

COPYRIGHT ARBITRATION ROYALTY PANEL

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PRE-HEARING CONFERENCE

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In re: Determination of
Statutory License Terms
and Rates for Certain
Digital Subscription
Transmissions of Sound
Recordings

No. 96-5
CARP DSTR

Tuesday
June 3, 1997

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

The above-entitled matter came on for hearing,
pursuant to notice, at 2:52 p.m.

BEFORE:

THE HONORABLE LEONORE EHRIG, CHAIRPERSON

THE HONORABLE THOMAS A. FORTKORT

THE HONORABLE SHARON T. NELSON

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APPEARANCES:On behalf of the Recording Industry Association
of America:

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On behalf of Digital Music Express:

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On behalf of Digital Cable Radio:

FERNANDO R. LAGUARDA, ESQ.
BRUCE D. SOKLER, ESQ.
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APPEARANCES: (continued)On behalf of Muzak:

JON L. PRAED
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ALSO PRESENT:

Jean Kang	Intern
Mavis Masaki	Intern
Tanya Sandros, Esq.	CARP
Amelia Sedano	Intern
Sara Yoon	Paralegal

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

2 (2:52 p.m.)

3 MS. SANDROS: As the first order of
4 business, I would like to welcome you to the Copyright
5 Office today and to this proceeding. Those of you who
6 don't know who I am, I think I met everyone when I
7 came in, my name is Tanya Sandros. I am an attorney
8 advisor for the Copyright Office.

9 First, I would like to introduce our
10 distinguished panel, or at least the two-thirds that
11 are here today. The Chairperson will be Leonore
12 Ehrig. We are fortunate enough to have her back. She
13 was here once before for the DART distribution
14 proceeding, and has agreed to join us once again and
15 preside over this proceeding.

16 On her left, I always get this confused,
17 is Sharon T. Nelson. Judge Nelson also participated
18 in the DART distribution proceeding and has joined us
19 once again for this one.

20 On an administrative note, I just wanted
21 to let you know that as of today, the CARP panel has
22 absolute control of this process and this proceeding.

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1 If you have questions, you really should direct them
2 to the panel. However, if you have too dumb
3 questions, you are welcome to call the Copyright
4 Office and ask the CARP secretary. We have a person
5 who is filling that position. Her name is Vivian
6 Roque-Balboa. You can call her at 707-1916. Roque,
7 R-O-Q-U-E, Balboa, B-A-L-B-O-A.

8 However, we would ask that if you do have
9 filings, motions and pleadings, that you bring
10 everything to the Copyright Office for processing. If
11 you have to take care of a document, make sure all the
12 arbitrators actually get the appropriate copies.

13 If you have a question and you believe you
14 need to contact the arbitrators, you can call me and
15 I will make the arrangements and pass the information
16 on. There is no contact between the parties and the
17 arbitration panel.

18 At this time, unless there are questions
19 from the floor, I would like to turn over the
20 proceeding to the panel.

21 Judge Ehrig?

22 CHAIRPERSON EHRIG: Thank you. We can't

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1 tell the players without a program. Tell me who is
2 who. Can we start over there? Your name and who you
3 represent.

4 MR. MARKS: Steven Marks for the Recording
5 Industry Association.

6 CHAIRPERSON EHRIG: Thank you.

7 MR. RUBEL: Eric Rubel, also for the
8 Recording Industry.

9 CHAIRPERSON EHRIG: Could you spell your
10 last name for me?

11 MR. RUBEL: Sure. It's R-U-B like boy, E-
12 L.

13 CHAIRPERSON EHRIG: Thank you.

14 MR. GARRETT: Bob Garrett for the
15 Recording Industry Association.

16 CHAIRPERSON EHRIG: Thank you.

17 MR. SOKLER: Oh, horizontally?

18 CHAIRPERSON EHRIG: Yes.

19 MR. SOKLER: Bruce Sokler, S-O-K-L-E-R,
20 for Digital Cable Radio, DCR.

21 CHAIRPERSON EHRIG: Thanks.

22 MR. LAGUARDA: Fernando Laguarda for DCR.

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1 CHAIRPERSON EHRIG: Thank you.

2 MS. BUSHYEAGER: Amy Bush Yaeger for DCR.

3 CHAIRPERSON EHRIG: Could you spell your
4 last name for me?

5 MS. BUSHYEAGER: Sure. It's B-U-S-H-Y-E-
6 A-G-E-R.

7 JUDGE NELSON: I'm sorry. I didn't get
8 it. B-U-S-H-Y-E-R?

9 MS. BUSHYEAGER: B-U-S-H-Y-E-A-G-E-R.

10 CHAIRPERSON EHRIG: Thank you.

11 MR. PRAED: Jon Praed, Muzak LP. Praed is
12 P-R-A-E-D.

13 CHAIRPERSON EHRIG: Thanks. The second
14 row on the right?

15 MS. SEDANO: My name is Amelia Sedano. I
16 am a legal intern with the Recording Industry.

17 CHAIRPERSON EHRIG: Thank you.

18 MS. KANG: I am Jean Kang. I am also a
19 legal intern for the Recording Industry.

20 MS. MASAKI: Mavis Masaki, another legal
21 intern.

22 MS. BOCCHI: Linda Bocchi, Vice President,

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1 Recording Industry.

2 CHAIRPERSON EHRIG: Thank you.

3 MR. GREENSTEIN: Seth Greenstein. I am
4 here on behalf of DMX, Inc., Digital Music Express.

5 MS. LUPOVITZ: I am Joni Lupovitz, also on
6 behalf of DMX.

7 CHAIRPERSON EHRIG: Thank you. Musak's
8 counsel from Los Angeles is not here. Right?

9 MR. PRAED: No. Mr. Vradenburg is no
10 longer with Latham.

11 CHAIRPERSON EHRIG: Oh, I see.

12 MR. PRAED: He's now general counsel at
13 AOL.

14 CHAIRPERSON EHRIG: Oh, okay. Okay. I
15 guess the first order of business is what they're
16 calling the cord rule one, payment.

17 We were wondering first if you all could
18 designate a pay agent, the person to whom our bills
19 would be submitted. Have you given any consideration
20 to that?

