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PRE-HEARING CONFERENCE

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ORIGINAL

In the matter of:

Digital Performance Right in
Sound Recording and Ephemeral
Recording

Docket No.
2000-9

CARP DTRA
1 & 2

CARP Hearing Room
LM-414
Library of Congress
Madison Building
101 Independence Ave, SE
Washington, D.C.

Monday
June 25, 2001

The above-entitled matter came on for hearing,
pursuant to notice, at 2:00 p.m.

BEFORE

THE HONORABLE ERIC E. VAN LOON Chairman
THE HONORABLE JEFFREY S. GULIN Chairman
THE HONORABLE CURTIS E. von KANN Arbitrator

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APPEARANCES:

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Launch Media, Inc.; Listen.com; Live365.com;
MTVi Group, LLC; MusicMatch, Inc.; MyPlay, Inc.;
NetRadio Corporation; Radioactive Media
Partners, Inc.; RadioWave.com, Inc.; Entercom
Communications Corporation; Spinner Networks,
Inc.; Susquehanna Radio Corp.; Univision Online;
Westwind Media.com, Inc.; and Xact Radio
Network, LLC

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

2 (2:07 p.m.)

3 MR. ROBERTS: By the way, for those of you
4 who don't know it, my name is Bill Roberts. I am the
5 nasty person who has been writing orders in this
6 proceeding and will continue to do so before the case
7 is officially commissioned to the arbitrators for
8 their work to begin.

9 But starting off, in the center is our
10 Chairperson, Eric Van Loon, from Boston. To his left
11 is the Honorable Jeffrey Gulin. Jeffrey from
12 Baltimore, Maryland. And on Eric's right is the
13 Honorable Curtis von Kann of Washington, D.C. So we
14 welcome all of them.

15 And as I've asked, the parties were going
16 to quickly go around the room and allow the attorneys
17 to identify themselves. So I think I'll start over on
18 the left.

19 MS. WASYLIK: Dineen Wasylik. I'm with
20 Wiley, Rein & Fielding.

21 MS. ABLIN: I'm Karyn Ablin with Wiley,
22 Rein & Fielding. We all here represent Clear Channel

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1 Communications, National Religious Broadcasters, Music
2 License Committee, and Salem Communications.

3 MR. ROBERTS: Thank you.

4 MR. KIRBY: Tom Kirby, also with Wiley,
5 Rein & Fielding.

6 MR. JOSEPH: Bruce Joseph, also with
7 Wiley, Rein & Fielding.

8 MR. STEINTHAL: Kenneth Steintahl, from
9 Weil, Gotshal & Manges, representing a number of
10 entities, including on the webcasters side, MTVi Group
11 and Launch Media, and many others. I'll spare you the
12 list. All four of us are from Weil, Gotshal,
13 representing different clients within the group that
14 we represent.

15 MR. RICH: I'm Bruce Rich, from Weil,
16 Gotshal. I represent some streaming radio
17 broadcasters as well as the background music
18 interests.

19 MR. JACOBY: And I'm Mark Jacoby.

20 MS. AISTARS: Sandra Aistars, also with
21 Weil, Gotshal for background music services.

22 MS. LEARY: I'm Denise Leary. I'm with

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1 National Public Radio, representing NPR and about 407
2 certified public radio stations around the country.

3 MS. CARROLL: I'm Amy Carroll. I
4 represent BMI, and I'm here attending just to monitor
5 on behalf of BMI.

6 MS. WOODS: Michelle Woods, from Arnold &
7 Porter, representing RIAA together with my colleagues
8 here.

9 MR. GARRETT: I'm Bob Garrett, from Arnold
10 & Porter.

11 MR. SCHECHTER: Ron Schechter, from Arnold
12 & Porter.

13 MS. HAMILTON: Melissa Hamilton, Arnold &
14 Porter.

15 MR. SLOTNICK: Barry Slotnick, Bingham
16 Dana, Association for Independent Music.

17 MR. LEVINE: Arthur Levine, Finnegan,
18 Henderson, Farabow, Garrett & Dunner. I represent two
19 performers unions, The American Federation of
20 Television and Radio Artists and the American
21 Federation of Musicians.

22 MR. ROBERTS: Okay. We have a sign-in

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1 sheet. I now turn it over to you, gentlemen to
2 resolve your payment, as well as schedule of this
3 proceeding. And I will be seeing all of you one
4 further time when we can convene on the first day of
5 hearings, which I guess will be on or about the 30th
6 of July. So good luck.

7 CHAIRMAN VAN LOON: Thank you very much,
8 Bill. And welcome to all of you. We've been led to
9 believe that we will see more of you in the next few
10 months than we will of our own spouses, so it's, I
11 think, quite an adventure that we're launching
12 together.

13 We know that there are two issues for
14 discussion and resolution this afternoon. One longer
15 and more complicated; the other -- that being schedule
16 -- and the other being shorter, the matter of fees and
17 payments. And so we've already caucused and decided
18 that clearly the most important issue should be taken
19 up first, which of course is the matter of payment for
20 the fees. And I wanted to inquire whether you all
21 have had some discussion and been able to work out a
22 proposal?

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1 MR. ROBERTS: If I may interject one
2 thing, on the way out, all of you are encouraged to
3 pick up a copy of our most recent order coming out
4 today to save us the cost of faxing it to you. This
5 deals with -- as our first one dealt with motions to
6 compel document production, this one deals with
7 motions to strike testimony. It's all fascinating
8 reading. Thank you.

9 CHAIRMAN VAN LOON: Thank you again.

10 MS. WOODS: Right. We've agree,
11 basically, to split the costs, fees, and expenses of
12 the proceeding 50/50. Each side will then agree on
13 how to divide that up. But, basically, if we receive
14 from -- I gather we will receive the bills from Gina.
15 So as long as each side gets a copy, we'll each pay 50
16 percent.

17 I don't know what other details you need
18 from us. I understand from Gina and Tanya Sandros
19 that there's a pretty set procedure for how you submit
20 the bills to them and they review them.

21 MR. STEINTHAL: The same on our side,
22 obviously. I expect one invoice, and we'll figure out

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1 among the various parties on the user side of the
2 ledger how to divvy that up. But for your purposes,
3 it's 50/50 between either side.

4 ARBITRATOR GULIN: I just want to ask, can
5 we ask that you memorialize that, put in writing, and
6 submit that to us, please?

7 MR. STEINTHAL: Sure.

8 MS. WOODS: Sure.

9 CHAIRMAN VAN LOON: And as a practical
10 matter, I know we send ours to the Library and Gina
11 reviews it and sends it to you. Will we be -- is this
12 set up in a fund way that we would receive two checks
13 or are we going to receive eight or nine different
14 ones?

15 MS. WOODS: We would anticipate on our
16 side your receiving one check for half of the total
17 amount of the invoice. I don't know what the
18 arrangement is.

19 MR. STEINTHAL: We need to work that out
20 among ourselves. If there's a strong preference from
21 the arbitrators, obviously we --

22 (Laughter.)

