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In the Matter of:

Adjustment of the Rates for
Noncommercial Educational
Broadcasting Compulsory
License

Docket No. 96-6
CARP NCBRA

Library of Congress
James Madison Building
101 Independence Avenue, S.E.
Room LM414
Washington, D.C. 20540

Tuesday, February 3, 1998

The above-entitled matter came on for
hearing, pursuant to notice, at 1:30 p.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson
THE HONORABLE EDWARD DREYFUS
THE HONORABLE JEFFREY S. GULIN

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ORIGINAL

APPEARANCES:On Behalf of Broadcast Music, Inc.:

NORMAN C. KLEINBERG, Esquire; and
MICHAEL E. SALZMAN, Esquire
of: Hughes, Hubbard & Reed, LLP
One Battery Park Plaza
New York, New York 10004-1482
(212) 837-6680/6833

JOSEPH J. DiMONA, Esquire
Assistant Vice President
Legal and Regulatory Affairs
BMI
320 West 57th Street
New York, New York 10019-3790
(212) 830-3847

On Behalf of ASCAP:

PHILIP H. SCHAEFFER, Esquire; and
SAMUEL MOSENKIS, Esquire
of: White & Case, LLP
1155 Avenue of the Americas
New York, New York 10036-2787
(212) 819-8740/8424

BEVERLY A. WILLETT, Esquire
ASCAP Building
Sixth Floor
One Lincoln Plaza
New York, New York 10023
(212) 621-6289

JOAN M. McGIVERN, Esquire
Assistant Vice President of Legal
Affairs
Office of the CEO
ASCAP
One Lincoln Plaza
New York, New York 10023
(212) 621-6289

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APPEARANCES (Continued):On Behalf of the Public Broadcasters:

R. BRUCE RICH, Esquire;
JONATHAN T. WEISS, Esquire; and
MARK J. STEIN, Esquire
of: Weil, Gotshal & Manges, LLP
767 Fifth Avenue
New York, New York 10153-0119
(212) 310-8170/8007

KATHLEEN COX, Esquire
General Counsel
Corporation for Public Broadcasting
901 E Street, N.W.
Washington, D.C. 20004-2037
(202) 879-9701

ANN W. ZEDD, Esquire
Assistant General Counsel
PBS
1320 Braddock Place
Alexandria, Virginia 22314
(703) 739-5170

DENISE LEARY, Esquire
Deputy General Counsel
National Public Radio
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 414-2049

ALSO PRESENT:

GINA GIUFFREDA
ADAM OPPENHEIM
BILL ROBERTS
PATRICK ROSS
RUTH YODAIKER

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1 P-R-O-C-E-E-D-I-N-G-S

2 (1:36 p.m.)

3 MR. ROBERTS: For those of you in the room
4 who don't know me, I'm Bill Roberts with the Copyright
5 Office. You probably have seen my signature on some
6 of the pleadings and decisions that have been handed
7 down in this proceeding so far.

8 You may have varying opinions about me,
9 but I don't take any of it personally. And some of
10 you may be relieved to know that this is the last that
11 you will see of me in this particular proceeding
12 because as of Friday, the 30th of January, the CARP
13 has been initiated. And all the power to make
14 decisions and issue rulings has now shifted from the
15 Copyright Office to the three gentlemen who are
16 sitting here today, which I'd like at this time to
17 introduce.

18 Serving as our Chairperson, in the center,
19 is Lewis Griffith. To his immediate left is Jeffrey
20 Gulin. And to Lewis' right is Ed Dreyfus. These will
21 be your three arbitrators for this proceeding.

22 I have passed along a request that was

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1 made by several of you to call for considerations that
2 the hearings be held in New York City, as opposed to
3 here in the Copyright Office in this particular room.
4 The judges have discussed it amongst themselves and
5 are ready, willing, and able to discuss that
6 possibility with you today.

7 Also, they will be discussing the matter
8 of billing and, more importantly, the matter of
9 payment since, unfortunately, the system is set up in
10 such a way that the Copyright Office does not have
11 authority to pay the arbitrators.

12 So by the end of this meeting or shortly
13 thereafter, some type of arrangement is going to have
14 to be worked out amongst all of you and the three
15 arbitrators to handle billing and payment of the three
16 individuals.

17 Also, we're here today to discuss the
18 scheduling. I believe at the end of last week Gina
19 faxed out to you a list of dates that were problems
20 for the arbitrators to assist you in organizing your
21 presentations and the availability of your witnesses.
22 And the arbitrators are going to be discussing that

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1 today with you as well.

2 Also, any other preliminary matters before
3 the hearings start should be raised with the
4 arbitrators in terms of logistics and any other
5 related matters.

6 Now that the proceeding has begun, we have
7 a unique situation here in that typically the
8 proceedings are held in this room. And when you need
9 to get in contact with the arbitrators, you have to go
10 through us.

11 It's going to be a little more problematic
12 in that there's a possibility that all of you may be
13 in New York City and we are down here. And obviously
14 it's not all that expedient for you to be calling us
15 up with questions for the arbitrators when, in fact,
16 they're located where you are.

17 So, Lewis, that's actually a matter that
18 you may want to discuss with the parties today in
19 terms of handling inquiries. Again, traditionally in
20 these proceedings, we have done that. However, we are
21 open to the possibility of allowing at least some type
22 of limited contact with the arbitrators in terms of

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1 asking or making requests with respect to procedural
2 deadlines, et cetera.

3 Obviously you cannot discuss any
4 substantive matters with the arbitrators that would
5 amount to an ex parte communication. And any matters
6 related to that, you would have to notify us.

7 I guess without further ado, I would like
8 to introduce somebody who is our current CARP
9 specialist, whom you might not have met. And that is
10 Gina Giuffreda. Gina is sitting in the back of the
11 room.

12 If you do have any questions about billing
13 or procedures or you need to know where to file
14 something or when something is due, anything related
15 to procedure, you should contact Gina.

16 If you have anything related to substance,
17 you can either contact Gina and she'll get in touch
18 with me or you can give me a call directly here at the
19 office. And for those of you who don't have my
20 number, it's (202) 707-8391. That is my direct line.
21 And I will be glad to handle your questions as best
22 that I can.

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1 So I wish all of you well. The
2 arbitrators' report is due by the 28th of July, which
3 obviously seems like a long way off, but in many
4 respects, it's not all that far off. And I'm sure
5 hopefully enough commendation will be made to give the
6 arbitrators sufficient time to draft a
7 well-thought-out and well-reasoned report, which I'm
8 sure they will deliver to us.

9 So thank you all for coming. And, Lewis,
10 I turn it over to you.

11 CHAIRPERSON GRIFFITH: All right. If
12 you'll wait just one moment before you leave? Mr.
13 Court Reporter, would you raise your right hand,
14 please?

15 (Whereupon, the court reporter was duly
16 sworn.)

17 CHAIRPERSON GRIFFITH: Bill, since none of
18 which you said was taken by the court reporter under
19 oath, we don't really have to follow.

20 MR. ROBERTS: Fair enough.

21 CHAIRPERSON GRIFFITH: We've put him under
22 oath. And we're ready to go and start the

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1 proceedings.

2 MR. ROBERTS: Well, it's your ship now.

3 CHAIRPERSON GRIFFITH: Thank you.

4 MR. ROBERTS: You're welcome. Take care.

5 CHAIRPERSON GRIFFITH: Ladies and
6 gentlemen, from myself and my fellow panel members,
7 good afternoon and, indeed, welcome to these
8 proceedings.

9 As Bill has indicated, my name is Lewis
10 Griffith. And I'm going to take just that much time
11 to tell you that I am a retired judge of the 19th
12 Judicial Circuit of the Commonwealth of Virginia. I
13 was Chief Judge to the Circuit Court of Fairfax
14 County. I served on that court and its inferior court
15 for a period of 17 and a half years.

16 Since my retirement, I seem to have
17 developed a multi-personality disorder I think. I sit
18 as a judge designate in that court. I sit three or
19 four times a year as an appellate court judge in
20 Virginia. I sit as what we call a judge pro tem,
21 which has the same authority as a Circuit Court. And
22 then I do arbitrations and mediations. So I am apt to

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1 forget which role I'm playing when I'm dealing with
2 you. So feel free to let me know so that I can step
3 back into that role.

4 Now that you know who I am and my
5 problems, let me first introduce Judge Gulin, Jeffrey
6 Gulin. And I'm going to ask him to tell you a little
7 bit about himself.

8 JUDGE GULIN: Very little.

9 CHAIRPERSON GRIFFITH: Okay.

10 JUDGE GULIN: Thank you, Judge Griffith.
11 And good afternoon, everyone.

12 My name is Jeff Gulin. I am a former
13 administrative law judge from the State of Maryland.
14 I've had the pleasure and privilege of serving on one
15 of these panels before; in fact, with Judge Griffith.
16 I think I recognize a face or maybe two.

17 And I look forward to working with you
18 all, and the best of luck to you.

19 CHAIRPERSON GRIFFITH: Judge Dreyfus?

20 JUDGE DREYFUS: Thank you.

21 My name is Ed Dreyfus. I'm a practicing
22 intellectual property attorney and not a judge, by the

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1 way. Ed Dreyfus, an intellectual property attorney
2 out of New Jersey with Stanger and Dreyfus. And I
3 have a background formerly with AT&T for 20 years and
4 have been in private practice with my own firm for the
5 last 5 or 6 years.

