The Panel's Adopted Benchmark

Both general approaches advocated by the parties suffer significant flaws. The copyright owners urge us to utilize the cable network marketplace as a valuation benchmark. However, we agree with the satellite carriers that the economic model governing cable networks varies markedly from the economic model governing broadcasters. Broadcasters produce and purchase programming and attempt to capture broad audiences with free over-the-air signals to satisfy *advertisers* -- if they deliver a larger audience, they charge a higher advertising fee. *Tr. 501, 678-9, 1842, 2070.* Indeed, commercial networks are willing to *pay* their affiliates to carry the network signal, containing their national advertising, in order to maximize advertising revenue. *Tr. 2064-68, 3226.* Cable networks rely primarily upon license fees, based upon viewer demand, as their revenue source. While many cable networks also advertise, it appears that the greater their reliance upon advertising revenue, the *lower* their license fee. *Tr. 1900.* In short, carriage of a cable network by a multichannel distributor, such as a cable operator or a satellite carrier, is not the equivalent of a "secondary transmission" of a broadcast station.

The satellite carriers urge us to set a rate based upon the average rate paid by cable operators under section 111. As discussed *supra*, satellite carriers provide virtually identical, arguably superior, services as cable operators but they have captured only a fraction of the multichannel video market. It might appear eminently reasonable to set compulsory royalty fees comparable to those paid by their entrenched competitor in order to foster fair competition. Unfortunately for the satellite carriers, this is not our charge. As we stated *supra*, Congress has directed us to find the fair market value of secondary transmissions. The *compulsory* rates prescribed under section 111 reflect Congressional judgment about the compensability of network programming and the unique regulatory scheme governing cable operators including must-carry and exclusivity rules. In any event, the compulsory rates prescribed under section 111 are not fair market rates and cannot be utilized as a benchmark for a fair market valuation.

We adopt the copyright owners' *general* approach using the *most similar* free market we can observe. However, because we recognize that the economics of cable networks differ from those of broadcasters, we adopt the most conservative analysis -- the PBS approach articulated by Linda McLaughlin. Ms. McLaughlin's analysis yielded a rate of $0.27 per subscriber per month averaged over the three year statutory period.[39] We are more persuaded by Ms. McLaughlin's analysis of a broad range of basic cable networks as contrasted by Mr. Gerbrandt's attempt to isolate one or two cable networks with programming most similar to broadcast station programming or by Dr. Owen's regression analysis. Indeed, our responsibility is to determine the fair market value of *retransmitted* broadcast signals *with advertisements and self promotions intact*; *not* the fair market value of the programming contained within those advertisement laden signals. Programming value is relevant but certainly not dispositive. In light of the different economic models involved, the fees ultimately negotiated between satellite carriers and broadcasters,[40] in a free market scenario, for secondary transmissions may not directly correlate to royalty fees negotiated between copyright owners and broadcasters for *primary* transmissions. Accordingly, we cannot determine with any confidence that the fair market value of a broadcast station in a hypothetical free market is closer to the royalty fees paid for USA than for the royalty

[39] *See note 27, supra.* We would have preferred a fuller explication of Ms. McLaughlin's inflation projections but we accept them as unrefuted by any credible evidence of record.

[40] See note 17, *supra*.

fees paid for other basic cable networks. Similarly, we've no confidence that Dr. Owen's regression analysis yielded a rate of any significance. Dr. Owen convincingly demonstrated a strong correlation between cable network programming expenditures and license fees paid for those cable networks. However, he failed to demonstrate that broadcasters should be legitimately plotted on the same graph. As discussed *supra*, broadcasters purchase programming for free over-the-air viewing to deliver audiences to their advertisers while cable networks purchase programming to support license fees. Though we adopt generally the cable network benchmark, we recognize that this marketplace does not provide a perfect valuation solution. We decline to magnify the inherent uncertainty in constructing a hypothetical free market by drawing precarious inferences. Stated in other terms, we are unconvinced that the fair market value of retransmitted *intact* broadcast signals exceeds the fair market value of the 12 basic cable networks that Ms. McLaughlin examined. Our decision to adopt the more conservative PBS-McLaughlin approach is further bolstered by "special features and conditions of the retransmission marketplace", addressed *infra*. Though many are not amenable to quantification, they *generally* militate in favor of the more conservative benchmark we have selected.

Applying the Statutory Considerations

Based upon our review of "economic, competitive and programming information presented by the parties"[41], we have adopted the PBS-McLaughlin approach as the most appropriate benchmark, or starting point, for determining fair market value of retransmitted distant broadcast signals. We now specifically address each statutory consideration.

[41] Section 119(c)(3)(D).

[T]he competitive environment in which such programming is distributed ...[42]

The satellite carriers implore us to promote competitive parity with their entrenched competitor by setting rates which replicate those prescribed under section 111. For reasons previously discussed, the royalty rates paid by cable operators cannot provide a basis for determining fair market value and a mechanical replication would not achieve true parity because satellite carriers are not burdened by similar regulatory obligations and network programming is not compensable under section 111. Moreover, in many white areas, satellite carriers do not directly compete with cable operators.