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1 -- we will certainly abide by that
2 request.

3 CHAIRMAN VAN LOON: Thank you. So
4 requested.

5 MR. STEINTHAL: Okay.

6 ARBITRATOR VON KANN: Can I just ask a
7 detail? Did you envision that we would send to Gina,
8 for example, on behalf of each of us, a single bill
9 which she will divide or would you like us to have a
10 bill marked Arnold & Porter and a bill marked Weil,
11 Gotshal, which we divided in half?

12 MS. WOODS: I understood it would be a
13 single bill and that we would just pay 50 percent of
14 the total.

15 ARBITRATOR VON KANN: I see. Okay.

16 MS. WOODS: I understand that they may
17 have some back and forth. They'll give us then an
18 improved invoice, which we'll then pay 50 percent of.

19 MR. STEINTHAL: Exactly.

20 ARBITRATOR VON KANN: Okay.

21 CHAIRMAN VAN LOON: And was there a
22 question?

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1 MR. RICH: May I ask a detail? What are
2 your hourly figures? What are your hourly charges,
3 each of you?

4 CHAIRMAN VAN LOON: Mine are \$400 an hour.

5 ARBITRATOR VON KANN: Same.

6 ARBITRATOR GULIN: I'm a bargain at \$350.

7 (Laughter.)

8 CHAIRMAN VAN LOON: Well, so we've
9 established the precedent of complete agreement in
10 being able to move forward on issue number one.

11 MR. STEINTHAL: I think you'll be happy
12 about issue number two, too.

13 CHAIRMAN VAN LOON: Outstanding. That's
14 -- Michelle, are you going to be the first to speak on
15 this or --

16 PARTICIPANT: Let Ken do it.

17 MR. STEINTHAL: I'll give it a shot and
18 hopefully accurately reflect what we've discussed.
19 What we've talked about is using a period of time that
20 you've allotted before the first break period, from
21 July 30 until September the 13th, which without
22 employing any weekend days, but certainly employing

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1 all Fridays, would be 30 total days. And that we will
2 work towards and indeed intend to effectuate the
3 completion of the direct case within that 30-day
4 period.

5 The parties have agreed to split the time
6 50/50 without making any allocation in advance of how
7 much time they're going to spend on any particular
8 witness in direct or in cross. Basically, each party
9 can employ whatever amount they want in direct or
10 cross examination, but ultimately employ up to 50
11 percent of the time available during that 30-day
12 period. To the extent that the arbitrators employ
13 time as we would expect in questioning of witnesses
14 along the way, that would be sort of netted out and
15 not count against either party.

16 The timekeeping, we have to work on the
17 implementation, but as a matter of practice, we just
18 felt it fair to have a 50/50 split, not charge any one
19 party for the time that you might want to spend on any
20 given witness, because we don't know which side that's
21 going to fall on, obviously, in advance. And we'll
22 just have to -- you know, part of our job will be the

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1 management of the allotted time that we have. So on
2 the time standpoint, that's the way -- and we're going
3 to do that throughout, the 50/50 time split net of the
4 time that you spend with the witnesses.

5 And if there are particular issues about
6 the timekeeping that you care about, please let us
7 know. Otherwise, we'll try to figure something out
8 that's acceptable to the parties that's not intrusive
9 but that is acceptable and therefore we can employ on
10 an equitable basis.

11 Assuming we proceed on that basis with the
12 direct cases, then the issue becomes how much time for
13 the rebuttal cases to be presented in writing,
14 discovery, and in a presentation. And we're working
15 around the 42-day blackout day periods that you all
16 have submitted to us and are trying to deal with that
17 in the most efficient way we can.

18 And so what we've come up is the
19 following: That three weeks after the conclusion of
20 the direct cases, which would bring us to October the
21 4th, we would put in the written rebuttal statements.
22 And then 11 days thereafter, we would start the

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1 rebuttal hearings. Now, granted, that's October 15.
2 You've given us four days before there's a bit of a
3 hiatus.

4 In the ideal world, we would have started
5 after the hiatus, frankly, but we feel that we have to
6 work backwards, given the 180-day time period,
7 assuming we're bound by such 180-day time period.
8 And, therefore, we've proposed four days before the
9 break, picking up with rebuttal after the break, on
10 November the 7th, for whatever period of time is
11 necessary.

12 Now, we haven't confined it to a given
13 time period at this point, because, frankly, we don't
14 know how many rebuttal witnesses either side is going
15 to have. It's hard to make a prediction at this point
16 in time.

17 And we've also -- we proposed the 11-day
18 period in response to sort of a negotiation session
19 with the other side about how to accomplish these
20 dates. The 11 days for discovery may be too short.
21 We're intending to abide by that. I think we have to
22 have some degree of flexibility as we go forward with

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1 you. You may want us to have an additional period of
2 time to resolve discovery disputes if we bring any to
3 you in that period. Maybe there will be none. And
4 our hope is that everybody goes forward, we start on
5 October the 15th, four days before the break, pick up
6 afterwards.

7 And then we have to deal with the briefing
8 schedule, which, again, working backwards, what we're
9 proposing is that we put in the main briefs on
10 December the 3rd, which is a Monday, and then we put
11 in reply briefs three weeks later, which is the first
12 day of the Christmas blackout period. And then we
13 schedule --

14 CHAIRMAN VAN LOON: Three weeks later
15 being the --

16 MR. STEINTHAL: December 24th.

17 CHAIRMAN VAN LOON: -- the 24th? Twenty-
18 fourth.

19 MR. STEINTHAL: Right. And then we would
20 hopefully schedule oral arguments after the year at a
21 time convenient to Your Honors and leave you with that
22 period of time, which -- you know, we're all sort of

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1 looking at this -- I don't know about other side; I
2 think they share the same feeling we do -- this is a
3 big case; there's a lot to do.

4 We're trying to figure in advance how
5 things are going to go in rebuttal. It's hard to do
6 when you don't really know what rebuttal is going to
7 look like yet, other than that we expect rebuttal to
8 be significant, at least on our side, based on the
9 direct cases that have been put in. And if you want
10 to have more time in terms of to write the decision,
11 then we're prepared to figure out how to do that.

12 And I guess that's -- you know, in terms
13 of what we've agreed to, that's what we've agreed to.
14 And we, on our side, would be happy to answers any
15 questions you have about or concerns you have about
16 the schedule we've outlined. We're just doing the
17 best we can with certain things. I don't know if the
18 -- for example, the blackout period, if there were
19 weeks that could be moved a little bit.

20 ARBITRATOR VON KANN: You're referring to
21 the blackout period. Which blackout are you talking
22 about?

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1 MR. STEINTHAL: We were given a schedule
2 that indicated literally --

3 ARBITRATOR VON KANN: Our schedule.

4 MR. STEINTHAL: Yes.

5 CHAIRMAN VAN LOON: We have not seen one
6 another's --

7 ARBITRATOR VON KANN: I don't know,
8 frankly, what the piece of paper in front of you says.

9 MR. STEINTHAL: We have an open -- there's
10 really -- between July the 30th and September the
11 13th, the only blackout days are August the 3rd,
12 August the 20th, August the 24th. Other than that,
13 our understanding is it's open and we've allotted that
14 30 days for the direct case.

