2nd?

6 CHAIRPERSON GARCIA: Yes, on Friday, that is when
7 they become due -- excuse me, is that right, Christie?

8 That is correct.

9 Mr. Ferrall?

10 MR. FERRALL: Vic Ferrall is my name.

11 I don't want to presume on your general counsel,
12 but we are concerned about the 30-days, he probably would
13 want to make a special effort to get Federal Register
14 publication before the end of this week.

15 CHAIRPERSON GARCIA: The Tribunal -- those are
16 the Tribunal's intentions.

17 Any further questions?

18 (No response.)

19 CHAIRPERSON GARCIA: The meeting is adjourned.

20 (Whereupon, the meeting was adjourned at 3:15 p.m.)

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CERTIFICATE OF REPORTER

This is to certify that the foregoing transcript
In the matter of: 1979 CABLE ROYALTY DISTRIBUTION

Before: COPYRIGHT ROYALTY TRIBUNAL

Date: 26 MAY 1982

Place: CONFERENCE ROOM 500
2000 L STREET, NW
WASHINGTON, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to type-
writing.

Neal R. Gross

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