6 CHAIRPERSON GRIFFITH: Okay. Now that
7 we've had the opportunity to introduce ourselves to
8 you, we're somewhat interested in finding out who you
9 are. So, for the record, -- and please don't hold us
10 to be able to identify each of you immediately after
11 this -- I'm going to ask that we begin in the first
12 table over here and ask you to simply state loudly for
13 the record who you are and what party you represent,
14 what your affiliation is.

15 MR. SCHAEFFER: My name is Philip
16 Schaeffer. I'm a member of the firm of White and
17 Case. And I am one of the attorneys for ASCAP.

18 MR. KLEINBERG: I'm Norman Kleinberg from
19 Hughes, Hubbard and Reed in New York City. And I'm
20 among the counsel for Broadcast Music, Inc., or BMI.

21 MR. RICH: I'm Bruce Rich, a member of the
22 firm of Weil, Gotshal and Manges in New York City.

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1 And our firm and I along with several of my colleagues
2 are representing PBS, NPR, and the Corporation for
3 Public Broadcasting.

4 MR. WEISS: I'm Jonathan Weiss, also of
5 Weil, Gotshal and Manges.

6 CHAIRPERSON GRIFFITH: All right. Start
7 back over here, please.

8 MS. MCGIVERN: I'm Joan McGivern. I'm
9 Assistant Vice President of Legal Affairs for ASCAP.

10 CHAIRPERSON GRIFFITH: All right.

11 MR. DIMONA: Joseph DiMona, Assistant Vice
12 President, Legal and Regulatory Affairs for Broadcast
13 Music, Inc.

14 CHAIRPERSON GRIFFITH: Thank you.

15 MR. SALZMAN: I'm Michael Salzman. I'm
16 Norman Kleinberg's partner at Hughes, Hubbard and
17 Reed, representing BMI.

18 CHAIRPERSON GRIFFITH: Thank you.

19 MR. STEIN: I'm Mark Stein with Weil,
20 Gotshal and Manges and representing the public
21 broadcasters.

22 CHAIRPERSON GRIFFITH: Good. I think

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1 we're back over here now.

2 MR. MOSENKIS: I'm Sam Mosenkis. I'm an
3 associate at White and Case, also representing ASCAP.

4 CHAIRPERSON GRIFFITH: All right.

5 MS. WILLETT: I'm Beverly Willett, one of
6 the attorneys for ASCAP in this proceeding.

7 CHAIRPERSON GRIFFITH: Thank you.

8 MS. LEARY: I'm Denise Leary. I'm Deputy
9 General Counsel with National Public Radio.

10 MS. ZEDD: I'm Ann Zedd, Assistant General
11 Counsel for Public Broadcasting Services.

12 MS. COX: I'm Kathleen Cox, General
13 Counsel for the Corporation for Public Broadcasting.

14 CHAIRPERSON GRIFFITH: And in the back row
15 I think on the right here.

16 MR. ROSS: My name is Patrick Ross. I'm
17 a reporter with Communications Daily covering this.

18 CHAIRPERSON GRIFFITH: Thank you.

19 MR. OPPENHEIM: My name is Adam Oppenheim.
20 And I've been a clerk at various points for National
21 Public Radio.

22 MS. YODAIKER: My name is Ruth Yodaiker.

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1 And I'm a clerk with National Public Radio.

2 CHAIRPERSON GRIFFITH: All right. Thank
3 you. And I believe we've covered everyone in the room
4 now. So thank you very, very much. We'll record who
5 you are and hope over the time of these proceedings we
6 come to know exactly who you are.

7 The CARP proceedings to me have become an
8 interesting method employed to solve these disputes
9 which arise. And perhaps one of the most interesting
10 things is we are solicited and appointed by the
11 Librarian of Congress to be a member of this panel.

12 There is absolutely no provision made for
13 payment of any arbitrators. And, for some reason,
14 that got my attention when I first served on a panel.
15 And it's the first thing that we must discuss and we
16 must resolve.

17 I think the best way to do it is this --
18 and I don't know if you all have had discussions
19 concerning this. If you have, we'll be interested to
20 know that. If you have not, we'll be likewise
21 interested to know that. Have you had any such
22 discussions?

1 MR. KLEINBERG: We have without
2 resolution.

3 CHAIRPERSON GRIFFITH: Without resolution.
4 Okay. Do you wish to propose to us a method of
5 payment for us or do you wish us to propose to you a
6 suggestion with respect to the procedure for
7 compensating us?

8 MR. SCHAEFFER: Well, it seems to me --
9 this is Mr. Schaeffer.

10 It seems to me there are two things.
11 There's the methodology of whether you want separate
12 checks cut or whether you would want a central payer.
13 And any proposal that the arbitrators make obviously
14 is perfectly satisfactory to us. We could have one of
15 the law firms, all three of the law firms. There will
16 be no problem I'm sure from any of these law firms
17 about payment.

18 We have had some disagreements about the
19 division of the fee. And I think maybe the parties
20 would want to argue about that, although I would defer
21 to the panel anyway. It seems to me you know the
22 issues as well as we do about that.

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1 CHAIRPERSON GRIFFITH: Okay.

2 MR. SCHAEFFER: But if you think it would
3 be helpful, we'll be glad to.

4 CHAIRPERSON GRIFFITH: All right. Do you
5 have any response anyone wants to make to his
6 comments?

7 MR. RICH: I certainly agree, Judge, about
8 the procedures for getting paid I think are not the
9 issue or an issue. It's really a sense of subject to
10 your own thinking, of course, the panel's thinking of
11 what we think is the most equitable way that the fee
12 should be apportioned among the parties.

13 CHAIRPERSON GRIFFITH: All right. Well,
14 let me just suggest the following procedures, and then
15 we'll discuss the matter with respect to the division
16 of the fees and such.

17 We would propose that the arbitrators will
18 submit to the Copyright Office on a monthly statement
19 which will reflect our fees and expenses through the
20 25th day of that particular month. Those statements
21 will then be forwarded to the parties or a designate
22 of the respective parties.

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1 The rules provide that payment is to be
2 made within 30 days. We would request that payment be
3 made within ten days in view of the fact that we might
4 be in New York City with transportation, hotel, living
5 expenses, and so forth.

6 The payments which are made, the check or
7 checks, should be made payable directly to the
8 arbitrators. And I think I've already said they would
9 be the accrued fees and expenses up to the 25th day of
10 each month.

11 Have I left anything out that you can
12 think of?

13 JUDGE GULIN: Other than I have no
14 personal preference as to whether it would be one
15 check or four checks.

16 CHAIRPERSON GRIFFITH: Yes. Well, I don't
17 think it matters. It doesn't matter to us whether
18 it's one check or four checks.

19 MR. SCHAEFFER: I think it would be more
20 convenient for us to do four checks. Then we wouldn't
21 be dependent on each other and we can just get the
22 checks out as a regular routine.

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1 CHAIRPERSON GRIFFITH: Well, I sense and
2 see a division. On one side here is a group who have
3 certain interests. And on this side is a group who
4 have certain interests.

5 I've been involved in two other CARPs.
6 They on this side of the table have been able to
7 designate one firm or one person as have the people on
8 the other side of the table. So we receive two checks
9 representing our fees.

10 If that's agreeable and you can agree who
11 that person or persons are going to be, then that
12 would be acceptable to us.

13 MR. SCHAEFFER: It's certainly okay with
14 ASCAP, and I gather it's okay with --

15 MR. KLEINBERG: We don't have any problem
16 with that.

17 CHAIRPERSON GRIFFITH: All right. Any
18 other discussion you wish to make with respect to the
19 procedure of payment?

20 (No response.)

21 CHAIRPERSON GRIFFITH: All right. With
22 respect to the division of fees, do you have any

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1 comments?

2 JUDGE GULIN: Why don't we begin with
3 requesting or asking whether there is any problem, any
4 disagreement between each side of the dispute.
5 Apparently there are two parties essentially to each
6 side. Is that correct?

7 And forgive us because we haven't seen any
8 documents yet in this case at all. So we're really in
9 the dark. But all I know is that there are two
10 parties on each side.

11 Within each side, is there disagreement as
12 to how --

13 MR. SCHAEFFER: Not between BMI and ASCAP.

14 MR. RICH: As a practical matter, when,
15 Judge, you get to the paperwork, you'll see that the
16 fee proposals are combined as if they were a unitary
17 entity on this side; that is, PBS and NPR combined for
18 purposes of fee proposals. And, likewise, the fee
19 proposals from the other side treat us as if we were
20 a combined entity.

21 So, for practical purposes, although there
22 will be testimony as to PBS and testimony as to NPR,

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1 for purposes of the proceeding otherwise, it's a
2 unitary entity. And, therefore, there's no issue at
3 all about --

4 JUDGE GULIN: So the contention, then, is
5 to what percentage each side?

6 MR. RICH: That's correct.

7 MR. SCHAEFFER: I don't know that I agree
8 with exactly what Mr. Rich has said, but that is the
9 dispute between whether to split or not.

10 CHAIRPERSON GRIFFITH: We'll have our
11 first conference. Just a moment.

12 MR. SCHAEFFER: Would you like us to
13 leave, Judge?

14 CHAIRPERSON GRIFFITH: No, not at all.
15 Please don't.

16 (Whereupon, the panel conferred off the
17 record.)

18 CHAIRPERSON GRIFFITH: I'd like the record
19 to reflect that Judge Gulin just said that my idea
20 conceptually was a very good one. So let me make a
21 suggestion to you, and then we want to hear from you
22 about this.