15 CHAIRMAN VAN LOON: And we're basically
16 going Monday to Friday --

17 MR. STEINTHAL: Yes.

18 CHAIRMAN VAN LOON: -- during that period.

19 MR. STEINTHAL: Yes. And we can talk
20 about -- except for those three days. We'll talk
21 about the duration and the days in a minute, at least
22 from our perspective.

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1 CHAIRMAN VAN LOON: Okay.

2 MR. STEINTHAL: We were told that
3 September the 14th through September the 28th were
4 out.

5 CHAIRMAN VAN LOON: What day of the month
6 is the 14th?

7 MR. STEINTHAL: September the 14th is a
8 Friday, so it's two weeks plus one day. Friday the
9 14th through Friday the 28th we were told were not
10 available. And then we were told after -- October is
11 okay from the 1st through the 18th. That the 19th of
12 October through November the 6th were no good. And
13 that's what caused us, frankly, a bit of a problem
14 from a logistic standpoint, because we finish the
15 direct on September the 14th.

16 If we have three weeks, which is as
17 expedited as we think we can really deal with putting
18 in the witness statements and rebuttal and have even
19 a truncated discovery period of 11 days, the reason we
20 truncated it was just to get started on the 15th of
21 October. If there was any way that the, for example,
22 the week of the 22nd were open as opposed to another

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1 period, then we would shift out schedule to meet,
2 obviously, your schedules. But this is the schedule
3 we've been trying to adjust to.

4 ARBITRATOR GULIN: With respect to that
5 period, I think that's my period. I have a two-week
6 trial that's been scheduled for, I think, a year or
7 two years now. But I hear rumblings of still a
8 possibility of postponement. So I certainly will let
9 you know as soon as I hear if that is in the offing.

10 MR. STEINTHAL: Okay.

11 MS. WOODS: There are also additional days
12 also in November.

13 MR. STEINTHAL: Additional unavailable
14 dates in November.

15 MS. WOODS: Yes.

16 MR. STEINTHAL: November 21 through --

17 MS. WOODS: One through 6 is --

18 MR. STEINTHAL: No, I said November 1
19 through 6.

20 MS. WOODS: Okay.

21 MR. STEINTHAL: And then November 21
22 through 24. Yes, and then we hit -- Christmas is

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1 December 24.

2 MS. WOODS: This is actually an order of
3 June 4 from the office.

4 ARBITRATOR VON KANN: We never got a copy.
5 Does anybody have an extra --

6 PARTICIPANT: They told us we didn't have
7 jurisdiction yet.

8 CHAIRMAN VAN LOON: We've been told the
9 same thing, of course.

10 PARTICIPANT: I don't think it's touched
11 this piece of paper, but --

12 MR. STEINTHAL: The other aspects of what
13 we've talked about on schedule -- I'll just get it all
14 out there, and then we can have a discussion about it,
15 I suppose -- would be we've agreed that the copyright
16 owners would go first, in terms of the presentation of
17 the direct case. We haven't agreed to but we would
18 prefer that the users go first in the rebuttal. I
19 don't know whether there's any disagreement or
20 agreement of whatever, but if they're going to go
21 first in the direct, we'd like to go first on the
22 rebuttal side.

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1 And as far as the days are concerned, we'd
2 like to start at 9:30 and go to one, with whatever
3 breaks are appropriate during the morning. And then
4 go from two until five or 5:30, depending on how the
5 day presents itself. And if need be, for witness
6 availability, I'm sure we've all dealt with those
7 problems -- you know, cut off early or maybe go a
8 little bit later, as the case may be. There's an
9 enormous amount we have to cover in a very truncated
10 period of time, as we all know, and so we're committed
11 to be as efficient as we can be and get that done.

12 So those are the basic outlines of what
13 we've talked about. I mean there appear to be about
14 60 witnesses on direct, so we're going to -- one of
15 the things we want to do is clearly, to the extent we
16 have multiple webcasters or broadcasters, try to avoid
17 duplication even though everybody's got their own
18 story to tell. We're going to have to make some
19 decisions to get things done officially and intend to
20 do that.

21 CHAIRMAN VAN LOON: Okay. So we're really
22 looking at -- just to recap to make sure, because

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1 we've been scribbling madly, not having had this --
2 direct going from July 30 to the 13th of September.

3 MR. STEINTHAL: Correct.

4 CHAIRMAN VAN LOON: And let me just,
5 before we jump into that, we know that on that
6 particular day we will not want to start before ten or
7 11, at the earliest, and we've considered the
8 possibility of starting at one o'clock.

9 ARBITRATOR VON KANN: July 30.

10 CHAIRMAN VAN LOON: Sorry?

11 ARBITRATOR VON KANN: That day being July
12 30.

13 CHAIRMAN VAN LOON: Only on July 30,
14 right.

15 MR. STEINTHAL: We had talked about
16 openings of about an hour and a half per side. Given
17 the duration of the case and the disjointed schedule,
18 I think it would be very helpful for both sides to be
19 able to present some sort umbrella to the case that
20 you're going to hear so that if we were going to start
21 in the morning, we'd probably do it before lunch; if
22 we start in the afternoon, then that will be the day.

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1 CHAIRMAN VAN LOON: Well, we agree
2 wholeheartedly that it would be very desirable and
3 helpful to us to have that kind of an umbrella. So we
4 would very much like to do that. And perhaps what
5 we'll just say is starting at one or 1:30 that day as
6 a time to schedule it all in that afternoon. And then
7 we'll go with witnesses the following morning.

8 MR. STEINTHAL: Okay.

9 CHAIRMAN VAN LOON: And one question, at
10 least for you to be thinking about. It's fair to say
11 that we feel the same kind of time pressure that you
12 do. I think that there was some phrase in one of the
13 presentations about apparently 180 days. It's been
14 pointed out to us and underscored that that's
15 statutory, that we have no flexibility in that regard,
16 and that for us the challenge is to take all of the
17 information and wisdom that you will present to us and
18 conflicting perspectives and turn that all into a
19 coherent written report within 180 days.

20 And so one thing that strikes me, and we
21 may need to have a caucus, is some concern about
22 closing arguments in January where we have to have

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1 what I'm told is typically a 100-page report by late
2 in January when 180 days runs out. So one thing that
3 we'd been thinking about was starting even earlier,
4 nine o'clock in the morning, for example. And we're
5 certainly here prepared to roll up our sleeves to work
6 hard if we need to go longer in the day, later into
7 the evening.

8 I would imagine that there could very well
9 be some instances where a witness, because of either
10 delays from an airplane or because they have some
11 other commitment, we need to go longer hours into the
12 evening. We have discussed that among ourselves.
13 We're absolutely prepared to do that, to give you the
14 opportunity to have as full as possible a
15 presentation.