The satellite carriers also note that, as evidenced by declining dish installation fees and declining fees per channel, DTH providers fiercely compete with each other. *SBCA PFFCL pg. 65.* However, this competition among carriers, in addition to the competition with cable operators, may actually tend to *increase* the marketplace rates for *both* cable networks and broadcast stations. *Tr. 1396-97, 1808-13.* In any event, no measure of quantification was adduced.

Accordingly, our consideration of this factor supports adoption of the PBS-McLaughlin rate.

[T]he cost for similar signals in private ... marketplaces[43]

Our reasoning for adopting the royalty fees paid by multichannel distributors for carriage of basic cable networks as the most appropriate benchmark is fully set forth *supra*. We add only briefly to that discussion here. Implicit in the McLaughlin analysis is that satellite carriers pay no

[42] Section 119(c)(3)(D)(i).

[43] *Id.*

less than the average fees paid by all multichannel distributors for carriage of the 12 basic cable networks she identified. Ms. McLaughlin opined that satellite carriers indeed pay as much or more. We need not draw any adverse inference[44] from the satellite carriers' failure to refute this evidence. However, we do accept the uncontroverted opinion of Ms. McLaughlin. We similarly accept the uncontroverted Kagan data, upon which Ms. McLaughlin based her analysis, as accurate.

[T]he cost for similar signals in similar ... compulsory license marketplaces[45]

We have previously set forth our reasoning for declining to adopt as a benchmark the rates paid by cable operators for retransmitting broadcast signals under their statutory compulsory license. Accordingly, a detailed discussion of Dr. Haring's methodology for calculating average cable fees paid under section 111 is unnecessary. Whether the study sample should be confined to only Form 3 cable operators, as urged by the copyright owners, is of no consequence to a true fair market analysis. Nor do we render any opinion as to whether rates should be calculated based upon existing satellite carrier program packages which, depending upon the methodology utilized, could yield higher rates by several multiples. *See e.g., Tr. 1158-63, 2996-97*. Our review of the structure and context of the section 111 compulsory license leads us to conclude that, in isolation, it cannot serve as a vehicle for determining the fair market value of retransmitted broadcast signals by satellite carriers.[46]

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[44] *See note 28, supra.*

[45] Section 119(c)(3)(D)(i).

[46] We also find Dr. Haring's alternative argument unconvincing. Dr. Haring suggests that because satellite carriers' retail revenue per signal has declined since the 1992 section 119 rates were set, it would be reasonable to reduce the 1992 rates by a corresponding percentage. This

However, the satellite carriers have raised a related issue which could *potentially* shed light upon fair market valuation -- the history of retransmission consent negotiations. Because in 1993 and 1996 several commercial network owned-and-operated stations failed to extract any cash remuneration from cable operators beyond the section 111 fees, the satellite carriers reason that the section 111 fees represent actual fair market value. We agree that these retransmission consent negotiations are relevant to a determination of fair market value and represent potentially probative evidence.[47] Unfortunately, the evidence adduced is so vague and replete with qualifiers as to provide little guidance. For example, on cross examination, SBCA did elicit a concession from Ms. McLaughlin that some cable systems obtained retransmission consent from ABC and

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argument fails analysis. Even assuming *arguendo* that revenue per signal was a reasonable barometer of fair market value, the 1992 rates were not established under a fair market value criterion and cannot be used as a benchmark or starting point for valuation.

[47] The copyright owners adamantly disagree. *See e.g., Commercial Networks Reply PFFCL pg. 24; JSC Reply PFFCL pg. 26; Broadcaster Claimants Reply PFFCL pg. 9; Tr. 4183-93.* They argue that signal retransmission rights are separate and distinct from copyright owner rights. Because retransmission consent confers no copyright interests, the outcome of retransmission consent negotiations are irrelevant to fair market value. We cannot fully agree. The purpose of this proceeding is to determine the fair market value of *retransmitted broadcast signals*; not the fair market value of the copyrighted material contained in those signals. After paying the royalty fees required under section 111, cable operators must engage in free market negotiations to obtain certain broadcasters' signals. The *total* payments presumably reflect the parties assessment of fair market value of the retransmitted signals. As the copyright owners correctly suggest, this total fee *may* not equate with the total payments which *might* be negotiated directly with all copyright owners in a hypothetical free market. But, we suspect few such negotiations would transpire. A free marketplace loathes inefficiency. It would likely favor an arrangement wherein broadcasters have cleared the rights for DTH distribution and negotiate directly with satellite carriers. We recognize that the broadcasters' cost of purchasing that clearance is a matter of speculation. Accordingly, the copyright owners correctly argue that we cannot be certain whether the total retransmission consent payments accurately reflect fair market value *in the absence of the compulsory license*. Nonetheless, the retransmission consent negotiations provide a window into the broadcast retransmission marketplace within the context of free market negotiations. Accordingly, they are potentially probative.