1 It occurred to us that the more
2 appropriate time to assess fees or fees and costs is
3 once we have made a determination with respect to the
4 matter. We, therefore, would suggest as a panel to
5 you subject to your discussion, subject to your
6 changing our minds with no problem whatsoever that for
7 the initial period until we issue a final report, the
8 fees and costs would be paid one-half by this group
9 and one-half by this group, reserving to the right for
10 either party or parties to argue and have us make a
11 determination at the conclusion of the evidence and
12 the determination by us of this matter an assessment
13 of fees and costs.

14 MR. SCHAEFFER: I think I speak for --
15 it's satisfactory to ASCAP and BMI.

16 CHAIRPERSON GRIFFITH: All right.

17 MR. RICH: Your Honor, I may want to
18 consult with my client. Since this effectively would
19 provide the division proposed by the other side, I can
20 understand that they would agree to it because we feel
21 now -- it will be no surprise -- that that's an
22 inappropriate final allocation.

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1 If you'll give me a moment to chat with my
2 client on a cash flow basis? Let me see if that's
3 agreeable.

4 CHAIRPERSON GRIFFITH: Sure. And let me
5 just say one thing beforehand. We feel like it would
6 be very difficult for us to make a determination with
7 respect to the allocation without actually hearing the
8 testimony and evidence and making a determination.

9 So you want to talk with them right now?

10 MR. RICH: Please, if I may take a minute.

11 CHAIRPERSON GRIFFITH: Sure.

12 (Whereupon, the foregoing matter went off
13 the record at 1:55 p.m. and went back on
14 the record at 1:56 p.m.)

15 CHAIRPERSON GRIFFITH: Yes. Please?

16 MR. RICH: Thank you.

17 With the understanding, which I take it to
18 be clear from your comment that this is obviously
19 without prejudice to an ultimate determination,
20 certainly as a matter of interim payment protocol,
21 we're agreeable to paying half for now.

22 Just for the record, our position is as of

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1 today that there are effectively three parties in
2 interest, not two and two. There's this side. And
3 there's ASCAP. And there's BMI. And I think when you
4 see the positions set out, you might agree with that.

5 And our position was going to be
6 one-third, one-third, one-third. But, again, since I
7 respect the fact that you're too new to the process to
8 make a judgment, we're glad on a temporary basis to go
9 along with the half/half proposal.

10 CHAIRPERSON GRIFFITH: And reserving the
11 right to you to bring that issue up at the appropriate
12 time in the proceedings.

13 MR. RICH: Thank you.

14 CHAIRPERSON GRIFFITH: All right.
15 Anything else with respect to the procedure and now
16 the division as to how the fees will be paid?

17 (No response.)

18 CHAIRPERSON GRIFFITH: All right. Our
19 first statements, then, will probably start on the
20 25th of January -- February. I'd like for it to be
21 January, but it's the 25th of February.

22 And if you will forward them directly to

1 the Copyright Office? Gina, do they come directly to
2 you or is --

3 MS. GIUFFREDA: They can address them to
4 me or as long as they have CARP on there, it will get
5 to me.

6 CHAIRPERSON GRIFFITH: Would you stand and
7 just state your name for the record and the office so
8 that they'll know exactly where to send this?

9 MS. GIUFFREDA: Gina Giuffreda. And you
10 can send it to the same address, the P.O. box, or you
11 can fax. If you have questions, you can fax them to
12 me.

13 CHAIRPERSON GRIFFITH: This is not where
14 the checks are to be sent.

15 MS. GIUFFREDA: Right.

16 CHAIRPERSON GRIFFITH: This is where the
17 information, the statements are going to come from
18 Gina.

19 MS. GIUFFREDA: Right.

20 CHAIRPERSON GRIFFITH: And if you don't
21 get one or something, that's a contact here at the
22 Copyright Office. We'll ask you to send the checks

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1 directly to the arbitrators. And Gina, once again,
2 can provide you with our respective addresses.

3 Do you want to state that? Should we
4 state that in the record or not?

5 MR. SCHAEFFER: It's on the record.

6 CHAIRPERSON GRIFFITH: No. I mean our
7 addresses.

8 MR. KLEINBERG: They're in the resumés,
9 Judge.

10 CHAIRPERSON GRIFFITH: They're in the
11 resumés? Okay. Fine.

12 MR. RICH: Judge, may I ask simply for the
13 record that each of you state what your rate of
14 compensation will be for this proceeding?

15 CHAIRPERSON GRIFFITH: Do you have an
16 objection to that? Mine is \$200 per hour.

17 JUDGE DREYFUS: Mine's 275.

18 JUDGE GULIN: And mine is also 200 an
19 hour.

20 MR. SCHAEFFER: That's plus expenses?

21 CHAIRPERSON GRIFFITH: Plus expenses, yes.

22 Have we resolved the matter with respect

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1 to the compensation of the arbitrators, ladies and
2 gentlemen?

3 (No response.)

4 CHAIRPERSON GRIFFITH: I believe indeed we
5 have. Let's move on to scheduling.

6 I'm sorry. Mr. Dreyfus has a point he
7 would like to make. Please?

8 JUDGE DREYFUS: Yes. As I mentioned and
9 as mentioned in my resumé, I was with AT&T for 20
10 years. At one segment of that, I was in the patent
11 litigation organization. And a colleague of mine was
12 Mr. David Bender, who has a number of years ago joined
13 White and Case.

14 I just want to get that on the record. I
15 don't consider it a conflict at all, but I just wanted
16 you to hear it from me and not from someone else.

17 MR. RICH: Thank you.

18 MR. SCHAEFFER: And for the record, Mr.
19 Bender is a counsel to White and Case.

20 JUDGE DREYFUS: Oh, is that right?

21 MR. SCHAEFFER: Yes and has been for some
22 years.

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1 JUDGE DREYFUS: Okay.

2 MR. SCHAEFFER: But he is a full-time
3 employee.

4 JUDGE DREYFUS: Yes.

5 CHAIRPERSON GRIFFITH: Okay. Thank you.

6 Under the top heading, which I have said,
7 scheduling of proceedings, one of the first things
8 that has come to our attention is that there is some
9 request that these proceedings be held at a place
10 other than where we are right now. As a native of
11 Purcelville, Virginia, New York City sounded
12 interesting at first. No. I have been there before,
13 believe me.

14 We have discussed this. Bill Roberts was
15 kind enough to call us and tell us that he had been
16 contacted by you and that you might propose that the
17 hearings would be held in New York City. We
18 understand that is for economy, and we have discussed
19 it among ourselves. And we feel that we are able to
20 accommodate you.

21 If I understand, -- correct me if I'm
22 wrong -- Ed Dreyfus would be commuting from --

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1 JUDGE DREYFUS: New Jersey.

2 CHAIRPERSON GRIFFITH: -- New Jersey.
3 Jeffrey Gulin, who lives just north of Baltimore, and
4 I, who live in suburban Washington, would be commuting
5 to and staying in New York City.

6 For the general schedule of hearings,
7 before I turn it over to Judge Dreyfus to handle, I
8 just want to make a brief comment. My experience has
9 been that we heard that you anticipate the total
10 presentation of this case would take between 15 and 25
11 days. I would anticipate that that is a direct case,
12 rebuttal case, and perhaps a day or day and a half for
13 the arguments of findings of facts and conclusions of
14 law.

15 With that in mind, we have to keep in mind
16 -- and we'll ask you to be sensitive to this -- that
17 our deadline is the 28th day of July, which means that
18 we have to accomplish these hearings. We have to have
19 read all of the material which you have supplied to
20 us, which just to begin with right now before you
21 begin your direct cases, we've got to go through that.
22 And then we have to remain current in reading the

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1 material as you present it to us and recording the
2 testimony and evidence which is presented.

3 But perhaps more importantly to us is we
4 have no negotiation with respect to the date that we
5 have to walk into this Copyright Office and file the
6 final report. That is July the 28th. So our
7 scheduling has to be able to accommodate that.

8 I think we would like to know a couple of
9 things about the hearing site. Where would you plan
10 to have these hearings?

11 MR. RICH: Judge, since I feel somewhat
12 responsible for floating this entire conception just
13 a few days back with my co-counsel, I ought to perhaps
14 amplify slightly some of the evolving thinking at
15 least on this side of the table.

16 CHAIRPERSON GRIFFITH: Please.

17 MR. RICH: Without doubt, from the
18 standpoint of counsel and many of the witnesses, New
19 York is the preferred site. I hasten to add, however,
20 that having had more opportunity to chat with our
21 clients, who are all Washington, D.C.-resident, and
22 our witnesses who are Washington, D.C. area-resident,

1 there is at least a strong preference for the portion
2 of the case to be presented by PBS and NPR when that
3 happens in the cycle, that that occur in the normal
4 process here in Washington for the convenience both of
5 witnesses and clients' counsel.

6 There is some additional possibility that
7 for certain other witnesses sponsored by our friends
8 at ASCAP and BMI, that, again, so as not unduly to
9 inconvenience our client representatives to the
10 convenience of everyone else, that there might be some
11 interest in having some flexibility in scheduling;
12 that is, that certain trial weeks if that's how it
13 works be here by agreement of everyone and conceivably
14 other trial weeks, particularly those that will be
15 witness-intensive on the part of ASCAP and BMI if it
16 otherwise works, occur up in New York City.