21 MR. SOKLER: I haven't experienced the
22 drawing, but something that has worked in the past.

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1 MR. GARRETT: Well, we have not talked
2 among ourselves about our method, Your Honor. From
3 the Recording Industry's standpoint, we would have or
4 we would propose the subject discussion here that each
5 side would pay one-half of the cost of the proceeding
6 here. That you would submit a monthly bill and our
7 half of the bill would be paid directly by the
8 Recording Industry Association. That would be our
9 proposal.

10 My backup proposal would be that they
11 would pay for everything.

12 (Laughter.)

13 CHAIRPERSON EHRIG: It is my understanding
14 that that 50-50 split is what has been done in other
15 proceedings.

16 MR. SOKLER: Right. The 50-50 split is
17 fine with our side, Your Honor. Just for
18 administrative simplicity, if -- I'm Mr. Sokler.

19 CHAIRPERSON EHRIG: Yes. I beg your
20 pardon.

21 MR. SOKLER: No problem.

22 CHAIRPERSON EHRIG: Okay.

1 MR. SOKLER: I was going to say for
2 administrative simplicity, why don't you send the
3 Panel's bill to me for our side and we will pay you
4 directly. I'll do the collection.

5 CHAIRPERSON EHRIG: Right. You don't want
6 to name one pay agent who would get our bills and then
7 split them? Would you prefer -- Mr. Griffith has that
8 been done?

9 MR. GARRETT: Garrett.

10 CHAIRPERSON EHRIG: I am saying Griffith.
11 I'll learn the names in a while. Garrett, okay. Has
12 that been done in other proceedings?

13 MR. GARRETT: I know that in the
14 proceeding that has almost finished, the 119
15 proceeding, I believe that each side had their own
16 agent.

17 CHAIRPERSON EHRIG: Oh, okay.

18 MR. GARRETT: There were several copyright
19 owners on one side who all ended up designating one
20 agent to pay their 50 percent.

21 CHAIRPERSON EHRIG: Okay.

22 MR. GARRETT: So it's whatever is

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1 convenient for the Panel. I suspect it works easier
2 if we're responsible for our half and then if they
3 don't pay, you can be mad at them and not us.

4 CHAIRPERSON EHRIG: They didn't accept
5 your alternative proposal.

6 (Laughter.)

7 CHAIRPERSON EHRIG: The only two other
8 things. I also understand that in other proceedings,
9 there has been a guarantee that the payment will be
10 made within 21 days of the receipt of the bills each
11 time. If we can impose that on this group.

12 MR. GARRETT: That's fine.

13 MR. SOKLER: That's acceptable to us.

14 CHAIRPERSON EHRIG: And then I guess you
15 need to know --

16 JUDGE NELSON: All three of us just go to
17 our addresses.

18 CHAIRPERSON EHRIG: Right. I think you
19 need to know the addresses for the three panelists.
20 I can give them to you now if you want to jot them
21 down.

22 JUDGE NELSON: Or they can do it with the

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1 first bill.

2 MR. GARRETT: I would suggest that with
3 the first bill, just tell us where you want us to send
4 it.

5 CHAIRPERSON EHRIG: Okay. That took care
6 of item number one on my list. The second item has to
7 do with the pending motions that the Librarian has
8 said we should deal with. One of them was concerning
9 the legislative history. We have determined that we
10 will delay ruling on that until such time as the
11 witness is here and offers the exhibit. Then we'll
12 take that up.

13 The other -- excuse me?

14 MR. GARRETT: I'm sorry, ma'am. I'm not
15 sure if this is an appropriate time, but subsequent to
16 the order that was issued by the Copyright Office on
17 that matter, the CARP in the 119 proceeding addressed
18 a similar motion concerning legislative history. I
19 would like to bring that motion, the ruling on that
20 motion to the attention of the Panel without argument
21 at this time if that's convenient.

22 CHAIRPERSON EHRIG: Sure. Thank you.

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1 MR. GARRETT: I have three, but --

2 CHAIRPERSON EHRIG: Let's leave one
3 because Judge Fortkort, he'll be here I'm sure. We
4 will receive this and consider it at such time as we
5 rule on the motion.

6 The other part was in regard to the video.
7 Our feeling is that we would just when it's offered,
8 we would probably look at it and give whatever weight
9 to it that we determine it's entitled to.

10 The other pending matter has to do with
11 discovery as to the terms set forth in your various
12 amended direct cases. I recognize that this is a very
13 limited matter and that discovery ought not to be very
14 comprehensive.

15 I was wondering what the parties want, and
16 if I can start with you, Mr. Garrett, hear what you
17 have to say on that.

18 MR. GARRETT: Your Honor, we filed
19 yesterday our testimony of David Leibowitz in
20 addition.

21 CHAIRPERSON EHRIG: Needless to say, we
22 have not read it.

1 MR. GARRETT: Okay. That's all right, as
2 long as I have read it at this point.

3 The other side had submitted a joint
4 filing. They don't have a witness to sponsor, as I
5 understand it. There really is no witness that they
6 are offering to sponsor these terms here.

7 We do have a witness and we have planned
8 to call them as a witness as part of our case here.
9 We're disinclined to do that if we can't have a
10 witness on the other side sponsoring the terms that
11 they have put in. I think that issue of whether there
12 is a witness and who that witness will be affects our
13 response on the nature of the discovery that's
14 necessary and the time of that discovery.

15 CHAIRPERSON EHRIG: Mr. Sokler?

16 MR. SOKLER: Judge Ehrig, I am going to
17 ask Mr. Greenstein to speak first on the subject
18 because I think he had a pending motion on this issue
19 before and then I can follow up to the degree
20 necessary.

21 CHAIRPERSON EHRIG: Tell me your name
22 again?

1 MR. GREENSTEIN: Seth Greenstein.

2 CHAIRPERSON EHRIG: Greenstein.

3 MR. GREENSTEIN: For DMX.

4 CHAIRPERSON EHRIG: Thank you.

5 MR. GREENSTEIN: Thank you, Your Honor.

6 Your Honor, I think there are two different issues at
7 work here. Let me address first the one that was
8 involving the prior motion. In the motion to strike
9 that we filed, that you have addressed earlier with
10 respect to the video tape and with respect to the
11 legislative history, there was also a motion that we
12 had filed in that motion to strike the discussion of
13 additional terms that had not previously been listed
14 in the testimony. That was in fact what gave rise to
15 the March 28 order.