16 But so you're doing direct from July 30
17 until September 13, with the three exceptions that
18 were identified. And then the rebuttal hearings would
19 be --

20 MR. STEINTHAL: That's starting on October
21 the 15th. The statements would go in October the 4th,
22 so that would be a window of --

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1 CHAIRMAN VAN LOON: To the 9th.

2 MR. STEINTHAL: -- ten or 11 days for
3 discovery.

4 CHAIRMAN VAN LOON: I mean to the 7th.

5 MR. STEINTHAL: And then we start on the
6 15th.

7 CHAIRMAN VAN LOON: Okay. So we go from
8 October 15 until November 7.

9 MS. WOODS: We understand there is --

10 CHAIRMAN VAN LOON: I'm sorry?

11 MS. WOODS: We understand there's a period
12 of unavailability in there.

13 MR. STEINTHAL: Yes, we only get four
14 days. We would go October 15 through the -- 15th,
15 16th, 17th, 18th. Then we'd break for the blackout
16 period, as presented --

17 MS. WOODS: And then start again November
18 7.

19 MR. STEINTHAL: -- and pick up on November
20 7. And go November 7 until rebuttal is completed.

21 MR. GARRETT: I think, certainly, if Judge
22 Gulin's trial were postponed or settled, we would be

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1 prepared to go straight through that period.

2 MR. STEINTHAL: Right.

3 CHAIRMAN VAN LOON: We'll have to get you
4 a good mediator to work with.

5 (Laughter.)

6 ARBITRATOR GULIN: I'm hoping that
7 happens, because I am concerned about reply briefs not
8 until December 24. And then we only have until
9 January -- towards the end of January to write the
10 final decision. In a case of this magnitude, I think
11 that could be really a problem.

12 CHAIRMAN VAN LOON: I agree.

13 ARBITRATOR VON KANN: I share that
14 concern.

15 MR. STEINTHAL: We, on our side, in trying
16 to deal with this, we proposed the 15th to get started
17 and go as far as we could. Obviously, if Your Honor's
18 trial gets put off and we can go through it, the
19 briefing can be moved up quite a bit, because we'll
20 finish rebuttal weeks before we would have otherwise
21 finished it. We don't know how rigid in a case where
22 there are as many blackout days as we've been given by

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1 the Bench in this Panel because of, obviously,
2 everyone's commitments.

3 We don't know whether with everyone's
4 consent the 180-day period could be extended for up to
5 the point of the blackout period, for example, where
6 days are unavailable to the parties to finish. We
7 don't want to pre-judge the need for such an
8 extension, but if the only way for you to have the
9 time to write your decision and us to get the trial
10 days necessary to get this before you is to have you
11 have the option to extend the period to write the
12 decision on a basis equivalent to the blackout period
13 days --

14 ARBITRATOR GULIN: I don't believe we have
15 that option. It's been fairly clearly put to us there
16 are no circumstances under which we can postpone the
17 final day of reckoning.

18 MR. STEINTHAL: Okay.

19 ARBITRATOR VON KANN: We can always ask,
20 but that's the impression that we would give, that
21 that's an absolute and there ain't no more.

22 MR. STEINTHAL: And there are some

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1 provisions about suspension in dire circumstances. I
2 don't know that --

3 ARBITRATOR VON KANN: Well, that's true.

4 ARBITRATOR GULIN: Maybe. Maybe we can --

5 MR. STEINTHAL: It may require the consent
6 of the parties, and you would have our consent for
7 that if that was something that you needed to fairly
8 get the job done.

9 MR. GARRETT: I should just make clear,
10 because we've had this conversation with the other
11 side, that we have some concerns also about extending
12 the 180-day period here beyond the statutory concerns.
13 And that was made aware to the other side. I
14 understand that they're perfectly willing to do it,
15 but we do have some concerns. We'd like to work with
16 you in whatever way we possibly can to get it done
17 within that 180-day period and to get our part of it
18 done to allow you sufficient time to write your
19 report. But we do have concerns about taking it
20 beyond the 180 days.

21 And I should say that not only for purpose
22 of this proceeding but we're here with a lot of other

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1 different proceedings that will be coming on, and
2 there's a concern for the precedent it's going to
3 establish for those proceedings as well.

4 ARBITRATOR VON KANN: Let me ask you a
5 question. I believe we may have to talk about this,
6 but we were talking earlier today about how much time
7 the Panel would ideally like to -- when we would like
8 to say, "Okay, we're done with you. Now we can go
9 off." And we wanted 60 days, which is the beginning
10 of December. And this schedule is about 30 to 40 days
11 shy of that, if we're going to have oral argument in
12 the beginning of January.

13 So I think we're concerned. We understand
14 you've got a lot to put on. What would be the
15 possibility -- I'm just throwing out an idea -- at
16 least on behalf of this arbitrator, I have no problem
17 going later into the evenings; I have no problem with
18 some Saturday sessions. That may present problems for
19 witnesses, and I don't know if my colleagues could do
20 it.

21 But it occurred to me, for example, you've
22 got four days in September -- 10th, 11th, 12th, 13th.

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1 If we went an extra hour in the preceding 26 days,
2 that is 26 days at the equivalent of almost -- 26
3 hours. That's almost four hearing days. I think we
4 ought to think about whether there may be a way to go
5 somewhat longer and begin to push this schedule back
6 a little bit so that we don't find ourselves quite as
7 far into the year before we really get the case from
8 you all. And I don't know how you all feel about
9 going till six or seven sometimes or going on a
10 Saturday sometimes.

11 MR. GARRETT: Judge, let me just ask this
12 question. We have approximately 60 witnesses. We
13 thought proposing to do it in 30 hearing days was a
14 fairly adventurous schedule, given the length of many
15 of the witnesses statements. I can that, at least in
16 my experience, doing a two-a-day for that length of
17 time is a fairly expeditious undertaking here. So we
18 thought that we were being reasonable in proposing
19 that direct cases go up to and including September 13.

20 Certainly, within that period, I, for one,
21 have no problem going later into the evening or going
22 on weekends to be certain that we get done by

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1 September 13. But I guess the question was whether or
2 not you thought that we actually do the 60 witnesses
3 in less time than September 13?

4 CHAIRMAN VAN LOON: It sounds like it's a
5 very aggressive schedule to get 60 done in 30 days.
6 And it looks like you have really --

7 MR. STEINTHAL: If I may, I agree with Bob
8 entirely about how aggressive we're being on going
9 through the 13th, and I think we may need some of
10 those weekends or evenings just to finish the direct
11 by the 13th. I think what we ought to focus on is
12 assuming Judge Gulin's trial doesn't get adjourned,
13 using evenings before then and weekends during then to
14 try to move up the completion of the rebuttal phase
15 starting on October 15, if we get the luxury of not
16 having to adjourn on October 17, we'll finish rebuttal
17 probably by, you know, October 26 or the end of
18 October, maybe October 31. Let's call it that. We'd
19 finish by October, and that gives us, you know,
20 perhaps, getting all the briefing done in November,
21 giving you December/January, your 60-day period. So
22 that's the key, really, is the completion of rebuttal

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1 starting on October 15, in terms of going late and
2 trying to figure things out then.