17 And, quite frankly, because we haven't yet
18 discussed with Mr. Schaeffer and Mr. Kleinberg witness
19 order, I was hoping that we might have a few days of
20 flexibility in coming back to the panel after today
21 about our more refined thoughts about where and when
22 the hearings might occur in terms of venue when we

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1 sort it out.

2 MR. KLEINBERG: Well, it also may evolve
3 I think once we agree hopefully on the schedule, at
4 least of the direct case, which we have communicated
5 with and have a proposal to make, taking into account
6 what we understood the panel's availability, our own
7 availability.

8 And so I'm not sure which comes first,
9 situs or schedule, because I think they may interact.
10 I think we're totally flexible with each other's needs
11 here.

12 JUDGE DREYFUS: I personally think
13 schedule comes first because we're all flexible on
14 whether it's New York or down here. I mean, we don't
15 want to jump up and down on a daily basis, but if
16 there's a three or four-day session up there, three or
17 four-day session down here, it doesn't matter.

18 MR. SCHAEFFER: The suggestion that was
19 made -- and I believe it originally came from Mr.
20 Salzman, which I thought was a very sound one, was
21 that, in specific answer to your question, we would
22 use as venues the law firms which have ample

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1 conference rooms on some sort of rotating basis.

2 Probably -- I think it was his suggestion;
3 certainly I would agree with it -- for ASCAP's case,
4 White and Case could use its conference rooms. It
5 would be more convenient for the witnesses. We have
6 huge conference rooms. The same thing for
7 Hughes-Hubbard for their witnesses. And if PBS wants
8 to the extent PBS does it in New York, certainly they
9 could do it at Weil-Gotshal.

10 But we could provide that way with a lot
11 of support almost anything you would want in the law
12 firms. We really all have everything you could need.

13 JUDGE DREYFUS: Can we ask, then, how many
14 days are estimated for your direct case?

15 MR. KLEINBERG: We came up with a schedule
16 that provides for 14 days, which we think I think
17 collectively is ample for the presentation of the
18 direct case, meaning direct with cross-examination.

19 JUDGE DREYFUS: All direct cases?

20 MR. KLEINBERG: All direct cases. And
21 that would essentially take us through the end of
22 March into the first week of April according to the

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1 schedule, taking into account everybody's schedule.

2 I'm happy to unveil what we've talked
3 about. And then you all can react to it in terms of
4 what we've tried to do, which is to not have too much
5 disruption.

6 The February time period is very chopped
7 up. And, as a consequence, we really are talking
8 about March, although we have a day that we were
9 proposing. If it's necessary, we could start on
10 February 26th with one day. And we could have opening
11 statements at whatever situs anyone agrees.

12 We then move to the week of March the 9th,
13 where we have three days available: the 9th and then
14 the 12th and the 13th. Again, I would say the 9th we
15 have circled again if people want to have a disjointed
16 presentation or not. We've indicated it's available
17 for everybody, including all of the arbitrators.

18 We then would propose the week of the
19 16th, the entire week of March, and the week of the
20 30th, the entire week; that is, five days each week.
21 We haven't gone any further than that because I think
22 we felt that would amply take up the case.

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1 So we've got two full weeks, as I've
2 indicated, and then the possibility of three days or
3 two the week of March 9th and then that one day if
4 that's agreeable on February 26th.

5 JUDGE DREYFUS: The availability of the
6 week of March 2nd for anyone in lieu of the week of
7 the 9th, is that a problem for you folks?

8 MR. KLEINBERG: Yes.

9 JUDGE DREYFUS: It is?

10 MR. KLEINBERG: It was.

11 JUDGE DREYFUS: Okay.

12 JUDGE GULIN: How about the availability
13 of weekends, Saturdays? For example, I think you
14 mentioned starting -- did you say the 12th of March?

15 MR. KLEINBERG: Well, we have the 9th is
16 available just taking into account everybody's
17 schedule. The 12th and 13th are together. So we said
18 the 9th is available, but it's then the arbitrators I
19 believe weren't available in between that.

20 JUDGE GULIN: Okay.

21 MR. KLEINBERG: So I circle it only as
22 it's an available day, but it may not be desirable.

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1 MR. SCHAEFFER: One suggestion for the
2 26th. One of the advantages would be it might be
3 after hearing at least the openings, it might be
4 helpful because you have a voluminous amount of
5 material to allow you to reflect until we start again
6 the week after. I think that 26th might be a useful
7 day to start.

8 CHAIRPERSON GRIFFITH: Let me ask just one
9 question, then. Say we adopted this schedule that you
10 proposed right out. We would end, then, on April
11 what?

12 MR. KLEINBERG: Third, I believe.

13 CHAIRPERSON GRIFFITH: April the 3rd.

14 MR. SCHAEFFER: And we would hold the 4th
15 if we ran low if we had to work --

16 CHAIRPERSON GRIFFITH: When would you
17 anticipate presenting your rebuttal cases to us? How
18 much time would you need?

19 MR. KLEINBERG: Well, I think the
20 threshold issue is whether there is anticipation of
21 significant, if any, rebuttal. And I know the rules
22 I believe provide for a 45-day period of discovery.

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1 Looking at it today, speaking for us, I'm
2 not sure that we foresee significant, if any,
3 rebuttal. But, again, we've looked at it to try to
4 see where that fits, taking into account Your Honors'
5 suggestion that we have to have an endpoint and move
6 backwards.

7 And putting in the 45 days and then
8 putting in some lesser amount of time for rebuttal
9 just by definition in the direct seemed to me we could
10 accomplish that. But I don't know what anyone's views
11 are on rebuttal.

12 MR. SCHAEFFER: I would say to the extent
13 that we have a rebuttal, I could start on -- we're all
14 used to this. We're all trial lawyers. We could
15 start on the 13th if it's necessary. So that would
16 give us one week, in effect.

17 It seems to me we're all very experienced
18 in court, and we've had this fast turnaround time on
19 an accelerated basis.

20 MR. RICH: I think the caveat there, Mr.
21 Schaeffer and Judges, is only that, as you'll see when
22 you get into the evidence, a number of exhibits are

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1 very data-intensive in the case.

2 This is a music use case. And everybody
3 has dumped carton loads figuratively or in electronic
4 disk format of data. The ability to analyze that data
5 on both sides takes time and sometimes creates the
6 normal glitches in trying to decode and use data.

7 The only concern I would have, therefore,
8 because I otherwise agree that a rebuttal case, if
9 any, could come on quickly would be that if one side
10 or another sponsors as a rebuttal bit of evidence a
11 study on this, that, or the other thing, there is the
12 question whether properly one or more of the other
13 parties will want the opportunity to discover the
14 basis underlying it, be able to replicate it in some
15 fashion, and from hard experience on this side, about
16 which I want to say a little more when I get a moment
17 later, it takes a bit of time.

18 So that's my only caution in suggesting
19 that in so short a time as ten days or so we might be
20 able to put on a rebuttal case.

21 JUDGE DREYFUS: May I raise this question?
22 That's a good point. May I raise this question? When

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1 did the parties' counsel first see the other side's
2 direct case?

3 MR. SCHAEFFER: Oh, quite a while ago.

4 MR. RICH: Yet, the discovery process is
5 still ongoing.

6 JUDGE DREYFUS: I see.

7 MR. SCHAEFFER: There have been between
8 ASCAP and Public Broadcasters substantial difficulty
9 in understanding each other's data. We have the same
10 problem apparently they do, although I think much of
11 it -- there was a conference yesterday that Ms.
12 Willett was at on the phone with one of the gentlemen
13 from Weil-Gotshal. And I think most of it has been
14 resolved.

15 It seems to me, though, that that's
16 something which we can handle as we go along. It may
17 be that that will necessitate some sort of stub
18 hearing on music measurement or it may not, but
19 certainly the music measurement is a day or two of
20 witnesses at some point.

21 I happen to think that the music
22 measurement is not going to be such a big dispute, but

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1 that's to be seen. We could start with everything
2 else on the 13th. And if one of us needs more time to
3 deal with the music measurement, we can deal with it
4 at that point.

5 JUDGE GULIN: If my memory serves, after
6 the direct case, between the direct cases and rebuttal
7 cases, there's a period of not only discovery, but you
8 have to submit written testimony. And I don't see how
9 that can possibly be done in one week. It just
10 doesn't sound right to me.

11 I believe in the last proceeding we
12 allowed what, a month? It turned out there was no
13 rebuttal case.

14 CHAIRPERSON GRIFFITH: They waived
15 rebuttal eventually, but we did provide for a month's
16 break.

17 JUDGE GULIN: And they were complaining
18 about that. So I think that a week is --

19 JUDGE DREYFUS: Different case.

20 JUDGE GULIN: Different case.

21 MR. SCHAEFFER: I really don't think that
22 this is -- I've been through a lot of the data last

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1 night. I understand Mr. Rich's problem. I have a lot
2 of problems with theirs. But we'll get that resolved.

3 I mean, I think the music measurement may
4 not be as big a deal as everybody thinks it is.

5 MR. KLEINBERG: My own observation is that
6 if there is the need for this additional period of
7 time, that we can deal with that in a reasonable
8 fashion, whether it's 30 days or some lesser amount,
9 as we move forward and see and still then bracket the
10 rebuttal time period in a time that allows the CARP to
11 have more than I think sufficient time to get to the
12 July 28th deadline because if we're talking about
13 April 3rd, then that's May, June, and July that's
14 left.