16 In reading the opposition of the Recording
17 Industry to our motion, however, they revealed that
18 one of the terms was in fact not a term at all.
19 Rather, it was a rate, which should according to the
20 rules and our understanding, have been identified from
21 the very start of the proceeding in the direct case.

22 That is part now of Mr. Leibowitz's

1 testimony. It is not just talking about terms, but
2 rather also an alternative formulation of a rate, a
3 minimum flat rate to apply on a per subscriber basis
4 to describe it generally.

5 It is our intention, Your Honor, to file
6 a motion to strike that. Again, on the basis that it
7 is untimely, that we have been in essence sandbagged
8 by their holding a rate in contravention of the rules
9 until the very end. Indeed, the March 28 order of the
10 Copyright Office talks about amending terms, not
11 amending rates and adding rates at the last minute.

12 So we would like the opportunity to
13 address that and if possible, Your Honor, since in
14 particular we just received our copy of the Recording
15 Industry's moving papers this morning at about 10:00,
16 if we could have until Friday to file the motion to
17 address this issue, I would appreciate that time.

18 CHAIRPERSON EHRIG: Yes. That would be
19 satisfactory.

20 MR. GREENSTEIN: Thank you.

21 I think this also has to bear on the issue
22 of sponsoring witnesses. When Your Honors do take a

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1 look at the submissions of the parties, you will see
2 that our submission is rather general because of
3 frankly a jurisdictional issue that has arisen.

4 Concurrent with this proceeding there is
5 a proceeding ongoing for a notice of proposed
6 rulemaking by the Copyright Office. That proposed
7 rulemaking deals with various kinds of notices and
8 recordkeeping obligations that are to be engaged in by
9 the subscription music services pursuant to the
10 statutory license.

11 We made two rounds of submissions. Then
12 we had a series of discussions sponsored by the
13 Copyright Office, roundtable discussions where Ms.
14 Bocchi represented the Recording Industry, and some of
15 us around the table got together and tried to agree on
16 various terms.

17 In the course of those discussions, there
18 were some questions that were raised, rather important
19 questions as to jurisdiction. What was within the
20 jurisdiction of the notice of proposed rulemaking by
21 the Copyright Office, and what was in the jurisdiction
22 of the Arbitration and Royalty Panel?

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1 Specifically, some issues that were
2 included there were to whom the payments should be
3 made? Should there be a statement of account that
4 goes along with it? Should there be proposed terms
5 for auditing? Should they be proposed by the
6 Copyright Office or by the Panel? Those issues still
7 unfortunately remain unresolved.

8 In light of that, the submission of the
9 services really dealt only with an identification of
10 these various issues that were on the subject to the
11 cross-jurisdictional dispute, saying we recognize
12 these issues exist but we think it's important first
13 to resolve the jurisdictional aspects.

14 Generally speaking, the kinds of terms
15 that we talk about I think are not those that would
16 need sponsoring witness per se. They are really more
17 on policy questions as to what kind of protections
18 ought to be included with respect to audits or how
19 often royalties are to be paid. It's not really the
20 kinds of things that are susceptible to factual
21 testimony per se. They are really more in the nature
22 of policy. That's why we do not present it as an

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1 amendment to testimony that would require a sponsoring
2 witness.

3 CHAIRPERSON EHRIG: If I can just address
4 this latter argument that you made. I took a quick
5 look this morning at what was submitted and I saw this
6 argument. I spoke with the Copyright Office. They
7 indicated that they would issue a very brief statement
8 indicating that there is no jurisdictional overlap and
9 why.

10 So I think that I can't answer your
11 question, but they can and they said they will. So
12 that should take care of that part of it.

13 But I guess until you get that, you don't
14 know what you are talking about, do you?

15 MR. GREENSTEIN: That has been our
16 problem. Again, this is something we had sort of
17 hoped that the office would issue a few months ago.

18 CHAIRPERSON EHRIG: Right. Well this
19 isn't going to resolve that rulemaking proceeding. It
20 is just going to say wherein that rulemaking
21 proceeding does or does not impact on this.

22 Mr. Sokler?

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1 MR. SOKLER: As I think the colloquy
2 indicates, we are in some level of complicated blocks
3 here. Your Honor is at a disadvantage because you
4 have not had a chance to read either Mr. Garrett's
5 submission or ours in any great detail.

6 I agree with Mr. Greenstein obviously
7 because we're part of the submission. We didn't think
8 our terms really required a witness. But if Mr.
9 Garrett feels he needs discovery, I think he can
10 direct discovery at the three parties and get that
11 taken care of. If Your Honors then decide that we
12 also need a witness to sponsor it, obviously one of
13 the current witnesses can bring that under their
14 testimony as well.

15 CHAIRPERSON EHRIG: I think maybe you are
16 going backwards. I think you need the witness and
17 then the discovery rather than the other way around.

18 MR. SOKLER: I think the discovery, since
19 the discovery is reasonably limited, Judge Ehrig, it's
20 basically not depositions or anything like that, but
21 looking for additional documentation underlying it.
22 So I don't think it necessarily has to be sequenced

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1 that way, but if Your Honors come to want to sequence
2 it a certain way, we will obviously follow that.

3 I also have -- I did receive Mr. Garrett's
4 filing last night. If Mr. Greenstein's motion to
5 strike is not granted, I know I will want to do some
6 discovery as well. I know that Mr. Garrett is eager
7 to have the case move along. I don't disagree with
8 that notion either. It may be that we need to sort of
9 push ahead simultaneously, even if it's a little bit
10 inefficient so that we can resolve the status, the
11 witness issue, and the discovery all at once.

12 I was going to propose that the two sides
13 need to have discovery. We ought to file it by the
14 end of the week with a short turnaround time. Then we
15 can move on.

16 CHAIRPERSON EHRIG: Mr. Garrett?

17 MR. GARRETT: I would just add, Your
18 Honor, that my principal concern here is that both
19 sides be treated the same way on this issue. We had
20 understood the ruling of the Copyright Office to
21 require us to submit terms and that would be sponsored
22 by a witness.

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1 If we are going to have a witness and make
2 that witness available for cross examination, then I
3 believe that a witness should likewise be made
4 available for cross examination by the other side.

5 I do not agree with the characterization
6 that the proposal that they have made here are
7 proposals that do not require a witness. For example,
8 there are as you will see when you read the documents,
9 that there are claims of a burden and expense such
10 that I think are certainly susceptible for discovery
11 and cross examination.