3 CHAIRMAN VAN LOON: Let me just, in
4 clarifying one thing, you were proposing that we have
5 the four days, then we have the trial, which perhaps
6 will be miraculously have those times available. But
7 then coming back on the 7th?

8 MR. STEINTHAL: Yes.

9 CHAIRMAN VAN LOON: And going until
10 essentially Thanksgiving?

11 MR. STEINTHAL: I don't think we'll need
12 until Thanksgiving. I think if we have four days
13 before and then we pick up on the 7th, you know,
14 rebuttal, we were kicking around --

15 CHAIRMAN VAN LOON: What's your best
16 guess?

17 MR. STEINTHAL: You know, ten days. Could
18 be eight days, could be 13 days, but call it ten for
19 now.

20 CHAIRMAN VAN LOON: So if we've done four
21 beforehand, then six more?

22 MR. STEINTHAL: Yes. I mean we're just --

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1 CHAIRMAN VAN LOON: I mean ballparking at
2 this point.

3 MR. STEINTHAL: We're ballparking.

4 MR. JOSEPH: Ballparking November 14.

5 CHAIRMAN VAN LOON: So then we're done by
6 the middle of November, essentially.

7 MR. STEINTHAL: Right.

8 MR. JOSEPH: And that's where we look at
9 the opening post-trial pleading. Likely to be a
10 fairly substantial document.

11 MR. STEINTHAL: And that's why I was
12 suggesting that the more we could front-load the
13 rebuttal through weekends or evenings if we have to to
14 get it done in October to meet your concerns and work
15 around the Judge's schedules and his trial, you know,
16 that would make a more -- I think a better way to
17 focus our energies and saving time and giving back
18 some. Because it's the blackout period at the end of
19 October and early November that's causing the jumping
20 through hoops right now.

21 ARBITRATOR VON KANN: Do you think you
22 could start earlier on the -- if you finish the direct

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1 case that's on the 13th and then this two-week
2 blackout kicks in, September 14 to 28, is there any
3 chance of starting the rebuttal cases on --

4 CHAIRMAN VAN LOON: October 4?

5 ARBITRATOR VON KANN: -- Monday, October
6 1?

7 MR. STEINTHAL: Well, the problem with
8 that is there's got to be -- there are two things that
9 happen. One is we have to put in the written rebuttal
10 statements. Then there's got to be an opportunity for
11 discovery, which we believe can be an important phase.
12 It may or may not be, but we have the right to it and
13 certainly believe that we may need it. And so what
14 we've done is truncate, frankly, that whole period to
15 get us starting by October 15, because I know that
16 others who have been involved in this process have
17 seen a much more robust period of rebuttal statements
18 and discovery than sandwiching it all in in as
19 truncated a fashion as we've done here, which we've
20 done precisely to get started by the 15th. I think
21 Your Honor must now take consideration that there are
22 two events there. It's not just one, the statements;

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1 it's the statements and the discovery.

2 ARBITRATOR VON KANN: Now, some of this,
3 presumably, could be -- I mean a witness who testifies
4 August 2 and you start working on his rebuttal, I
5 suppose you want it, perhaps, but don't have to wait
6 till the middle of September to begin writing it. I
7 presume somebody will be probably preparing as August
8 goes along.

9 MR. KIRBY: I think the schedule took all
10 that into account, Your Honor. We're assuming, I
11 think, a back office operation as well as a front
12 office operation.

13 MR. RICH: Let me suggest from my own
14 experience in the PBS CARP that certainly the most
15 crucial rebuttal testimony in that case, from our
16 perspective, was that offered by the respective
17 economists, each of whom submitted comprehensive
18 rebuttal testimony and each of whom, if memory serves,
19 reappeared on the stand for a day or more. And by
20 definition, they were, speaking for our side,
21 certainly, unable to prepare that comprehensive
22 testimony without aid of the complete record. And

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1 secondly, and I think very valuably, it was only at
2 the very end that one or more members of the Panel
3 addressed very specific questions to the experts to
4 address in rebuttal, one or more of which involved
5 data work.

6 And so anticipating that certainly
7 possibility, one or more of those possibilities here
8 and the magnitude of the case, our feeling was that
9 allowing a three-week window for preparation of
10 rebuttal testimony is not unduly generous to the
11 parties, and certainly an 11-day discovery window in
12 rational circumstances, one could argue, is
13 ridiculously inadequate.

14 ARBITRATOR GULIN: I agree. I think
15 you're not going to be able to contract that at all.
16 Let me ask this: Is there any possibility -- I
17 ordinarily would not suggest this, but is there any
18 possibility of simply waiving the oral presentation of
19 the rebuttal phase and simply relying upon the
20 written? And if that's not acceptable, how about
21 waiving the direct oral portion of rebuttal? In other
22 words, simply go directly to cross examination of

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1 rebuttal witnesses.

2 MR. RICH: We were enjoined by Bill
3 Roberts before you appeared, not to get into merits in
4 the case, and it would be a little difficult, I think,
5 for our side to respond fully except with the
6 conclusion, which is we think that would -- from our
7 perspective, from a trial standpoint, we don't think
8 waiving direct would be desirable.

9 ARBITRATOR GULIN: All right.

10 CHAIRMAN VAN LOON: One thing that I know,
11 excuse me, that we could do, at least looking at that
12 time, I know that the 19th has been -- you're
13 available, right, Jeff, on October 19?

14 ARBITRATOR GULIN: Yes.

15 CHAIRMAN VAN LOON: It's a Friday.

16 ARBITRATOR GULIN: I don't have my trial
17 schedule in front of me, unfortunately. What was
18 that?

19 ARBITRATOR VON KANN: Well, it's not one
20 of the blackouts -- it is.

21 CHAIRMAN VAN LOON: It is, but I think
22 it's me.

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1 ARBITRATOR VON KANN: Does yours start on
2 a Monday, Jeff?

3 CHAIRMAN VAN LOON: Would yours start on
4 Monday, the 22nd?

5 ARBITRATOR GULIN: Probably, yes. Yes,
6 yes, the 22nd.

7 CHAIRMAN VAN LOON: One thing I know we
8 can do immediately is make the 19th available. And
9 then if we decided we all wanted to go through
10 Saturday, the 20th, now that would give us six solid
11 days rather than four, which I think would be more to
12 work with in terms of dealing with the rebuttal. And
13 then assuming that the trial is on, best case we only
14 have a few days after that hiatus.

15 MR. STEINTHAL: I think that would give us
16 an opportunity if we had six full days before the
17 hiatus to truncate some of the period of initial
18 briefs, because we have to use that blackout period
19 that exists there before the end of rebuttal to work
20 on as much as we could of our proposed findings.