15 JUDGE DREYFUS: But I think the panel
16 feels that they have to bracket that time right now --

17 CHAIRPERSON GRIFFITH: Indeed.

18 JUDGE DREYFUS: -- as part of the order
19 that's going to come out right now on scheduling.

20 MR. KLEINBERG: Well, I was going to
21 suggest that as an approach to find out when you want
22 us to be done.

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1 JUDGE DREYFUS: Right. If the parties
2 want to waive it, they can waive it later, but we have
3 to have it in there now.

4 MS. WILLETT: I was just going to say it
5 might be helpful if you backtracked for us and told us
6 how much time that you need. Then perhaps we could
7 work from there.

8 As far as the 45 days go, we may need a
9 little additional time for discovery, but we certainly
10 wouldn't need the 45 days. I think it's provided in
11 the rules, but certainly the parties can waive it. In
12 the entire proceedings, that 45-day period has been
13 quite substantially.

14 CHAIRPERSON GRIFFITH: Don't be alarmed,
15 but we might start writing the final report today.

16 JUDGE DREYFUS: Before we see any
17 evidence.

18 CHAIRPERSON GRIFFITH: That is the
19 historical perspective, which actually takes time.

20 MR. SCHAEFFER: Sure.

21 CHAIRPERSON GRIFFITH: You would be
22 surprised.

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1 MR. SCHAEFFER: Sure.

2 MR. RICH: Judge, could I just spell out
3 a proposal?

4 JUDGE DREYFUS: Sure.

5 MR. RICH: Speaking again for this side of
6 the table, I would be prepared to represent that any
7 written rebuttal cases I would anticipate, having I
8 think a feel for the case at this point, could come in
9 from our side two weeks from April 3rd. We would be
10 prepared to put in any written statements as of that
11 time.

12 And I would share Ms. Willett's
13 observation that I think we could make every effort to
14 do expedited, if any, discovery based on the
15 respective submissions, which I hope will be minimal
16 at that point.

17 MR. SCHAEFFER: That would be satisfactory
18 to ASCAP.

19 CHAIRPERSON GRIFFITH: Is that two weeks,
20 you say? Is that the 13th, then?

21 MR. RICH: Two weeks from the 3rd would be
22 the 17th of April.

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1 CHAIRPERSON GRIFFITH: Seventeenth.

2 MR. KLEINBERG: Seventeenth.

3 CHAIRPERSON GRIFFITH: Seventeenth.

4 JUDGE DREYFUS: Written rebuttal.

5 MR. KLEINBERG: Written rebuttal.

6 JUDGE DREYFUS: Okay. Written rebuttal.

7 Would there be testimony with respect to rebuttal?

8 MR. RICH: I think there would be the
9 possibility of testimony.

10 JUDGE DREYFUS: And that would come -- we
11 can schedule, let's say, four days for potential.

12 CHAIRPERSON GRIFFITH: Four days maximum?

13 MR. RICH: I would think that might cover
14 it.

15 JUDGE DREYFUS: Right.

16 CHAIRPERSON GRIFFITH: Starting, Ed?

17 JUDGE DREYFUS: Starting the 20th.

18 MR. KLEINBERG: We have one --

19 JUDGE DREYFUS: Is that too soon?

20 MR. KLEINBERG: -- problem with one of our
21 counsel having another trial that's scheduled in
22 between there. And, without disrupting this, if we

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1 could get some additional days, another four or five
2 days from the start of the testimony, that would
3 facilitate I think the problem from our side.

4 JUDGE DREYFUS: The 27th, the following
5 week?

6 MR. KLEINBERG: If that's okay with
7 everyone.

8 MR. SCHAEFFER: That's satisfactory to us.

9 MR. SALZMAN: I'm sorry? Do I understand
10 rebuttal testimony will begin April --

11 JUDGE DREYFUS: The 27th for four days.

12 MS. WILLETT: Do we feel that that's going
13 to allow enough time? That's only really ten days to
14 get the rebuttal cases, submit document requests to
15 opposing parties, and the parties to respond, produce
16 the documents, and for any motions that have to be
17 made to be taken care of and ruled upon by the panel.

18 JUDGE GULIN: I agree with you. I think
19 it's being a little optimistic.

20 JUDGE DREYFUS: That pushes us into May.

21 MR. KLEINBERG: What's the next available,
22 the week of -- it looks like the 13th and the 15th the

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1 panel was tied up. So the week of May the 4th?

2 JUDGE DREYFUS: Fourth, yes.

3 MR. KLEINBERG: Does that seem better? If
4 we started the testimony, then, the week of May 4th,
5 the question was asked: When would motions be due and
6 discovery requests relative to the provision of the
7 rebuttal, which is on April the 17th? April 17th is
8 when you get the testimony. A week?

9 MR. SCHAEFFER: I would think if we got
10 the testimony on the 17th, the week of the 24th we
11 could make our motions and requests. I think seven
12 days is more than enough for these three law firms.

13 MR. KLEINBERG: Right. Bruce?

14 MR. RICH: Yes.

15 MR. KLEINBERG: Twenty-fourth, then, for
16 requests and motions.

17 JUDGE DREYFUS: The written rebuttal, I
18 mean, you've gotten each other's direct case now. You
19 can even think in terms of rebuttal now. All right?

20 MR. SCHAEFFER: Correct.

21 JUDGE DREYFUS: Why can't we move the 17th
22 up to the 10th of April for written rebuttal?

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1 MR. SCHAEFFER: You mean the 13th, really.

2 JUDGE DREYFUS: No. I'm in April.

3 MR. SCHAEFFER: Yes. I am, too. The 10th
4 is a Friday, and it happens to be a bad Friday because
5 it's Passover.

6 JUDGE DREYFUS: Oh, you mean move it to
7 the 13th?

8 MR. SCHAEFFER: Yes. That's what I'm
9 saying, just the Monday, instead of the Friday.

10 JUDGE DREYFUS: I see. That's fine. Is
11 that doable?

12 MR. RICH: We have the least of the
13 scheduling problems until April, but both Mr. Weiss
14 and I have a longstanding client obligation in Las
15 Vegas, which is at least through Wednesday of the week
16 succeeding the week of the 3rd. Just as a physical
17 matter, if we move it up too aggressively, I don't
18 know that we'll adequately have time to --

19 MR. KLEINBERG: When is that, Bruce?

20 MR. RICH: It's through that following --

21 MR. WEISS: Sixth, 7th, and 8th of April.

22 MR. RICH: Yes. Through the 8th of April,

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1 we won't even be physically around.

2 MR. KLEINBERG: Okay. So you --

3 MR. RICH: So I'm saying much before the
4 17th is going to just really be difficult for us to
5 make I think in terms of a written rebuttal.

6 MR. SCHAEFFER: Bruce, you're always
7 better off on the Monday, though, for all of us
8 because we all work weekends. And you do, too. So
9 you might want to just give yourself an extra couple
10 of days.

11 JUDGE DREYFUS: So what you're saying is
12 the 17th is not --

13 MR. RICH: Fifteenth, a couple of days
14 back. Fifteenth is fine.

15 MR. KLEINBERG: A propitious day.

16 MR. SCHAEFFER: I'm looking at religious
17 holidays, and you're looking at taxes.

18 MR. KLEINBERG: They all kind of merge.

19 JUDGE DREYFUS: So can we hold onto the
20 27th for rebuttal testimony start?

21 MR. RICH: I think we ought to try that.

22 JUDGE DREYFUS: Okay. And, again, this is

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1 assuming that --

2 MR. SCHAEFFER: Could we do it -- again,
3 I would like to do it on a Monday because everybody --

4 JUDGE DREYFUS: That is a Monday.

5 MR. KLEINBERG: April 27th.

6 MR. SCHAEFFER: Oh, April 27th? I'm
7 sorry. I misheard.

8 MR. KLEINBERG: See, when are the motions
9 is going to be due, then? Because we're only leaving
10 two weeks.

11 JUDGE DREYFUS: You're talking about
12 discovery motions on rebuttal?

13 MR. KLEINBERG: Yes.

14 MS. WILLETT: Yes.

15 MR. KLEINBERG: I think we really need to
16 the first week to May 4th to start.

17 JUDGE DREYFUS: To start rebuttal
18 testimony?

19 MR. KLEINBERG: To have the physical
20 testimony, the four days that we were talking about.

21 MR. SCHAEFFER: I'm going to make
22 incidental to that a proposal, which may fall on deaf

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1 ears, may not. I think a lot of the discovery motions
2 could be done by telephone conference or orally a lot
3 faster than these lengthy and very expensive written
4 material that we put in that repeat much stuff that's
5 irrelevant.

6 And you gentlemen have experienced jurists
7 and lawyers. We could really save a lot of time by
8 telephone conference on issues.

9 CHAIRPERSON GRIFFITH: My concern is if
10 you start the rebuttal testimony on May the 2nd, was
11 it?

12 MR. KLEINBERG: Fourth.

13 CHAIRPERSON GRIFFITH: Fourth? When do
14 you propose, then, to have the argument on the
15 findings of facts and conclusions of law? When are
16 they to be filed and argued?

17 MR. SALZMAN: Your Honor anticipates that
18 we would put in the written submissions and then have
19 the closing arguments?