NBC without paying any cash,[48] but she also testified that "[s]ome stations obtained cash". *Tr. 1650.* On cross examination, Mr. Gerbrandt similarly acknowledged that commercial network owned-and-operated stations were retransmitted without payment of cash but testified that he was unsure if cash was paid for retransmisson consent of other broadcast stations. *Tr. 2108, 2112.* Testimony by SBCA witness, Mr. Shooshan, regarding the retransmission consent negotiations appeared to be limited to *local* retransmissions of owned-and-operated commercial network stations. Tr. 3235 ("Without that retransmission consent, cable couldn't carry the local broadcast signal"); Tr. 3242 (["The history of retransmission consent negotiations] establishes ... a lower bound on what the networks ... should be compensated under a compulsory license, which is zero." -- the rate paid under section 111 for *local* retransmissions); *W.T. of Shooshan pg. 10* ("Cable companies typically carry the local network affiliates subject to retransmission consent"). Another SBCA witness, Dr. Haring, similarly appeared to discuss the retransmission consent negotiations only in the context of *local* retransmissions. *Tr. 3139* ("... I cite the example of retransmission consent where the end result was that cable operators were paying zero to start with and they were paying zero at the end ..." -- the rate under section 111 for *local* retransmissions). No witness testified with respect to the history of retransmission consent negotiations involving network stations *not* owned by the commercial networks. This testimony upon which SBCA relies lacks sufficient scope and specificity to rebut or modify the PBS-McLaughlin analysis.[49]

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[48] *But see note 37, supra.*

[49] We note parenthetically that the number of superstations carried by satellite carriers has not grown. *W.T. of Desser pg. 17.* SBCA cites this fact as evident of the declining value of broadcast signals in the DTH marketplace. *SBCA PFFCL pgs. 77-78.* The Broadcaster Claimants

[S]pecial features and conditions of the retransmission marketplace[50]

The parties identified a myriad of facts and circumstances they deemed relevant to a final determination of fair market value. We shall address the salient concepts.

1. Satellite Carriers Expand the Reach of Broadcast Signals

SBCA counsel convincingly argued that by expanding the penetration of broadcast signals, satellite carriers benefit the broadcasters and copyright owners by increasing advertising revenue. The copyright owners' denial defies logic. The fundamental mission of broadcasters is to expand their audiences to maximize advertising revenues.[51] At their own expense and risk, the satellite carriers developed a DTH market which expands the broadcasters reach at no cost to the broadcasters. However, we agree that no empirical evidence demonstrating an increase in advertising revenues was adduced. Though the broadcasters (and hence the copyright owners) clearly benefit from expanded reach,[52] these benefits may not be amenable to measurement and

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advance an equally respectable interpretation. *Broadcaster Claimants Reply PFFCL pg. 9.* They note that superstations which were retransmitted by a satellite carrier as of May 1, 1991 are exempted from the retransmission consent provisions of 47 U.S.C. § 325. The Broadcaster Claimants suspect that satellite carriers retransmit *only* those superstations to avoid *paying cash* necessary to procure the retransmission consent of other potential superstations.

[50] Section 119(c)(3)(D)(i).

[51] PBS does not rely upon advertising *per se* but rather upon government financing, corporate underwriting, and viewer contributions. Accordingly, PBS similarly benefits from additional viewers by furthering their educational mission; increasing the number of potential contributors; and possibly encouraging additional corporate underwriting (more viewers see the corporate underwriting "acknowledgements"). *Tr. 1270-76.*

[52] *See e.g., Tr. 2222, 2858-62* (Recognizing the benefits of retransmission of their signals to other markets, some superstations substitute national advertising, in place of local advertising, in the feed they deliver to satellite carriers for retransmission and they generally cooperate with the carriers); *Tr. 1968-69* (Though an examination of demographics is important, additional white area viewers should increase network advertising revenues); *Tr. 3452* (Some commercial network

quantification. The copyright owners further argue that because most basic cable networks also advertise, to the extent that broadcasters do benefit from expanded reach, that benefit is already reflected in the cable network benchmark. We agree *to a point*. Broadcast stations rely upon advertising revenue to a much greater extent than do cable networks (excepting those cable networks which command very low or even negative royalty fees[53]). It naturally follows that the benefits which accrue to broadcasters have *not* been *fully* reflected in the cable network benchmark price. Though some downward adjustment from the copyright owners' *general* approach seems appropriate, we are unable to quantify such adjustment. However, our decision to adopt the most conservative approach (PBS-McLaughlin) reflects this consideration.

2. Market Transactions Provide Additional Compensation to Copyright Owners

The satellite carriers cite agreements between professional sports leagues and retransmitted superstations that provide compensation, in addition to section 119 license fees, to copyright owners directly resulting from DTH distribution. *Tr. 398–401, 408-10.* Again, it appears that copyright owners *do* indirectly benefit from expanded reach provided by satellite carriers. Though a downward adjustment of the benchmark is conceptually appropriate, we are unable to quantify such adjustment from the evidence adduced.

3. Commercial Networks Pay Their Affiliates

A related argument advanced by SBCA addresses the issue of affiliate compensation. *See e.g., SBCA PFFCL pg. 39.* By distributing the signals of the Commercial Networks to white areas, satellite carriers perceive themselves as "affiliates in the sky" deserving similar

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affiliates substitute national advertising for local advertising in cooperation with satellite carriers).