12 With respect to Mr. Greenstein's argument
13 about we have submitted a rate rather than term, I
14 will basically address that when I see the motion.
15 But let me just say that when they filed their motion
16 before the Copyright Office months ago, they directed
17 the Copyright Office's attention specifically to the
18 portions of our testimony where we talked about the
19 need for a minimum rate. We explained that we needed
20 a minimum rate. We said that on the record or the
21 facts that were available to us, it was not something
22 that we could calculate. We would need discovery of

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1 them before we could make those types of calculations.

2 We got that discovery. We have made those
3 calculations. We have submitted the information now
4 exactly as they have requested us to do. I think
5 obviously what we have done is in accord with what the
6 Copyright Office contemplated. Beyond that, I'll say
7 my response when I received their motion, it still
8 doesn't resolve the question I think that started us
9 aloud here, which was what discovery and what's going
10 to be the timing of that discovery.

11 I am a little concerned that if we have to
12 wait until a motion is filed, we respond and you rule
13 here, that it's going to delay the ultimate receipt of
14 this evidence on terms.

15 CHAIRPERSON EHRIG: Okay. I think what we
16 have to do is perhaps bifurcate this hearing, to go
17 ahead with the direct testimony that we have and at
18 the end of that, to look towards this matter of terms.

19 But in the meantime, I would like to have
20 that motion to strike by Friday as you indicated.
21 Give Mr. Garrett an opportunity to respond to it. But
22 I would also say that I believe in the interest of

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1 fairness, that you do have to have a sponsoring
2 witness to introduce whatever terms that you are going
3 to submit.

4 I think probably we're going to have to
5 wait until the motion to strike and we answer before
6 we establish a discovery timetable. Okay?

7 JUDGE NELSON: But we are always amenable
8 to the parties coming on their own and deciding
9 something that would work quicker than what we can
10 devise.

11 CHAIRPERSON EHRIG: Absolutely.

12 JUDGE NELSON: So, Mr. Garrett, you
13 mentioned that you think this is going to be too slow.
14 So if you have some suggestions of some other method
15 that we can use to move it along, we are certainly
16 ready to hear it. We're certainly not against you
17 talking among yourselves and coming up with something
18 great.

19 MR. GARRETT: I am happy to talk with him,
20 Your Honor, on any issue.

21 CHAIRPERSON EHRIG: All right. Then the
22 next thing that we have to discuss is the schedule for

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1 the hearing. Mr. Garrett proposed that the hearings
2 start a week from today or a week from yesterday on
3 the ninth with his opening statement and the direct
4 testimony of his witnesses, followed by the
5 presentation of the other parties' cases.

6 We are inclined to agree that that's a
7 good idea to get started, because we are always
8 looking towards the end of this where we are going to
9 have to come up with a decision. We need to get the
10 hearing underway so we can go forward with that.

11 First, let me ask you two questions. You
12 are all called the subscribing parties. Is that the
13 way -- subscribing services?

14 MR. SOKLER: I think that's one of the
15 easy ways to refer to us.

16 MR. GREENSTEIN: Subscription service.

17 MR. GARRETT: The exploiters.

18 (Laughter.)

19 CHAIRPERSON EHRIG: And what do we refer
20 to you all, just RIAA?

21 MR. GARRETT: RIAA, the Recording
22 Industry.

1 CHAIRPERSON EHRIG: Okay. So it's the
2 Services on the one hand and the Recording Industry on
3 the other. Okay.

4 As far as the Services are concerned, what
5 order will your witnesses be presented, will your
6 cases be presented?

7 MR. SOKLER: Your Honor, we believe, and
8 some of this may depend on some of the scheduling
9 details we'll discuss in the next couple of minutes,
10 that DCR will present first, then DMX, then Musak, and
11 then the jointly sponsored witness, Dr. Woodbury.

12 CHAIRPERSON EHRIG: How do you spell his
13 name?

14 MR. SOKLER: Wood, bury the man, one word.
15 W-O-O-D-B-U-R-Y.

16 (Laughter.)

17 CHAIRPERSON EHRIG: Oh, okay. I didn't
18 know whether you were telling me what do with him or
19 what.

20 (Laughter.)

21 CHAIRPERSON EHRIG: Okay. So that is the
22 order.

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1 Now what are your views as to the June 9
2 schedule that has been proposed?

3 MR. SOKLER: We obviously responded to Mr.
4 Garrett's letter on a couple of different levels. One
5 was some of the issues that we've now resolved in
6 terms of motions to strike and discovery, which I
7 don't think delays it.

8 The second piece is that while we have
9 tried to keep schedules very very open, there have
10 been certain encumbrances that we have tried to talk
11 back and forth, but we need to sort of work out.

12 The third level that was a problem which
13 I think we also need to discuss in this conversation
14 is Mr. Garrett's letter asserted and assumed not just
15 the order of witnesses, but how much time each of the
16 witnesses might take in terms of cross, et cetera.

17 CHAIRPERSON EHRIG: Well, if I can stop
18 you on that. We would start on the ninth. We would
19 hope to follow his list of witnesses, but if cross
20 examination, redirect take longer then it's just going
21 to have to take longer. So that is no problem.

22 MR. SOKLER: Then there is a question of

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1 attempting to coordinate on our side so we don't
2 duplicate witnesses, et cetera. We have tried to
3 divide up the prime cross examination requirement.
4 Just to give you sort of one example of the way the
5 timing seems to lie, one of the witnesses that Mr.
6 Garrett had scheduled for Thursday the 12th happens to
7 be my witness. I just ended up with a conflict where
8 I can not do that witness on the 12th. I think we
9 would hope that there be some way to accommodate
10 schedules in that regard or were you through.

11 CHAIRPERSON EHRIG: Let me stop you right
12 there.

13 Mr. Garrett, can you maybe juggle the
14 witnesses? Is the order carved in stone?

15 MR. GARRETT: Well, I tried to be as
16 accommodating as I can to the other side, Your Honor.
17 But the fact of the matter is is we would like to
18 present our witnesses in a particular order. I think
19 we have structured the case so that it goes in a
20 certain way. To the extent that we can, subject to
21 the Panel's convenience and requirements on your side,
22 I would very much like to follow that order.