20 CHAIRPERSON GRIFFITH: Yes. That's what
21 I anticipate.

22 MR. KLEINBERG: Okay. This really, then,

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1 I guess gets to the ultimate question I think that was
2 asked: When do you want us to be done? When is your
3 endpoint? And will you --

4 JUDGE GULIN: I think it would be nice to
5 have --

6 JUDGE DREYFUS: We need six weeks to
7 write.

8 CHAIRPERSON GRIFFITH: At least.

9 JUDGE GULIN: Minimum, yes. I was
10 thinking June 1.

11 MR. KLEINBERG: Okay. Well, we can
12 operate within that framework.

13 JUDGE GULIN: That means, then, if we have
14 rebuttal testimony the week of May 4th through the
15 8th, you can get us proposed findings of facts,
16 conclusions of law, whatever else you want to submit,
17 by June 1?

18 JUDGE DREYFUS: They have to argue it.

19 JUDGE GULIN: And argue it. We can set
20 aside a day for argument.

21 CHAIRPERSON GRIFFITH: It shouldn't take
22 more than a day.

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1 MR. KLEINBERG: Right.

2 CHAIRPERSON GRIFFITH: As a matter of
3 fact, we limited the time in the last one I did.

4 MR. KLEINBERG: Right. So we could do the
5 written findings and conclusions by June 1, and we
6 could have a day as soon thereafter that allows --

7 JUDGE GULIN: Yes, shortly after that.

8 CHAIRPERSON GRIFFITH: One of the things
9 that's important to do is establish the specific days
10 that we're going to do each of these things because,
11 even though this room is not totally available to us,
12 there are other incidents in which -- we may have some
13 precedent, do we, or --

14 MS. GIUFFREDA: You have priority unless
15 --

16 CHAIRPERSON GRIFFITH: Priority.

17 MR. SCHAEFFER: And we all have Washington
18 law firms. So we can let --

19 CHAIRPERSON GRIFFITH: Yes, but we need to
20 be able to set this schedule so that we can exercise
21 that priority when there are a dozen different groups
22 that want to use this room I know from time to time.

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1 MR. SCHAEFFER: Another suggestion, just
2 really only for civilization's purposes: Instead of
3 doing it the Monday after Memorial Day weekend, maybe
4 we can make it June 2 so we have a day back at work
5 before we submit the papers and all the rest of it.

6 MR. WEISS: Memorial Day is I think the
7 25th.

8 MR. SCHAEFFER: Excuse me?

9 MR. WEISS: Isn't Memorial Day the 25th?

10 MR. SCHAEFFER: I'm sorry. I've got the
11 -- yes. Forgive me. I withdraw that.

12 CHAIRPERSON GRIFFITH: Yes?

13 MS. WILLETT: Judge Griffith, would you
14 really anticipate it being due the week before so that
15 the reply findings would be due that week? We have
16 proposed findings and reply findings.

17 CHAIRPERSON GRIFFITH: That's a very good
18 point. I had forgotten about those.

19 MR. SCHAEFFER: Ms. McGivern suggests:
20 Why don't we -- we could get the reply findings on the
21 8th and argue on the 11th.

22 CHAIRPERSON GRIFFITH: Wait just one

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1 minute.

2 JUDGE DREYFUS: Well, I would propose
3 opening final conclusions, findings of fact and
4 conclusion, on the 18th. Then reply to that would be
5 on the 26th. And then they would argue it the
6 following week on the 2nd. Eighteenth. Reply would
7 be on the 26th. And then the final argument is on the
8 second.

9 JUDGE GULIN: That's putting them under a
10 lot of pressure. If they're willing to do that --

11 MR. SCHAEFFER: Well, I have to tell you
12 I've never used reply findings nor do others
13 apparently in the Southern District. We have the
14 argument.

15 JUDGE GULIN: You may not use them, but
16 the rules provide for them.

17 MR. SCHAEFFER: I probably would now waive
18 them. We certainly would be willing to work under
19 pressure.

20 JUDGE DREYFUS: The suggestion is the
21 final argument would be on June 2nd; the reply briefs
22 would be due on May the 26th; and the opening briefs,

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1 conclusions, and findings would be on the 18th of May.

2 JUDGE GULIN: What are your feelings on
3 it?

4 MR. SCHAEFFER: That's fine with me.

5 MR. KLEINBERG: That's a little less than
6 two weeks after -- I'm just thinking out loud.

7 JUDGE DREYFUS: Right. Speak out loud.
8 It's okay. The point is, though, that there's going
9 to be work done in parallel. As you put on your case,
10 as you do cross-exams, as you hear rebuttal cases,
11 there's going to be material prepared for those briefs
12 as you go because we're up against a time frame here
13 that we've got to accommodate.

14 MR. KLEINBERG: I'm just suggesting that
15 if we could have two weeks to do the initial findings
16 from the end of the testimony, if we're projecting
17 four days starting on the 4th, and then it would be
18 the 8th, if we could measure the two weeks from the
19 8th, I don't know what that does to the schedule, but
20 humanity suggests it may -- those are the most
21 important things I think we're going to be presenting,
22 the proof. And I don't think we should be

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1 shortchanging the panel on the preparation time for
2 the findings.

3 JUDGE GULIN: Let's have a little powwow
4 and see what we can come up with.

5 CHAIRPERSON GRIFFITH: I'm impressed by
6 the fact that so far he's argued religious holidays
7 and humanity.

8 JUDGE DREYFUS: Totally out of character.

9 MR. SCHAEFFER: Well, he is a character.

10 (Whereupon, the panel conferred off the
11 record.)

12 CHAIRPERSON GRIFFITH: All right. Ladies
13 and gentlemen, if we may have your attention, please?
14 Judge Dreyfus?

15 JUDGE DREYFUS: All right. We have
16 opening statements on February 26. We have the
17 beginning of testimony in direct case from March 16th
18 through March 20. We have a continuation of the
19 direct cases and testimony from March 30 through April
20 the 3rd. We have written rebuttal submitted by April
21 the 15th. We have rebuttal testimony, if any,
22 beginning April 27th for four days, through April 30.

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1 The next date I have is the submission of
2 opening briefs, proposed findings, and conclusions on
3 April 22nd. Was there something in between for May
4 4th?

5 MR. SCHAEFFER: You left out March 9th,
6 12th, and 13th for testimony.

7 MR. KLEINBERG: In the direct case.

8 MR. SCHAEFFER: In the direct case.

9 CHAIRPERSON GRIFFITH: 3/9 through --

10 JUDGE DREYFUS: That was March 9 and 12
11 and 13.

12 MR. SCHAEFFER: That's right. That gives
13 us enough.

14 MR. KLEINBERG: All right. Now, the
15 findings? I'm sorry. I missed it. What's the --

16 JUDGE DREYFUS: The --

17 JUDGE GULIN: Ed?

18 JUDGE DREYFUS: Yes?

19 JUDGE GULIN: I'm not sure you had that
20 right. Let me hear what you had. What did you say?
21 You said 16th of June was oral argument; correct?

22 JUDGE DREYFUS: Yes, oral argument, 16th.

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1 JUDGE GULIN: And we have June 1st.

2 JUDGE DREYFUS: June 1 for reply findings
3 and conclusions.

4 JUDGE GULIN: We had May 22nd.

5 JUDGE DREYFUS: May 22nd, opening findings
6 and conclusions.

7 MR. KLEINBERG: I think you said April.

8 JUDGE DREYFUS: I'm sorry.

9 JUDGE GULIN: The only thing I had
10 different was when we started rebuttal testimony. I
11 had May 4th. You had 27th of April. I'm not sure
12 which.

13 MR. RICH: I think we may be agreeable to
14 April 27th.

15 JUDGE GULIN: April 27th is okay?

16 MR. RICH: Norman, are you?

17 MR. KLEINBERG: If everybody else is, I'm.

18 MR. SCHAEFFER: I'm agreeable to it.

19 JUDGE GULIN: Now I think we have it.

20 JUDGE DREYFUS: All right.

21 MR. KLEINBERG: And then opening findings
22 and conclusions would be May 22nd; reply findings,

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1 June 1; final argument, June 16th.

2 JUDGE DREYFUS: Correct.

3 CHAIRPERSON GRIFFITH: Everybody agree to
4 that?

5 JUDGE GULIN: That's fine. If it's oral
6 argument on the 16th, one day.

7 MR. KLEINBERG: Right.

8 CHAIRPERSON GRIFFITH: And we reserve the
9 right because it is one day to limit you to X number
10 of minutes or something, but we'll determine that at
11 that time or prior to that to let you know.

12 MR. SCHAEFFER: Will there be a limitation
13 on opening argument?

14 CHAIRPERSON GRIFFITH: Not on opening. On
15 closing.

16 MR. SCHAEFFER: No. But I'm saying:
17 Would you want a limitation on opening argument?

18 CHAIRPERSON GRIFFITH: Not necessarily
19 unless the parties want to. It's up to you.

20 MR. RICH: Hopefully we won't abuse it.

21 CHAIRPERSON GRIFFITH: Okay.

22 MR. RICH: Judge Gulin, you had asked

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1 about Saturdays. Might I simply make this suggestion
2 again from our side? Hopefully the days we blocked
3 work. Sometimes there's slippage, illness. Who
4 knows?

5 Speaking from this side, we'd be willing
6 as spillover possibilities to work on an occasional
7 Saturday if it means that that allows us to keep the
8 schedule during the direct case.

9 MR. SCHAEFFER: I would, too. And I've
10 just been advised of something in connection with
11 schedule. One of our witnesses and indeed at least
12 one of our first witnesses is going to have trouble in
13 March but would be available February 26th. I know
14 the openings aren't going to take much more than a
15 couple of hours. I can't imagine.