[53] *See e.g., Tr. 1900-03.*

compensation. The Commercial Networks counter that their relationships with affiliated stations are complex and interdependent. Local affiliates add local programming, particularly local news. tailored to enhance the attractiveness of the Commercial Networks to the local audience. Affiliates also build goodwill by promoting Commercial Network programming and by actively participating in local civic affairs. *W.T. of Sternfeld pgs. 13-16.* We agree that satellite carriers are not the functional equivalents of affiliated stations. But as we stated *supra*, satellite carriers do enhance the value of *all* broadcast signals they retransmit by penetrating new markets. Again, our decision to adopt the most conservative approach (PBS-McLaughlin) reflects this consideration.

4. Exclusivity Rules

In the 1970s, the FCC promulgated syndicated exclusivity rules to protect local broadcast stations which purchased the exclusive rights to broadcast certain syndicated programming. Cable operators were required to black out such programming from any distant signal retransmitted into that local market. In 1980, the FCC repealed the syndicated exclusivity rules. 79 F.C.C. 2d 683 (1980). Consequently, the Tribunal imposed a syndex surcharge on Form 3 cable operators to compensate copyright owners for the loss of their ability to sell exclusive programming. 47 FR 52146 (Nov. 19, 1982). However, in 1990, because the FCC reinstated blackout protection with respect to cable operators (but not satellite carriers), the Tribunal removed the syndex surcharge and cable royalty payments declined about 20%. 57 FR 19052 (May 1992). At the 1992 satellite rate adjustment proceeding, the panel observed that while copyright owners could demand blackout of programming retransmitted by cable, they had no comparable protection with respect to programming retransmitted by satellite carriers.

Accordingly, the panel recommended, and the Tribunal adopted, a 20% surcharge for satellite retransmission of superstation signals.[54] *Id.*

The copyright owners cite this continuing lack of syndicated exclusivity protection (and analogous protection under the "Sports Rule") vis-a-vis satellite carriers as a special feature of the retransmission marketplace warranting an *upward* adjustment of the benchmark. *See e.g., JSC PFFCL pg. 66; W.T. of Desser pg. 34.* We tend to agree conceptually. However, the copyright owners failed to adduce any quantifying evidence to justify an adjustment. Unlike our predecessors, we are bound by the solitary fair market value criterion and, absent empirical data, cannot presume that a 20% surcharge would be an appropriate fair market surcharge today.

5. Compensability of Commercial Network Programming -- the 4 to 1 Ratio

As previously addressed, commercial network programming is explicitly noncompensable under section 111, but is compensable under section 119. *See* notes 12 and 13, *supra.* In 1992, our predecessor panel apparently adopted the original Congressional reasoning behind the 4 to 1 ratio (the copyright owners of commercial network programming had already received full compensation for nationwide distribution). But because they found that in 1991 the proportion of network programming had declined to about one-half of the typical affiliate's program day (down from 75%), they contemplated a 2 to 1 ratio (a royalty rate for network stations 50% that of superstations). However, after applying the controlling statutory criteria, they concluded that a unitary rate would cause "industry disruption" and apparently settled upon a 3 to 1 ratio. 57 FR 19052 at 19060-61 (May 1992).

[54] The surcharge would not apply if all of the programming contained in the superstation signal were free from syndicated exclusivity protection under FCC rules. 57 FR 19052 (May 1992).

This reasoning is inapposite to the current section 119 fair market value criterion. We agree with the SBCA position that we are not bound to set a unitary rate -- "the pay-in may not necessarily correlate to the pay-out." *Id* at 19052. However, whatever rate we set must be based upon a fair market valuation. We find no credible evidence that retransmitted network stations are worth less than retransmitted superstations. Indeed, even assuming *arguendo*, we were to conclude that network programming is worth less, or even wholly uncompensable, we find no record support for any particular ratio -- no evidence was adduced as to the *present day* average proportion of network to non-network programming. And imposition of the original 4 to 1 ratio by rote, merely to replicate section 111 rates, would not be consistent with a fair market value analysis.

6. Many Satellite Carriers Deliver High Resolution Digital Signals and Provide Electronic Guides to Subscribers

SBCA argues that, unlike cable operators, satellite carriers enhance the value of broadcast signals by delivering digital quality pictures and sophisticated electronic guides to their subscribers. *Tr. 187, 3230.* We agree, but no quantifiable benefit was identified and no evidence adduced that this benefit would materially affect fair market value -- the rate negotiated in a hypothetical free market.

7. The Costs of Complying with the White Area Restrictions

Satellite carriers incur considerable costs in order to comply with the "unserved households" restrictions prescribed pursuant to section 119(a)(2)(B). These extra costs, they contend, diminish the value of commercial network signals which would be reflected in a free market transaction. *W.T. of Parker pg. 19; Tr. 2341-46.* We agree that the satellite carriers incur costs to retransmit network signals that they do not incur when carrying a cable network. However, SBCA was unable to quantify those costs. Moreover, we are unconvinced that in a hypothetical free market, as a result of these extra costs uniquely incurred by satellite carriers, broadcasters would necessarily agree to "discount" their product proportionally, if at all. We, therefore, decline to attempt any adjustment of the benchmark rate.