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1 JUDGE NELSON: I guess I am a little lost.
2 Is it inconvenient because you are not planning to be
3 here that day?

4 MR. SOKLER: I have a conflict already on
5 my schedule the 12th and the 13th. We might try to
6 change up our order of witnesses, though we are not
7 being given a heck of a lot of time as to who is to do
8 what because obviously we have tried to get ready
9 before we came before Your Honors this morning. It
10 may be possible that what he thought takes four days
11 will take three, and the problem won't come up. But
12 obviously, this is a subject that I thought we had
13 addressed and resolved.

14 We're not trying to ruin Mr. Garrett's
15 presentation, but again, we did not express a view to
16 Mr. Garrett before he submitted your letter to Your
17 Honor about either the order of witnesses, the amount
18 of time, how many witnesses we should have, whether
19 there just should be Mr. Garrett's opening or whether
20 we should all have openings on the morning of the
21 ninth, which might make a little more sense, and just
22 sort of have to work out that schedule this afternoon.

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1 Do you have anything you want to add to
2 that?

3 MR. GREENSTEIN: No. I don't think so.
4 I think one of the last points that Mr. Sokler raised
5 though was important though. From our perspective, we
6 would prefer if possible that all opening statements
7 be heard at the same time, rather than doing
8 sequentially before each set of witnesses testifies.

9 CHAIRPERSON EHRIG: I think that makes
10 sense.

11 JUDGE NELSON: Then let's find out how
12 long your planning for opening? How long was your
13 opening going to be, Mr. Garrett?

14 MR. GARRETT: It won't be long. About an
15 hour, Your Honor.

16 JUDGE NELSON: About an hour?

17 MR. GARRETT: Yes.

18 MR. SOKLER: Thirty minutes.

19 JUDGE NELSON: Thirty minutes?

20 MR. SOKLER: I am going to sing that song.

21 JUDGE NELSON: Thirty minutes.

22 MR. GREENSTEIN: I would have said in the

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1 neighborhood of 20 to 30 minutes.

2 CHAIRPERSON EHRIG: Let's give each party
3 30 minutes to make an opening statement.

4 JUDGE NELSON: Anybody need more? I mean
5 you are just going to have two on your side? Are you
6 going to have three, four?

7 MR. PRAED: Musak will have a short
8 opening statement.

9 JUDGE NELSON: Also 30 minutes, an hour?

10 MR. PRAED: There will be more than that.

11 CHAIRPERSON EHRIG: Let's do 30 for
12 everybody unless you end up in the middle of a
13 sentence, then maybe you can go on.

14 JUDGE NELSON: We would just like to start
15 off with finding out what people want before I impose
16 something else.

17 MR. GARRETT: Your Honor, is that 30
18 minutes per side or is it -- is it 30 minutes for us
19 and 90 minutes for them?

20 CHAIRPERSON EHRIG: You have got a point
21 there.

22 MR. PRAED: I doubt I'll be using nearly

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1 the 30 minutes. Five or 10.

2 JUDGE NELSON: Do you want an hour and 15
3 minutes?

4 MR. GARRETT: I don't think I can talk
5 more than an hour straight.

6 JUDGE NELSON: Why do I have difficulty
7 believing a lawyer saying that?

8 MR. GARRETT: All right. You have
9 convinced me. I will take an hour and 15 minutes.

10 CHAIRPERSON EHRIG: Let's give each side
11 an hour and you can break up your hour as you see fit.
12 All right?

13 MR. SOKLER: Fine.

14 CHAIRPERSON EHRIG: And I think we should
15 go ahead with the order of the witnesses as Mr.
16 Garrett proposed. Then you can kind of work it out,
17 okay, amongst yourselves as best you can to handle
18 that.

19 Now then can we immediately upon finishing
20 that case start up with DCR's?

21 MR. SOKLER: Starting -- since our
22 witnesses, Your Honor, are business people, it would

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1 probably be better if we could just no matter what
2 sort of establish starting the 16th, the following
3 Monday, as opposed to having them come in from out of
4 town and seeing when things --

5 CHAIRPERSON EHRIG: Okay. So that would
6 be Monday the 16th. Now you are DCR?

7 MR. SOKLER: DCR.

8 CHAIRPERSON EHRIG: Okay. How many
9 witnesses do you propose?

10 MR. SOKLER: We have three witnesses, Your
11 Honor.

12 CHAIRPERSON EHRIG: Three witnesses. And
13 will you prior to the conclusion of Mr. Garrett's case
14 give us a list of your witnesses and the order in
15 which they will testify?

16 MR. SOKLER: Yes.

17 CHAIRPERSON EHRIG: So we will know who
18 will come in.

19 Then DMX, how many witnesses?

20 MR. GREENSTEIN: Yes, Your Honor. We have
21 two witnesses.

22 CHAIRPERSON EHRIG: Two. Okay. And if

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1 you can have your witnesses here, you can judge by
2 what is going on when to have them here. If we have
3 to lose a couple of hours for you to start the next
4 day or something we can work that out.

5 MR. GREENSTEIN: Thank you, Your Honor.

6 CHAIRPERSON EHRIG: And Musak will have
7 how many witnesses?

8 MR. PRAED: We will have one witness, Your
9 Honor.

10 CHAIRPERSON EHRIG: Okay.

11 MR. PRAED: One potential problem. Our
12 one witness is Bruce Funkhouser. He is unavailable on
13 June 19th, which is that Thursday.

14 CHAIRPERSON EHRIG: Again, maybe you can
15 work that out with your colleagues and see. Just be
16 sure to advise us as to what you do.

17 JUDGE NELSON: Maybe what we need to do is
18 find out do you have any idea how long your witnesses
19 are going to take?

20 MR. SOKLER: In terms of direct, it's
21 easy. I think we need to consult with Mr. Garrett on
22 a non-committal estimate of cross.

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1 JUDGE NELSON: You'll only see that when
2 he crosses your first witness. I mean before that
3 happens, I am not sure you will understand anything on
4 that.

5 How long do you think they will take on
6 direct?

7 MR. SOKLER: I think our three witnesses
8 take no more on direct than four hours total.

9 CHAIRPERSON EHRIG: And DMX's two
10 witnesses?

11 MR. GREENSTEIN: The same, Your Honor.

12 MR. PRAED: I would anticipate Mr.
13 Funkhouser would be half an hour, 45 minutes.

14 CHAIRPERSON EHRIG: Okay. So while all
15 that is going on, the matter of the terms will be --
16 motions will be made and the answers will be filed.
17 Then hopefully, you all could get together and come up
18 with some schedule that you can present to us for
19 discovery, bearing in mind that it should be very
20 narrow, that which is being discovered. Okay?