16 So I would be prepared to put one or two
17 witnesses on on February 26th. I don't think they'll
18 be enormously controversial, but I think one of them
19 would be Mary Rogers.

20 And I have to check Baumgartner, whom we
21 have to take up anyway. If that's satisfactory --

22 CHAIRPERSON GRIFFITH: Do you have any

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1 objection to that?

2 (No response.)

3 CHAIRPERSON GRIFFITH: Okay.

4 JUDGE DREYFUS: That's only one day, and
5 that would include cross?

6 MR. SCHAEFFER: Yes. I don't think that
7 --

8 JUDGE GULIN: I want to bring up one other
9 matter. We certainly do want to accommodate all
10 counsel and change venue when necessary to New York.
11 There is one problem that creates for us in terms of
12 expenses. The regulations provide a national per diem
13 for us. I think it's \$124 for a hotel.

14 We have an arrangement with a hotel here
15 that gives us a very nice suite for that. Now, I want
16 you to understand and hope that there will be no
17 objection that we're probably not going to stay within
18 that limit in New York.

19 MR. KLEINBERG: It would be impossible,
20 and we'll survive.

21 JUDGE GULIN: Okay.

22 CHAIRPERSON GRIFFITH: As a matter of

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1 fact, I think we want you to recommend to us where we
2 would stay in New York which would be within walking
3 distance of the places where you anticipate holding
4 the hearings.

5 MR. KLEINBERG: We could do that. I think
6 our firms have special rates --

7 CHAIRPERSON GRIFFITH: Right.

8 MR. KLEINBERG: -- at places that could
9 also ameliorate the expense side.

10 CHAIRPERSON GRIFFITH: We appreciate your
11 participation in reserving accommodations for us.

12 JUDGE GULIN: And perhaps someone would
13 undertake to give us that information. Maybe you
14 could agree among yourselves who would be in touch
15 with us.

16 CHAIRPERSON GRIFFITH: As soon as
17 possible. One other thing I'd like to mention before
18 we leave this topic is --

19 MR. SCHAEFFER: Wouldn't we do it through
20 Gina?

21 CHAIRPERSON GRIFFITH: Yes. That's a good
22 idea.

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1 JUDGE GULIN: That's the best way, yes.

2 CHAIRPERSON GRIFFITH: That is the best
3 way. Thank you.

4 -- is there is a logistics problem with
5 respect to our, at least two of us, coming to New York
6 and staying and one coming in every day and staying.
7 And that is the transportation and storage of
8 materials. It's one thing to get on the Metroliner
9 with your briefcase, another thing to get on with what
10 I saw in the file here.

11 We hope to be able to bring current
12 material necessary for witnesses that you're
13 presenting, that type of thing. But do you anticipate
14 that other than our hotel rooms, there would be
15 facilities where we might store materials?

16 MR. SCHAEFFER: Absolutely, absolutely.

17 MR. KLEINBERG: I think one of the
18 benefits of having the law firms is that we could
19 provide basically rooms also for the panel to put
20 their stuff, to disappear to, to have lunch in,
21 whatever.

22 I mean, I think we all have had these

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1 experiences where we've had movable arbitrations. And
2 that's one of the real benefits I think in doing --

3 CHAIRPERSON GRIFFITH: And you understand
4 that we might be UPSing materials to a storage
5 facility to be available for us when we come to New
6 York.

7 MR. KLEINBERG: Absolutely.

8 CHAIRPERSON GRIFFITH: The other thing
9 that I want to bring up before I let Judge Gulin get
10 in here is the reporting service. He wants to go to
11 New York, I guess. He just smiled. You do intend to
12 have accommodations so that the proceedings must be
13 recorded?

14 MR. SCHAEFFER: Absolutely. He can
15 arrange that with us.

16 CHAIRPERSON GRIFFITH: And who is going to
17 take the responsibility for that?

18 MR. SCHAEFFER: We can do it. We need to
19 use Southern District court reporters or an agreed
20 reporter.

21 MR. RICH: I just want to again for the
22 record indicate that because our client is still

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1 sorting out the logic and logistics of this that I
2 hope at least as a holding matter, this room would be
3 reserved for the days that we have blocked pending
4 working out other understandings about New York or
5 anything else. These are important logistical issues.

6 CHAIRPERSON GRIFFITH: Gina, is this room
7 --

8 MS. GIUFFREDA: We have priority, and
9 there are only two people who can bump you. If we get
10 on there first, they have to work around you.

11 CHAIRPERSON GRIFFITH: That was done one
12 time. The Librarian of Congress somehow feels like he
13 operates this place.

14 But yes, those days are now reserved for
15 this room. And we will notify Gina of any changes.
16 We would like as much advance notice, of course, as
17 possible on the time you want us to have hearings in
18 New York City. And naturally we don't want to be
19 necessarily running back and forth.

20 What else?

21 JUDGE GULIN: I was just going to ask that
22 those storage facilities that we spoke of, if there

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1 could be some type of locked facility that we could
2 keep our personal notes in and that type of thing.
3 That would be helpful. And get us a key perhaps.

4 CHAIRPERSON GRIFFITH: We could actually
5 probably, you know, if you would arrange it or check
6 on it keep the stuff at our hotel, don't you think?

7 JUDGE GULIN: Yes. Just transporting.

8 CHAIRPERSON GRIFFITH: Transporting.

9 JUDGE GULIN: If the hotel is very close
10 proximity, that's not a problem.

11 MR. SCHAEFFER: And we could do that. The
12 White and Case has a separate litigation support
13 center that is in another building where I could
14 provide you with -- I mean, I don't know how that will
15 all sit with everybody else -- secure space with locks
16 and all the rest of it. And you could use the
17 facility for your own conferences.

18 That's at 44th Street and 6th Avenue.
19 It's right near White and Case. It's a little further
20 from Weil-Gotshal and quite far from Hughes-Hubbard.

21 MR. KLEINBERG: Well, I do think this is
22 something that --

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1 MR. SCHAEFFER: We can work out.

2 MR. KLEINBERG: -- we can work out.

3 CHAIRPERSON GRIFFITH: A logistics matter
4 we can work out.

5 MR. KLEINBERG: I think what we're going
6 to do is we're going to work out the venue amongst
7 ourselves, then take care of the logistics that go
8 along with that, like where in New York it will be, at
9 what time, and what will make the most sense in terms
10 of providing accommodations, both hotel and office for
11 the panel.

12 CHAIRPERSON GRIFFITH: So, just to
13 reiterate for the record, at this particular point, we
14 have the schedule worked out; that is, the days. We
15 have reserved this room for all of those days.

16 We understand that you're going to propose
17 to us that certain of these hearings be held in New
18 York City. And we have confirmed that we are
19 agreeable to that. If you will notify us when as to
20 what days you intend to have the hearings in New York
21 City and what days you intend to have the hearings
22 here? Can that be done by --

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1 MR. KLEINBERG: Twenty-sixth is the first
2 day.

3 JUDGE DREYFUS: Of February.

4 MR. KLEINBERG: Yes. Within a week, we
5 can.

6 CHAIRPERSON GRIFFITH: Within a week?

7 MR. RICH: Yes. Not a problem.

8 CHAIRPERSON GRIFFITH: Okay. And, once
9 again, that notification should go directly to Gina
10 here at the Copyright Office.

11 (Whereupon, the panel conferred off the
12 record.)

13 CHAIRPERSON GRIFFITH: We will issue a
14 scheduling order in writing reflecting these days as
15 the hearing days for this proceeding.

16 Does anyone else have any other matters
17 you'd like to address at this time?

18 MR. SCHAEFFER: Yes. I think it's been
19 agreed between the parties on order of proof that it's
20 kind of an exchange, that the Public Broadcasters will
21 argue first and then BMI or ASCAP or ASCAP or BMI
22 depending on their agreement.

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1 And then ASCAP will begin its direct case
2 first followed by BMI and then Public Broadcasters.
3 I think that's our agreement.

4 MR. RICH: Subject to the panel's
5 agreement.

6 JUDGE GULIN: What was that again?

7 MR. KLEINBERG: The opening statements
8 would begin with PBS, probably ASCAP/BMI. But then
9 the presentation of the proof will be ASCAP, BMI, and
10 PBS.

11 CHAIRPERSON GRIFFITH: PBS.

12 MR. SCHAEFFER: I would also ask that we
13 reach an agreement on when as far as we could do it
14 depending on schedule changes and all that sort of
15 thing each of us give the order of witnesses to the
16 other by, say, a week from today if that would be good
17 for everybody.

18 CHAIRPERSON GRIFFITH: That is very
19 helpful to us.

20 MR. SCHAEFFER: That may also affect our
21 scheduling of our venues and things of that sort. But
22 I could certainly do it within a week and if you guys

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1 can.

2 MR. RICH: We might need just slightly
3 beyond you, but we clearly need it from you sooner
4 than you need it from us.

5 MR. SCHAEFFER: Yes. I mean, why don't we
6 try and do it in a week, obviously force majeure
7 notwithstanding or some problem somebody has, nobody
8 has to get rid of.

9 Then I had a question --

10 CHAIRPERSON GRIFFITH: Just a minute. I
11 want to make sure I'm clear on what you have just
12 agreed to on the record that you're going to exchange
13 witness lists a week from today?