8 Under a Compulsory License Setting, Broadcasters Save the Costs of Clearing their Signals

Under the section 119 compulsory license, *all* parties obviously save the transaction costs which they would incur if required to negotiate rates in a free market. No benchmark adjustment is required. But, SBCA further argues that in a free market, it would be virtually impossible for satellite carriers to negotiate directly with every copyright owner of every program contained in each day's signal they retransmit. Accordingly, they reason, broadcasters would invariably be compelled by market forces to clear all rights and negotiate with satellite carriers for retransmission of their entire signals. Those costs which the broadcasters would incur in purchasing the clearances are unknown. Hence, SBCA concludes that the section 119 rates should not be raised without considering the broadcasters' cost savings. *See SBCA Reply PFFCL pg.69.* We tend to agree with both of SBCA's premises but not its conclusion. In a hypothetical free market, it is quite conceivable that the higher the costs broadcasters must pay to clear their signals for DTH distribution, the higher the royalty rates they would charge satellite carriers. Accordingly, the impact of high clearance costs on fair market value (based upon a hypothetical free market analysis) could be positive rather than negative. No adjustment to the cable network benchmark is required. Merely because the rates we set shall be paid under the compulsory license (whereby broadcasters have no necessity to clear the rights), the broadcasters will not enjoy a windfall as SBCA seems to imply. The royalty payments are, of course, subject to distribution to all copyright owners.

9. Section 119 "Sunsets" after 1999

Satellite carriers note that cable operators enjoy the competitive advantage of greater certainty and stability with respect to the section 111 compulsory license while section 119, by its own terms, is temporary. *W.T. of Shooshan pg. 6.* We agree but, again, our charge is to determine a fair market rate; *not* to achieve absolute competitive parity with cable operators. Accordingly, even if quantified, no benchmark adjustment would be appropriate.

10. Launch Support

SBCA correctly notes that some programmers actually pay cable operators to carry their newly launched cable networks. *Tr. 254, 1389.* However, launch support is not paid for established cable networks such as those studied by Ms. McLaughlin. *Tr. 2074.* Hence, no offset to the McLaughlin benchmark is appropriate.

11. Broadcast Signals Contain Local Programming of Little Value to Satellite Carrier Subscribers

Satellite carriers contend that to the extent primary transmissions (which are being secondarily transmitted), contain programming produced by primary transmitters for their local markets (e.g., station-produced local news and community events), that programming has little value to subscribers in distant markets. A satellite customer in Arizona probably has little interest in local news from Raleigh-Durham. *Tr. 1553-54.* While we generally concur with this assessment, no adjustment from the benchmark is appropriate. We are attempting to set a rate which most closely approximates the *average*[55] fair market value of *retransmitted* broadcast signals. As frequently stressed by the satellite carriers, the value of the programming contained in each signal varies widely among broadcast signals and cable network signals. By example, some viewers may have no interest in the local news programming of a particular retransmitted commercial network affiliate but may generally prefer the commercial network programming to that of the basic cable networks. The satellite carriers themselves implore us not to base a fair market value determination upon this kind of analysis of *primary* transmission programming.

12. The Primary Broadcast Transmission is Free to the Public

Satellite carriers contend that because primary transmissions of broadcast stations are broadcast free over-the-air to the public, this implies a zero fair market value of retransmissions. This argument is unpersuasive with respect to distant retransmissions[56] because the signals are retransmitted outside its licensed geographic area into distant areas where acceptable quality signals are generally *not* available free over-the-air.

13. Advertising Inserts

The final two "special features" that we shall address, "advertising inserts" and "uplink costs," present among the most challenging issues for the Panel to resolve. As they have consistently throughout these proceedings, counsel ably argued their respective positions.

Cable networks typically grant multichannel distributors, such as cable operators and satellite carriers, a certain number of time slots or "availabilities" to insert advertising. This

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[55] Of course, *if warranted by the evidence adduced*, we may categorize signals and establish separate rates for each category as did our predecessors.

[56] See our discussion of local retransmissions *infra*.

insertion generates revenue for the multichannel distributor which can defray the cost of the license fees in an amount equivalent to about $0.08 per subscriber per month. *W.T. of Haring pg. 10; see also Tr.* 2078-89, 2196-98 (Mr. Gerbrandt attempting to explain SBCA Exh. 35X which implies even higher advertising insert revenues) and *Tr. 1824-25;* note *32, supra* (Dr. Owen deducted $0.08 to account for lack of advertising inserts). By contrast, satellite carriers are legally precluded from inserting advertising into retransmitted broadcast signals. They must retransmit the signal intact without alteration. 17 U.S.C. § 119(a)(4). Accordingly, the satellite carriers naturally argue that because the benchmark is based upon the rate paid by multichannel distributors to cable networks, we must deduct $0.08 to obtain the "real cost" of cable networks. The copyright owners counter that most satellite carriers don't insert advertising into cable network signals anyway. Indeed, HSD carriers don't possess the technology to insert advertising. *Tr. 1622-23.* Moreover, multichannel distributors *appear* to pay the same cable network license fee regardless of whether they insert advertising. *Tr. 1623-24, 2198-99.*