21 Now --

22 MR. GARRETT: Your Honor?

1 CHAIRPERSON EHRIG: Yes, sir.

2 MR. GARRETT: Just that I understand, the
3 contemplation then is that our case will go on
4 entirely during the week of the ninth. That will be
5 followed by the Service's case?

6 CHAIRPERSON EHRIG: Yes.

7 Just a couple of little announcements. We
8 determined that the hearing should start at 10:00 and
9 go until 1:00, at which point we will break for lunch,
10 come back at 2:00. Then conclude at 5:00. We'll take
11 15 minute breaks at 11:30 and at 2:30. All of this of
12 course is subject to change for the convenience of the
13 parties or if the witness is almost finished or some
14 such thing.

15 I have asked the reporter if at the end of
16 each day if she could prepare a list of the exhibits
17 that were offered and received, and present it to the
18 parties the first thing the following morning so we'll
19 always know what the status of the record is, and
20 we'll always be able to see if there are any loose
21 ends and take care of them then rather than three
22 months later when nobody remembers what it was all

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1 about.

2 In so far as the protective orders that
3 have been granted, if at any point the parties desire
4 the hearing to be closed because of that which a
5 witness is going to testify to, please let us know in
6 advance so we can accomplish that.

7 JUDGE NELSON: Excuse me. Actually, Ms.
8 Sandros said she needs to know quite a bit in advance
9 because she needs to give public notice as to these
10 hearings and she needs to put it in that public notice
11 as to which hearings. We don't know yet what it is,
12 so I don't want to just say whatever you say goes, but
13 maybe. But Ms. Sandros needs to know what's going to
14 be public and what's not so she'll have that for her
15 public notice to this hearing.

16 MR. GARRETT: Your Honor, I know this
17 issue has come up in past proceedings. Normally it is
18 very difficult to know in advance. I mean often what
19 happens is that the witnesses confronted during cross
20 examination with a document that is marked restricted,
21 you may or may not know that you are going to use that
22 document until the time it is actually used.

1 The procedure that had been followed was
2 simply that the chairman would designate that that
3 portion of the transcript would be marked as
4 restricted and treat it just as any other kind of
5 restricted document, but notice was not given in past
6 proceedings in the Federal Register. That is a
7 terribly cumbersome process.

8 If there has been a lot of material that
9 had been marked as restricted at hearings, it is
10 likely that you may go any days without having
11 something like that come up.

12 JUDGE NELSON: Do you have it the reverse
13 way? Do you have any witnesses that you know ahead of
14 time that what they are really going to be dealing
15 with primarily is going to be restricted?

16 MR. GARRETT: Well, we certainly know that
17 because they have filed a number of, certain of their
18 witness testimony under seal, we can certainly
19 contemplate that when their witnesses testify that
20 they will be under, portions at least of the
21 transcript will be under seal. Consequently, portions
22 of the transcript on cross examination will also be

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1 under seal. There may be public portions.

2 Often what has happened is you get these
3 transcripts that 50 pages are public, and then the
4 next 25 pages are not, and then 50 pages are. That's
5 just the way it has worked.

6 The goal has always been, at least in the
7 past, to try to keep as much of this public. It's
8 certainly a lot easier to handle. Among other things,
9 when you file post-findings at the end of the
10 proceeding, you then have to designate those portions
11 of the findings that are confidential or restricted
12 and all that sort of thing.

13 CHAIRPERSON EHRIG: I guess we are going
14 to have to leave it to you all to tell us what is and
15 what is not.

16 MR. SOKLER: Right. I agree with Mr.
17 Garrett that it seems very foreseeable that much of
18 the second week will contain portions of the day,
19 that's when the Services, that will contain
20 confidential information. With respect to the first
21 week, I don't think we filed any direct testimony
22 under seal.

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1 MR. GARRETT: That's correct.

2 MR. SOKLER: So it will be somewhat more
3 episodic.

4 CHAIRPERSON EHRIG: Right. Well I will
5 pass that along to Ms. Sandros, and let her do what
6 she feels is necessary.

7 Okay. Is there anything else that we need
8 to go over today?

9 One other thing. At the end of all of the
10 direct cases, we will then set up a schedule for any
11 rebuttal material that you all want to submit and any
12 further testimony. But that is down the road.

13 JUDGE NELSON: Let me understand. So at
14 this moment, we are all in agreement that we will go
15 those two weeks in June. I just need to know. I have
16 a few cases that are pending at the moment, people
17 waiting to be called to tell them what the schedule is
18 going to be.

19 So I am trying to figure out, would it be
20 your intent then, assuming we will then go to the
21 terms portion of the hearing, that we will break for
22 a week for you to comply with other things and then

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1 come back in July for another week of hearing? I mean
2 if that is what we're going to do, I suspect with
3 three panelists here and all the lawyers in this room
4 we maybe need to at least do some kind of general
5 scheduling for that so that we don't come up in a week
6 from now with too many conflicts in being able to
7 schedule this.

8 MR. SOKLER: Again, I'll defer somewhat to
9 the other counsel. But it sounds right, Judge Nelson,
10 that maybe we ought to assume that the week of the
11 23rd won't occur and that we reserve a couple of days
12 before the fourth of July, the 30th, the first. I
13 can't believe that we are likely to have many days of
14 hearings on the terms. But if people want to reserve
15 it in their schedule.

16 Mr. Garrett's original proposal had us
17 finish with his case Thursday the 12th. We could
18 still end up doing that, and we get to miss Friday the
19 13th. We'll have to see how that plays out. Then
20 we're going to start our side's case the week of the
21 16th. My guess is it will take much, if not most of
22 that week.

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1 JUDGE NELSON: Mr. Garrett? We need to
2 figure out how to schedule.

3 MR. GARRETT: As I understand, Your Honor,
4 we're talking simply about coming back to finish up on
5 the terms.

6 JUDGE NELSON: Well you need the time to
7 do the discovery which we're hoping since we're
8 bifurcating it, that you will be able to do that to
9 some extent simultaneously. We certainly respect the
10 fact that you will want to do some witness preparation
11 or whatever. So I don't know. We don't know
12 anything. It's the one clear thing we can say at this
13 moment. We have read just the motions. We have not
14 read the rest of the file.