14 MR. SCHAEFFER: That is correct, in the
15 approximate order that we're going to call the
16 witnesses.

17 CHAIRPERSON GRIFFITH: In the approximate
18 order? Fine. Okay.

19 MR. SCHAEFFER: Subject to force majeure
20 and --

21 CHAIRPERSON GRIFFITH: I understand.

22 MR. SCHAEFFER: -- the usual caveats.

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1 CHAIRPERSON GRIFFITH: I understand.
2 Next?

3 MR. SCHAEFFER: Then there will be -- and
4 I don't know if this is the time to raise it. Some of
5 us have views that certain portions of the hearings
6 involve confidential data and information. I don't
7 know if this is the time to raise that or if you wish
8 to raise it immediately before the witness or
9 whatever. We have had various stipulations of
10 confidentiality.

11 Speaking for ASCAP, we only have one or
12 two concerns with one or two witnesses. One of them
13 is the ASCAP economist, Dr. Boyle. And the other one
14 may be Mr. Salzman, although I doubt it.

15 JUDGE DREYFUS: Would they like a
16 protective order?

17 MR. SCHAEFFER: Yes, that's what we would
18 suggest. And I think they have been used before in
19 these proceedings.

20 JUDGE GULIN: Did I understand you to say
21 you had stipulations or you didn't have stipulations?

22 MR. SCHAEFFER: We don't. We had a

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1 protective order with respect to discovery. I don't
2 think we've had a protective order -- it may be
3 implicit in it, but we don't have a real protective
4 order.

5 JUDGE GULIN: Can you two agree to it?

6 MR. SCHAEFFER: If it's all right with --

7 JUDGE GULIN: Is there any argument as to
8 --

9 MR. RICH: Copyright off the shelf that
10 was in the province of the panel to determine how to
11 control --

12 CHAIRPERSON GRIFFITH: That's one we have
13 not seen yet. Do you all agree to that?

14 MR. RICH: I think we can reach agreement
15 among counsel.

16 MR. SCHAEFFER: That's fine. If Bruce
17 tells me we can reach agreement, I have no doubt we
18 can. If we don't, then we'll get back to you. We've
19 got plenty of time on that.

20 MR. SCHAEFFER: Yes. We'll try and give
21 it to you within a week.

22 CHAIRPERSON GRIFFITH: If you'll stipulate

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1 to that, we'll issue an order to that.

2 MR. SCHAEFFER: All right. We'll try and
3 get back to you within a week on that.

4 CHAIRPERSON GRIFFITH: Okay.

5 MR. SCHAEFFER: I should think we could do
6 it.

7 CHAIRPERSON GRIFFITH: If you stipulate to
8 it, we will issue an order to reflecting that.

9 MR. SCHAEFFER: And, finally, there's one
10 matter that I know that's still open: the issue of
11 one witness. Mr. Baumgartner was referred to the
12 CARP. He would be also I think a witness on -- all
13 right.

14 Well, in any event, he would be one of our
15 earlier witnesses: Mr. Baumgartner. So we need a
16 ruling on that sooner, rather than later. I don't
17 know if you want to hear argument now. We've briefed
18 it voluminously on both sides.

19 JUDGE GULIN: I can't hear argument now.

20 CHAIRPERSON GRIFFITH: Without reading it,
21 I don't see how we can entertain argument without
22 having even looked at the issue at this point.

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1 MR. SCHAEFFER: I would be willing, then,
2 to submit --

3 CHAIRPERSON GRIFFITH: Couldn't we rule on
4 the basis of what's been briefed and --

5 MR. SCHAEFFER: As far as I'm concerned,
6 yes.

7 MR. RICH: You can. When you read our
8 submission, -- we're the proponents to strike Mr.
9 Baumgartner's testimony -- there is also incorporated
10 in a suggestion as a conditional suggestion that it
11 may be that certain further discovery related to an
12 aspect of his involvement might be appropriate. And
13 I would only ask you to obviously consider that as a
14 component.

15 But we feel the papers are complete from
16 our standpoint.

17 CHAIRPERSON GRIFFITH: He was scheduled
18 early in your case?

19 MR. SCHAEFFER: He should be one of the
20 earlier witnesses, yes. He's --

21 (Whereupon, the panel conferred off the
22 record.)

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1 MR. SCHAEFFER: It wouldn't be on the
2 26th.

3 CHAIRPERSON GRIFFITH: Pardon me?

4 MR. SCHAEFFER: It would not, but if Mr.
5 Baumgartner is going to be disqualified, then I would
6 want to make an application probably for a substitute,
7 which is another issue.

8 (Whereupon, the panel conferred off the
9 record.)

10 CHAIRPERSON GRIFFITH: Ladies and
11 gentlemen, we will rule on that matter on or before
12 February the 20th.

13 MR. RICH: Needless to say, if the panel
14 desires oral argument, we'll make ourselves available.

15 CHAIRPERSON GRIFFITH: If we desire that,
16 we'll request it, and we appreciate that. Yes.

17 Any other matters?

18 MR. RICH: I had one other matter to
19 raise, which is conditional and hopefully won't ripen
20 into a concern. As part of the discovery process,
21 there was a ruling from Mr. Roberts in the Copyright
22 Office several weeks ago, the result of which was that

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1 we received as recently as January 29th from ASCAP
2 some 40 million records in electronic form.

3 That's a huge number. And it is a huge
4 amount of data, which is music-intensive data, which
5 we had hoped to receive back in October, when our
6 similar material came forward. But the fact is it
7 came to us as recently as last week.

8 Our economists are working heroically to
9 work with that data. There have been significant
10 difficulties interpreting it. I don't think that's
11 anybody's fault. It's in the nature of working with
12 large volumes of data. And Mr. Schaeffer made
13 available yesterday someone in-house at ASCAP to begin
14 to help us sort out and understand that data, which
15 was appreciated.

16 What I don't know sitting here today, in
17 all candor, however, is the length of time we will
18 require, having received this data so late, for
19 understanding it. It is a critical component of the
20 ASCAP direct case and that of Dr. Boyle, ASCAP's chief
21 economist.

22 It purports to examine the relative music

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1 intensity of various broadcast media one to the other:
2 public television versus commercial television. It's
3 a very key component.

4 We're hoping -- I can't get optimistic,
5 and I'm not yet pessimistic. We're hoping to be able
6 to use that in a fashion that I will be able
7 meaningfully to cross-examine Dr. Boyle aided by our
8 experts on the time table that we're proposing.

9 But I simply wanted to raise a possibility
10 with the panel today that that volume of data and the
11 lateness of its production could create a circumstance
12 where I might have to come back and indicate to you
13 that we are still not in a position adequately to deal
14 with it.

15 Again, I'm not necessarily saying that's
16 the case. That's not our intention. We hope to have
17 our hands around it. But the very timing of the
18 production creates this distinct possibility.

19 CHAIRPERSON GRIFFITH: Well, I would think
20 that any party could petition the panel for any type
21 of relief at any time. And we would have to consider
22 and determine the matter at that time.

1 MR. SCHAEFFER: Yes. I don't want to
2 dispute anything Bruce says, and I do dispute much of
3 what he says. But, in any event, my present intention
4 is Dr. Boyle will be the last witness for ASCAP. And
5 that should provide them with ample time. We're
6 talking --

7 JUDGE DREYFUS: Is he being offered as an
8 expert witness?

9 MR. SCHAEFFER: Yes, he is.

10 JUDGE DREYFUS: In what field?

11 MR. SCHAEFFER: In the field of statistics
12 and economics. He's somebody -- we will make him the
13 last witness. If there's a problem, we can always
14 defer his cross anyway.

15 JUDGE DREYFUS: Has he submitted a report
16 for the record?

17 MR. SCHAEFFER: Oh, yes. Yes, a very
18 elaborate report. I think it's the underlying data
19 from that report that Mr. Rich is -- rather than get
20 into a debate, I'm sure we can accommodate Mr. Rich.

21 I mean, we've got similar problems with
22 their data also. And I'm sure we can work it out. If

1 we have a problem, I'm sure if I ask Mr. Rich, he will
2 accommodate me.

3 JUDGE DREYFUS: There is an expert witness
4 from your side?

5 MR. RICH: There is. And they had our
6 expert's material timely in October.

7 JUDGE DREYFUS: Okay.

8 MR. RICH: But so be it.

9 CHAIRPERSON GRIFFITH: Anything else from
10 you? I have one other matter.

11 (No response.)

12 CHAIRPERSON GRIFFITH: On our hearing
13 dates, which we have agreed to, we'll start at 10:00
14 o'clock in the morning, take our lunch from 1:00 to
15 2:00. We'll try to end as close to 5:00 as we can.
16 We may take a ten-minute break even in the morning and
17 afternoon. Is that agreeable?

18 MR. RICH: Yes.

19 MR. KLEINBERG: That's fine.

20 CHAIRPERSON GRIFFITH: Are there any other
21 issues or matters to be brought to the attention of
22 the panel at this time?

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(No response.)

CHAIRPERSON GRIFFITH: We will see you at
10:00 o'clock a.m. somewhere on February the 26th.
Please let us know where. The meeting is adjourned.

(Whereupon, the foregoing matter was
concluded at 2:56 p.m.)

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CERTIFICATE

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 Noncommercial Educational
 Broadcasting Compulsory License,
 Docket No. 96-6 CARP NCBRA

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: February 3, 1998

Place: Washington, DC

represents the full and complete proceedings of the
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