If this last assertion is accurate, one would expect that in a hypothetical free market negotiation, broadcasters would similarly decline to reduce their license fees to satellite carriers for their lack of advertising availabilities and no benchmark adjustment would be appropriate. Both Ms. McLaughlin and Mr. Gerbrandt opined that, based upon their knowledge and experience, neither the availability of advertising inserts, nor the carriers ability to insert, affects the prices that cable networks charge. *Id.* They did not support this opinion with any documentary evidence or empirical data. However, the satellite carriers allowed this testimony to stand essentially unrefuted. Indeed, Dr. Haring was explicitly invited to render an opposing opinion but forthrightly declined *Tr. 3137-40.* In the final analysis, we accept the copyright owners' expert testimony and decline to deduct $0.08 from the benchmark as advocated by the satellite carriers.

14. Extra Uplink Costs

The license fees paid to cable networks include delivery of their signals. The cable networks incur the cost of uplinking their signal, arranging for transponder time, and downlinking the signal. By contrast, under the compulsory license scheme, multichannel distributors pay for *access* to the signal only. The multichannel distributors, such as satellite carriers, incur the costs of delivery. Cable operators incur an average cost of approximately $0.65 per subscriber per month to retransmit broadcast signals in addition to royalties paid. Accordingly, the satellite carriers naturally assert that these costs should be deducted from the benchmark rate. *Tr. 3094, 3130-31; W.T. of Haring pgs. 9-10.* The copyright owners counter with an argument akin to that they advanced vis-a-vis advertising inserts. Cable network license fees do not vary based upon the multichannel distributors' costs. *Tr. 2199, 2528*. Accordingly, one would not expect broadcasters to offer discounts to compensate multichannel distributors in a hypothetical free market for their additional costs. Again, we must agree with the copyright owners. The record is devoid of any credible evidence to the contrary. Mr. Parker was invited to demonstrate whether carrier costs impacted the rates negotiated between satellite carriers and cable networks. He could not. Indeed, Mr. Parker conceded, for example, that despite additional costs incurred by DBS carriers (beyond those of HSD carriers), DBS operators were unable to negotiate lower rates on that basis. *Tr. 2528*. Moreover, he declined to urge the Panel to set a discounted rate for DBS carriers to account for their higher costs than HSD carriers. *Tr. 2398-99*. We must similarly decline to discount the cable network benchmark to account for higher delivery costs of broadcast signals.

[T]he economic impact of such fees on copyright owners[57]

The parties devoted little hearing time to this issue. We accept the obvious, general notion that higher royalty rates provide greater incentive to copyright owners while lower rates would render broadcast stations a "... less attractive vehicle at the margin for program suppliers." Tr. 1465-66.

[T]he economic impact of such fees on ... satellite carriers;[58] *and the impact on the continued availability of secondary transmissions to the public*[59]

Obviously, higher section 119 rates will potentially reduce the marginal profits of satellite carriers unless they successfully pass on the increase to their distributors or subscribers (if demand is inelastic). Although Ms. McLaughlin did not perform a demand elasticity study, she testified that after the 1992 rate increases, the number of broadcast stations retransmitted and the percentage of satellite subscribers to retransmitted broadcast signals remained constant.[60] *W.T. of McLaughlin pg. 9; Tr. 1630, 1786.* She concluded that despite an increase in the compulsory rate to $0.27 per subscriber per month, the number of subscribers to retransmitted broadcast stations would continue to grow at substantially the same rate as the number of satellite subscribers generally. *Tr. 1628-33.* Ms. McLaughlin also examined the retail prices charged by satellite distributors and concluded that if the rates for retransmitted broadcast signals were increased to

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[57] Section 119(c)(3)(D)(ii).

[58] *Id.*

[59] Section 119(c)(3)(D)(iii).

[60] She could not ascertain if the 1992 price increases were passed on to the subscribers. Tr. *1638-40.*

$0.27 per subscriber per month and *not* passed on to subscribers, those rates would constitute only 30% of the average retail prices charged to subscribers leaving sufficient profit margin for the satellite carriers to avoid significant adverse impact to them or their subscribers. *Tr. 1635, 1638.*

Again, we recognize that *any* rate increase, particularly if rates are set above those paid by their entrenched competitor, tends to adversely impact the satellite carriers. However, the satellite carriers did not attempt to quantify the impact of increased rates and adduced no credible evidence that the availability of secondary transmissions would be interrupted. Accordingly, we conclude that a rate increase to $0.27 per subscriber per month would have no significant adverse impact upon the satellite carriers or the availability of secondary transmissions to the public.

The Fair Market Value of Retransmitted Distant Signals

We began our analysis by adopting a conservative valuation benchmark of $0.27 per subscriber per month based upon an evaluation of the statutory considerations. We carefully considered all proposed adjustments to that benchmark but remain unpersuaded that any adjustment is appropriate to achieve a rate that "*most* clearly" represents the fair market value of retransmitted distant broadcast signals.