15 MR. GARRETT: There are really two things
16 going on here. One is rebuttal, which as I know Your
17 Honor said, we would decide at the end of this case.
18 That makes perfect sense.

19 But one has to kind of figure in that
20 needs to be trying to actually submit the rebuttal, to
21 prepare the rebuttal testimony, submit it. That
22 testimony will also be subject to discovery.

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1 Technically, it is subject to the same types of
2 discovery and prehearing motions that apply to our
3 direct cases that were filed many months ago. So some
4 time needs to be set aside to go through that sort of
5 pre-hearing process.

6 Then the amount of time for hearings on
7 that rebuttal testimony of course vary, depending upon
8 how many witnesses the parties have.

9 CHAIRPERSON EHRIG: Okay. Well let's work
10 first on the one on the terms. How many witnesses do
11 you think you are going to need on terms?

12 MR. GARRETT: We have only submitted one
13 witness.

14 CHAIRPERSON EHRIG: But the time? Someone
15 says one person. I have had one person on the stand
16 for a week. I mean, you know.

17 MR. GARRETT: We have one witness who I
18 anticipate his direct will go about, a little more
19 than an hour.

20 MR. SOKLER: It is very unlikely I would
21 think the terms hearing would take more than two days.

22 JUDGE NELSON: Okay. Your suggestion of -

1 - so do you want to schedule that one at the moment to
2 start on the 30th of June, which would be just one
3 week off, or start that on Tuesday, which was the
4 first?

5 MR. MARKS: I think the Panel is in favor
6 of the second.

7 JUDGE NELSON: Oh, the second.

8 CHAIRPERSON EHRIG: Okay. Anything else
9 that we need to -- I'm sorry.

10 JUDGE NELSON: Let's finish the rebuttal
11 thing.

12 CHAIRPERSON EHRIG: I don't think we can.

13 MR. SOKLER: Is it worthwhile to sort of
14 put a pin in a week in case there is a rebuttal
15 hearing just to see?

16 JUDGE NELSON: That would be my
17 suggestion.

18 CHAIRPERSON EHRIG: Okay.

19 JUDGE NELSON: Is that we just sort of see
20 if we can just sort of -- it's just a lot of people to
21 try and make sure that everybody makes sure they can
22 be here when it's time.

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1 MR. SOKLER: I am always a little nervous
2 making this sort of suggestion, but I am looking at
3 the calendars that have floated around thus far. The
4 one clean week still is the week of July 28th, at
5 least according to the schedule I have. Maybe that is
6 far enough in advance to stick a pin in by?

7 MR. GARRETT: That would I think be --

8 JUDGE NELSON: Could I encourage the week
9 of August 4?

10 CHAIRPERSON EHRIG: I am going to be in
11 Hilton Head for the first two weeks of August, so
12 we're gone.

13 MR. SOKLER: We had that X'd out on our
14 calendar. That's why I like the week before.

15 JUDGE NELSON: Well I'll tell you what I
16 have. I have actually a hearing that has been
17 scheduled. It says on the calendar, it says that
18 there is a possibility. I have already heard two
19 weeks of the case. The parties, there is a lot of
20 money at stake but the parties I think are now after
21 two weeks in a little bit better position towards
22 settlement. I think they are going to settle, but

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1 they have not included me in the settlement part, so
2 I have no idea how close they really are.

3 But my guesstimate would be that they
4 would settle. But at the moment, that case actually
5 is from the 14th to the 31st. The 30th and the 31st
6 was supposed to be in May. They moved those two dates
7 over. I think it's part and parcel to the fact that
8 they are negotiating settlement.

9 So I would tend to say there is an 80
10 percent shot that week will be free for me, but --

11 CHAIRPERSON EHRIG: Is this the week of
12 July 28th you are talking about?

13 JUDGE NELSON: Right. It's the 30th and
14 31st of that week that's --

15 MR. SOKLER: Why don't we still pin it at
16 realizing that you have an ability to blow it up.
17 We'll be --

18 JUDGE NELSON: I'm being honest about my
19 calendar.

20 MR. SOKLER: We'll be a lot smarter when
21 we get closer.

22 JUDGE NELSON: I understand. I just have

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1 a sense of guilt if it falls apart here. So maybe
2 what we need is a fallback position. I mean because
3 I don't rule their settlement so I can't say.

4 So we'll pencil that week. I assume you
5 want the whole week for rebuttal?

6 MR. GARRETT: It is hard to say now, but
7 it would be good I think to schedule a week.

8 JUDGE NELSON: I just want to schedule at
9 least as much time as opposed to looking for more time
10 afterwards. So if at the least what we do is to say
11 that week, so it's from the 28th to the first.

12 MR. SOKLER: Why don't we do that because
13 we'll all have the incentive not to send Judge Ehrig
14 off on vacation with more to do.

15 JUDGE NELSON: She'll be happy about that,
16 but let's assume that that case does not settle. So
17 the choices are as follows. If that case does not
18 settle, and I actually need those two days which these
19 particular lawyers will use them, I could give the
20 28th, 29th and the first. It's just two days that
21 week that are booked. It's the 30th and 31st. So we
22 could try to get it in in those three days.

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1 Or we could take an alternate week of
2 August 18th.

3 MR. GARRETT: Would it be possible to do
4 a Saturday session?

5 JUDGE NELSON: Absolutely.

6 MR. GARRETT: So we could do the --

7 MR. SOKLER: The first and the second, if
8 necessary?

9 JUDGE NELSON: The first and the second.

10 MR. SOKLER: That way we could --

11 CHAIRPERSON EHRIG: I'm gone on the
12 second.

13 MR. SOKLER: You're gone?

14 CHAIRPERSON EHRIG: Yes.

15 JUDGE NELSON: Well how about the other
16 side.

17 MR. GARRETT: The 26th.

18 MR. SOKLER: The 26th.

19 JUDGE NELSON: The 26th.

20 CHAIRPERSON EHRIG: Yes.

21 JUDGE NELSON: I am of course not supposed
22 to be here, but you see I break all my plans just to

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1 be here for hearings. I was supposed to be in
2 Chicago, but okay. So we use the 26th?