21 ARBITRATOR VON KANN: If you then -- the
22 following -- when we resumed on the 7th, Wednesday the

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1 7th, if you again went through Saturday the 10th to
2 get the remaining four of your ten days in. So that
3 would give you ten days in the rebuttal and be
4 finished about a week earlier than we were talking
5 about. It helps a little. In other words, it would
6 be October 15 through 20 and then November 7 through
7 10, which would give you six days and then four days.
8 Helps a little, not a huge amount.

9 MR. STEINTHAL: Helps a little, but still
10 even if we got you the briefs in two weeks, including
11 over Thanksgiving holiday, we're still at November 26
12 if we put in briefs two weeks later, encompassing that
13 holiday. By the time we put in replies, which there's
14 got to be some significant ability here, we expect
15 that there's going to be very, very detailed
16 submissions and proposed findings, so the reply period
17 has got to be significant enough for people to not
18 only read and analyze but also pull together a
19 response.

20 ARBITRATOR VON KANN: How long before have
21 you had for reply briefs? Two weeks?

22 MR. GARRETT: Three.

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1 ARBITRATOR VON KANN: Three?

2 MR. KIRBY: Yes. While we call them
3 reply, they're really oppositions, because we have
4 simultaneous initial filings, so this is our first
5 opportunity to respond to the written submission of
6 the other side.

7 MS. WOODS: But might that -- if we were
8 able to do that, could we do the oral argument before
9 December?

10 MR. STEINTHAL: Yes.

11 MS. WOODS: I've seen that sort of --

12 ARBITRATOR GULIN: Yes, the oral
13 argument's not really the problem.

14 MS. WOODS: Okay.

15 ARBITRATOR GULIN: That's not -- again,
16 writing for oral argument and you probably will,
17 subject to change.

18 MR. GARRETT: We certainly don't consider
19 oral argument essential from our perspective here.
20 It's really only if it's helpful to the Panel. I mean
21 that's a date that we put in because it's been at
22 other proceedings. But if the Panel does not feel

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1 that it's helpful, we can certainly waive that date.

2 ARBITRATOR GULIN: Well, as I said, that's
3 not going to make much difference. It's just a half
4 day or, at most, a whole day. The really critical
5 date is the date that the reply briefs are do.

6 ARBITRATOR VON KANN: Which if I was
7 following this along would be December 17. If we got
8 the rebuttal October 15 to 20 and November 7 to 10
9 would be the ten days of rebuttal; the briefs,
10 November 26; the replies three weeks later, December
11 17. Now you're right up against the Christmas
12 holidays for oral argument, but do you think you could
13 do oral argument the end of that week, I don't know,
14 the 21st or something like that?

15 ARBITRATOR GULIN: As I said, I don't
16 think that's the problem, oral argument. I think we
17 can work with this, and hopefully, if I could squeeze
18 in a few more days, we'll probably be all right.

19 CHAIRMAN VAN LOON: We think it would be
20 helpful -- we think that it's very important to your
21 interests that our written report be as thoughtful and
22 intelligent as possible. And as I say, we had been

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1 thinking about how desirable it would be to have 90
2 days to write the opinion, 60 in a tight circumstance.
3 We think it would be helpful if now having heard from
4 you, your thoughts about this, if we take a short
5 recess and be able to put our heads together on some
6 of this and then come back to talk a little further.

7 ARBITRATOR GULIN: Any of you know what
8 the final date is of the 180 days?

9 MR. GARRETT: January 28, I think it is.
10 Monday, I think, we counted like January 28, I
11 believe.

12 ARBITRATOR GULIN: The 28th? Thank you.
13 (Whereupon, the foregoing matter went off
14 the record at 2:47 p.m. and went back on
15 the record at 3:05 p.m.)

16 CHAIRMAN VAN LOON: Well, we have Plan A
17 and Plan B. Thanks to the time we may very well be
18 able to significantly shift the time schedule on this
19 toward the end.

20 Let me say, first, that we believe, given
21 the volume of material and the importance of this,
22 that we really -- that we should clearly start at nine

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1 every morning, and that we should have a presumption
2 that we'll go certainly till five and very comfortably
3 till six, that certainly if we're in any kind of a
4 situation where there's another hour or something to
5 do to wrap up a witness, we're not going to come back
6 the following morning to do an extra hour. We will
7 just plan to roll up our sleeves, stay working hard,
8 and get things done.

9 We've developed a schedule, two schedules,
10 partly contingent on the efforts that Judge Gulin is
11 going to make to see whether we could carve out some
12 additional time in October. But the beginning part of
13 this is all the same. We do the direct hearings
14 starting at one o'clock on July 30 and running through
15 September 13, with the three exceptions of August 3,
16 20, and 24. Then rebuttal materials would be filed
17 October 4, and the first six days of rebuttal
18 hearings, in either event, would be October 15 through
19 20. If the trial is not able to be adjusted, we would
20 come back and complete the rebuttal hearings November
21 7 to 10.

22 ARBITRATOR VON KANN: All this is

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1 basically what you all proposed just a little while
2 ago.

3 CHAIRMAN VAN LOON: And then, thereafter,
4 the main briefs coming in on November 26, the replies
5 on December 17. That's the same three weeks. And
6 December 17 is a Monday, and we would plan to have an
7 oral argument, in that event, on Friday, the 21st of
8 December. In the event that we are able to do a shift
9 in the other trial, we'd still have the first six of
10 the rebuttal hearing October 15 to 20, but then we
11 would immediately pick up and complete that the
12 following week, October 22 to 25. And in that event,
13 the briefs would be due on November 8, which is two
14 weeks later. And reply briefs would be due three
15 weeks after that, which would be November 30.

16 ARBITRATOR VON KANN: It's actually the
17 29th, but we gave you an extra day for Thanksgiving.
18 Take the day off and think about your country's
19 history. Don't take the whole day off but part of it.

20 CHAIRMAN VAN LOON: And in that event, we
21 would plan to have oral argument on December 7.

22 ARBITRATOR VON KANN: Pearl Harbor Day

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1 seems appropriate in the case somehow.

2 CHAIRMAN VAN LOON: So what we're thinking
3 and would propose to do is that we would go forward
4 from today with Schedule A. That is the one that gets
5 oral argument done December 21, subject to if we're
6 able to have happy, happy news from Baltimore. We
7 would then cut to the second schedule.

8 I see a lot of nodding in the room on
9 different aspects of this. Have you had a -- maybe I
10 don't want to ask what your reaction is.

11 MR. STEINTHAL: The reaction among us is
12 that we appreciate the Plan A if the schedule isn't
13 moved, and we all need to work around that, and that
14 seems fine. On Plan B, with the good break, if we get
15 that week, one of the reasons that we proposed two
16 weeks for the brief after the closing of the rebuttal
17 case was that we have the hiatus to work on our main
18 briefs.

19 And I'm wondering how greedy it would be
20 to ask to get one of those weeks back to work -- if we
21 don't have that hiatus, we're going, essentially,
22 direct from the direct case, to preparing rebuttal,

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1 doing rebuttal hearing. It would simply be a three-
2 week period to put in our main brief.