Local Retransmissions -- ASkyB

Motions to Dismiss

As we noted *supra*, PBS and JSC filed separate motions to dismiss, as a matter of law, the rate request of ASkyB. PBS moved only for dismissal of ASkyB's rate request with respect to the local retransmission of network signals while JSC moved for dismissal with respect to both network and superstation local retransmissions

1. Network Local Retransmissions

17 U.S.C. § 119 (a)(2)(B) provides:

> The statutory license [for network stations] shall be limited to secondary transmissions to persons who reside in *unserved households*. (emphasis added).

An "unserved household" is defined under 17 U.S.C. § 119 (d)(10) and provides in pertinent part:

> The term "unserved household", with respect to a particular television network,[61] means a household that ___
> (A) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity ... of a primary network station affiliated with that network ...

Accordingly, network signals generally may not be retransmitted to the local coverage area of local network signals.[62] The separate rate request of ASkyB is explicitly intended to apply to retransmission of network signals to *served* households.[63] Section 119 does not provide a compulsory license for these retransmissions. Hence, we lack subject matter jurisdiction to set a rate for local retransmissions of local *network* signals.

ASkyB's opposition is founded on three grounds. First, they assert that the Copyright Office has already ruled on this issue. Secondly, they argue that the section 119 unserved areas limitation applies only to areas unserved by *other* affiliates of the same network. Thirdly, they argue that the motions are untimely and unfairly prejudicial. We disagree.

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[61] Under section 119, "networks" include PBS stations. 17 U.S.C. § 119 (d)(2)(B).

[62] There may be rare instances where households are situated within the local market of a network station (defined under 17 U.S.C. § 119 (d)(11) as "the area encompassed within a network station's predicted Grade B contour"), but cannot receive signals of Grade B intensity. These households qualify as unserved but, under section 119, ASkyB would pay the conventional "rate for non-local signals". *W.T. of Padden note 4.*

[63] *W.T. of Padden page 3.*

By letters dated September 17, 1996 and October 4, 1996, JSC requested the Copyright Office to rule upon the legal permissibility of requests for separate local retransmission rates and requested a bifurcated or preliminary proceeding to resolve these issues. By Order of October 29, 1996, the Copyright Office rejected JSC's request for a separate proceeding. It further declined to rule upon the legal issues raised by ASkyB's request, apparently viewing JSC's arguments as "standing" challenges. Whether the Copyright Office properly characterized JSC's objections as relating to standing rather than fundamental jurisdiction is now moot. The Copyright Office did not reach the merits or substance of the JSC arguments articulated in its pending motion. The Copyright Office clearly reserved these issues for the Panel to resolve.

With respect to the second argument raised by ASkyB, it has utterly failed to support its unique interpretation of the section 119 unserved areas limitation with any legal authority. We acknowledge that an amendment of section 119 to allow such retransmissions may be reasonable and appropriate. Local retransmission of network signals would *not* appear to undermine the network-affiliate relationship. But we are not legislators. The existing language of section 119 regarding unserved areas is clear and unambiguous.

Finally, ASkyB cites no authority for the proposition that the pending motions were untimely filed. Nor can ASkyB legitimately claim unfair prejudice. For the sake of economy, JSC diligently attempted to resolve these issues prior to the evidentiary hearing. Moreover, at the outset of the hearing, both JSC and PBS openly expressed their intention to file motions to dismiss. *Tr. 48, 50.* ASkyB was not unfairly prejudiced by the motions.

2. Superstation Local Retransmissions

JSC additionally moves to dismiss the rate request of ASkyB with respect to local retransmissions of superstations on the ground that Congress did not envisage a zero rate for any retransmission under section 119. We find no merit in this argument. Congress directed the Panel to determine the fair market value of retransmitted signals and the Panel is not precluded from establishing reasonable categories with separate rates for each category. Accordingly, it is certainly conceivable that we might determine the fair market value of a particular category to approach zero.

3. Rulings on Motions to Dismiss

The Panel grants the motion of PBS and grants in part, and denies in part, the motion of JSC. The separate rate request of ASkyB with respect to locally retransmitted network signals is dismissed for lack of subject matter jurisdiction. The Panel shall proceed to determine the fair market value of locally retransmitted *superstation* signals.

The Fair Market Value of Locally Retransmitted Superstations

ASkyB claims to be developing the technology to retransmit local signals within the respective stations' local market as defined under section 119(d)(11) (within stations' Grade B contours). *Tr. 3731.* Currently, a satellite subscriber who desires to view local broadcasts must utilize an A-B switch in conjunction with a conventional antenna or additionally subscribe to a cable service. *W.T. of Shew pg. 2.* There is no guarantee that this innovation will prove technologically or commercially viable. *See e.g., Tr. 3655; ASkyB PFFCL pg. 2.* However, this potential development promises to significantly promote competition within the multichannel video marketplace and confer important benefits to subscribers. Moreover, should ASkyB ultimately decline to pursue local retransmissions, other similar ventures could shortly appear on the horizon.[64] Accordingly, it is appropriate to set a rate for local retransmissions of superstations during the prescribed period of the statutory compulsory license.