3 MR. SOKLER: If we have to.

4 JUDGE NELSON: Okay. I just need to know
5 because I don't want to commit to other cases and then
6 have this problem. When they asked us originally for
7 this case, they asked me to hold the whole month of
8 June, which is what I have been doing.

9 MR. SOKLER: I think against these
10 parameters, we ought to be smart enough to make it
11 work.

12 JUDGE NELSON: I'm sorry. Just one more
13 question. That is, is that I have actually committed
14 to go to a wedding in Detroit on Saturday the 21st.
15 I just need to have some sense of how early a plane I
16 can go for on June 20th.

17 CHAIRPERSON EHRIG: Why don't we just kind
18 of --

19 JUDGE NELSON: I have to book my flight,
20 so that's why.

21 Well, here he arrives.

22 We should make it clear that all the

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1 rulings that have been given from the bench so far
2 today were based on conference that was done yesterday
3 after the Panel had a chance to read all the motions.
4 Judge Fortkort was part of all that, even though he
5 just now got here.

6 CHAIRPERSON EHRIG: I would just like to
7 introduce Judge Fortkort, our missing link. We have
8 gone over mostly everything that we had discussed in
9 that conference yesterday. Everyone went along with
10 everything we said. Not that they had any choice, but
11 --

12 JUDGE NELSON: We're just discussing on
13 June 20th. So we --

14 MR. PRAED: Do you have a particular
15 flight that --

16 JUDGE NELSON: I don't. I'll tell you as
17 soon as I find it. I need to work my way backwards to
18 say okay, I can try a flight out of National from --

19 MR. SOKLER: I think you ought to make
20 your reservation.

21 CHAIRPERSON EHRIG: And tell us.

22 MR. SOKLER: Basically we're talking about

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1 six fact witnesses are businessmen. The good news is
2 the last witness in order is an economist who is here
3 in town. If necessary, we'll work out something
4 again, to make it all fit.

5 JUDGE NELSON: Or we could start earlier
6 that day.

7 MR. SOKLER: Exactly. Does that make
8 sense, Bob?

9 MR. GARRETT: Sure. I mean if it's Dr.
10 Woodbury, we're going to be the ones cross examining
11 when you want to go to Detroit. So I suppose that
12 would be an incentive for us to move things along.

13 JUDGE NELSON: As I say it's a wedding.
14 I mean for other things as I said, I have a trip to
15 Chicago I'll cancel that one, that's one thing, but I
16 have to go to Detroit. Something sounds wrong with
17 that, but I'll give up Chicago for Detroit.

18 MR. GARRETT: Would you like us to get you
19 out of that?

20 JUDGE NELSON: I think I have to go. But
21 anyway, so I need to just figure out how late in the
22 day. We have said we would go until 5:00. See

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1 because usually a normal hearing, the last day, I mean
2 you go until 10:00 at night just to finish it to wrap
3 it up. So my suggestion would be, and I realize this
4 is an imposition on the rest of the group, but if we
5 could go later earlier in the week if we're starting
6 to run --

7 MR. SOKLER: Right. You make your
8 reservation sometime for Friday afternoon whenever.
9 We'll have a better feel for what tempo we'll require
10 to make that work. We'll just do it.

11 JUDGE NELSON: Okay. It sounds like we
12 have scheduled most of what we need to. Mr. Fortkort
13 be part of something here.

14 CHAIRPERSON EHRIG: Okay, well if there's
15 nothing else then we will adjourn until Monday.

16 MR. SOKLER: Monday at 10:00.

17 CHAIRPERSON EHRIG: Right.

18 JUDGE NELSON: Oh I'm sorry. One thing.
19 You said you were going to file your motion on Friday?

20 MR. GREENSTEIN: That's correct, Your
21 Honor.

22 JUDGE NELSON: What time on Friday?

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1 Friday is a long day.

2 MR. GREENSTEIN: Close of business or
3 would you rather have it by noon time? What's your
4 preference?

5 JUDGE NELSON: I am not sure it's our
6 preference, because we have to wait until we hear the
7 response to it I think.

8 MR. SOKLER: And that motion is on the
9 second bifurcated piece anyway, so we're not going to
10 have to do anything on Monday on that subject.

11 MR. GARRETT: I guess one thing I am a
12 little unclear of is are we to proceed with discovery
13 while this motion is pending? I guess we would have
14 to do that if we are going to have -- since we have
15 already scheduled the date of testimony.

16 CHAIRPERSON EHRIG: You mean the June 30
17 date you are talking about?

18 MR. GARRETT: Yes, ma'am.

19 JUDGE NELSON: Are you asking the question
20 that we might in fact strike it so that you wouldn't
21 then have any discovery to do?

22 MR. GARRETT: Well, I was hoping that

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1 wouldn't be the case.

2 JUDGE NELSON: So I would go on the
3 assumption, your best assumption to go forward and
4 discover what? I must be missing something. I mean
5 you are thinking that we are going to grant their
6 motion to deny your --

7 MR. GARRETT: No. All I am saying is we
8 just need to work out. I am happy to work out with
9 them a schedule for discovery. That's the only --

10 JUDGE NELSON: Oh, the schedule of
11 discovery.

12 MR. GARRETT: When the discovery request
13 is due on responses or due, that sort of thing.

14 CHAIRPERSON EHRIG: Right. If you can
15 work it out and present it to us, we'll appreciate
16 that.

17 Okay. All right, then we will reconvene
18 on Monday, the ninth at 10:00. Thank you all very
19 much.

20 (Whereupon, the foregoing matter went off
21 the record at 3:45 p.m. and went back on
22 the record at 3:46 p.m.)

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1 CHAIRPERSON EHRIG: If we can go back on
2 the record. Mr. Garrett, did you have a question that
3 you wanted to ask?

4 MR. GARRETT: Yes. Just one other. Maybe
5 we can work this out as part of the schedule too, but
6 we need to have a date by which they would identify
7 who their witness is going to be to sponsor the terms.
8 If you prefer us to work that out with them, that's
9 fine.

10 CHAIRPERSON EHRIG: Yes. I do.

11 MR. SOKLER: That will be fine.

12 CHAIRPERSON EHRIG: Thank you. We'll go
13 off the record again.

14 (Whereupon, at 3:47 p.m., the proceedings
15 were concluded.)

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