3 CHAIRMAN VAN LOON: What our inclination
4 is is to split the baby in half, to make it two and a
5 half weeks. Leave it enabling us to keep the December
6 7 date as the one for the -- but, actually, that's not
7 going to --

8 ARBITRATOR VON KANN: If you move, for
9 example, November 8 to the 12th, which gives you
10 another four days, and maybe move the November 30 date
11 to December 3, beginning of the week, I think we're
12 pretty uncomfortably going much past the 7th, if we
13 can. We can jiggle with the dates a little date, but
14 we don't want to see the December date become December
15 15.

16 MR. STEINTHAL: Every little bit helps.
17 I mean we were going to be going from, essentially,
18 two intense weeks of six days of, essentially,
19 rebuttal with no time, as we initially thought in that
20 hiatus, to start getting the main brief done.
21 Obviously, we're going to have to be working on
22 different things at the same time, but there's going

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1 to be a lot to digest for you too, so we want to
2 present it to you the best we can. So I'll take
3 November 12.

4 CHAIRMAN VAN LOON: Let's make it the
5 14th. Let's make it the 14th.

6 MR. STEINTHAL: Excellent.

7 ARBITRATOR VON KANN: Softy.

8 CHAIRMAN VAN LOON: But still stick with
9 December 3?

10 MR. STEINTHAL: It's choose your poison.

11 MR. GARRETT: I tell you, either one of
12 those was fine with us. My experience is that you
13 give us a date, and I don't care what date it is,
14 we'll all be working until 4:59 p.m. that day to get
15 it done. And not to be cynical, but I suspect the
16 work product which will be much the same, regardless
17 whether we have those four extra days or not.

18 MR. STEINTHAL: Why don't we take the
19 offer of the 14th and work --

20 CHAIRMAN VAN LOON: Still for the 3rd and
21 the 7th.

22 MR. STEINTHAL: Yes.

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1 CHAIRMAN VAN LOON: Because I see in my
2 calendar that Hanukkah starts on Monday the 10th, and
3 that may cut into a number of people. This way, it's
4 all over before then.

5 MR. STEINTHAL: Excellent.

6 MR. GARRETT: I'm sorry, could you tell us
7 what those dates were again?

8 CHAIRMAN VAN LOON: This is Plan B. Under
9 Plan B, we still have the first six days of rebuttal
10 hearings October 15 to 20, but then we conclude that
11 the following week, October 22 to 25. And that would
12 have reply briefs due then November 14 -- main briefs
13 on the 14th and the replies on December 3 and oral
14 argument, which is a Monday, on December 7, which is
15 that Friday.

16 MR. STEINTHAL: Obviously, I know from our
17 end, we think that ten days that you asked us, what is
18 your best guess, that's our best guess. I mean I
19 think we all have to live and learn a little bit as
20 the direct goes on as to what rebuttal's going to look
21 like. So I just wanted to add that caveat, because we
22 have a lot of uncertainty as to what's going to happen

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1 during direct, which will dictate how we feel we need
2 to present rebuttal. That's all.

3 CHAIRMAN VAN LOON: There's an additional
4 issue that we would like to discuss with you,
5 procedural not subjective. Jeff, would you lay it
6 out?

7 ARBITRATOR GULIN: Yes. It has to do with
8 the matter I guess I've been a little bit vocal about
9 in the past, and it has to do with the use of
10 documents during cross examination. I think it would
11 be beneficial for us and for you to reach some
12 understanding about how documents are used during
13 cross examination to avoid any unfair surprise to any
14 of the parties.

15 As everyone in this room is aware, under
16 formal rules of evidence, the use of documents during
17 cross examination is very tightly circumscribed.
18 They're limited to certain situations, like a
19 deposition, books and treatises, and there are
20 specific rules on how they're used. It's been my
21 observation that in these proceedings many of the
22 parties are accustomed to using documents in a far

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1 more liberal way in cross examination, which is fine
2 for -- I suspect the Panel will have no problem with
3 that so long as you all agree to it and understand it
4 in advance. Maybe you've already discussed it.

5 But to avoid any sunrise to anyone,
6 because I know in one of the cases I was involved
7 with, one of the attorneys was just as much taken
8 aback by it as I was. And the argument in favor of
9 this practice, which I'll describe in a moment, was
10 that this is the way it's always been done in CARP
11 proceedings.

12 The practice I'm talking about is there's
13 a witness on the stand, and the cross examining
14 attorney has a document, which can be anything. It
15 can be an article out of a newspaper, it could be some
16 scribblings that co-counsel wrote down, it can be
17 anything. And rather than present the document to the
18 witness and ask the witness to review the document and
19 then ask questions, the typical question, I imagine,
20 would be, "Do you agree with what you've read? Does
21 that refresh your recollection?" Rather than that
22 happening, the attorney simply reads the document into

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1 the record, knowing full well that the witness has
2 never seen the document, knowing full well that the
3 witness is going to disagree with the document, but
4 it's been read into the record, and then there's the
5 obligatory question, "Do you agree with what I just
6 read into the record?"

7 The problem that that creates is the
8 question of whether what's just been read into the
9 record is ever substantive evidence that can be cited
10 in proposed conclusions -- findings of fact and
11 conclusions of law. I think we can all agree that
12 when that happens, and the witness says, "I've never
13 seen the document, and I disagree with everything in
14 it," no one's going to argue that there's been any
15 substantive evidence put in the record.

16 But often what happens is the witness
17 equivocates, "Maybe I agree with part of this, maybe
18 I don't agree with part of this." And the argument or
19 expectation among counsel is, "Well, there's been some
20 substantive evidence put in here." Now, the document,
21 itself, hasn't been put into evidence unless it's
22 specifically admitted. You're aware of the

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1 requirement of a sponsoring witness. You'd have to
2 have the witness on the stand who you're cross
3 examining be the sponsoring witness, and then we'd
4 admit it into evidence.

5 But even aside from that, if the document
6 doesn't come in, the question remains, what was read
7 into the record can that ever be substantive evidence?
8 And I know that in the first hearing I was involved in
9 the parties had to go back and go through this huge
10 record, this huge transcript and come to some
11 agreement on when the answer to that question was
12 substantive evidence and when what was read into the
13 record is substantive evidence. It's a nightmare of
14 an ordeal to go through, but if you're willing to go
15 through it, I suspect the Panel will have no problem
16 with allowing this procedure.

17 But I just want to avoid unfair surprise
18 and not have the parties go in with this under some
19 agreement. I don't know if this is something that
20 you've all discussed. If it isn't, I would encourage
21 you to discuss it and come to some agreement as to how
22 documents are going to be used under cross

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1 examination. Otherwise, someone may be surprised by
2 the manner in which we rule. So maybe this is
3 something that we could either discuss it now or bring
4 it up at a later date, however you want to handle it.

5 MR. JACOBY: I'm just going to point out
6 that there is a rule that does address that in the
7 confines of this proceeding. It's Section 251.47(k).
8 It addresses it. What I would suggest is that,
9 perhaps, the parties should, in light of your
10 comments, have some discussion about how we're going
11 to deal with that issue, both in light of the rule and
12 in light of your comments.