The task facing the Panel is particularly challenging because neither side presented any empirical data or study to support a particular fair market value rate. The cable network analyses, including the PBS-McLaughlin study, performed by the copyright owners are inapposite to local retransmissions. The license fees paid by multichannel distributors for cable networks simply cannot serve as a benchmark for the fair market value of broadcast signals that are retransmitted almost exclusively to subscribers who can obtain the same signal free over-the-air. Unfortunately, ASkyB did not, or could not, provide a true fair market valuation study. Indeed, no similar free market exists from which to draw data. The Panel must base its decision essentially upon expert opinion testimony.

In assessing the enumerated considerations of section 119 (see discussion *supra)*, ASkyB did present compelling expert testimony in support of a zero fair market rate.[65] Local retransmission of broadcast stations benefits the broadcast station and the copyright owners of the programming. If a local broadcast station is not available on a satellite carrier service, subscribers to that service are less likely to view that station. The viewer may not wish to install an A-B switch/antenna or additionally subscribe to a cable service or may find the system too inconvenient for regular use. Accordingly, retransmission of the local station prevents audience

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[64] *See* Panel Order of August 6, 1997 permitting EchoStar Communications Corporation to adopt the evidence adduced and the PFFCL filed by ASkyB.

[65] As addressed *supra*, we disagree with the ASkyB interpretation of "fair market value". Nonetheless, certain opinions and arguments expressed by ASkyB remain relevant to a true fair market value determination.

(and advertising revenue) loss. Indeed, local broadcast stations would likely welcome carriage by satellite carriers, or any other multichannel distributor, retransmitting into their respective markets. The history of retransmission consent negotiations, discussed *supra*, appears consistent with this desire.[66] A zero rate would also seem consistent with Congressional reasoning behind their decision to require no royalty payments by cable operators under section 111 for distant retransmissions of network programming.[67] The copyright owners have already sold the rights to transmit their programming to the entire local market. They have been fully compensated and are not injured by retransmission into the same market. *Tr. 3576; W.T. of Padden pgs. 18-19*. We recognize that copyright owners are free to *attempt* to obtain additional compensation for this separate use of their work. We simply believe they would likely fail in that endeavor.

No finder of fact can be expected to anticipate all of the complexities of a hypothetical free market negotiation and predict a precise rate. However, in the local retransmission context, we believe the parties would likely negotiate a rate of zero.[68] Indeed, because satellite carriers are not

[66] As previously discussed, the anecdotal evidence adduced regarding the retransmission consent negotiations lacks sufficient precision to establish a fair market value, or rebut an empirical study, but the evidence does *corroborate* an otherwise unrefuted fair market value rate of zero with respect to local retransmissions. We also note here ASkyB's assertion that because broadcast stations are subject to retransmission consent, fair market compensation is ultimately guaranteed. *W.T. of Padden pg. 19; W.T. of Shew pg. 11*. This assertion is generally inapposite to retransmission of superstations. None of the superstations currently retransmitted by satellite carriers is subject to retransmission consent. 47 U.S.C. § 325(b)(2)(D); *W.T. of Desser pg. 17*.

[67] *See* note 13, *supra*.

[68] We recognize that satellite carriers currently pay the rates prescribed under the section 119 compulsory license for retransmission of superstations to *all* of their subscribers including those subscribers residing within the Grade B contours of where the signals are originally broadcast. *See Tr. 214*. However, we believe a rate of zero would likely be negotiated in a free market with respect to these subscribers.

subject to must-carry rules.[69] it is conceivable that some broadcasters would be willing to *pay* for retransmission carriage. See *Tr. 3812-13.*

The copyright owners cite record testimony that the ability to retransmit local broadcast stations (including superstations) would be of great value to ASkyB and "will result in substantial revenues." *JSC PFFCL pg. 73: see also PBS Reply PFFCL pgs. 19-20.* Accordingly, they argue, the fair market value of retransmitted broadcast stations cannot be zero. This reasoning fails the copyright owners' own interpretation of fair market value as the rate that would be negotiated in a free market. ASkyB *and* the copyright owners benefit from local retransmissions. We are unpersuaded that in a hypothetical free market, superstations would risk non-carriage in their local markets by insisting upon cash payments. Admittedly, our conclusion is based upon the opinion of expert witnesses (Padden and Shew) unsupported by empirical evidence , and anecdotal corroborating evidence (retransmission consent negotiations of 1993/1996). However, our charge is to establish royalty fees that "most clearly represent the fair market value of secondary transmissions." We find the rate that *most* clearly represents the fair market value of local superstation secondary transmissions is zero.

[69] The copyright owners argue that a zero rate would not establish absolute parity with cable operators who are uniquely subject to must-carry and other regulatory burdens. We agree. But as we have frequently stated, our statutory mission is to determine fair market value; not to achieve *or ensure* parity. Must-carry, retransmission consent, or other regulatory features are matters for Congress or other regulatory bodies to explore if appropriate.