13 ARBITRATOR GULIN: Okay. I think the rule
14 addresses really the admissibility of the document
15 itself.

16 MR. JACOBY: Right.

17 ARBITRATOR GULIN: I'm talking more about
18 the admissibility of the comments that are made -- the
19 question that is posed and then the answer that is
20 elicited as a result of that question. After all, the
21 document has been read into the record. What is the
22 evidence here? What is it that can be cited to in

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1 proposed findings of fact and conclusions of law?

2 So I think what you need to decide among
3 yourselves is whether you want to continue with that
4 practice of being able to do that or revert to the
5 more traditional avenue. And some of you may have
6 already planned your cross examinations in this manner
7 expecting to do that.

8 But, of course, the more traditional way
9 of using documents to impeach is asking the witness if
10 he recognizes the document, asking the witness if it
11 refreshes his recollection. If the witness says, "No,
12 I don't know anything about this document. I've never
13 seen it before, never agree," what use is permitted
14 after that of the document? In a traditional
15 circumstance, the document's thrown in the trash.

16 So that's something you might want to
17 discuss and might want to let us know if you've
18 reached some agreement. Otherwise, I guess we'll just
19 have to decide how we're going to handle it.

20 MR. STEINTHAL: I think the limited time
21 period everyone has will encourage them not to go down
22 that path.

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1 MR. GARRETT: My reaction exactly.

2 ARBITRATOR GULIN: That's all I had.

3 CHAIRMAN VAN LOON: Are there any other
4 issues or questions that anyone wanted to raise today
5 that are important?

6 MR. STEINTHAL: I know that some people on
7 my team asked this, but how shall we dress for
8 purposes of these hearings? Seriously, I mean like
9 informal or will it be business casual? It seems like
10 a silly question, but a lot of people have raised
11 that, so I just wanted to get your views on that.

12 ARBITRATOR GULIN: I can say that I have
13 a number of light summer suits that I'd like to wear.

14 (Laughter.)

15 MR. LEVINE: May I wear a wig?

16 ARBITRATOR VON KANN: People should be
17 comfortable. Washington in August is a pretty brutal
18 place, and I think we'll be pretty liberal about that.
19 No shorts and t-shirts, but I think beyond that just
20 be comfortable.

21 MR. SCHECHTER: As of the moment, this
22 room is not particularly well air conditioned.

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1 MS. WOODS: It gets really cold, though,
2 when they turn it on. It's freezing.

3 MR. SCHECHTER: Okay.

4 MS. WOODS: Or at least for me. You'd
5 probably like it.

6 ARBITRATOR GULIN: And if we go Saturdays,
7 we can have dress down days for Saturdays.

8 MS. WOODS: If we want --

9 ARBITRATOR GULIN: Yes.

10 MS. WOODS: If we want to do Saturdays, we
11 probably should let the office know as soon as
12 possible. I just recall there being all sorts of
13 logistical difficulties with getting the building open
14 and the air.

15 ARBITRATOR VON KANN: We have to give them
16 some advance notice.

17 CHAIRMAN VAN LOON: I think that the first
18 time that this will come up will be as we're doing the
19 direct and whether there's compelling reason to not be
20 able to force this in a very disciplined way into
21 those periods. But we have also been led to believe
22 that it will be relatively easy so long as we give

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1 them 24 hours advance notice. I underscore "led to
2 believe."

3 MR. GARRETT: Judge, I just wanted to make
4 clear here for the start of the hearing, that first
5 day we'll start at one o'clock, and the only order of
6 business that day will be the opening statements. And
7 then we should be prepared with our first witness at
8 nine o'clock the next day.

9 CHAIRMAN VAN LOON: That's -- yes, unless
10 -- that was on the thought that each side was going to
11 need an hour and a half or so for -- and, of course,
12 we have multiple parties, so there may be additional
13 statements. So, yes. Our plan will be the first
14 witness Tuesday morning, the 31st, nine o'clock.

15 MR. SCHECHTER: Someone was just saying
16 additional time. I thought we were doing an hour and
17 a half for each side. Is that what you're proposing?
18 I thought that's what we had said.

19 MS. WOODS: If there's additional time, we
20 just want to make sure it's an equal amount on both
21 sides.

22 CHAIRMAN VAN LOON: Yes.

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1 ARBITRATOR VON KANN: Are we comfortable
2 with that, an hour and a half per side for opening?

3 CHAIRMAN VAN LOON: Certainly, with this
4 kind of an arrangement, if you want to have two hours
5 each, since we're starting at one, to give you a
6 little bit additional time, we're certainly
7 comfortable with that.

8 MR. SCHECHTER: I wasn't interposing an
9 objection. I thought that's we had said, that's all.

10 CHAIRMAN VAN LOON: Right. And we will
11 have a break between the two presentations.

12 This raises an important question, and we
13 would welcome a clarification. In your opening
14 presentations, you've really talked about dividing the
15 time for a variety of things between the two sides.
16 We know that there's I think it's eight parties, that
17 there are smaller ones. Are any of those other
18 parties not represented here today?

19 [No response.]

20 CHAIRMAN VAN LOON: So everyone is
21 represented today, and therefore this general way of
22 proceeding and the division of time and all is binding

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1 on everyone.

2 ARBITRATOR VON KANN: Can I stop for a
3 second? I may have missed this when the introductions
4 went around. I should have had my service list and
5 checked it off, but I didn't. I didn't hear anybody
6 identify themselves as from the Mince Levin firm.

7 CHAIRMAN VAN LOON: That's the old one.

8 ARBITRATOR VON KANN: I'm on the old list?

9 CHAIRMAN VAN LOON: You're on April 12;
10 this is May 9.

11 PARTICIPANT: They've withdrawn. Their
12 client has withdrawn.

13 ARBITRATOR VON KANN: Okay. Richardson
14 O'Neil?

15 MR. SLOTNICK: No, Bingham Dana.

16 ARBITRATOR VON KANN: Okay. I see. Okay.
17 Meethoff & Kaiser?

18 MR. LEVINE: I'm representing here.

19 ARBITRATOR VON KANN: Okay. And Finnegan,
20 okay.

21 MR. LEVINE: The musicians have had their
22 annual meeting.

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ARBITRATOR VON KANN: I see. Okay.

CHAIRMAN VAN LOON: Okay. Thank you all very much. We hope that the tone and the consensus exhibited today will be carried throughout.

PARTICIPANT: Lots of luck.

(Laughter.)

CHAIRMAN VAN LOON: Thank you very much.

(Whereupon, at 3:26 p.m., the CARP Hearing was concluded.)

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CERTIFICATE

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the matter of: Hearing: Digital Performance Right
 in Sound Recording and Ephemeral
 Recording,
 Docket No. 2000-9 CARP DTRA 1 & 2

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: June 25, 2001

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.



A handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to read "K. J. ...".